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THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT  
AT-WILL RULE: ILLINOIS CREATES AN  
AMORPHOUS TORT

*Palmateer v. International Harvester Co.*  
85 Ill. 2d 124, 421 N.E.2d 876 (1981)

DAVID PECK, 1982\*

Illinois and most other American jurisdictions have adopted the termination-at-will rule which permits an employer to discharge an employee without notice and without cause, unless the duration of the employment relationship is specified in an employment contract.<sup>1</sup> Most jurisdictions today still follow this basic common law rule<sup>2</sup> that sanctions an employer's unfettered right to discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being guilty of a legal wrong."<sup>3</sup> Justifications currently advanced for

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1. 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967). See generally 56 C.J.S. *Master and Servant*, § 8 (1948); 53 AM. JUR. 2d, *Master and Servant*, §§ 34, 43 (1970). Some examples of the application of the termination-at-will rule are: *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439 (7th Cir.), cert. denied, 379 U.S. 914 (1964); *Hablas v. Armour & Co.*, 270 F.2d 71 (8th Cir. 1959); *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir.), cert. denied, 345 U.S. 941 (1953); *Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894 (1938); *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); *May v. Santa Fe Trail Transp. Co.*, 189 Kan. 419, 370 P.2d 390 (1962); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967). See also Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-19 (1976) [hereinafter cited as Feinman, *Employment at Will*]; Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 212 (1973). For an excellent analysis of the contractual limitations on an employer's right of discharge, see Comment, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.-KENT L. REV. 697 (1981) [hereinafter cited as *Contractual Right of Discharge*].

2. The common law rule that an employment for an indefinite term is regarded as an employment at-will which may be terminated at any time by either party for any reason has been widely recognized. See, e.g., *Justice v. Stanley Aviation Corp.*, 36 Colo. App. 1, 530 P.2d 984 (1974); *Lorson v. Falcon Coach, Inc.*, 214 Kan. 670, 522 P.2d 449 (1974); *Coe v. Burwell Nurseries*, 2 Ohio App. 2d 102, 206 N.E.2d 577 (1965); *Sooner Broadcasting Co. v. Grotkop*, 280 P.2d 457 (Okla. 1955); *Bullock v. Deseret Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P.2d 559 (1960).

3. *Payne v. Western Atlantic R.R. Co.*, 81 Tenn. 507, 519-20 (1884), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). The Tennessee Supreme Court set forth the classic statement of the employment at-will doctrine:

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

the rule include the employer's right to govern the direction of his business,<sup>4</sup> the rule of mutuality of contract,<sup>5</sup> and the avoidance of frivolous lawsuits.<sup>6</sup> The rationale behind the mutuality of contract theory is that, if the employee is free to quit at any time, the employer should then be free to dismiss him at any time.

Recently however, in Illinois and elsewhere, judicial decisions<sup>7</sup> and legislative enactments<sup>8</sup> have begun to recognize that the mutuality rule can no longer be justified because, "with the rise of large corporations" employing "relatively immobile workers who often have no other place to market their skills,"<sup>9</sup> the employer can easily bend the

*Id.* at 518-19.

4. *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super 335, 399 A.2d 1023 (1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *O'Neil v. Providence Amusement Co.*, 42 R.I. 479, 108 A. 887 (1920). The *Fortune* court stated: "We do not question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests . . . . We recognize the employer's need for a large amount of control over its work force." 373 Mass. at 101-02, 364 N.E.2d at 1256. See also Comment, *Contracts—Termination of Employment at Will—Public Policy May Modify Employer's Right to Discharge*, 14 RUTGERS L. REV. 624 (1960).

5. Mutuality of contract requires that both parties are bound or neither is bound to the contract. Symmetry is the crux of this definition of mutuality. Accordingly, terminable-at-will employment contracts are valid because neither party is bound to the agreement. For examples of the mutuality of contract rule, see *Adair v. United States*, 208 U.S. 161, 174-75 (1908) ("So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé"); *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Pitcher v. United Oil & Gas Syndicate Inc.*, 174 La. 66, 69, 139 So. 760, 761 (1932) ("An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition . . . [I]f the contract of employment be not binding on the employee . . . then it cannot be binding upon the employer; there would be lack of 'mutuality' "); *Rape v. Mobile & O.R.R. Co.*, 136 Miss. 38, 100 So. 585 (1924); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *petition for discretionary review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). See generally *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) [hereinafter cited as *Blades*]; *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) [hereinafter cited as *Summers, Time for a Statute*]; Note, *Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois*, 12 LOY. U. CHI. L.J. 861, 873-76 (1981).

6. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 399 A.2d 1023 (1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980). See also *Blades, supra* note 5, at 1428 ("there is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion.").

7. A growing number of state courts in the last few years have held that a termination violating public policy or motivated by bad faith or malice provides a sufficient basis for a wrongful discharge claim sounding in tort and/or contract. For examples of state courts which have been receptive to wrongful discharge actions brought by at-will employees against their former employers, see *Olsen, Wrongful Discharge Claims Raised By At Will Employees: A New Legal Concern for Employers*, 332 LAB. L.J. 265-69 (1981) [hereinafter cited as *Olsen*].

8. For examples of state laws limiting the employer's absolute discharge power, see [1979] 1 LAB. L. REP. [State Laws (CCH)] 43045, 43055. See also, [1981] GOV'T EMPL. REL. REP. (BNA) 51:501-23.

9. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1980), *rev'g in part*, 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980), *citing Blades, supra* note 5, at 1405.

will of his employee to his own by the threat of discharge. To rectify this imbalance, courts have begun to look for ways to interject greater equality into the relationship of management and the at-will employee. Courts, however, have split as to the best method for curbing the absolute power of the employer to discharge the at-will employee who is otherwise defenseless against employer coercion and caprice.<sup>10</sup> While some courts permit an employee's right of action for breach of contract where the employee is terminated in bad faith,<sup>11</sup> other courts have recently recognized a tort action for wrongful discharge,<sup>12</sup> commonly referred to as the tort of retaliatory discharge.<sup>13</sup> At least one commentator<sup>14</sup> and a number of state and district courts<sup>15</sup> have argued that the legislature should act to repeal the harsh common law doctrine by statutorily articulating the right of employees not to be discharged except for just cause. A carefully drafted statute would give at-will employees substantially the same protection with regard to discharges as that now enjoyed by employees covered by collective bargaining agreements.<sup>16</sup>

10. "It is the fear of being discharged which above all else renders the great majority of employees vulnerable to employer coercion." *Blades, supra* note 5, at 1406. *See also* Summers, *Time for a Statute, supra* note 5; Note, *Implied Contract Rights to Job Security*, 26 *STAN. L. REV.* 335 (1974) [hereinafter cited as *Job Security*].

11. *See, e.g.,* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1255-56 (1977) ("a written contract [between the employer and employee] contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract."); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (employee terminated because she refused to date her foreman was a termination made in bad faith and thus constituted a breach of the employment contract).

12. *See, e.g.,* *Blades, supra* note 5; Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 *Wis. L. REV.* 777, 788-811 (1977) [hereinafter cited as *Whistleblowing*].

13. The tort of abusive or retaliatory discharge holds employers liable for dismissals in response to employee activity that is protected by public policy. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

14. Summers, *Time for a Statute, supra* note 5, at 519-24.

15. *See, e.g.,* McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24 (E.D. Wis. 1980); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977).

16. Section 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1970 & Supp. IV 1974), guarantees the right to bargain collectively. Seventy-nine percent of the collective bargaining agreements surveyed provided that employees could not be discharged without "cause" or "just cause". [1979] 2 COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS (BNA) 40:1. Employees who happen to be covered by a collective bargaining agreement may not be allowed to bring an independent tort action for discharge in retaliation for filing a worker's compensation claim. *See Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 407 N.E.2d 95 (3d Dist. 1980) (the term "just cause", contained within a collective bargaining agreement prohibiting an employee's termination except for just cause, is sufficiently broad and flexible to include retaliatory discharge for filing a worker's compensation action). The Illinois Appellate Court for the Third District held in *Cook* that where an employee employed under a labor union contract is discharged for

In *Palmateer v. International Harvester Co.*<sup>17</sup> the Illinois Supreme Court addressed the issue of whether an employee has stated a cause of action for the tort of retaliatory discharge<sup>18</sup> by alleging that he was terminated in violation of public policy. The *Palmateer* court held that the plaintiff stated a cause of action for the tort of retaliatory discharge by alleging that he was discharged "in contravention of a clearly mandated public policy."<sup>19</sup>

Although the term "public policy" cannot be precisely defined,<sup>20</sup> the court defined the term as concerning "what is right and just and what affects the citizens of the state collectively."<sup>21</sup> Public policy should be distinguished from matters which are purely personal.<sup>22</sup> The court in *Palmateer* stated that "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses."<sup>23</sup> The court recognized a cause of action based on public pol-

filing a claim under the Workmen's Compensation Act, the employee is limited to a claim for breach of contract, and before any suit can be filed, the employee must exhaust all available remedies, including the stipulated grievance procedure. The First District reached an opposite conclusion in *Wyatt v. Jewel Co.*, 108 Ill. App. 3d 840, 439 N.E. 2d 1053 (1982). Relying on *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the *Wyatt* court held that a union employee's tort action for retaliatory discharge was not barred by the exclusive contractual remedies provided in the employee's collective bargaining agreement. The Illinois Supreme Court may be called upon to resolve the conflict between the *Wyatt* and *Cook* decisions.

17. 85 Ill. 2d 124, 421 N.E.2d 876 (1981), *rev'g*, 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980).

18. This comment shall use the terms "abusive discharge" and "retaliatory discharge" interchangeably to encompass situations where the employer, motivated by improper reasons, dismisses the at-will employee without cause.

19. 85 Ill. 2d at 134, 421 N.E.2d at 881.

20. Most courts, including the Illinois Supreme Court, have been reluctant to define adequately the term "public policy" in a context of wrongful discharge actions. Although most decisions are premised upon a finding that a specific public policy has been violated, the courts have left no instruction as to how the finding was reached. See Abramson and Silvestri, *Restrictions on the Right of an Employer to Discharge At Will: The Action for Wrongful Discharge*, 40 FED. B. NEWS & J. 177, 180 (1981) [hereinafter cited as *Action for Wrongful Discharge*]. In *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (4th Dist. 1977), the Illinois Appellate Court defined public policy as "that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 1024, 366 N.E.2d at 1147, *quoting* *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 288, 294, 22 N.E. 798, 803 (1889). Another statement, perhaps just as confusing and vague as the *Leach* definition, defines public policy as anything which contravenes good morals or any established interest of society. See 72 C.J.S. *Policy* 212 and cases cited therein.

21. 85 Ill. 2d at 130, 421 N.E.2d at 878.

22. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 879 (1981). The majority stated:

Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort [of retaliatory discharge] will be allowed.

23. *Id.* at 133, 421 N.E.2d at 880.

icy for an employee discharged because he agreed to cooperate with law enforcement officials in a criminal investigation of a fellow employee.

This comment will first examine recent decisions of other jurisdictions which have abandoned the at-will rule in favor of a contract, tort or statutory remedy for a wrongfully discharged employee. The history of *Palmateer* in the lower courts will then be discussed, and the supreme court's reasoning will be analyzed. Finally, a critical analysis of the court's decision and its potential impact on future case law will be presented.

#### HISTORICAL BACKGROUND: THE ABANDONMENT OF THE EMPLOYMENT AT-WILL DOCTRINE

The practice of terminating employment at the will of either party was not the rule in early England.<sup>24</sup> Rather, the law presumed that the parties intended that a "general" or "indefinite" hiring was one from year to year, terminable only at the end of a year.<sup>25</sup> During the nineteenth century the English common law developed a rule that, absent cause for discharge, employment was terminable only after a notice period fixed by the custom of the trade.<sup>26</sup>

American courts have long since abandoned the English approach and adopted the at-will doctrine which presumes that the employment contract is terminable at the will of either party in the absence of an express agreement to the contrary.<sup>27</sup> These courts subscribed to the "laissez-faire" theory that the government foster rapid economic growth by exercising as little control as possible in trade and industry.<sup>28</sup> The courts, seeking to encourage industrial growth by insulating the employer from liability for abusive firings,<sup>29</sup> developed the employment-at-will rule.<sup>30</sup> In *Adair v. United States*<sup>31</sup> and *Coppage v. Kan-*

24. Feinman, *Employment At Will*, *supra* note 1, at 119-22.

25. *Id.* at 120, *citing*, 1 W. BLACKSTONE, COMMENTARIES 425. *See* *Douglass v. Merchants' Ins. Co.*, 118 N.Y. 484, 488, 23 N.E. 806, 807 (1890); *Davis v. Gorton*, 16 N.Y. 255, 257, 69 Am. Dec. 694, 695 (1857); *Bascom v. Shillito*, 37 Ohio St. 431, 433-34 (1882). *See generally* 1 C. LABATT, MASTER AND SERVANT § 156 (2d ed. 1913).

26. Summers, *Time for a Statute*, *supra* note 5, at 485.

27. *Id.* *See also* *Harrod v. Wineman*, 146 Iowa 718, 125 N.W. 812 (1910) (terminable-at-will doctrine so well established that it requires no citation).

28. *See* Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081, 1083-84 (1973); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1441 (1975) [hereinafter cited as *Abusive Discharge*]; *Job Security*, *supra* note 10, at 342-43.

29. *See* Feinman, *Employment At Will*, *supra* note 1, at 131-35; *Abusive Discharge*, *supra* note 28, at 1440.

30. *See Job Security*, *supra* note 10, at 342-43.

sas,<sup>32</sup> the United States Supreme Court held that legislation which interferes with the employment relationship violates the employer's freedom to contract. This judicial attitude, which condones discharge of employees without cause, came about in response to declining prices and severe economic depression in which economic stability could best be achieved by permitting employers to discharge their employees without cause.<sup>33</sup>

Modern criticism of the terminable-at-will doctrine centers upon the employer's absolute right to discharge the at-will employee.<sup>34</sup> Under this doctrine the employee is defenseless against the *threat* of discharge and therefore vulnerable to employer coercion and caprice.<sup>35</sup> In a highly technological society with specialized jobs requiring years of training, the employee, because of his comparative immobility, will gradually become more easily oppressed by the threats of his employer.<sup>36</sup>

The last seventy-five years have witnessed significant modifications of the at-will rule which were developed in order to protect individual workers from the coercive power of their employers.<sup>37</sup> Although the presumption that employment is at-will remains almost untouched,<sup>38</sup> federal legislation has greatly restricted an employer's freedom to terminate at-will employees.<sup>39</sup> Such federal statutes have been enacted for a variety of reasons: first, to promote unionization as a countervailing force against oppressive employer power;<sup>40</sup> second, to

31. 208 U.S. 161 (1908) (striking down federal statute that barred common carriers from dismissing employees for union membership). The United States Supreme Court found that "the right of the employ  to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employ ." *Id.* at 174-75.

32. 236 U.S. 1 (1915) (striking down Kansas statute forbidding "yellow dog" contracts that required employees as a condition of employment to agree not to join a union).

33. Comment, *Kelsay v. Motorola, Inc.—A Remedy for the Abusively Discharged At Will Employee*, 1979 S. ILL. U.L.J. 563, 564 (1979) [hereinafter cited as *The Abusively Discharged At Will Employee*].

34. *Whistleblowing*, *supra* note 12, at 783.

35. *Id.*, citing *Blades*, *supra* note 5, at 1406.

36. *Blades*, *supra* note 5, at 1405.

37. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1827 (1980) [hereinafter cited as *Protecting At Will Employees*].

38. Summers, *Time for a Statute*, *supra* note 5, at 491.

39. For a general discussion of various federal statutes which protect at-will employees from wrongful discharges, see *Protecting At Will Employees*, *supra* note 37, at 1827-28. See also *infra* notes 40-51 and accompanying text.

40. The National Labor Relations Act of 1935 prohibits an employer from discriminating in employment in order to encourage or discourage union membership. Wrongfully discharged employees can be, and normally are, ordered reinstated, and the employment relationship is thus specifically enforced. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1974). "Simi-

establish minimum wages and maximum hours;<sup>41</sup> third, to prohibit discrimination because of race, creed, nationality, sex and age;<sup>42</sup> fourth, to protect employee health and safety;<sup>43</sup> and fifth, to establish retirement benefits.<sup>44</sup> Although statutes prohibiting discrimination because of race, creed, nationality, sex and age focus primarily on hiring, promotion, and seniority practices, they have also been used to challenge dismissals in a wide variety of wrongful dismissal cases. Charges of discrimination have been filed by male workers threatened with discharge because they had long hair,<sup>45</sup> or because they wore beards,<sup>46</sup> and by female employees dismissed for objecting to sexual advances by male supervisors,<sup>47</sup> gaining weight,<sup>48</sup> getting married,<sup>49</sup> becoming preg-

lar statutes have been passed by fifteen states (Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, and Wisconsin), . . . thereby extending this protection to a major portion of private employment." Summers, *Time for a Statute*, *supra* note 5, at 492. For examples of federal statutes which promote unionization as a safeguard against employer power and coercion, see Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (1976); Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1976).

41. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976). See generally W. MALONE, M. PLANT & J. LITTLE, *THE EMPLOYMENT RELATION* 545-639 (1974).

42. See Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2 (1976) (prohibits discriminatory discharge on the basis of "race, color, religion, sex, or national origin"). Title VII does not, however, prohibit discrimination on the basis of age. Title VII is enforced through civil suits brought either by the Equal Employment Opportunity Commission or by the victimized employee. Other protections against retaliatory discharge include: Consumer Credit Protection Act § 304(a), 15 U.S.C. § 1674(a) (1976) (prohibits discharge of employee whose wages are garnished for an indebtedness); Fair Labor Standards Act § 15(a)(3), 29 U.S.C. § 215(a)(3) (1976) (retaliatory discharge against those exercising rights under the Act is illegal); Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1976) (protects older workers from discriminatory discharge); 38 U.S.C. § 2021(a) (1976) (grants returning veterans right to return to their former job without fear of being discharged for one year); Federal Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-25 (1964) (protects dealers from being wrongfully disenfranchised by automobile manufacturers).

Many states also prohibit discharges for political activity. See, e.g., CAL. LAB. CODE § 1102 (West 1971). Some states bar discharges because of physical handicap. See, e.g., CAL. LAB. CODE § 1402(a) (West Supp. 1980); MINN. STAT. ch. 363 (1976). A few states prohibit retaliatory discharges for filing workmen's compensation claims. See *Sventko v. Kroger Co.*, 69 Mich. App. 644, 651, 245 N.W.2d 151, 155 (1976); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1979); MO. ANN. STAT. § 287.780 (Vernon Cum. Supp. 1980). The Texas statutory provisions prohibit an employer from discharging an employee who files a workmen's compensation claim, hiring a lawyer to represent him in a claim, or testifying in good faith at a proceeding under the Workmen's Compensation Act.

43. Occupational Health and Safety Act of 1970, § 11(c), 29 U.S.C. § 660(c) (1976) (discharge of those exercising rights under the Act prohibited); Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-941 (1976).

44. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 § 2, 88 Stat. 829 (codified in various sections of 5, 18, 29, 31, 42 U.S.C.).

45. See, e.g., *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373 (N.D. Tex. 1975).

46. *Brown v. D.C. Transit System, Inc.*, 10 FEP Cases 841 (D.C. Cir. 1975); *Rafford v. Randle Eastern Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972).

47. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975).



nant,<sup>50</sup> or refusing to shave their legs.<sup>51</sup>

In addition to federal legislation, a number of states have passed laws forbidding employers from discharging an employee who exercises his right to vote,<sup>52</sup> engages in political activity or expresses a political opinion,<sup>53</sup> serves as a juror,<sup>54</sup> or refuses to take a lie detector test.<sup>55</sup> These laws generally provide criminal penalties but no civil remedies, with the result that employees seldom get their jobs back or recover damages.<sup>56</sup> However, some public employees, such as tenured school teachers, have adequate protection against unjust dismissal because they can only be dismissed after proof of incompetence or serious misconduct.<sup>57</sup>

### THE PUBLIC POLICY EXCEPTION TO THE AT-WILL RULE

Within the last few years, many state courts have carved out an exception to the terminable-at-will doctrine, holding that a termination violating public policy provides a sufficient basis for a wrongful discharge claim sounding in tort or contract.<sup>58</sup> As one commentator ob-

48. *Ashwarth v. Eastern Airlines, Inc.*, 389 F. Supp. 597 (E.D. Va. 1975). Michigan state law prohibits height and weight discrimination. MICH. COMP. LAWS ANN. § 37.2102 (West Supp. 1982-1983).

49. *Collins v. United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975).

50. *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975).

51. *Quist v. Plaza Restaurant*, 2 [1981] EML. PRAC. REP. (CCH) ¶ 5388 (Conn. Commission on Human Rights & Opportunities, 1975).

52. The Massachusetts statute, for example, provides:

No person shall, by threatening to discharge a person from his employment or to reduce his wages, or by promising to give him employment at higher wages, attempt to influence a voter to give or to withhold his vote, or, because of the giving or withholding of a vote, discharge a person from his employment or reduce his wages.

MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1975). For a collection of state laws, see [1981] LAB. L. REP. (CCH) (1 State Laws) ¶ 43,045.

53. The California statute, for example, provides:

No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

CAL. LAB. CODE § 1102 (West 1971).

54. For a collection of state laws, see [1981] LAB. L. REP. (CCH) (1 State Laws) ¶ 43,035, 43,055.

55. For a collection of state laws, see [1981] LAB. L. REP. (CCH) (1 State Laws) ¶ 43,055.

56. *E.g.*, *Bell v. Faulkner*, 75 S.W.2d 612, 614 (Mo. Ct. App. 1934) (The court dismissed the suit of an employee discharged for expressing his political opinions despite a statute expressly prohibiting such discharges. The court held that the statute was "purely prohibitive in its character, and . . . its violation cannot be satisfied with money.")

57. See J. WEISBERGER, *JOB SECURITY AND PUBLIC EMPLOYEES* 9-44 (1973); Jacobson, Sperry & Jensen, *The Dismissal and Non-Reemployment of Teachers*, 1 J.L. & EDUC. 435 (1972); Lanzarone, *Teacher Tenure—Some Proposals for Change*, 42 FORDHAM L. REV. 526 (1974).

58. Olsen, *supra* note 7, at 268. Olsen notes that discharged workers have asserted numerous theories of recovery to skirt the terminable-at-will doctrine. For example, many employees have contended that their at-will employment contract was actually for a fixed period of time; or that

served, "as a general exception to the rule . . . an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."<sup>59</sup> Furthermore, "while the public policies initially recognized by many of the courts arose out of statutes granting to employees employment-related *rights* and imposing legal *duties* on employers, many courts recognized rather ethereal public policies not to be found readily in legislation, constitutions, or judicial opinions."<sup>60</sup> Recognizing that many wrongfully terminated employees are not adequately protected by specific federal or state laws, many jurisdictions have permitted an abusively discharged plaintiff to proceed under either a contract or tort theory of recovery where the discharge violates public policy.

### *Contract Theory*

*Petermann v. International Brotherhood of Teamsters Local 396*<sup>61</sup> was the first decision to establish a cause of action for retaliatory discharge on a contract theory. In this California case, the employee was discharged for refusing to obey his employer's instructions to commit perjury at a legislative hearing. Although the *Petermann* court recognized that an employment contract which does not specify the term of employment is terminable at the will of either party, the court also recognized that the right to discharge may be limited by statute or by considerations of public policy.<sup>62</sup> The court characterized public policy as "inherently not subject to precise definition,"<sup>63</sup> but proceeded to hold that the employer's behavior was contrary to public policy as reflected

their employment contract contained express or implied provisions that they would remain employed so long as they performed their job satisfactorily; or that they could only be discharged for just cause; or that their discharge violated due process procedural safeguards; or that they detrimentally relied on their employer's oral promise of work for a reasonable period of time; or that they gave their employer additional consideration beyond the mere performance of services. *Id.* at 267-68. The public policy exception to the common law rule arose because these narrow theories of recovery have not provided the average American worker much protection from abusive termination. For an excellent discussion of the various theories of recovery, see Hoekstra, *Palmateer: A Further Extension to Retaliatory Discharge in Illinois*, 71 ILL. B.J. 298, 298-302 (1983).

59. *Id.* at 268, quoting *Jackson v. Minidoka Irrigation District*, 98 Idaho 330, 336, 563 P.2d 54, 57 (1977).

60. *Id.* at 268-69 (emphasis in original). In *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980), the court declared, without discussion, that strong state public policy favored the protection of pension plans. See also *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee wrongfully discharged for cooperating with law enforcement officials in a criminal investigation of a fellow employee where no statute expressly favored citizen crime-fighters).

61. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

62. *Id.* at 188, 344 P.2d at 27. The court cited no authority for its decision.

63. *Id.*

in California's penal code which makes it a crime "to solicit the commission of perjury."<sup>64</sup> Given that the state perjury laws reflected a public policy encouraging truthful testimony, a failure to permit the plaintiff's cause of action was viewed by the court as tantamount to ignoring criminal conduct and defeating the interests of the state.<sup>65</sup>

The *Petermann* decision is also significant for the remedy which the court fashioned. Basing its holding upon the employment contract rather than the tort of retaliatory discharge, the court determined that terminations which violate public policy constituted a breach of the employment contract.<sup>66</sup> The wrongfully discharged employee was entitled to a civil remedy for damages but he did not have a right to be reinstated.<sup>67</sup> Although the criminal statute prohibiting perjury defined a public policy which the employer breached, the statute was not intended to provide a right or remedy to an employee who suffered discharge for giving truthful testimony. The court thus created a public policy exception to the terminable-at-will rule to "effectuate the state's declared policy against perjury"<sup>68</sup> and to prevent the employer from coercing his employee to break the law. The court acknowledged the legislature's role in setting and defining public policy and perceived the decision to be necessary to the proper effectuation of the legislative mandate.<sup>69</sup> Using the public policy rationale of *Petermann*, subsequent decisions have developed a protection for employees discharged in contravention of some independent statutory policy.<sup>70</sup>

Fifteen years after *Petermann* the New Hampshire Supreme Court

64. *Id.* See CAL. PENAL CODE § 653(f) (West 1970).

65. Thus, the court stated:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

174 Cal. App. 2d at 188-89, 344 P.2d at 27.

66. *Id.* at 188, 344 P.2d at 27.

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

68. *Id.* at 189, 344 P.2d at 27.

69. *Id.*

70. See, e.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr., 401 (1970) (employer violated public policy favoring collective bargaining and minimum wages by terminating employee who retained attorney to negotiate wages with his employer); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (employee discharged for union activity violates public policy as codified by legislative enactment affording employees the protection of collective bargaining); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (discharge of employee for filing workmen's compensation claim violated public policy); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978) (public policy violated where employee terminated for refusal to perform catheterizations which were illegal for her to perform). See also *Whistleblowing*, *supra* note 12, at 797-98.

joined California in recognizing a contract action for retaliatory discharge. In *Monge v. Beebe Rubber Co.*,<sup>71</sup> the court permitted the plaintiff to recover for lost wages for the period during which she was deprived of employment. The defendant breached the oral contract of employment by discharging the plaintiff in retaliation for the plaintiff's refusals to comply with her foreman's requests for social companionship. The court held that a discharge "which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract."<sup>72</sup> The court offered neither a statutory nor a common law basis for allowing recovery.<sup>73</sup> Instead, it rested its decision upon the premise that society, as a whole, held an important interest in the employment relationship, an interest often at variance with the employer's interest in operating a profitable and efficient business by exercising his right to discharge an at-will employee.<sup>74</sup> By suggesting that public policy considerations can be used to prohibit all bad faith discharges whether or not an independent statutory policy is explicitly violated,<sup>75</sup> *Monge* departs from a long line of cases, stemming from *Petermann*, which limit the employer's right to discharge in only those instances where the discharge contravenes some independent statutory policy.<sup>76</sup> Other states have also permitted a cause of action based on a breach of contract theory.

71. 114 N.H. 130, 316 A.2d 549 (1974). See also *Recent Decisions*, 8 GA. L. REV. 996 (1974).

72. 114 N.H. at 133, 316 A.2d at 551.

73. *Id.* The majority cites *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), and *Petermann v. International Brotherhood of Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), in support of its decision, but these two cases do not stand for the proposition that public policy without an accompanying statutory violation is sufficient by itself to modify the terminable-at-will doctrine. See the remarks of Justice Grimes, 114 N.H. at 135-36, 316 A.2d at 553 (Grimes, J., dissenting).

74. 114 N.H. at 133, 316 A.2d at 551.

75. *Monge* effectively abolished the at-will rule on public policy grounds, and thus opened the way for future courts to prohibit retaliatory discharges by judicial decisions which were not necessarily based on expressly stated statutory policy. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 399 A.2d 1023 (1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980) (public policy violated where doctor discharged because of a difference of medical opinion regarding drug testing on human subjects); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (dicta that all that is required for tort of retaliatory discharge is that discharge be in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy); *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (employer breached implied covenant of good faith in the employment contract by discharging salesman to avoid paying him bonuses).

76. For examples of cases which have required a legislative expression of public policy to cover the circumstances of the discharged at-will employee, see *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978).

In *Fortune v. National Cash Register Co.*,<sup>77</sup> the Massachusetts Supreme Judicial Court held in favor of an at-will employee discharged by his employer who wished to avoid paying the plaintiff a large bonus. The court held that there was sufficient evidence to conclude that the discharge was motivated by the defendant's desire to minimize its commissions obligation and that an at-will employment contract contains an implied covenant of good faith and fair dealing, and thus, the bad faith termination constituted a breach of contract.<sup>78</sup>

### *Tort Theory*

A number of courts have recognized the tort of abusive or retaliatory discharge. For the plaintiff, the tort theory has many advantages over the contract theory. In most contract cases, the plaintiff's recovery is limited to wages lost during the time of absence from employment.<sup>79</sup> In addition to compensatory damages,<sup>80</sup> tort remedies permit the plain-

77. 373 Mass. 96, 364 N.E.2d 1251 (1977).

78. For an example of cases which have held that an at-will employment contract contains an implied covenant of good faith and fairness, see *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1976) (relying on *Monge* and applying New Hampshire law); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (discharge of at-will employee, for reasons relating to age, held to be a breach of implied covenant of good faith and fair dealing); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980) (tort cause of action for at-will employee discharged because his pension was about to vest); *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974) (contract cause of action recognized for bad faith discharge); *Smith v. Frank R. Schoner Inc.*, 94 Ohio App. 308, 311-12, 115 N.E.2d 25, 27 (1953) (cause of action for unlawful discharge recognized if employer discharged employee to avoid payment of commission).

The *Fortune* court's holding can be traced to a well-established rule that a principal cannot deprive an agent of a commission by prematurely terminating the relationship. See *Buysse v. Paine, Webber, Jackson and Curtis, Inc.*, 623 F.2d 1244, 1249 (8th Cir. 1980); *Rees v. Bank Bldg. & Equip. Corp.*, 332 F.2d 548 (7th Cir. 1964); *Coleman v. Graybar Electric Co.*, 195 F.2d 374 (5th Cir. 1952). Cf. *Lampley v. Celebrity Homes, Inc.*, 42 Colo. App. 359, 594 P.2d 605 (1979) (obligation to pay bonus under profit-sharing plan cannot be avoided by discharging employee before distribution made); *Sinnett v. Hie Food Prods., Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970) (employee terminable at-will may be discharged 361 days after hire but, because terminated without good cause, entitled to recover yearly stock bonus). *Contra*, *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980) (summary judgment granted to defendant in case where plaintiff alleged that discharge was motivated by desire to minimize commissions, because no public policy involved); *Cactus Feeders, Inc. v. Wittler*, 509 S.W.2d 934 (Tex. Civ. App. 1974) (plaintiff not entitled to recover bonus because bonus left to discretion of employer even though discharge occurred just prior to payment). See generally *RESTATEMENT (SECOND) OF AGENCY* § 454 (1958); *Olsen*, *supra* note 7, at 280.

79. In *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), the New Hampshire Supreme Court held that damages attributable to mental suffering were not properly recoverable in a breach of contract action. Recovery was limited to the loss of the computed "average pay" for the period the employee was discharged.

80. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank in Fairmount*, 246 S.E.2d 270 (W. Va. 1978).

tiff to recover punitive damages<sup>81</sup> as well as damages for mental anguish, pain and suffering.<sup>82</sup>

In 1973, the Indiana Supreme Court became the first jurisdiction to recognize a tort action for retaliatory discharge in a workmen's compensation context. *Frampton v. Central Indiana Gas Co.*<sup>83</sup> involved an employee who was allegedly discharged in retaliation for filing a workmen's compensation claim. The court maintained that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general [terminable-at-will] rule must be recognized."<sup>84</sup> The statutory right which the court relied on was the Indiana Workmen's Compensation Act which prohibits employers from using any "other device" to escape liability for workmen's compensation claims.<sup>85</sup> Although the Act did not provide for a private right of action for its breach, the court read "other device" broadly so as to include retaliatory discharge. The plaintiff was thus held to have a private cause of action, "in order for the goals of the Act to be realized and for public policy to be effectuated."<sup>86</sup> The court did not award any damages to the plaintiff, but instead remanded the case to the circuit court for further proceedings.

In 1976, the Michigan Court of Appeals addressed the identical issue raised in *Frampton*: whether a private cause of action should be permitted for an at-will employee who is discharged in retaliation for filing a workmen's compensation claim. The appellate court, in *Sventko v. Kroger Co.*,<sup>87</sup> acknowledged that the Michigan Workmen's

81. The purpose of punitive damages is to punish the employer for wrongfully discharging his employee. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

82. See, e.g., *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). *Contra*, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

83. 360 Ind. 249, 297 N.E.2d 425 (1973).

84. *Id.* at 253, 297 N.E.2d at 428.

85. IND. CODE ANN. § 22-3-2-15 (Burns 1974):

[N]o contract or agreement, written or implied, no rule regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act.

86. 260 Ind. at 251-52, 297 N.E.2d at 427. See also *Whistleblowing*, *supra* note 12, at 789.

*Frampton* has been followed in Texas in the case of *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App. 1976), but limited as to remedy permitted. See *Smith v. Coffee's Shop for Boys & Men, Inc.*, 536 S.W.2d 83 (Tex. Civ. App. 1976) (no right exists to force an employer to rehire an employee discharged for filing a workmen's compensation claim).

Louisiana distinguished *Frampton* in *Stephens v. Justiss-Mears Oil Co.*, 300 So.2d 510 (La. Ct. of App. 1974), on the basis that, where the employee had filed for workmen's compensation benefits nine months before his discharge, the court held there was no evidence that the discharge was in retaliation for filing the claim.

87. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

Compensation Act<sup>88</sup> did not expressly provide for a private remedy for the statute's breach. Following *Frampton*, however, the *Sventko* court held that an employer is not free to discharge an employee when to do so would contravene public policy.<sup>89</sup> The court stated that the workmen's compensation act manifested a clear expression of public policy. The concurring opinion noted that the legislative policy of providing financial benefits to victims of work-related injuries could best be effectuated by allowing a tort action for retaliatory discharge.<sup>90</sup>

The *Frampton* and *Sventko* decisions stand for the proposition that a tort action for retaliatory discharge will lie where an employer, by use of the discharge power, acts to thwart a clear statutory expression of public policy which has conferred rights upon the employee and that granting the relief sought will further the intent of the legislature.<sup>91</sup>

One year after *Sventko*, the United States Court of Appeals for the Seventh Circuit in *Loucks v. Star City Glass Co.*<sup>92</sup> declined to follow the trend established by *Sventko* and *Frampton*. The *Loucks* court held that Illinois workmen's compensation law did not permit a cause of action against an employer who discharged an employee in retaliation for filing a workmen's compensation claim because the Illinois legislature did not provide for a prohibition against retaliatory discharge in a workmen's compensation context.<sup>93</sup> The court concluded that the legislature, not the courts, should decide whether to extend the Workmen's Compensation Act.<sup>94</sup>

### *Illinois Adopts the Tort of Retaliatory Discharge:*

*Kelsay v. Motorola, Inc.*

In December 1978, in *Kelsay v. Motorola, Inc.*,<sup>95</sup> the Illinois

88. MICH. COMP. LAWS ANN. §§ 418.101-941 (1976).

89. "[A]n at will employer is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state." 69 Mich. App. at 647, 245 N.W.2d at 153.

90. *Id.* at 651, 245 N.W.2d at 155 (Callen, J., concurring). The dissent strongly objected to such "judicial legislation." *Id.* at 653, 245 N.W.2d at 158 (Danhof, J., dissenting). The dissent would require "express legislative authority" before limiting the at-will rule.

91. See *Whistleblowing*, *supra* note 12, at 791. At least three other jurisdictions have followed *Frampton* and *Sventko* in recognizing a cause of action for retaliatory discharge in a workmen's compensation context; *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Brown v. Transcom Lines*, 284 Or. 597, 346 A.2d 1087 (1978); *Texas Steel Co. v. Douglas*, 533 S.W.2d 111 (Tex. Civ. App. 1976).

92. 551 F.2d 745 (7th Cir. 1977).

93. *Id.* at 748.

94. *Id.* at 749.

95. 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (4th Dist. 1977), *rev'd*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). For a discussion of *Kelsay*, see *The Abusively Discharged At Will Employee*, *supra* note 33; *Kelsay v. Motorola, Inc.—Illinois Courts Welcome Retaliatory Discharge Suits Under the*

Supreme Court first addressed the issue of whether Illinois should recognize a cause of action for the tort of retaliatory discharge. Confronted with a particularly harsh application of the terminable-at-will rule,<sup>96</sup> the court held that the retaliatory discharge of an employee for pursuing a workmen's compensation claim offended the public policy of Illinois<sup>97</sup> as manifested in the Illinois Workmen's Compensation Act.<sup>98</sup> Justice Ryan, writing for the majority, rejected *Loucks* as controlling precedent, noting that federal court decisions construing state law do not bind state courts.<sup>99</sup> Furthermore, the court disagreed with the *Loucks* result, stating that "an employer's otherwise absolute power to terminate an employee at will should [not] prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workmen's Compensation Act".<sup>100</sup> Although the legislature had not provided a civil remedy for the plaintiff's discharge, the court held that the termination—if allowed to stand—would contravene established public policy.<sup>101</sup> The court concluded that such an "abusive discharge" gave rise to a cause of action in tort for compensatory and, in future cases, punitive damages.<sup>102</sup>

*Workmen's Compensation Act*, 1980 U. ILL. L.F. 839 (1980). See also *infra* text accompanying notes 96-102.

96. "In [Illinois] the rule has long been established that a hiring at a monthly or annual salary, if no duration is specified in the contract, is presumed to be at will and either party may terminate the hiring at his pleasure without liability." *Long v. Arthur Rubloff & Co.*, 27 Ill. App. 3d 1013, 1023, 327 N.E.2d 346, 353 (1975). See, e.g., *Pleasure Driveway and Park Dist. v. Jones*, 51 Ill. App. 3d 182, 367 N.E.2d 111 (1977); *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977); *Brian v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970); *Roemer v. Zurich Insurance Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1975); *Atwood v. Curtiss Candy Co.*, 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959); Note, *Tort Remedy for Retaliatory Discharge: Illinois Workmen's Compensation Act Limits Employer's Power to Discharge Employees Terminable At-Will*, *Kelsay v. Motorola, Inc.*, 29 DE PAUL L. REV. 561, 561-3 (1980) [hereinafter cited as *Tort Remedy for Retaliatory Discharge*]; *The Abusively Discharged At Will Employee*, *supra* note 33; *Recent Decision*, 68 ILL. B.J. 287 (1979).

97. 74 Ill. 2d at 185, 384 N.E.2d at 358.

98. ILL. REV. STAT. ch. 48, § 138.1-138.28 (1979), as amended by P.A. 81-992 § 17 (1980).

99. 74 Ill. 2d at 182, 384 N.E.2d at 357.

100. *Id.* at 181, 384 N.E.2d at 357.

101. *Id.* at 184, 185, 384 N.E.2d at 358-59. The plaintiff was terminated by Motorola prior to the enactment of an amendment to the Workmen's Compensation Act making it unlawful for an employer to interfere with or coerce the employee in the exercise of his rights under the Act. ILL. REV. STAT. ch. 48, § 138.4(h) (1975).

102. 74 Ill. 2d at 189-90, 384 N.E.2d at 361. The *Kelsay* court affirmed a directed verdict in favor of the plaintiff for \$749 in compensatory damages but reversed the trial court's order for \$25,000 in punitive damages. The court held that punitive damages could not be awarded in the present case because this

would be permitting the jury to punish the defendants for conduct which they could not have determined beforehand was ever actionable. The assessment of punitive damages has some of the same functions as the sanctions of criminal law. The sanctions of the criminal law cannot constitutionally be imposed when the criminality of the conduct is not capable of being known beforehand.



### *The Parameters of the Public Policy Exception*

The public policy exception to the termination-at-will doctrine has received widest acceptance where there has been some clearly expressed legislative mandate of public policy. Thus, actions for retaliatory discharge have been allowed where the employee was terminated for refusing to commit a criminal act,<sup>103</sup> refusing to violate a consumer credit code,<sup>104</sup> refusing to perform catheterizations which were illegal for the employee to perform,<sup>105</sup> engaging in union activity,<sup>106</sup> and taking time off from work to serve on a jury.<sup>107</sup> Other cases have rejected the public policy exception despite strong public policy overtones articulated by the legislature. For example, employees had no cause of action in tort when discharged for refusing to falsify medical records,<sup>108</sup> exercising a statutory right to examine corporate books,<sup>109</sup> and opposing an employer's discriminatory employment practices in not hiring women.<sup>110</sup> Some courts have refused to grant a cause of action for breach of the employment contract where the employer's motive for firing did not infringe upon clearly established public policy,<sup>111</sup> while other courts have denied recovery where the activity which lead to the discharge was the private concern of the employee.<sup>112</sup> A few courts have been reluctant to permit a cause of action for the tort of retaliatory discharge where there was no clear violation of public policy,<sup>113</sup> or where public policy was held to be too vague a concept to justify the creation of a new tort,<sup>114</sup> or where purely private interests were at

*Id.* at 188, 384 N.E.2d at 359, *quoting*, *Nees v. Hocks*, 272 Or. 210, 220-21, 536 P.2d 512, 517 (1975) (citation omitted).

103. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (for refusing to engage in price-fixing scheme which violated express provisions of the Sherman Antitrust Act (15 U.S.C. § 1)).

104. *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

105. *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978).

106. *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961).

107. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

108. *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977). The Alabama court refused to grant relief to the discharged employee on the following grounds: the employment contract was at-will, the fear of overruling existing Alabama law, and the public policy argument was too nebulous a standard.

109. *Campbell v. Ford Indust., Inc.*, 274 Or. 243, 546 P.2d 141 (1976).

110. *McCluney v. Jos. Schlitz Brewing Co.*, 489 F. Supp. 24 (E.D. Wis. 1980).

111. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 508, 573 P.2d 907, 909 (1977); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 334, 563 P.2d 54, 58 (1977); *Keneally v. Orgain*, 606 P.2d 127, 129 (Mont. 1980).

112. *Becket v. Welton Becket & Assoc.*, 39 Cal. App. 3d 815, 822, 114 Cal. Rptr. 531, 534 (1974); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811, 812 (Ky. App. 1977).

113. *Martin v. Platt*, 386 N.E.2d 1026, 1028 (Ind. 1979); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 456 (Iowa 1978); *Jones v. Keogh*, 137 Vt. 526, 563-64; 409 A.2d 581, 582 (1979).

114. *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977).

stake.<sup>115</sup>

Before applying the public policy exception most courts require the plaintiff to show more than a mere personal interest.<sup>116</sup> The employer's actions must harm not only the plaintiff but also society as well, usually by circumventing a specific statutory pronouncement.<sup>117</sup> A purely private interest that has not ripened into a societal interest is normally fatal to a cause of action.<sup>118</sup>

The tort theory of recovery provides greater monetary relief from unjust dismissal than does the contract theory.<sup>119</sup> Tort liability attaches in cases of abusive discharge based upon the employer's malicious motives.<sup>120</sup> Tort law restricts the employer's right to terminate in situations where the employee is not protected by an oral or written contract specifically providing for job security. Some courts have indicated a preference for the public policy exception rather than imply a contractual covenant of good faith and fair dealing in the employment relation as a means of limiting management's prerogative.<sup>121</sup> The major advantage of the tort theory is the possibility of recovering punitive damages

115. *Campbell v. Ford Indus., Inc.*, 274 Or. 243, 546 P.2d 141 (1976).

116. *See, e.g., Nees v. Hocks*, 272 Or. 210, 216-18, 536 P.2d 512, 515 (1975).

117. *Id. See generally, Whistleblowing, supra* note 12, at 796.

118. *See, e.g., Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977) (attending night law school); *Becket v. Welton Becket & Assoc.*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (refusal to terminate suit against employer).

119. *Blades, supra* note 5, at 1421-22.

120. *Id.* at 1422-23.

121. Illinois accepts the public policy exception to the terminable-at-will rule where an employee exercises statutory rights. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (employee stated a cause of action for wrongful discharge where plaintiff alleged her termination was motivated by her filing a worker's compensation claim against her employer; the Illinois Supreme Court held employers could be sued by employees for punitive damages when averting statutory rights). The Illinois Supreme Court extended the public policy exception in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (where an employee was terminated for "whistleblowing" to a local law enforcement agency accusing a fellow employee of criminal activity and for volunteering to testify against the employee, an action may lie for the tort of retaliatory discharge). The Illinois Appellate Court rejected reading a "just cause" limitation into the employment contract. *Criscione v. Sears, Roebuck & Co.*, 66 Ill. App. 3d 664, 384 N.E.2d 91 (1978) (court refused to follow employee's contention that there exists in all employment agreements the limitation of "just cause" absent explicit language so providing). The Illinois Appellate Court refused to limit management's prerogative by statements contained in employee handbooks. *Sargent v. Illinois Institute of Technology*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979). The court rejected the employee's argument that guidelines set forth in a personnel manual constituted terms of a contract to which the employer was bound. *Id.* at 121, 397 N.E.2d at 445.

Indiana recognizes the public policy exception for statutorily conferred personal rights. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (recognizes that the discharge of an employee for filing a workmen's compensation claim was in violation of public policy). Indiana rejects the notion that a company handbook limits an employer's prerogative to discharge. *Shaw v. S. S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975). The court refused to accept the employee's contention that an employee's handbook sets out conditions of employment, or constitutes a part of a contract of employment.

as well as damages for emotional harm which are not generally available in contract actions.<sup>122</sup> On the other hand, the contract theory prohibits discharges made in bad faith<sup>123</sup> or without just cause.<sup>124</sup> Unfortunately, many courts have failed to identify the actual bases for their decisions, leaving employers to speculate whether they breached an implied contract or committed a tort.<sup>125</sup>

The scope and meaning of the public policy exception to the at-will rule has been, and continues to be, a confusing and inconsistent area of the law. In this regard, a myriad of conflicting decisions under both the contract and tort theories of recovery will provide little if any precedential value to any individual discharge case. Confusion over the validity of the development and scope of the public policy exception to the at-will rule has led more than one court to conclude that the conflicts over the creation of the cause of action for wrongful discharge and its limitations should be resolved by the legislative process.<sup>126</sup> In *Palmateer* the Illinois Supreme Court has further muddied an already murky area of the law.

### *PALMATEER V. INTERNATIONAL HARVESTER CO.*

#### *Facts of the Case*

In *Palmateer v. International Harvester Co.*,<sup>127</sup> Ray Palmateer alleged that he had suffered a retaliatory discharge by his employer, International Harvester Company, for "blowing the whistle" on a co-

122. See, e.g., *Kelsay v. Motorola, Inc.* 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (punitive damages may properly be awarded prospectively in retaliatory discharge cases); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (plaintiff was discharged fourteen months before the filing of the Illinois Supreme Court's opinion in *Kelsay*, and therefore, punitive damages would be allowed only in future cases); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (emotional harm).

123. See notes 71-78 *supra* and accompanying text.

124. "Just or good cause is some substantial misbehavior on the part of the employee which is recognized as good grounds for dismissal both at law and by sound public opinion." *Contractual Right of Discharge*, *supra* note 1, at 714-15; *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980) (a promise to discharge only for cause may be incorporated into the employment contract either by express oral or written agreement or based upon an employee's legitimate expectations grounded in the employer's manual and the promise is enforceable even though no mutual intention to create contract rights in the employee existed).

125. See, e.g., *McCluney v. Jos. Schlitz Brewing Co.*, 489 F. Supp. 24 (E.D. Wis. 1980); *Trombetta v. Detroit, Toledo & Ironton Ry.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978); *Geary v. United States Steel Corp.* 456 Pa. 171, 319 A.2d 174 (1974); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

126. See, e.g., *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178 (Tex. Civ. App. 1979). See generally, Summers, *Time for a Statute*, *supra* note 5.

127. 85 Ill. 2d 124, 421 N.E.2d 876 (1981). Justice Simon authored the opinion; Justice Underwood dissented and Justices Ryan and Moran filed a separate dissent.

employee who might have committed a crime. Palmateer claimed he was dismissed for having supplied information to local law-enforcement officials that an employee might be involved in a violation of the Illinois Criminal Code of 1961<sup>128</sup> and for having agreed to cooperate in the investigation and trial of the employee if requested.<sup>129</sup> The employee's crime was never specifically stated in the record. The circuit court of Rock Island County dismissed the complaint<sup>130</sup> for failure to state a cause of action and the Illinois Appellate Court affirmed the dismissal in a divided opinion.<sup>131</sup> While recognizing an exception to the terminable-at-will rule for an employer who terminates an employee in derogation of "a contract provision, a statute, or public policy,"<sup>132</sup> the appellate court concluded that there was insufficient Illinois precedent in which an employee had been discharged for participating in the uncovering of criminal wrongdoing.<sup>133</sup> Thus, in the absence of legislative or judicial authority for expanding the tort of retaliatory discharge, the court held that "the parties had an employment contract at-will."<sup>134</sup>

Writing in dissent in the appellate court decision, Justice Barry found substantial statutory authority for the proposition that it is contrary to the expressly stated public policy of Illinois for an employer to threaten to discharge an employee in order to prevent the employee from cooperating with the police in the enforcement of the Illinois Criminal Code.<sup>135</sup>

128. ILL. REV. STAT. ch. 38 (1979).

129. 85 Ill. 2d at 127, 421 N.E.2d at 877.

130. In addition to a claim for wrongful discharge, Palmateer also requested compensatory and punitive damages for breach of contract, violation of his constitutional and civil rights, and intentional infliction of severe emotional distress. The trial judge entered judgment for International Harvester on all counts. Palmateer appealed to the appellate court from the wrongful discharge and intentional infliction of emotional distress judgment.

131. 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980).

132. *Id.* at 52, 406 N.E.2d at 597.

133. *Id.* Writing for the majority Justice Stouder did not examine the various provisions of the Illinois Criminal Code of 1961 which, according to Justice Barry in his dissent, made International Harvester's conduct violative of public policy. For a detailed analysis of the specific code sections, see note 135, *infra*.

134. 85 Ill. App. 3d at 52, 406 N.E.2d at 597.

135. *Id.* at 57, 406 N.E.2d at 601. (Barry, J., dissenting). ILL. REV. STAT. ch. 38, §§ 31-4, 31-8, 32-1, 32-4 (1977) (these code sections proscribe, respectively, obstruction of justice, refusing to aid a police officer, interfering with jurors or witnesses called to testify, and compounding a crime). The dissent cited *People v. Vitucci*, 49 Ill. App. 2d 171, 199 N.E.2d 78 (1964) (employer held in contempt for discharging an employee who exercises his civil rights of serving on a jury) and *People v. Huggins*, 258 Ill. App. 238 (1930) (making it a contempt of court to fire or discipline an employee for attending court when subpoenaed as a witness) for examples of case law which prohibit activity of essentially the same character as that complained of by the plaintiff, Palmateer.

Justice Barry's dissent became, in slightly modified form, the position of the majority in the Illinois Supreme Court's reversal of the appellate court's dismissal. 85 Ill. App. 3d at 58, 406

The Illinois Supreme Court granted Palmateer leave to appeal. The court addressed the issue of whether a private right of action for the tort of retaliatory discharge should be permitted an at-will employee discharged for providing information to the police regarding a possible criminal violation by a fellow employee and agreeing to testify if requested to do so.<sup>136</sup> Relying on *Kelsay*, the supreme court reversed the judgment granting dismissal of Palmateer's complaint by the appellate and circuit courts with regard to the discharge claim and remanded the case to the circuit court for further proceedings.<sup>137</sup> In a four to three decision, the supreme court held that Palmateer had stated a cause of action for retaliatory discharge.<sup>138</sup> The court concluded that a complaint shall not be dismissed where the plaintiff alleges that the employer discharged the employee in retaliation for the employee's activities, and that the discharge contravened clearly mandated public policy.<sup>139</sup>

The supreme court disposed of the prayer for punitive damages in the same manner as in *Kelsay*,<sup>140</sup> holding that punitive damages would only be allowed in future cases.<sup>141</sup> Consistent with the holding in *Kelsay*, the court disallowed an award of punitive damages because Palmateer had been discharged fourteen months before the *Kelsay* opinion was filed.<sup>142</sup>

### *Reasoning of the Majority Opinion*

The main concern facing the Illinois Supreme Court in *Palmateer* was not whether the public policy exception to the terminable-at-will rule should be recognized—*Kelsay*<sup>143</sup> had already firmly established its existence. The issue was rather how explicitly must the legislature have articulated the public policy before an employee could maintain a private cause of action for retaliatory discharge. Despite language in the Workmen's Compensation Act suggesting that the Illinois General As-

N.E.2d at 601 (Barry, J., dissenting). Both Justice Barry and the majority of the supreme court found a clear mandate by the Illinois legislature certifying that the public policy of Illinois is to encourage employees to disclose evidence of criminal activity and to encourage people with information to cooperate with the authorities. In light of this public policy, the tort of retaliatory discharge is actionable. 85 Ill. 2d at 133, 421 N.E.2d at 880.

136. *Id.* at 127, 421 N.E.2d at 877.

137. *Id.* at 135, 421 N.E.2d at 881.

138. *Id.* at 133, 421 N.E.2d at 880.

139. *Id.* at 134, 421 N.E.2d at 881.

140. *Id.* at 134-35, 421 N.E.2d at 881.

141. For a discussion of the award of punitive damages in *Kelsay*, see *supra* text accompanying note 102.

142. 85 Ill. 2d at 134-35, 421 N.E.2d at 881.

143. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

sembly had made a conscious decision to deny a civil remedy,<sup>144</sup> the *Kelsay* court determined that the public policy, as stated in the Act, "could only be effectively implemented and enforced by allowing a civil remedy for damages."<sup>145</sup> According to *Palmateer*, the *Kelsay* court noted that "public policy strongly favored the exercise of worker's compensation rights; if employees could be fired for filing compensation claims, that public policy would be frustrated."<sup>146</sup> The majority in *Palmateer* reaffirmed the *Kelsay* decision which limited an employer's otherwise absolute power to discharge an at-will employee where the discharge contravenes the public policy of the Act.<sup>147</sup>

The broad issue before the supreme court in *Kelsay* arose again in *Palmateer*: whether a court may provide relief to at-will workers who are discharged in violation of public policy where the cause of action is not expressly stated in a statute or clearly sanctioned in the legislative history. Despite the legislature's failure to grant outright approval in either case, the supreme court fashioned a remedy based on public policy considerations, which effectively implemented the legislative intent. In view of the fact that the legislature had not expressly provided relief for a wrongfully discharged employee, the supreme court examined the public policy behind the two statutes. Even in the absence of an explicit legislative proscription against retaliatory discharge, the supreme court concluded that public policy nevertheless favors permitting employees to file workmen's compensation claims under the Act<sup>148</sup> or to participate actively in criminal investigations.<sup>149</sup>

The *Palmateer* court, however, refused to limit the tort of retaliatory discharge to a workmen's compensation context,<sup>150</sup> and extended

144. The Illinois Workmen's Compensation Act was intended by the legislature to be the exclusive remedy available to employees for job-related injuries. The Act specifically provides: "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act." ILL. REV. STAT. ch. 48, § 138.11 (1973). The employer in *Kelsay* also argued that the legislature's decision to provide solely for criminal punishment of employers who, after 1975, "discharge or . . . threaten to discharge . . . an employee because of the exercise of his rights or remedies granted to him by [the] Act," ILL. REV. STAT. ch. 48, § 138.4(h) (1975), without providing for a *civil* remedy for employees who are so discharged, precluded the plaintiff's action. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180, 384 N.E.2d 353, 356 (1978). The *Kelsay* court refused to accept the employer's argument and held that "to uphold and implement [the] public policy [of the Act] a cause of action should exist for retaliatory discharge." *Id.* at 181, 384 N.E.2d at 357.

145. *Id.* at 185, 384 N.E.2d at 358.

146. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 127-28, 421 N.E.2d 876, 877 (1981).

147. See *supra* notes 95-102 and accompanying text.

148. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d at 182, 384 N.E.2d at 357.

149. *Palmateer v. International Harvester Co.*, 85 Ill. 2d at 132, 421 N.E.2d at 880.

150. The *Kelsay* majority carefully limited its decision to the workmen's compensation issue

its application to any situation where "a discharge contravenes public policy."<sup>151</sup> Henceforth, after *Palmateer*, an employer's freedom to dismiss an employee may be circumscribed where public policy would be contravened by permitting the retaliatory firing.<sup>152</sup>

Having concluded that *Kelsay* supported the public policy exception,<sup>153</sup> the supreme court turned its attention to "what constitutes clearly mandated public policy."<sup>154</sup> The court said that although public policy is not subject to precise definition,<sup>155</sup> it may be found "in the State's constitution and statutes, and, when these are silent, in its judicial decisions."<sup>156</sup> Public policy is a matter which strikes "at the heart of a citizen's social rights, duties, and responsibilities."<sup>157</sup> In place of a precise definition, the majority cited numerous examples from other jurisdictions which permitted a cause of action where the employee was discharged for refusing to violate a statute,<sup>158</sup> or for engaging in statutorily protected union activities.<sup>159</sup> The court observed that the cause of action has been denied where it is clear that only private interests are at stake.<sup>160</sup> According to the court, no consistent answer for restricting the employer's right to terminate has emerged where the nature of the interest is partly public and partly private.<sup>161</sup>

The most critical aspect of the court's holding was its conclusion that public policy "favors citizen crime-fighters."<sup>162</sup> Although no specific statutory provision in the Illinois Criminal Code<sup>163</sup> creates a

presented and refrained from announcing a broad public policy exception to govern disputes in other situations. 74 Ill. 2d at 183-85, 384 N.E.2d at 358-59.

151. 85 Ill. 2d at 130, 421 N.E.2d at 878.

152. The majority concluded: "In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole." *Id.* at 129, 421 N.E.2d at 878.

153. The majority stated: "The [*Kelsay*] court noted that public policy strongly favored the exercise of worker's compensation rights." *Id.* at 127, 421 N.E.2d at 877.

154. *Id.* at 130, 421 N.E.2d at 878.

155. *Id.* See also *Petermann v. International Brotherhood of Teamsters, Local 396*, 174 Cal. App. 2d 184, 187, 344 P.2d 25, 27 (1959); *Job Security*, *supra* note 10, at 340-44.

156. 85 Ill. 2d at 130, 421 N.E.2d at 878, quoting, *Smith v. Board of Education*, 405 Ill. 143, 147, 89 N.E.2d 893, 896 (1950). The dissent pointed out that many Illinois cases make no mention of the role of judicial decisions in formulating public policy and that the question of public policy is first and foremost a matter of legislative concern. 85 Ill. 2d at 137, 421 N.E.2d at 882 (Ryan, J., dissenting).

157. *Id.* at 130, 421 N.E.2d at 878-79.

158. *Id.* at 130-31, 421 N.E.2d at 879.

159. *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961). See *supra* text accompanying note 106.

160. See *supra* text accompanying notes 115-18.

161. 85 Ill. 2d at 131, 421 N.E.2d at 879.

162. *Id.* at 132, 421 N.E.2d at 880.

163. See ILL. REV. STAT. ch. 38 (1979).

mandatory duty to search out and prosecute criminal activity,<sup>164</sup> the court reasoned that public policy, nonetheless, “favors the exposure of crime.”<sup>165</sup> The court stressed that the most basic of all public policies is the enforcement of the state’s criminal laws.<sup>166</sup> The effective implementation of these laws demands that citizens be encouraged to volunteer information to law enforcement officials and to assist in the investigation and prosecution of the suspected crime.<sup>167</sup> Thus, “[o]nce the possibility of crime was reported, Palmateer was under a statutory duty to assist in the investigation when requested to do so by local authorities.”<sup>168</sup> In response to International Harvester’s contention that it should be free to discharge an employee for recklessly resorting to the criminal justice system, the court answered that public policy had determined that the problem should be resolved through the criminal justice system.<sup>169</sup> An employee must be free to “blow the whistle” on a fellow employee who may have violated the Criminal Code, regardless of the magnitude of the crime.<sup>170</sup> By bringing such criminal activity to light, the whistle-blowing employee acts in the public’s best interest. In summary, the court concluded that the criminal laws were enacted not only to punish unlawful activity, but also to encourage behavior which aids in the enforcement of these laws.<sup>171</sup> Having determined that such behavior is beneficial to society as a whole, the court held that Palmateer’s conduct fell within the public policy exception to the terminable-at-will rule.

Finally, the court addressed International Harvester’s position that the complaint was defective because Palmateer refrained from identify-

164. Writing for the majority, Justice Simon stated: “No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters.” 85 Ill. 2d at 132, 421 N.E.2d at 880.

165. *Id.*, quoting, *Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 44, 411 N.E.2d 229, 231 (1980).

166. 85 Ill. 2d at 132, 421 N.E.2d at 879.

167. *Id.* at 133, 421 N.E.2d at 880. Palmateer’s counsel argued:

While governments are instituted to secure the rights of the people and to protect property, the people must recognize their corresponding individual obligations and responsibilities. The duty to provide information concerning violations of the law to the police is as fundamental a responsibility as that to obey the law, for unless the former obligation is encouraged those who fail to observe the latter would never be brought to justice. Suppression of evidence and interference with witnesses constitute dangerous threats to the safety and welfare of the people and the orderly process of government and have, therefore, been the subject of strict criminal sanctions. Cooperation with peace officers is required.

Brief for Palmateer at 7, *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (citations omitted).

168. *Id.* See also ILL. REV. STAT. ch. 38, § 31-8 (1979).

169. *Id.* at 133, 421 N.E.2d at 880.

170. *Id.*

171. *Id.*



ing his fellow employee and failed to set forth the precise crime which was the focus of the investigation. Instead of moving for a more definite statement,<sup>172</sup> International Harvester moved to dismiss the complaint for failure to state a cause of action. Granting that the complaint was not as specific as it should have been, the court found that the complaint nonetheless reasonably informed the employer of the nature of the claim and stated a cause of action.<sup>173</sup>

### *Reasoning of the Dissents*

In his tersely worded dissent, Justice Underwood reiterated his reasons for dissenting in *Kelsay*. He criticized the majority for its judicial activism in an area where the principle of separation of powers requires that only the legislature may proclaim declarations of public policy.<sup>174</sup>

In a separate dissent, Justice Ryan, joined by Justice Moran, strongly disagreed with the majority's decision and advanced his own reasons for denying relief to *Palmateer*: first, that the public policy against retaliatory discharge must be clearly defined; second, the legislature has not sought to articulate any public policy favoring citizen crime-fighters; and third, that the decision will contribute to the already declining business climate in Illinois.<sup>175</sup>

Ryan insisted that most of the jurisdictions that have allowed a cause of action for retaliatory discharge have required that the public policy against such discharge be "clearly articulated, strong, fundamental, compelling and well-defined."<sup>176</sup> To support his conclusion, he argued that courts are generally unwilling to create a cause of action for a

172. ILL. REV. STAT. ch. 110, § 45(1) (1979).

173. *Id.* at 134, 421 N.E.2d at 880.

174. *Id.* at 135-36, 421 N.E.2d at 881 (Underwood, J., dissenting). See also *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 190-91, 384 N.E.2d 353, 361-62 (1978) (Underwood, J., concurring and dissenting); ILL. CONST. art. II, § 1 (1970). Section 1 provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." *Id.*

175. 85 Ill. 2d at 136-45, 421 N.E.2d at 881-86.

176. *Id.* at 141, 421 N.E.2d at 883. Justice Ryan wrote: "Only in cases where there have been clearly articulated, strong, fundamental, compelling and well-defined policies can a discharge which contravened these policies give rise to a tort action for retaliatory discharge." *Id.* (Ryan, J., dissenting). See also *Percival v. General Motors Corp.*, 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (clear mandate of public policy); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978) (clearly violative of public policy); *Campbell v. Ford Industries, Inc.*, 274 Or. 243, 546 P.2d 141 (1976) (strong public policy); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (clear mandate of public policy); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979) (clear and compelling public policy); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (substantial public policy). *Contra*, *Petermann v. International Brotherhood of Team-*

discharged employee "simply because his conduct was praiseworthy or because the public may have derived some benefit from it."<sup>177</sup> According to Justice Ryan, the clear articulation of such a strong public policy is almost always "found in legislative pronouncement."<sup>178</sup> By concluding that public policy favors citizen crime-fighters, the dissent stated that the majority usurped the function of the legislative branch of government whose proper function is to establish public policy.<sup>179</sup>

Justice Ryan pointed out that most courts have required a nexus between a violation of some legislatively expressed public policy and the motivation for the discharge before the at-will doctrine can be ignored.<sup>180</sup> Ryan cautioned against abandoning the general rule that an at-will employment is terminable at the discretion of the employer, except in instances where the wrongful discharge is based on statutes which are specifically designed to protect the rights of the employee.<sup>181</sup> Adoption of public policy parameters extending beyond those clearly expressed by the legislature in a statute is an action perilously close to

sters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (public policy favors that which has a tendency to be beneficial to the public welfare).

Justice Ryan distinguished *Monge* and *Fortune* from the strong-public-policy line of cases on the basis that these two cases sought a contract remedy rather than a tort remedy. See *supra* text accompanying notes 71-78.

177. 85 Ill. 2d at 139, 421 N.E.2d at 883 (Ryan, J., dissenting). Justice Ryan observed that in *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), the employer had the right to discharge an employee who objected to the safety of a product even though his intentions were praiseworthy. Justice Ryan also cited *Abriz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978), for the proposition that courts will not permit a cause of action for retaliatory discharge where the public benefit is small relative to the employer's right to control the direction of his business. Furthermore, Justice Ryan discussed *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977), where the plaintiff had been discharged after he announced his plans to attend night law school. The *Kraftco* court refused to afford relief to the plaintiff in the absence of clearly established legislative policy.

178. 85 Ill. 2d at 141, 421 N.E.2d at 883 (Ryan, J., dissenting). See J. SUTHERLAND, STATUTORY CONSTRUCTION, § 55.01 (4th ed. 1973). See generally, R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7-12 (1975); *Whistleblowing*, *supra* note 12, at 793.

179. 85 Ill. 2d at 136, 421 N.E.2d at 881 (Ryan, J., dissenting).

180. *Id.* at 141-43, 421 N.E.2d at 883-84.

181. *Id.* at 140, 421 N.E.2d at 883. Justice Ryan analyzed two California cases which upheld the validity of the at-will doctrine where there was no articulated public policy through legislative action. In *Becket v. Welton Becket & Associates*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974), the employee, as an executor of the estate, was discharged for refusing to terminate a lawsuit against his employer. The court denied relief because the public policy had not been expressed by either a criminal statute or a statute designed to protect the rights of the employee. In *Tameny v. Atlantic Richfield Co.*, 27 Cal. App. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980), the Supreme Court of California held that the plaintiff had sufficiently alleged a wrongful discharge tort claim. The employee contended that he was fired after fifteen years of satisfactory job performance because he refused to take part in alleged price-fixing violations prohibited by the Sherman Act and the California Cartwright Act. The court acknowledged that employees may maintain actions for retaliatory discharge where the legislature has "articulated a fundamental public policy which the employer's discharge clearly contravened." *Id.* at 177, 164 Cal. Rptr. at 845, 610 P.2d at 1336.

judicial legislation.<sup>182</sup> Justice Ryan distinguished the cases permitting a cause of action for retaliatory discharge based on bad faith<sup>183</sup> from the strong-public policy line of cases on the basis that the former allowed recovery for breach of contract rather than for a tort, and punitive damages were not sought.<sup>184</sup> In the dissent's view, the majority mistakenly created its own "vague concept of public policy" which was never articulated by the legislature.<sup>185</sup> Justice Ryan stated that Palmateer was not entitled to recover compensatory and punitive damages because his complaint did not allege conduct on his part that would "bring it within the area of any public policy that has been articulated by the legislature."<sup>186</sup> Palmateer only alleged that he was discharged for reporting to the authorities that an employee *might* have committed a crime and that he agreed to assist in the investigation; "the complaint [did] not even allege that a crime had been committed."<sup>187</sup> Justice Ryan noted that the legislature has declared "obstruction-of-justice"<sup>188</sup> and "refusing to aid a police officer"<sup>189</sup> to be crimes; however, the legislature has not sought to articulate any public policy favoring citizen crime-fighters. Because Palmateer was not discharged for failing to violate the requirements of the Illinois Criminal Code, his conduct did not fall within any legislative pronouncement which is the source of the public policy exception. His conduct fell substantially below the clear, well-defined public policy requirement which Justice Ryan argued is essential for an actionable tort.<sup>190</sup>

Justice Ryan also expressed concern over the "deteriorating business climate" in Illinois and predicted that the vague concept of public policy endorsed by the majority would force many industries to leave the state.<sup>191</sup> In summary the dissent stated that to maintain a better balance between the interests of employer and employee,<sup>192</sup> the tort of retaliatory discharge should be allowed only where the discharge violated a strong public policy which has been clearly articulated, nor-

182. 85 Ill. 2d at 136, 421 N.E.2d at 881 (Ryan, J., dissenting).

183. See *supra* text accompanying notes 71-78.

184. 85 Ill. 2d at 141, 421 N.E.2d at 884.

185. *Id.* at 145, 421 N.E.2d at 886.

186. *Id.* at 141, 421 N.E.2d at 884.

187. *Id.* at 142, 421 N.E.2d at 884 (Ryan, J., dissenting).

188. ILL. REV. STAT. ch. 38, § 31-4 (1979).

189. *Id.* § 31-8.

190. 85 Ill. 2d at 141-42, 421 N.E.2d at 884 (Ryan, J., dissenting).

191. *Id.* at 143, 421 N.E.2d at 885 (Ryan, J., dissenting).

192. Justice Ryan cautioned against allowing the pendulum to swing too far in favor of the employee. In developing this new tort, courts "must balance the interests of employee and employer" so the expectations of both can be best accommodated. *Id.* at 143, 421 N.E.2d at 884 (Ryan, J., dissenting).

mally by the legislature.<sup>193</sup> In the process of emerging from the harshness of the traditional rule, the pendulum has begun to swing to the opposite extreme in favor of an employee's right to permanent employment.<sup>194</sup> According to the dissent, courts must balance the interests of employee and employer with the "hope of fashioning a remedy that will accommodate the legitimate expectations of both."<sup>195</sup>

## ANALYSIS

### *The Majority's Reliance on the Illinois Criminal Code*

The majority determined that the employment at-will rule is not absolute. An employer at-will is not free to discharge an employee when the reason for the discharge has the effect of contravening the public policy of Illinois. Expressions of public policy are generally found in the state's "constitution and statutes and, when they are silent, in its judicial decisions."<sup>196</sup> The majority declared that the enforcement of a state's criminal code is the cornerstone of ordered liberty.<sup>197</sup> The court recognized that the Illinois Criminal Code does not require citizens to take an active part in the ferreting out and prosecution of crime. Nonetheless, public policy, as expressed in the Illinois criminal statutes, favors citizen crime-fighters.<sup>198</sup>

Relying apparently on two sections of the Illinois Criminal Code, the majority concluded that public policy "favors Palmateer's conduct in volunteering information to the law-enforcement agency."<sup>199</sup> The obstruction-of-justice statute<sup>200</sup> makes it unlawful to conceal a crime. The majority interprets this statute very broadly as conferring a right and placing an affirmative duty upon an employee to report possible criminal activity to the police. The court maintained that an employee

193. *Id.* at 145, 421 N.E.2d at 885-86 (Ryan, J., dissenting).

194. *Id.* at 143, 421 N.E.2d at 884.

195. *Id.*

196. *Id.* at 130, 421 N.E.2d at 878, *citing*, *Smith v. Board of Education*, 405 Ill. 143, 147, 89 N.E.2d 893, 896 (1950).

197. 85 Ill. 2d at 132, 421 N.E.2d at 879, *citing*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 61-62, 394 N.E.2d 1204 (1979); *Jarrett v. Jarrett*, 78 Ill. 2d 337, 345, 400 N.E.2d 421 (1979).

198. *The Palmateer* majority quoted from *Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 44, 411 N.E.2d 229, 231 (1980), a case involving actions for malicious prosecution but analogous to the citizen employee who fears discharge:

Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused.

85 Ill. 2d at 132-33, 421 N.E.2d at 880.

199. 85 Ill. 2d at 133, 421 N.E.2d at 880.

200. ILL. REV. STAT. ch. 38, § 31-4 (1979). The obstructing justice statute provides:

has the right under the obstructing justice statute to assume the role of a citizen crime-fighter undertaking to ferret out crime for law-enforcement authorities. However, the dissent correctly points out that *Palmateer* was not discharged for failing to violate or for complying with the requirements of this statute.<sup>201</sup>

The second section of the criminal code referred to in the majority opinion concerns refusal to aid an officer.<sup>202</sup> According to the majority, once a crime has been reported an employee has a statutory duty to assist officials when requested to do so. As the dissent points out, the majority construes the refusal-to-aid-an-officer statute as placing an obligation on an employee to become involved in fighting crime. Public policy, as articulated by the legislature in the criminal code, "also favors *Palmateer's* agreement to assist in the investigation and prosecution of the suspected crime."<sup>203</sup> These two sections of the Illinois Criminal Code, taken together, comprise a clear expression of public policy warranting the abrogation of the common law concept of termination at-will. Unwilling to depart from the strictures laid down in *Kelsay*, the court sought the legitimacy of legislative action. Legislation remains the strongest indicator of the existence of public policy. The statutory right involved in *Palmateer* was the Illinois Criminal Code which depends for its enforcement upon the voluntary cooperation of private citizens.

The majority overlooked a recently enacted section of the criminal code which expressly forbids an employer from discharging or terminating an employee for attending criminal proceedings. This statute provides that no employer shall discharge or threaten to discharge any employee who is a witness to a crime for time lost from regular em-

A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:

(a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or

(b) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; or

(c) Possessing knowledge material to the subject at issue, he leaves the State or conceals himself.

(d) Sentence.

Obstructing justice is a Class 4 felony.

*Id.*

201. 85 Ill. 2d at 141, 421 N.E.2d at 884 (Ryan, J., dissenting).

202. ILL. REV. STAT. ch. 38, § 31-8 (1979). The statute provides:

Whoever upon command refuses or knowingly fails reasonably to aid a person known by him to be a peace officer in:

(a) Apprehending a person whom the officer is authorized to apprehend; or

(b) Preventing the commission by another of any offense, commits a petty offense.

*Id.*

203. 85 Ill. 2d at 133, 421 N.E.2d at 880.

ployment while attending criminal proceedings pursuant to subpoena.<sup>204</sup> Employers who violate this section can be held in criminal contempt of court. Although Palmateer was not subpoenaed to appear at a criminal hearing, he was a witness to a possible crime and agreed to assist law-enforcement officials in gathering further information. Despite this difference, the statute verges on legislative approval of Palmateer's crime-fighting activities. The subpoenaed-crime-witness statute is a clear expression of legislatively defined public policy favoring citizen crime-fighters. The statute became effective on January 1, 1980, more than six months prior to the appellate court decision and over fifteen months ahead of the supreme court opinion. If the majority had been aware of the statute's existence, the public policy exception would have received stronger legislative support.

Further legislative approval (or disapproval) of the public policy exception can be found in other criminal statutes. For example, in some special circumstances the refusal of a citizen to come forward with information respecting criminal wrongdoing may leave that citizen vulnerable to a charge of misprision of felony.<sup>205</sup> This crime is defined as concealing a felony committed by another.<sup>206</sup> Illinois does not have a misprision of felony statute; however, it is a crime in Illinois to compound a crime by agreeing not to prosecute an offender.<sup>207</sup> Al-

204. ILL. REV. STAT. ch. 38, § 155-3 (Supp. 1982-1983). The subpoenaed-crime-witnesses statute provides:

§ 8. No employer shall discharge or terminate, or threaten to discharge or terminate, from his employment, or otherwise punish or penalize any employee of his who is a witness to a crime, because of time lost from regular employment resulting from his attendance at any proceeding pursuant to subpoena issued in any criminal proceeding relative to such crime. Any employer who shall knowingly or intentionally violate this section shall be proceeded against and punished for contempt of court. This section shall not be construed as requiring an employer to pay an employee for time lost resulting from attendance at any proceeding.

*Id.* This statute became effective on January 1, 1980. Palmateer's counsel cited the subpoenaed-crime-witness statute in its brief. Brief for Palmateer at 7, *Palmateer v. International Harvester Co.*, 85 Ill. 2d 125, 421 N.E.2d 876 (1981). The majority apparently either glossed over or intentionally ignored this statute in favor of a panoramic view of the criminal code.

205. See Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 294 (1971).

206. The federal crime of misprision of felony is defined as:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be fined not more than \$500 or imprisoned not more than three years, or both.

18 U.S.C. § 4 (1976).

207. ILL. REV. STAT. ch. 38, § 32-1 (1979). Compounding a crime is defined as:

(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.

(b) Sentence. Compounding a crime is a petty offense.

*Id.*

though the *Palmateer* court overlooked the statute forbidding compounding a crime,<sup>208</sup> an agreement not to prosecute is against the public policy of Illinois.<sup>209</sup>

There is some indication that the Illinois legislature did not intend to provide *Palmateer* with a civil remedy. The legislature enacted two statutes which prohibit retaliatory discharges relating to garnishments.<sup>210</sup> It is uncertain whether the majority should have found that a legislative enactment protecting certain employee activities should, by negative implication, preclude a cause of action for wrongful discharge arising from other employee activities.<sup>211</sup> Regrettably, the legislature did not state explicitly in these statutes whether the enumerated protected activities were intended to be exclusive. The majority never mentioned the two garnishment statutes.

The *Palmateer* decision is especially noteworthy for the heavy emphasis which the court placed on the public policy discouraging violations of the Criminal Code. The court brushed aside International Harvester's claim that it ought to be able to fire a managerial employee "who recklessly and precipitously resorts to the criminal justice system" to handle such an internal, personnel problem.<sup>212</sup> International Harvester's business judgment, no matter how sound, cannot override the General Assembly's decision that even very minor thefts are nonetheless crimes. Where the defined public policy touches upon the Criminal Code, the terminable-at-will rule must be carefully scrutinized.<sup>213</sup> The employer is not permitted to take matters into its own hands by "retaliating against its employees who cooperate in enforce-

208. The majority in *Palmateer* refers to the Illinois Criminal Code as a whole without specifically mentioning the statute which prohibits compounding a crime.

209. *Murphy v. Rochford*, 55 Ill. App. 3d 695, 371 N.E.2d 260 (1977) (agreement not to prosecute is void as against public policy).

210. The two garnishment statutes provide:

§ 10. No employer may discharge or suspend any employee by reason of the fact that his earnings have been subjected to wage demands on his employer for any indebtedness. Any person violating this Section shall be guilty of a Class A misdemeanor.

ILL. REV. STAT. ch. 48, § 39.11 (1975).

§ 18. No employer may discharge or suspend any employee by reason of the fact that his earnings have been subjected to a deduction order for any one indebtedness. Any person violating this Section shall be guilty of a Class A misdemeanor.

ILL. REV. STAT. ch. 62, § 88 (1973).

211. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). *Expressio unius est exclusio alterius*. The express provision of specified powers may imply an intention to withhold those left unmentioned. 2A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1973).

212. 85 Ill. 2d at 133, 421 N.E.2d at 880.

213. *Id.*

ing" the criminal law.<sup>214</sup> Thus, although *Palmateer* extended *Kelsay* to a fact situation other than a discharge for filing a workmen's compensation claim, *Palmateer* may still be confined to circumstances where a discharge violates well-settled public policy expressed by the legislature.<sup>215</sup> Unfortunately, dicta in the majority opinion suggests that the public policy exception can rest on judicial pronouncements as well as on statutory principles.<sup>216</sup>

*The Majority Opinion: The Creation of an Amorphous Tort*

The most problematic aspect of Justice Simon's opinion is the failure to set forth a workable test for determining when an employer is free to discharge an employee without the risk of being compelled to defend a suit for retaliatory discharge. This is particularly disturbing in light of the fact that the Illinois Supreme Court's stated purpose for granting this appeal was "to determine the contours of the tort of retaliatory discharge approved in *Kelsay*".<sup>217</sup> Rather than clarifying the future application of the public policy exception to the terminable-at-will rule, the court has only added to the confusion surrounding the scope and meaning of the exception.<sup>218</sup>

The court first speaks approvingly of a balancing test where "the employer's interest in operating a business efficiently and profitably" must be balanced against "the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."<sup>219</sup> While never expressly rejecting the balancing test, the court never mentions it again. Subsequent language in the opinion also suggests that the balancing test is disfavored. The majority refuses to balance the employer's right to fire an employee who disrupts the smooth operation of the plant and acts against the wishes of his employer by going to the police with the employee's desire to remain employed. Furthermore, the balancing test cannot be reconciled with the majority's rejection of International Harvester's argument that "in the exercise of its sound business judgment it ought to be able to properly fire a managerial employee who resorts to the criminal justice system to handle" a minor

214. *Id.* at 133-34, 421 N.E.2d at 880.

215. Note, *Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois*, 12 LOY. U. CHI. L.J. 861, 871 (1981).

216. 85 Ill. 2d at 134, 421 N.E.2d at 881.

217. *Id.* at 127, 421 N.E.2d at 877.

218. Justice Ryan, in his dissent, criticized the majority for creating an amorphous tort based on "some vague concept of public policy that has never been articulated by anyone except four members of this court." *Id.* at 145, 421 N.E.2d at 886 (Ryan, J., dissenting).

219. *Id.* at 129, 421 N.E.2d at 878.



crime.<sup>220</sup> According to the majority, International Harvester's judgment, no matter how sound, cannot override clearly mandated public policy discouraging violations of the Illinois Criminal Code.<sup>221</sup>

A close reading of the *Palmateer* opinion reveals that the majority used a two-part test: first, the employer must discharge the employee in retaliation for the employee's activities; and second, the discharge must be in contravention of a clearly mandated public policy.<sup>222</sup> The broad wording of this two-part test gives the impression that the court did not intend to limit its holding to the facts before it, but rather in dicta intended for the test to be widely applied to future cases. The court could have addressed the present set of facts without approving such a nebulous two-part test. Henceforth, neither the employer nor the employee will be able to predict confidently when a discharge violates public policy. The court, unfortunately, does not explain how this two-part test is to be applied in future cases. The uncertainty of application and unpredictability of result of the majority's test can be shown by an example.

Assume hypothetically that the Illinois Supreme Court were confronted with the same set of facts as the Pennsylvania Supreme Court addressed in *Geary v. United States Steel Corp.*<sup>223</sup> In *Geary*, the Pennsylvania Supreme Court found that no clear public policy was violated by the discharge of a salesman who had called his superior's attention to and had objected to the marketing of a potentially unsafe tubular product designed for the oil and gas industry. Although the employer removed the product from the market, the court concluded that "Geary had made a nuisance of himself"<sup>224</sup> by warning of the defect and that "no clear mandate of public policy was violated"<sup>225</sup> because no statute covered Geary's conduct. *Geary* and *Palmateer* are strikingly similar in a number of ways. In both cases, the employer discharged the plaintiff in retaliation for "blowing the whistle" on alleged wrongdoing in the workplace. Further, in both cases the plaintiff had taken it upon himself to become involved in activity which promoted the public's best interest when it was neither required by law nor by his employ-

220. *Id.* at 133, 421 N.E.2d at 880.

221. *Id.*

222. The majority stated: "All that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." *Id.* at 134, 421 N.E.2d at 881.

223. 456 Pa. 171, 319 A.2d 174 (1974). For further discussion of *Geary* and the inherent vagueness of the term "clearly mandated public policy", see *Whistleblowing*, *supra* note 12, at 799-803; Summers, *Time for a Statute*, *supra* note 5, at 481.

224. 456 Pa. at 180, 319 A.2d at 178.

225. *Id.* at 185, 319 A.2d at 180.

ment and obviously was against the wishes of his employer. The only significant differences between the two cases are that in *Geary* there were no criminal justice concerns and no statutory provisions which impliedly encouraged citizen crime-fighters. Assuming the Illinois Supreme Court found that *Geary* was discharged in retaliation for pointing out the defect,<sup>226</sup> the issue would be whether his discharge contravened a clearly mandated public policy. The *Palmateer* court expressly recognized a non-statutory cause of action for an employer's termination of an at-will employment relationship,<sup>227</sup> and thus, the Illinois court would not be precluded from granting relief. The difficulty would lie in predicting whether public policy in Illinois favors an employee who seeks to have what he considers to be an unsafe product removed from the market. It is unclear from the majority opinion how far the public policy exception can be extended to cases which present non-legislatively defined public policy issues that are not criminal in nature.<sup>228</sup> If *Palmateer* is read broadly as impliedly extending the exception to any situation where the discharge is even vaguely related to some public policy expressed in either legislative or judicial pronouncements, *Geary* would have a cause of action in Illinois. On the other hand, if *Palmateer* is read more narrowly as requiring the wrongfully discharged employee to show that a specific legislative or judicial pronouncement expressly favors employees making safety-oriented judgments, then *Geary* probably could not invoke the exception. Regrettably, the supreme court gave no indication of how broadly the public policy exception should be applied in future cases.

With few exceptions, courts recognizing a cause of action for wrongful discharge have to some extent relied on statutory expressions of public policy as a basis for the employee's claim. The *Geary* court could not identify any specific statutory source of public policy and concluded that the general notion that it was the state's public policy to encourage production of safe products was insufficient. The court observed that although the employee's motivation in making the charges may have been praiseworthy, that alone could not override "the company's legitimate interest in preserving its normal operational proce-

226. Note that, as a practical matter, the first part (i.e., a discharge in retaliation for the employee's activities) of the two-part test will usually not be an issue in the litigation. The second half of the test is far more likely to be litigated.

227. See *supra* notes 163-65 and accompanying text.

228. The majority suggested that the public policy exception should be broadly applied where the employee's conduct touches upon a possible violation of the criminal laws. 85 Ill. 2d at 133, 421 N.E.2d at 880.

dures from disruption."<sup>229</sup> The critical difference between *Geary* and *Palmateer* is the latter's concern for the promotion of the criminal justice system. The *Palmateer* court observed that where the motivation for the employee's discharge touches on the Illinois Criminal Code, the employer's prerogative will not be balanced with the employee's crime-fighting responsibilities.

If *Palmateer* is restricted to its holding, the majority is certainly correct in concluding that public policy favors citizen crime-fighters. The problem, however, arises when the majority then goes on to adopt the two-part test by way of dicta. The second part of the test requires that "the discharge be in contravention of a clearly mandated public policy."<sup>230</sup> Public policy is a nebulous concept, having no clear and definite boundaries.<sup>231</sup> The vagueness of the concept will result in frequent litigation over which activities should be protected by the tort action. The *Palmateer* court has attempted to define and expand public policy on its own, without legislative guidance. In the court's peregrinations, it has of necessity wandered into virgin territory. The court has not shed new light onto the murky terrain of public policy. The best that can be said of *Palmateer* is that it provides some guidelines for drawing the outer limits of the tort action for wrongful discharge. The difficulty remains in determining whether a discharge is actionable when it does not concern the Criminal Code.

By creating an amorphous tort based on vague notions of public policy, the majority has opened the courthouse door to every employee who claims he has been wrongfully discharged in contravention of "some vague concept of public policy that has never been articulated by anyone except" the supreme court.<sup>232</sup> As a consequence of the *Palmateer* decision, the public policy exception is now in a quagmire. The public policy exception will prompt an *ad hoc* in-court examination of each claimant's position, imposing onerous burdens of proof regarding what constitutes public policy upon both the employer and the employee. In this regard, the lower courts will recognize that the

229. 456 Pa. at 183, 319 A.2d at 180 (footnote omitted).

230. 85 Ill. 2d at 134, 421 N.E.2d at 881.

231. See *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977). In *Hinrichs*, an employee was discharged because she refused to falsify medical records. *Id.* at 1131. The court found the concept of public policy too vague a basis for the creation of a new tort and therefore held that the issue was best left to the legislature. *Id.*

232. 85 Ill. 2d at 145, 421 N.E.2d at 886 (Ryan, J., dissenting). Justice Ryan prophesied that employers may discharge employees "only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages." *Id.* at 136, 421 N.E.2d at 881, quoting, *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 192, 384 N.E.2d 353, 362 (1978) (Underwood, J., dissenting).

once mightily legislatively defined public policy has been seriously eroded by *Palmateer*. The lower courts will undoubtedly adopt a myriad of conflicting positions so that an individual discharge case will have little, if any, precedential value. Faced then with inconsistent lower court decisions, the supreme court may yet have another opportunity to define the nebulous term, "clearly mandated public policy". Confusion over the validity and scope of the public policy exception will hopefully be resolved by the legislative process.

The *Palmateer* decision is at once both a logical extension of the well-defined public policy exception first announced in *Kelsay* and an unwarranted expansion of the exception based on vague notions of public policy found only in judicial opinions. On the one hand, the public policy in *Palmateer*, as in *Kelsay*, was evidenced by a statute which established the parameters of the exception. On the other hand, by suggesting a discharge is actionable whenever it contravenes clearly mandated public policy, the *Palmateer* majority has clearly gone beyond the statutory basis relied on in *Kelsay*. Perhaps Justice Simon wrote a deliberately confusing opinion with the expectation that employers would not be able to predict precisely how broadly the public policy exception would be applied in future cases. In this way the tort of retaliatory discharge would effectively curb employer misconduct and coercion in the workplace. The majority has sent a clear message to employers that abusive discharges will no longer be tolerated. The fact that the public policy exception has not been articulated by the legislature is no longer an available defense for employers doing business in Illinois. Henceforth, lower courts may examine judicial precedent in determining the contours of the exception.

### *The Dissenting Opinion: The Balancing Test*

In stark contrast to the amorphous public policy exception endorsed by the majority, Justice Ryan argued for a balancing test which takes into account the interests of both employer and employee.<sup>233</sup> By advocating a balancing test, Justice Ryan recognized that the tort of retaliatory discharge is a departure from the traditional rule that an employment contract for an indefinite time may be terminated by

233. See *supra* notes 192-95 and accompanying text. See also *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611 (Pa. Super. Ct. 1980) (court weighed the employee's interest in making a living, the employer's interest in running its business, its motive in discharging the employee and its manner of effecting the discharge, with any social interests or public policies that may be implicated in the discharge).

either party at any time and for any reason.<sup>234</sup> If employers are going to be permitted to operate their businesses efficiently and profitably, then the at-will rule must remain viable. This can only happen when courts adopt the balancing test.

The balancing test recognizes an at-will employee's interest in job security, particularly when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty. Equally to be considered is that the employer has an important interest in being able to discharge an at-will employee whenever it would be beneficial to his business. Finally, society as a whole has an interest in ensuring that its laws and important public policies are not contravened. Any modification of the at-will rule must take into account all of these interests. The balancing test weighs all of these conflicting interests and attempts to reach an equitable result.

As Ryan points out, the problem with the majority opinion is that it fosters speculation as to what is the supreme court's view of public policy. The majority held that the public policy exception may be extended to situations not covered by legislation if the court is convinced that some established public policy is undermined by an employer's discharge practices.<sup>235</sup> Justice Ryan argued convincingly that the majority should have exercised judicial self-restraint. He noted that the majority stretched the exception too far by converting a statutory prohibition<sup>236</sup> into a judicially created affirmative duty to come forward and assist in a criminal investigation. Justice Ryan steadfastly maintained that if the legislature had intended that citizens should become involved in crime fighting, it would have enacted appropriate legislation. According to Justice Ryan, the majority has simply substituted its preference for the considered judgment of the General Assembly.

### *The Advantages of the Balancing Test*

The dissent's balancing test is preferable to the majority's two-part test for three reasons. First, the balancing test avoids the possibility of extending the new tort into the "nebulous area of judicially created public policy" by requiring that support for the cause of action be found in legislative enactments.<sup>237</sup> By requiring a statutory basis for

234. *Id.* at 142, 421 N.E.2d at 884. *See supra* text accompanying notes 1-3.

235. *See supra* text accompanying notes 150-61.

236. *See supra* text accompanying notes 162-71.

237. *Id.* at 142, 421 N.E.2d at 884.

the public policy exception, the dissent ensures the gradual growth of the tort of retaliatory discharge which is still in its infancy. The second part of the majority's two-part test—the discharge must be in contravention of a clearly mandated public policy—increases the possibility that the exception may completely absorb the at-will rule.

Second, the majority's two-part test will have an adverse impact on the business community in Illinois. Afraid that any discharge may be actionable, employers will be reluctant to fire disruptive employees who threaten to file a lawsuit if released. With the advent of punitive damages awarded to the discharged employee, there is a danger of life-tenured employment for the unwanted worker. The dissent points out that the disgruntled employee could seriously interfere with labor relations and, in the case of citizen crime-fighters, impair the company's internal security program.<sup>238</sup> The employer's legitimate interests in conducting his business "and employing and retaining the best personnel available cannot be unjustifiably impaired."<sup>239</sup> In recognizing this new tort, a proper balance must be maintained between the employee's interest in earning his livelihood and the employer's interest in operating his business efficiently and profitably. The employer's ability to make employment business decisions may be chilled or at least stymied by the nebulous public policy exception.

Third, the majority's two-part test creates the possibility of a potential floodgate of litigation based on *judicial* notions of the scope of the public policy exception. While the majority's goal in protecting at-will employees from abusive discharges is laudable, the inherent vagueness of judicially designed public policy poses a bevy of practical problems for employers and employees. Because of its statutory basis the balancing test should help to curtail vexatious lawsuits brought by discharged employees who fabricate "plausible tales of employer coercion."<sup>240</sup>

#### A STATUTORY APPROACH FOR WHISTLEBLOWING EMPLOYEES

One possible alternative to the public policy exception would be the enactment of a statute which protects "whistle-blowing" employees. Michigan recently enacted a statute which may serve as a model for creating a legislative definition of protected activity upon which an em-

238. *Id.* at 136, 421 N.E.2d at 881 (Ryan, J., dissenting).

239. *Id.* at 144, 421 N.E.2d at 885 (Ryan, J., dissenting), *quoting*, *Pierce v. Ortho Pharmaceutical Corp.*, 166 N.J. Super. 335, 341, 399 A.2d 1023, 1026 (1979).

240. 85 Ill. 2d at 145, 421 N.E.2d at 885 (Ryan, J., dissenting), *quoting*, *Blades, supra* note 5, at 1428.

ployee's cause of action may be based.<sup>241</sup> The Whistleblowers' Protection Act protects an employee who engages in "whistle-blowing" activities by providing that an employer shall not discharge or threaten to discharge an employee who reports a suspected violation of federal or state laws or regulations.<sup>242</sup> The Michigan statute specifically provides that a wrongfully discharged employee may bring a civil action for injunctive relief and/or actual damages.<sup>243</sup> The statute does not provide for an award of punitive damages. The employee is required to prove by clear and convincing evidence that he was about to report a possible violation of state or federal law.<sup>244</sup> The Michigan statute gives the court wide latitude in fashioning an appropriate remedy, including reinstatement, back wages, full reinstatement of fringe benefits and seniority rights, and actual damages.<sup>245</sup> The state can also impose a civil

241. The Whistleblowers' Protection Act became effective on March 31, 1981 by 1980 Mich. Pub. Acts 469. For an excellent summary of the Act, see G. Murg & C. Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 350 (1982) [hereinafter cited as *Exceptions Overwhelm the Rule*]; Malin, *Protecting the Whistleblower From Retaliatory Discharge*, 16 U. MICH. J.L. REF. — (1983) (author points out that the Michigan statute was intended to enable the government to rely on employees in enforcing federal, state and local statutes and regulations and to that end is designed to encourage whistleblowing; however, employees discharged while pursuing internal channels may not be protected by the statute).

242. MICH. COMP. LAWS § 15.362 (1980). The statute protects a "whistle-blowing" employee from a retaliatory discharge:

Sec. 2. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

*Id.*

243. *Id.* § 15.363. The statute sets forth the legal and equitable remedies available to the at-will employee threatened by a retaliatory termination:

Sec. 3. (1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has their principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees.

(4) An employee shall show by clear and convincing evidence that they or a person acting on their behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.

*Id.*

244. *Id.*

245. *Id.* § 15.364.

fine not to exceed five hundred dollars.<sup>246</sup> The statute does not impair the employee's or employer's rights under any collective bargaining agreement.<sup>247</sup> An employer is required to post notices informing his employees of their rights under the statute.<sup>248</sup> Finally, a successful plaintiff may recover attorneys' and witnesses' fees.<sup>249</sup>

The Michigan approach of legislatively establishing the public policy exception to the terminable-at-will rule is vastly superior to the *ad hoc* approach currently adopted in Illinois.<sup>250</sup> The Michigan statute essentially codifies the balancing test advocated by the dissent. This statutory approach should be adopted by the Illinois General Assembly to provide a uniform and predictable growth of the public policy exception which is still in its infancy.

### CONCLUSION

For too many years, the at-will employee has been vulnerable to capricious or retaliatory discharge. Recently, a few courts have used contract or tort theories to limit the harsh application of the common law doctrine of terminable-at-will employment in cases where employee termination would contravene some aspect of public policy. In *Palmateer v. International Harvester Co.*, the Illinois Supreme Court held that an employee may maintain a tort action for retaliatory discharge when the employer discharges the employee in retaliation for the employee's conduct and the discharge contravenes clearly mandated public policy. The majority maintained that public policy favors citizen crime-fighters. The dissent criticized the majority for approving a non-statutory public policy exception to the at-will rule. By prompting an expansion of an employee's right to sue his employer for wrongful discharge, the majority has cleared the way for a potential flood of litigation based on vague notions of public policy.

246. *Id.* § 15.365.

247. *Id.* § 15.366.

248. *Id.* § 15.368.

249. *Id.* § 15.364.

250. See *Exceptions Overwhelm the Rule*, *supra* note 241, at 350.



