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WRONGFUL TERMINATION IN THE BANKING INDUSTRY

*Robert H. Platt**

INTRODUCTION

In recent years, employer-employee relations have increasingly come within the purview of legislative regulation and judicial innovation. Parties to employment contracts can no longer freely define their own relationships.¹ Consequently, traditional employer-employee relationships have been redefined.

Employee relations have been particularly affected by legislative and judicial intrusions on an employer's ability to discharge employees. Indeed, until recently, courts considered the employer's right to terminate an employment contract for an indefinite term to be absolute.² Today, significant judicial inroads have steadily eroded the employment "at-will" rule. As a result, disgruntled employees have obtained a potent litigation weapon.³

In the banking industry, however, the traditional employer-employee relationship remains nearly intact. Within this particular sphere of business, the at-will doctrine retains much of its vitality due to legislation passed at the turn of the century. This legislation, which comprise the National Bank

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1. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employment contracts are terminable only for good cause if either of two conditions exist: the contract was supported by consideration independent of services performed for the employer, or the parties agreed, expressly or impliedly, that the employment could be terminated only for good cause).

2. See, e.g., *Pirre v. Printing Devel., Inc.*, 432 F. Supp 840 (S.D.N.Y. 1977); *Martin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); *Boucher v. Godfrey*, 119 Conn. 622, 178 A. 655 (1935); *Martin v. N.Y. Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

3. See *Cleary v. American Airlines*, 111 Cal. App. 3d 433, 168 Cal. Rptr. 722 (1980) (longevity of employment service and express policy of employer to provide specific procedures for adjudicating employee disputes estopped plaintiff's discharge without good cause); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (written at-will employment contract contains implied covenant of good faith and fair dealing and termination must not breach this covenant); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employment for definite term exists when employer agrees to permanent employment "as long as I did my job" and termination therefore can only be for good or just cause); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (employee at-will has cause of action for wrongful discharge when discharge was contrary to clear, specific mandate of public policy).

Act,⁴ the Federal Reserve Act,⁵ and the Federal Home Loan Act,⁶ collectively known as the Bank Acts, allowed banks within the scope of the relevant statutes to dismiss certain employees at pleasure without fear of common law wrongful discharge suits.

Part I of this Article surveys the history of the at-will doctrine, Parts II and III discuss the several legislative and judicial limitations that have restricted the application of the at-will rule and upset the traditional employer-employee balance. Finally, Part IV focuses on the at-will rule as it applies to the banking industry and the judicial attempts to erode the at-will rule.

I. HISTORY OF THE AT-WILL RULE

The termination-at-will rule provides that either an employer or an employee may terminate a written or oral contractual arrangement for employment of indefinite duration at any time "with or without cause, for any reason, however capricious and unfounded it might be."⁷ The at-will doctrine arose out of the increasing popularity of *laissez-faire* economics,⁸ and gained unquestioned adherence⁹ after it was first emphatically articulated in a late nineteenth century treatise:

4. National Bank Act, 12 U.S.C. § 21 (1982).

5. Federal Reserve Act, 12 U.S.C. § 221 (1982).

6. Federal Home Loan Act, 12 U.S.C. § 1421 (1982).

7. *Fidelity & Gas Co. v. Gibson*, 135 Ill. App. 290, 294, *aff'd*, 232 Ill. 49, 83 N.E. 539 (1908). *Gibson* is a common law example of judicial legislation that contributed to the evolution of the at-will doctrine. *See also Payne v. Western & A. R.R.*, 81 Tenn. 507, 520 (1884) (employer may terminate at-will employee "for good cause, for no cause or even for cause morally wrong"), *rev'd on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915); Annot., 62 A.L.R.3d 271, 273 (1975) (citing 59 cases from the 1950's and 1960's that enunciate and adhere to the at-will doctrine).

8. *See Note, Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 555 (1980); *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, 563 (1980).

9. *See Note, Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342, 346 (1974); *Feinman, The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118, 128 (1976). *See also Boucher v. Godfrey*, 119 Conn. 622, 178 A. 655 (1935) (either party may terminate employment with or without cause if contract is for indefinite term); *J.E. Hanger, Inc. v. Fitzsimmons*, 273 F. 348 (1921) (contract of employment without express or implied duration provision is terminable at-will of either party); *Wynne v. Ludman Corp.*, 79 So. 2d 690 (Fla. 1955) (no cause of action may be maintained for breach of employment contract terminable by employer at any time); *Crawford v. Stewart*, 25 Hawaii 226 (1919) (a hiring is for an indefinite term and terminable at-will when no facts can be proven to infer that any particular time was contemplated by the parties), *reh'g denied*, 25 Hawaii 300 (1920); *Davis v. Davis*, 197 Ind. 386, 151 N.E. 134 (1926) (no cause of action when agreement lacks mutuality because it did not specify pay rate or hours to be worked by employee); *Drake v. Block*, 247 Iowa 517, 74 N.W.2d 577 (1956) (oral contracts indefinite as to period of employment terminable by employer at-will); *Louisville & Nash. R.R. v. Wells*, 289 Ky. 700, 160 S.W.2d

[T]he rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.¹⁰

The *laissez-faire* economic theory that spawned the at-will doctrine has since subsided.¹¹ Yet, the at-will rule still prevails¹² and remains the law in most jurisdictions.¹³ Today, however, proponents defend the at-will doctrine

16 (1942) (contract is terminable at-will of employee when contract does not obligate employee to work for a definite time period); *Pechon v. National Corp. Serv., Inc.*, 234 La. 397, 100 So. 2d 213 (1958) (employment contract was for indefinite period of time and terminable at the will of either party); *Blaisdell v. Lewis*, 32 Me. 515 (1851).

10. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

11. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-18 (1967).

12. See, e.g., Annot., 62 A.L.R.3d 271 (1975):

[F]ew legal principles would seem to be better settled than the broad generality 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 or for no reason at all.

Id. at 271. See also *White v. Chelsea, Inc.*, 425 So. 2d 1090 (Ala. 1983) (employment at-will existed when there was no agreement specifying employment duration or limiting employer's right to terminate); *Justice v. Stanley Aviation Corp.*, 35 Colo. App. 1, 530 P.2d 984 (1974) (contract silent as to duration term terminable at-will); *Davis v. Hospital Auth.*, 167 Ga. App. 304, 306 S.E.2d 306 (1983) (employer had absolute authority to terminate plaintiff's employment); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977) (employee could not maintain wrongful discharge claim without showing infringement on public policy because contract was for employment at-will); *Harper v. Cedar Rapids Television Co.*, 244 N.W.2d 782 (Iowa 1976) (employment contract at the time of discharge contained indefinite duration and was terminable at-will).

13. See *Forde v. Royal's, Inc.*, 537 F. Supp. 1173 (S.D. Fla. 1982); *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980); *Builders Supply Corp. v. Shipley*, 86 Ariz. 153, 341 P.2d 940 (1959); *Miller v. Missouri Pac. Transp. Co.*, 225 Ark. 475, 283 S.W.2d 158 (1955); *Justice v. Stanley Aviation Corp.*, 35 Colo. App. 1, 530 P.2d 984 (1974); *Taylor v. Greenway Restaurant, Inc.*, 173 A.2d 211 (D.C. 1961); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Harper v. Cedar Rapids Tel. Co.*, 244 N.W.2d 782 (Iowa 1976); *Mildfelt v. Lair*, 221 Kan. 557, 561 P.2d 805 (1977); *Pechon v. National Corp. Service, Inc.*, 234 La. 397, 100 So. 2d 213 (1958); *Rape v. Mobile & O. R.R. Co.*, 136 Miss. 38, 100 So. 585 (1924); *Eib v. Federal Reserve Bank*, 633 S.W.2d 432 (Mo. App. 1982); *State v. Employers of Labor*, 102 Neb. 768, 169 N.W. 717 (Neb. 1918); *Brooks v. Carolina Tel. & Tel. Co.*, 56 N.C. App. 801, 290 S.E.2d 370 (1982); *Wood v. Buchanan*, 72 N.D. 216, 5 N.W.2d 680 (1942); *Brown v. Toledo Mental Hygiene Clinic*, 63 Ohio App. 2d 192, 410 N.E.2d 1262 (1978); *Sooner Broadcasting Co. v. Grotkop*, 280 P.2d 457 (Okla. 1955); *Rotondo v. Seaboard Foundry*, 440 A.2d 751 (R.I. 1981); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981); *Little v. Federal Container Corp.*, 61 Tenn. App. 26, 452 S.W.2d 875 (1969); *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178 (Tex. Civ. App. 1979); *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979); *Kovachik v. American Auto Ass'n.*, 5 Wis. 2d 188, 92 N.W.2d 254 (1958); *Lukens v. Goit*, 430 P.2d 607 (Wyo. 1967); see also 9 S. Williston, A Treatise on the

based on the concept of mutuality—"the employer and the employee remain free to continue or to terminate an employment relationship as each desires."¹⁴

II. LEGISLATIVE LIMITATIONS ON THE AT-WILL RULE

Courts were initially hostile to legislative efforts to interfere with the right of employers and employees to freely contract for their terms of employment. In *Adair v. United States*,¹⁵ the United States Supreme Court invalidated a federal statute that prohibited employers from discharging employees because of their organization of, or membership in, labor unions. In doing so, the Court stated, "it is not within the functions of government—at least in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another"¹⁶

As *laissez-faire* economics gradually fell into disfavor, however, Congress again attempted to balance the bargaining power between employers and employees. Thus, recognizing "[t]he inequality of bargaining between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association,"¹⁷ Congress passed the Labor Management Relations Act of 1947 (LMRA).¹⁸ This time the Supreme Court upheld the protective legislation observing that such legislation was necessary because "a single employee was helpless in dealing with an employer."¹⁹

More recently, federal legislation has been enacted to preclude application of the at-will rule to individuals terminated because of age,²⁰ physical disability,²¹ race, color, religion, national origin, or sex.²² Moreover, the Con-

THE LAW OF CONTRACTS 1017 (3d ed. 1967); 56 C.J.S., *Master and Servant* § 8 (1948 and Supp. 1984); see, e.g., CAL. LAB. CODE § 2922 (West 1984):

An employment, having no specified term, may be terminated at the will of either party on notice to the other Employment for a specified term means an employment for a period greater than one month.

Id. For a comprehensive study of the history of the at-will doctrine, see Feinman, *supra* note 9.

14. Vernon and Gray, *Termination at Will—The Employer's Right to Fire*, 6 EMP. REL. L.J. 25 (1981).

15. 208 U.S. 161 (1908).

16. *Id.* at 174. See also *Coppage v. State of Kansas*, 236 U.S. 1 (1915) (holding similar state legislation unconstitutional).

17. Labor Management Relations Act, 29 U.S.C. § 151 (1982).

18. *Id.*

19. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937).

20. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1982); see also Executive Order 11,141, 3 C.F.R. 179 (1964) (prohibiting federal contractors from discriminating based on age).

21. The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1982) (amended version).

22. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982); see also Executive Order 11,246, 3 C.F.R. 339 (1965) (prohibiting race, color, religion, sex, or national origin discrimination by federal contractors).

sumer Credit Protection Act²³ prohibits employers from discharging employees because their wages have been subjected to garnishment,²⁴ and the Pregnancy Discrimination Act²⁵ disallows the termination of female employees "because of or on the basis of pregnancy, childbirth or related medical conditions."²⁶ Federal law now also prohibits termination of the employment relationship because of military status²⁷ or jury duty.²⁸ In addition, Congress has passed numerous "anti-reprisal" provisions that prohibit employers from discharging employees for reporting violations of, or asserting rights under, several health, safety, environmental protection, and individual rights laws.²⁹

III. JUDICIAL LIMITATIONS ON THE AT-WILL RULE

Courts have also recently scrutinized the at-will doctrine, and have continually strained to avoid what they perceived to be inequitable employee terminations. In the process, courts have utilized the following independent legal theories to avoid application of the at-will rule: (a) the tort of wrongful discharge, (b) breach of an express or implied contract, and (c) breach of the covenant of good faith and fair dealing.

23. 15 U.S.C. § 1601 (1982).

24. 15 U.S.C. § 1674(a) (1982).

25. 42 U.S.C. § 2000e (1982).

26. *Id.*

27. Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 (1982).

28. Jury System Improvement Act, 28 U.S.C. § 1875 (1982) (protection of jurors' employment).

29. *See, e.g.*, Civil Service Reform Act, 5 U.S.C. §§ 2301, 2302, 7102, 7116 (1982); Toxic Substances Control Act, 15 U.S.C. § 2622 (1982); Asbestos School Hazard Detection and Control Act, 20 U.S.C. § 3608 (1982); Employee Retirement Income Security Act, 29 U.S.C. § 215(a)(3) (1982); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1) (1982); Fair Labor Standards Act, 29 U.S.C. § 1140 (1982); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a) (1982); 29 C.F.R. § 1977.12(b)(2) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1982); Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(d) (1982); Energy Reorganization Act Amendment of 1978, 42 U.S.C. § 5851 (1982); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1982); Clean Air Act Amendments of 1977, 42 U.S.C. § 7622 (1982); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (1982); Railroad Employers' Liability Act, 45 U.S.C. § 60 (1982); Federal Railroad Safety Act Amendment, 45 U.S.C. § 441 (1982); International Safe Container Act, 46 U.S.C. § 1506 (1982).

Most state legislatures have followed Congress' lead, and have occasionally gone further than their federal counterpart in circumscribing the at-will rule. *See, e.g.*, California Fair Employment and Housing Act, CAL. GOV'T. CODE §§ 12,900-12,966 (West 1981) (forbidding discharge of employees because of race, religion, color, national origin, ancestry, physical handicap, mental condition, marital status, sex, or age); Discharge for Refusal to Assign Rights to Invention, CAL. LAB. CODE § 2871 (West 1981) (employment agreement providing for the assignment of rights as a condition is prohibited); Requiring Polygraph Test as Condition of Employment, CAL. LAB. CODE § 432.2 (West 1981); Discharge For Refusal to Provide Fingerprints or Photographs. CAL. LAB. CODE § 1051 (West 1981) (misdemeanor to use fingerprints and photographs provided for employment to the detriment of the employee).

A. *The Tort of Wrongful Discharge*

Numerous courts have recently developed and applied a tort exception to the at-will rule.³⁰ This tort exception allows an employee to bring suit for the tort of wrongful discharge if the termination violated "public policy." The California Court of Appeal first articulated the public policy theory in the seminal case of *Petermann v. International Brotherhood of Teamsters*.³¹ In *Petermann*, the plaintiff was a business agent employed by the Teamsters. The plaintiff alleged that the Teamsters discharged him for disobeying union instructions to give false testimony before a state committee that was investigating union hiring hall operations.³² The appellate court reversed the trial court, and noted that a contract lacking a fixed duration term is "terminable at the will of either party . . . for any reason whatsoever."³³ The court concluded, however, that the unfettered right of discharge "may be limited by statute. . . or by considerations of public policy."³⁴ While acknowledging that "[t]he term 'public policy' is inherently not subject to precise definition,"³⁵ the *Petermann* court declared:

[I]n order to more fully effectuate the State's declared policy against perjury, the civil law . . . must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when reason for the dismissal is the employee's refusal to commit perjury.³⁶

When several courts followed *Petermann's* lead in utilizing the public policy theory,³⁷ practitioners and employers initially feared that this exception

30. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983); *Perry v. Hartz Mountain Corp.*, 537 F. Supp 1387 (S.D. Ind. 1982); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Smith v. Piezo Technology & Professional Adm'rs*, 427 So. 2d 182 (Fla. 1983); *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 652 P.2d 625 (1982); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Trombetta v. Detroit, Tol. & I. R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Cloutier v. Greater Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

31. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

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

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

34. *Id.*

35. *Id.* at 188, 344 P.2d at 26.

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

37. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge of employee for refusal to participate in illegal price-fixing scheme against public policy); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr 769 (1961) (discharge of employee for signing union membership application violates

to the at-will rule would greatly impinge upon an employer's ability to make efficient business decisions. The floodgates appeared to be opened to tenuous wrongful discharge claims. Shortly thereafter, dismissed employees began challenging an employer's right to terminate for reasons such as refusing to get a haircut,³⁸ criticizing an employer's employment policies,³⁹ announcing an intention to attend law school,⁴⁰ refusing to take a psychological stress evaluation test,⁴¹ and refusing to continue a project an employee viewed as unethical.⁴² Employees sought protection from allegedly wrongful discharges based on their own perceptions of public policy. In response, many courts severely limited the public policy exception by circumscribing it primarily to violations of policy expressly stated by statute.⁴³ For example, in *Parnar v. Americana Hotels, Inc.*,⁴⁴ the Hawaii Supreme Court acknowledged the difficulty of applying the public policy exception without the guidance of a statutory admonition, and expressed the need to limit the exception:

In view of the somewhat vague meaning of the term "public policy," few courts have been inclined to apply the public policy exception absent a violation of statute or clearly defined policy. These decisions manifest a reluctance of courts to unjustifiably intrude on the employment arrangement or to arrogate to themselves the perceived legislative function of declaring public policy.⁴⁵

Nevertheless, courts have since expanded the public policy exception during the last few years to include discharges for "whistle blowing,"⁴⁶ performing

public policy); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (dismissal of employee for filing workers compensation claim against public policy); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (discharge of employee for serving on jury duty against public policy); *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965) (discharge of employees for union membership violated public policy and statute).

38. *Page Airways v. New York State Div. of Human Rights*, 50 A.D.2d 83, 376 N.Y.S.2d 32 (N.Y. App. Div. 1975), *aff'd*, 39 N.Y.2d 877, 352 N.E.2d 140, 386 N.Y.S.2d 223 (1976).

39. *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265 (Fla. App. 1980).

40. *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977).

41. *Larson v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977).

42. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

43. *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980); *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 379-80, 652 P.2d 625, 630-31 (1982); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Krystad v. Lau*, 65 Wash. 2d 827, 400 P.2d 72 (1965).

44. 65 Hawaii 370, 652 P.2d 625 (1983)

45. *Id.* at 379, 652 P.2d at 630-31; *see also Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977) (public policy exception "too vague" to overturn at-will rule)

46. "Whistle blowing" by an employee is the reporting of an unlawful act. *See Parnar v. Americana Hotels*, 65 Hawaii 370, 652 P.2d 625 (1982); *Palmtree v. International Harvester*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). *Cf. Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981) (employee allegedly dismissed for testifying at an administrative proceeding; however, appeal denied because case did not state a claim); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251

statutory duties such as serving jury duty,⁴⁷ and retaliation for filing workers' compensation claims⁴⁸ and claims under the Occupational Safety and Health Act.⁴⁹ The exercise of judicial restraint, however, should encourage courts to defer to the legislature to determine what constitutes a discharge in violation of public policy. The public policy exception to the at-will rule will otherwise continue to expand in scope and thereby impede the rights of employers to make independent business decisions.

B. Express or Implied Contract

An increasing number of courts have recognized a second major exception to the at-will rule—the breach of an express or implied contract.⁵⁰ Employers' personnel policies and employee manuals may create implied contracts that limit employers' right to discharge.⁵¹ Courts have similarly held that oral

S.E.2d 51 (1978) (employee terminable at-will when termination due to fact that he was about to uncover criminal activities, which is not statutory); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. App. 1980) (no binding promise between employer and employee to avoid discharge at-will, and assuming there was, public policy permitted termination for reporting negligent acts); *Adler v. American Standard Co.*, 291 Md. 31, 432 A.2d 464 (1981) (although cause of action exists when termination violates public policy, employee's excessively vague complaint failed to allege any public policy violations).

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

48. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Serv.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

49. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). *Cf. Ohlsen v. DST Indus.*, 111 Mich. App. 580, 314 N.W.2d 699 (1981) (employee's OSHA suit barred for failure to exhaust all administrative remedies).

50. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. App. 1983). *Cf. Horizon Corp. v. Weinberg*, 23 Ariz. App. 215, 531 P.2d 1153 (1975) (advertisement described employment as "permanent," but did not create definite duration term, and therefore terminable at-will); *Hamlen v. Fairchild Indus., Inc.*, 413 So. 2d 800 (Fla. App. 1982) (indefinite general hiring contract for permanent employment is terminable at-will); *Williams v. Delta Haven, Inc.*, 416 So. 2d 637 (La. App. 1982) (absent specific duration term in employment, contract right to terminate at-will exists).

51. *Serafin v. City of Lexington*, 547 F. Supp. 1118 (D. Neb. 1982), *aff'd*, 716 F.2d 909 (8th Cir. 1983); *Walker v. North San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982); *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. App. 1983); *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982); *Hernandez v. Home Educ. Livelihood Program*, 98 N.M. 125, 645 P.2d 1381 (1982); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982); *Dangott v. ASG Indus.*, 558 P.2d 379 (Okla. 1976); *Simpson v. Western Graphics*

representations made to employees at interviews⁵² or during their employment⁵³ may create contractual obligations. Conversely, some courts have also held that when employers expressly incorporate at-will language into written personnel manuals or policies, it creates a contractual *right for employers* to terminate employees at-will.⁵⁴

Thus, written or oral representations made to employees or prospective employees may create enforceable contracts that limit an employer's right to terminate employees at-will.

C. *The Implied Covenant of Good Faith and Fair Dealing*

The third, and least recognized exception to the at-will doctrine, is a cause of action for breach of the implied covenant of good faith and fair dealing. To date, only a few jurisdictions, led by California, have recognized the existence of a covenant of good faith and fair dealing in employment contracts.⁵⁵ The vast majority of jurisdictions have declined to recognize this covenant.⁵⁶

Corp., 293 Or. 96, 643 P.2d 1276 (1982); Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. App. 1981). Cf. Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd*, 609 F.2d 500 (3d Cir. 1979) (failure to follow company personnel policy did not create a cause of action for breach of employment contract); Heideck v. Kent General Hosp., Inc., 446 A.2d 1095 (Del. 1982) (employment at-will where employee agreed that she was not hired under written contract, that employer never orally promised employment for definite term, and that she did not feel bound to work for a fixed term); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Williams v. Delta Haven, Inc., 416 So. 2d 637 (La. App. 1982).

52. Forman v. BRI Corp., 532 F. Supp. 49 (E.D. Pa. 1982).

53. Brudnicki v. General Elec. Co., 535 F. Supp. 84 (N.D. Ill. 1982); Rabago-Alvarez v. Dart Indus. Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

54. Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); Hillsman v. Sutter Community Hosp., 153 Cal. App. 3d 743, 200 Cal. Rptr. 605 (1984).

55. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Magnan v. Anaconda Indus., 429 A.2d 492 (Conn. Super. Ct. 1980); Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

56. Walker v. Modern Realty, 675 F.2d 1002 (8th Cir. 1982) (under Missouri law courts will not imply an obligation of good faith into employment contracts unless legislature created the obligation); Hunter v. H.D. Lee Co., 563 F. Supp. 1006 (N.D.N.Y. 1983) (no implied covenant of good faith and fair dealing in employment contracts under Kansas law); Scholtes v. Signal Delivery Serv., 548 F. Supp. 487 (W.D. Ark. 1982) (Arkansas will not imply covenant of good faith and fair dealing in every employment contract); Payne v. AHFI/Netherlands, B.V., 522 F. Supp. 18 (N.D. Ill. 1980) (employer in Illinois owes no duty of good faith and fair dealing in employment contracts); Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977) (no obligation of good faith and fair dealing incorporated into employment contracts); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978) (no covenant to deal fairly with employees imputed in employment contracts); Catania v. Eastern Airlines, Inc., 381 So. 2d 265 (Fla. App. 1980) (no cause of action for violation by employer

Jurisdictions that do recognize a covenant of good faith and fair dealing in employment contracts interpret the covenant as an implicit promise by the parties to act in good faith towards one another. Indeed, in *Seaman's Direct Buying Service, Inc. v. Standard Oil of California*,⁵⁷ the California Supreme Court recently held that a breach of the covenant of good faith and fair dealing in employment contracts may entitle a plaintiff to tort remedies for punitive damages.⁵⁸

In California, an aggrieved individual's ability to state a cognizable cause of action for breach of the covenant of good faith and fair dealing in employment contracts is restricted. In *Cleary v. American Airlines, Inc.*,⁵⁹ the California Court of Appeals explained that "the longevity of the employee's service, together with the expressed [grievance] policy of the employer, operate as a form of estoppel" Subsequent California decisions interpreted *Cleary* to hold that only an aggrieved employee who has longevity of service and has relied on an expressed grievance policy articulated in an employer's policy manual can maintain a cause of action based on a breach of the covenant. Accordingly, California courts routinely dismiss claims for breach of the covenant of good faith and fair dealing when an employee is not a long term employee,⁶⁰ or when the termination is not in derogation of

of obligation of good faith and fair dealing); *Gunn v. Hawaiian Airlines, Inc.*, 162 Ga. App. 474, 291 S.E.2d 779 (1982) (no implied requirement that employer terminate its employees in good faith); *Parnar v. Americana Hotels*, 65 Hawaii 370, 652 P.2d 625 (1982) (requirement of good faith is not part of every contract; otherwise judiciary would need to supervise the discharge of every employee); *Griffith v. Sollay Found. Drilling*, 373 So. 2d 979 (La. App. 1979) (no just cause requirement in employment contracts); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981) ("even an arbitrary and capricious discharge is not actionable under a contract terminable at will"); *Reiter v. Yellowstone County*, 627 P.2d 845 (1981) (18 year employment does not create implied covenant of good faith, and changes in at-will rule must be made by legislature); *Murphy v. American Home Prod.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) ("incongruous" to argue that employer impliedly agreed to covenant of good faith and fair dealing; this would destroy employer's termination rights); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. App. 1981) (nurse discharged without cause did not state cause of action for bad faith termination; Tennessee law does not recognize this cause of action, and any change in the law must come from legislature or state supreme court); *Watson v. Zep Mfg.*, 582 S.W.2d 178 (Tex. Civ. App. 1979) (employer has no duty of good faith in discharging employee absent legislative mandate); *Mann v. American W. Life Ins. Co.*, 586 P.2d 461 (Utah 1978) (no requirement that employer have good cause for termination).

57. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

58. *Id.* at 756 n.6, 206 Cal. Rptr. at 358 n.6. See also *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984) (breach of contract providing for payments to laid-off employee creates tort action for intentional infliction of emotional distress by former employer.)

59. 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 733 (1980).

60. *Cf. Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985). In *Khanna*, a California Court of Appeals recently held, for the first time, that longevity of service and an employer acting contrary to an expressed grievance policy are not always required elements to allege a cause of action for breach of the covenant. *Khanna* specifically held that a cause of action for breach of the covenant is established whenever an employer engages in

an employer's established grievance procedure.⁶¹

IV. THE BANKING ACTS

A. Coverage and Intent

The three exceptions to the at-will rule have virtually emasculated the doctrine in many jurisdictions. Consequently, in the last few years banks have resurrected longstanding legislation that regulates the banking industry and expressly preserves the at-will doctrine.⁶² The Bank Acts—the National Bank Act, the Federal Reserve Act, and the Federal Home Loan Act—each embody in explicit terms a legislative intent to advance the at-will doctrine in the banking industry.

All three Bank Acts provide that certain bank employees can be “dismiss[ed] at pleasure”⁶³ by a bank's board of directors. The National Bank Act provides for the “at pleasure” dismissal of the “president, vice president, cashier, and other officers.”⁶⁴ The “dismissal at pleasure” authority is extended in the Federal Reserve Act to include not only the president, vice-president and other officers, but also other “employees.”⁶⁵ The Federal

“bad faith action extraneous to the contract, combined with the [employer's] intent to frustrate the [employee's] enjoyment of contract rights.” *Id.* at 262, 215 Cal. Rptr. at 867.

61. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (32 years sufficient longevity to state cause of action); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (18 years sufficient longevity to state cause of action); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (15 years sufficient longevity to state cause of action); *cf. Scopas v. Armstrong World Indus., Inc.*, 114 L.R.R.M. 2933 (C.D. Cal. 1983) (four and one-half years insufficient longevity to state cause of action); *Foley v. Interactive Data Corp.*, 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985) (seven years falls short of the necessary longevity to state a cause of action); *Newfield v. Insurance Co.*, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984) (less than two years is insufficient longevity to state cause of action); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (three and one-half years is insufficient longevity to state cause of action).

62. See National Bank Act, 12 U.S.C. § 21 (1982); Federal Reserve Act, 12 U.S.C. § 221 (1982); Federal Home Loan Bank Act, 12 U.S.C. § 1421 (1982).

63. 12 U.S.C. § 24, par. 5 (1982); *id.* § 341, par. 5; *id.* § 1432(a).

64. 12 U.S.C. § 24, par. 5 (1982). Section 24 provides:

A national banking association . . . shall have power—

.....

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

65. 12 U.S.C. § 341, par. 5 (1982). Section 341 provides:

A Federal reserve bank . . . shall have power—

.....

Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define

Home Loan Act utilizes even broader language, and in addition to including those employees enumerated in the preceding acts, gives banks authority to dismiss at pleasure "attorneys and agents."⁶⁶

The National Bank Act governs associations that are certified by the Comptroller of the Currency as national banking institutions.⁶⁷ Today, all such banks must include the word "National" in their title.⁶⁸ The Federal Reserve Act governs the twelve federal reserve banks in the United States,⁶⁹ and the Federal Home Loan Act governs the twelve banks established by the Federal Home Bank Board.⁷⁰ Both the Federal Reserve Act and the Federal Home Loan Act, however, are unclear as to whether "member banks"⁷¹ are also entitled to utilize the "dismissal at pleasure" language in the acts. To date, no court has clarified this issue.

The inclusion of explicit at-will language in the Bank Acts reflect Congressional concern that federally chartered banks would be unnecessarily re-

their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

In *Obradovich v. Federal Reserve Bank*, 569 F. Supp. 785 (S.D.N.Y. 1983), the United States District Court for the Southern District of New York examined the scope of the term "employee." The court held that the legislative history of the Federal Reserve Act indicated that "Congress deliberately chose to use the broad term 'employees' in the dismiss at-pleasure provision rather than limit its application to officers or high level professionals or executives." *Id.* at 790 n.17. The *Obradovich* court thus concluded that a painter in the maintenance department of a bank, whose duties did "not seem essential to the Federal Reserve's discharge of its financial responsibilities" could nonetheless be dismissed at-pleasure. *Id.*; see also *Little v. Federal Reserve Bank*, 601 F. Supp. 1372 (N.D. Ohio 1985) (security guard is employee under Federal Reserve Act). *Obradovich* is cited in *Little v. Federal Reserve Bank*, 601 F. Supp. 1374 (N.D. Ohio 1985), which held that there was no violation of due process in the at-will discharge of a bank guard. Note that the term "employee" does not appear in the National Banking Act. Thus, lower-level employees of national banks may still arguably state a cause of action for wrongful discharge; cf. *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (former at-will bank manager of consumer credit stated proper cause of action for intentional and outrageous infliction of emotional distress by alleging discharge in retaliation of compliance with consumer credit protection laws); see also *Case v. First Nat'l Bank*, 59 Misc. 269, 109 N.Y.S. 1119 (Sup. Ct. 1908) (a "solicitor of business" is not an officer under the National Bank Act).

66. 12 U.S.C. § 1432(a) (1982). Section 1432(a) provides: "[the bank shall have the power] to select, employ, and fix the compensation of such officers, employees, attorneys, and agents . . . and to dismiss at pleasure such officers employees, attorneys, and agents"

67. 12 U.S.C. §§ 21, 35 (1982).

68. 12 U.S.C. § 22 (1982).

69. 12 U.S.C. § 221 (1982).

70. 12 U.S.C. § 1422 (1982); 12 C.F.R. 500.32 (1985).

71. The Federal Reserve Act provides: "Wherever the word "bank" is used in this chapter, the word shall be held to include State Bank, banking association, and trust company, except where national banks or Federal reserve banks are specifically referred to."

12 U.S.C. § 221 (1982) states:

The term "member bank" is described as any national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks.

Id. The Federal Home Loan Bank Act defines "member" as "any institution which has subscribed for the stock of a Federal Home Loan Bank." 12 U.S.C. § 1422 (1982).

stricted in discharging their financial responsibilities if they could not dismiss certain employees at pleasure.⁷² Indeed, in *Westervelt v. Mohrenstecher*,⁷³ an early case construing the National Bank Act, the Eighth Circuit amply highlighted the policy behind providing a bank board of directors with the unfettered authority of dismissal:

The act of congress expressly fixed the tenure of office of the cashier of this bank It provided that this cashier should always hold his office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success—to the very existence—of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence⁷⁴

The dismissal-at-pleasure language in the Bank Acts remained virtually untested until the common law right of employers to discharge at-will fell into judicial disfavor. Courts typically dealt with these claims summarily when faced with litigation under the dismissal-at-pleasure language in the Bank Acts.⁷⁵ For example, in *Copeland v. Melrose National*

72. See *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896) (applying National Bank Act); cf. *Armano v. Federal Reserve Bank*, 468 F. Supp. 674, 676 (D. Mass. 1979) (applying the Federal Reserve Act); *Copeland v. Melrose Nat'l Bank*, 229 App. Div. 311-12, 241 N.Y.S. 429, 431 (N.Y. App. Div.), *aff'd*, 254 N.Y. 632, 173 N.E. 898 (1930) (applying the National Bank Act); *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 418, 40 S.E. 373, 373 (1901) (applying similarly worded state statute to corporate practice).

73. 76 F. 118 (8th Cir. 1896).

74. *Id.* at 122. Almost 90 years later, *Kemper v. First Nat'l Bank*, 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981), questioned the vitality of the policy underlying the National Bank Act. The plaintiff in *Kemper* was a dismissed bank president. The plaintiff argued that the policy, as enunciated by *Westervelt*, was outdated. The plaintiff contended that the Act was designed to protect bank customers in the days before federal deposit insurance, and therefore had no place in the modern banking industry, which needs to be able to offer certain employment prospects in order to attract management personnel of high quality. 94 Ill. App. 3d at 171, 418 N.E.2d at 821. The *Kemper* court, however, observed "that Congress has amended other portions of Section 24, Title 12 numerous times, without altering paragraph 5 . . . [and therefore] decline[d] plaintiff's invitation to reconsider the policy implications of the law." *Id.* at 172, 418 N.E.2d at 821.

75. *Rankin v. Tygard*, 198 F. 795 (8th Cir. 1912) (bank president's contractually fixed term determined only an outer limit of employment and employer could still remove at pleasure); *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896) ("neither the bank nor its board

Bank,⁷⁶ a bank vice-president brought suit for breach of a three-year employment contract that provided for liquidated damages if he was prematurely dismissed. The *Copeland* court relied upon the National Bank Act, and stated that "a contract for a definite term which forbids discharge [at-pleasure] except under penalty of paying compensation for the full term violates the statute, and is unenforceable."⁷⁷

Thereafter, the dismissal-at-pleasure language of the Banking Acts laid dormant. For nearly forty years, there was no litigation challenging a bank's common law and statutory authority to dismiss at-will. With the statutory and judicial erosion of an employer's ability to dismiss at-will, however, a resurrection of the dismissal-at-pleasure provisions in the Bank Acts occurred. Suddenly, lawyers began to dust off the Bank Acts and use them as potent weapons against common law claims for wrongful discharge, breach of express and implied contracts, and breach of the covenant of good faith and fair dealing.

B. Judicial Interpretation of the Bank Acts

After modern courts began to erode the at-will doctrine, the first case to address the utilization of the Bank Acts as a defense to a wrongful termination lawsuit was decided by the California Court of Appeal. In *Kozlowsky v. Westminster National Bank*,⁷⁸ decided in 1970, the plaintiff, a national bank president, was terminated during the term of his one-year written

can make contracts or appointments in violation of that [at-pleasure] provision"); *Cox v. First Nat'l Bank*, 10 Cal. App. 2d 302, 52 P.2d 524 (1935) (cashier's contract with national bank for definite period with fixed salary void, does not prevent removal at any time by board of directors, and will not support action for damages for discharge nor permit recovery of salary accruing after discharge); *First Nat'l Bank v. Miller*, 23 Ga. App. 441, 98 S.E. 402 (1919) (because bank board of directors had no authority to employ plaintiff-cashier for fixed term, cashier had no cause of action); *First Nat'l Bank v. Briggs' Assignees*, 69 Vt. 12, 37 A. 231 (1894) (under National Bank Act no liability for discharge notwithstanding contractual arrangement to the contrary).

Perhaps the earliest case to comment on the meaning of the "at pleasure" language of the National Bank Act was *Harrington v. First Nat'l Bank*, 1 N.Y. Sup. Ct. 361 (1873), in which the court noted that a national bank could not make a contract with an officer such that the directors would be deprived of their ability to discharge at-will. This was essentially dictum, however, since the court found that there was sufficient cause to justify the cashier's dismissal, and that the ability of the employer to discharge for cause was an implied contract term.

For additional authority, see *Kemper v. First Nat'l Bank*, 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981) (following interpretation of National Bank Act in *Rankin*, 198 F. 785 (8th Cir. 1912)); *Van Slyke v. Andrews*, 146 Minn. 316, 178 N.W. 959 (1920) (national banking law expressly permits board of directors to remove officers at any time).

76. 229 A.D. 311, 241 N.Y.S. 429 (N.Y. App. Div.), *aff'd*, 254 N.Y. 632, 173 N.E. 898 (1930).

77. *Id.* at 312-13, 241 N.Y.S. 429-30.

78. 6 Cal. App. 3d 593, 86 Cal. Rptr. 52 (1970).

employment contract.⁷⁹ The plaintiff's complaint alleged causes of action for breach of contract, deceit, and interference with contractual relations. The bank argued that the National Bank Act empowered it to dismiss the president at pleasure. The court held that the "provision [in the National Bank Act] that the board of directors may dismiss officers at pleasure, . . . has been construed as overriding any contract to employ for a fixed term."⁸⁰ The court concluded that "[b]y virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ."⁸¹

Likewise, in *McGeehan v. Bank of New Hampshire, National Association*,⁸² an executive vice-president of a national bank was terminated during the term of a one-year contract of employment. The terms of the employment contract specifically provided that the bank could terminate the plaintiff's employment during the one-year term "only if he [was] convicted of a criminal act."⁸³ Nevertheless, the bank terminated the vice-president before the one-year agreement expired even though he had not been convicted of a criminal act. The plaintiff subsequently alleged wrongful termination, breach of contract, and tortious interference with his employment contract.⁸⁴ The Supreme Court of New Hampshire affirmed the judgment of the lower court, and held that the National Bank Act "render[s] unenforceable, as against public policy, all contractual provisions which do not allow a national banking association to discharge its officers at will without incurring liability for breach of contract."⁸⁵

Courts have reached similar results under the Federal Reserve Act. In *Bollow v. Federal Reserve Bank of San Francisco*,⁸⁶ the Federal Reserve Bank of San Francisco had employed the plaintiff for eleven years as a regulatory attorney. The plaintiff alleged that the bank fired him for uncovering a potentially illegal regulatory activity on the part of the bank and the Federal Reserve Board,⁸⁷ and brought breach of contract, constitutional, and tort claims against the bank and several of its officers.⁸⁸

79. *Id.* at 596, 86 Cal. Rptr. at 53.

80. *Id.* at 596, 86 Cal. Rptr. at 54.

81. *Id.* at 596-97, 86 Cal. Rptr. at 54. The court noted, however, that a discharged employee could still attempt to state an action for interference with contractual relations. *Id.* at 598, 86 Cal. Rptr. at 55. See also *Kemper v. Worcester*, 106 Ill. App. 3d 121, 435 N.E.2d 827 (1982) (employment agreement, although terminable at-will, constituted sufficient relationship upon which to base cause of action for tortious interference with contractual relations).

82. 123 N.H. 83, 455 A.2d 1054 (1983). See also *Alfano v. First Nat'l Bank*, 490 N.Y.S.2d 56 (1985) (National Bank Act renders unenforceable employment contract between officers and national banks).

83. 123 N.H. at 85, 455 A.2d at 1055.

84. *Id.*

85. *Id.*

86. 650 F.2d 1093 (9th Cir. 1981)

87. *Id.* at 1096.

88. *Id.*

The Ninth Circuit affirmed the judgment of the district court, and held that the Federal Reserve Act preempted California common law remedies for breach of contract.⁸⁹ The court denied plaintiff any relief and stated:

By promising Bollow [the plaintiff] employment security in excess of that provided for by section Four, Fifth, [defendant] clearly overstepped the bounds of his authority under that section . . . Thus, any contract which might have been created . . . is void and unenforceable against the Bank.⁹⁰

Further, in *Armano v. Federal Reserve Bank of Boston*,⁹¹ the Federal Reserve Bank of Boston allegedly terminated an employee in contravention of certain personnel policies and practices that the plaintiff claimed established an employment contract with the Federal Reserve Bank.⁹² The plaintiff sought damages for breach of the alleged employment contract and for severe emotional distress.⁹³ The trial judge held that "assuming . . . that such personnel rules and practices would otherwise constitute a binding employment contract, I rule such a contract is void and unenforceable under the Federal Reserve Act"⁹⁴ The court reasoned:

Clearly, a contract that binds the Bank by requiring just cause for dismissal prevents the Bank from exercising its express power to dismiss an employee at pleasure. By that provision, Congress clearly sought to protect Federal reserve banks from unnecessary restrictions in carrying out their financial responsibility. Neither the Act's express powers nor incidental powers thereto authorized federal reserve banks to bind themselves in employment contracts.⁹⁵

*Jaffee v. Federal Reserve Bank of Chicago*⁹⁶ and *Obradovich v. Federal Reserve Bank of New York* also reached similar results.⁹⁷ The plaintiffs in both *Jaffee* and *Obradovich* alleged that certain employment policies and rules established by their respective banks created employment contracts that should have barred their respective terminations. The courts held in both cases that the "dismiss at pleasure" language in the Federal Reserve Act renders void and unenforceable any employment contract that contains contrary provisions.⁹⁸

Discharged employees have met with similar results after bringing common law causes of action against banks protected by the Federal Home Loan Act. In *Inglis v. Feinerman*,⁹⁹ a bank terminated an employee without a

89. *Id.* at 1098.

90. *Id.* at 1099.

91. 468 F. Supp. 674 (D. Mass. 1979).

92. *Id.* at 675.

93. *Id.*

94. *Id.*

95. *Id.* at 676.

96. 586 F. Supp. 106 (N.D. Ill. 1984).

97. 569 F. Supp. 785 (S.D.N.Y. 1983).

98. *Id.* at 790; 586 F.Supp. at 107-08.

99. 701 F.2d 97 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

disciplinary hearing as provided for in the bank's personnel manual.¹⁰⁰ The Court of Appeals for the Ninth Circuit affirmed the decision of the trial court, and held that "attempts to create employment rights from independent sources such as the employment manual are void under the Federal Home Loan Bank Act."¹⁰¹

In the wake of the cases decided under the dismissal-at-pleasure language of the Bank Acts, banks covered by the acts apparently have unfettered discretion to terminate certain employees without fear of reprisal. Nevertheless, certain courts have made judicial incursions into these statutory mandates.

C. Judicial Erosion of the Bank Acts

Notwithstanding the clear dictate of the Bank Acts, which allow covered banks to dismiss certain employees at pleasure, some courts have bent over backwards to erode this directive. In *Mahoney v. Crocker National Bank*,¹⁰² the named plaintiffs brought an action on behalf of themselves and those similarly situated. The plaintiffs alleged age discrimination, wrongful discharge, breach of implied employment contract, and breach of the covenant of good faith and fair dealing.¹⁰³ The bank contended that the National Bank Act preempted plaintiffs' state law claims, and therefore no liability could attach.¹⁰⁴ The court, strictly construing the National Bank Act, observed that since the statute empowered a board of directors to appoint and dismiss officers, a bank could not exercise its power to dismiss officers at pleasure unless the board itself, or its duly authorized delegate, approved the appointment and dismissal of the officers.¹⁰⁵

The *Mahoney* court held that the board of directors of a bank need not have directly appointed or dismissed the named plaintiffs.¹⁰⁶ The court noted that in the National Bank Act, "section 24, Sixth provides the board with the power to enact by-laws regulating the manner in which officers shall be appointed."¹⁰⁷ The court further observed that the by-laws of the bank provided that officers of the bank "may be appointed by the Board of Directors or the Chairman of the Board or by such person or persons as

100. 701 F.2d at 98-99.

101. *Id.* at 99.

102. 571 F. Supp. 287 (N.D. Cal. 1983).

103. *Id.* at 288.

104. *Id.* at 289.

105. *Id.* at 290-91.

106. *Id.* at 290.

107. *Id.* 12 U.S.C. § 24, par. 6 provides:

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, *its directors elected or appointed, its officers appointed*, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

12 U.S.C. § 24, par. 6 (1982) (emphasis added).

the Board may designate."¹⁰⁸ Because the board of directors had approved the appointments of the named plaintiffs, the court held that the bank had therefore made the appointments in accordance with the bank's by-laws.¹⁰⁹

The *Mahoney* court then examined whether the named plaintiffs had been discharged in accordance with the National Bank Act. The court noted that Section 24, Sixth, of the National Bank Act provides that the board of directors of a national bank may prescribe by-laws that regulate the manner in which "its general business [shall be] conducted, and the privileges granted to it by law exercised and enjoyed."¹¹⁰ The court also examined the regulations of the National Bank Act, which further provide that "the board of directors of a national bank may not delegate responsibility but may assign the performance thereof."¹¹¹ The *Mahoney* court, relying on the statute itself and the regulations promulgated thereunder, held that:

Congress therefore has empowered boards of directors of national banks and the persons to whom the board of directors assign the performance of making dismissals with the right to dismiss officers at pleasure. Where dismissals are made by the entities or persons empowered to dismiss at pleasure, the bank may invoke the dismissal at pleasure defense to lawsuits arising from the dismissals.¹¹²

The court then turned its attention to the bank's by-laws, which provided that the Chairman of the Board, or his designee, may remove officers and employees of the bank.¹¹³ The court found that the Chairman of the Board or his designee had not discharged the named plaintiffs in *Mahoney*. Accordingly, the court concluded that the bank did not comply with the requirements of the National Bank Act, and therefore could not assert the National Bank Act as a defense.¹¹⁴ The *Mahoney* court opined:

Congress specifically states that boards of directors have the power to dismiss officers at pleasure. This Court has interpreted this authorization of power to apply to boards of directors and to those persons to whom the boards assign dismissal powers. A dismissal at pleasure must be accomplished in the manner in which Congress empowers that it can be made. When Congress gives power, the proper exercise of that power is bound by any limitations set forth by the Congress, and here Congress has so limited the exercise of that power. Section 24, Fifth and Sixth must

108. 571 F. Supp. at 289-90. Article VI, Section 1 of the Crocker National Bank by-laws provided: "Senior officers shall be appointed by the Board of Directors and other officers may be appointed by the Board of Directors or the Chairman of the Board or by such person or persons as the Board may designate." *Id.*

109. *Id.*

110. 571 F. Supp. at 290-92.

111. *Id.* at 290-91. See *supra* note 107.

112. *Id.* at 291.

113. 571 F. Supp. at 291.

114. *Id.* at 290. Article IV, Section 3, of Crocker National Bank's by-laws provided: "The Chairman of the Board, or such person or persons as he may designate, may . . . remove officers and employees of the association, other than senior officers." *Id.*

be read together as authorizing dismissals of officers at pleasure *only* by boards of directors and those to whom the boards assign the performance of the dismissal of officers. Congress did not authorize that any others could dismiss officers at pleasure.¹¹⁵

Less than one week later, the Sixth Circuit applied similar reasoning and refused to dismiss a complaint brought by a former branch manager of a national bank in *Wiskotoni v. Michigan National Bank-West*.¹¹⁶ Wiskotoni was discharged after bank officials allegedly learned that he had been involved in the "numbers rackets."¹¹⁷ Although Wiskotoni denied the allegation and offered to take a polygraph test, the bank denied him the opportunity to take the test and he was subsequently discharged.¹¹⁸ The plaintiff brought an action against the bank for breach of implied contract and for violation of Michigan public policy.¹¹⁹ The bank moved to dismiss the complaint contending that the National Bank Act preempted Michigan law.¹²⁰ The *Wiskotoni* court, however, held that the plaintiff was not an "officer" as defined by the National Bank Act because he was neither appointed nor dismissed by the bank's board of directors.¹²¹

The bank's by-laws in *Wiskotoni* provided that branch managers of the bank were "officers."¹²² The *Wiskotoni* court held, however, that such a designation by the bank's by-laws was not dispositive.¹²³ The court concluded that the plaintiff was not an officer of the bank for purposes of the National Bank Act because he was not appointed and discharged by the bank's board of directors.¹²⁴ However, the majority did not address the issue of whether the bank's board of directors could assign the task of appointing and discharging branch managers to officers of the bank.¹²⁵

115. *Id.* at 291. (emphasis in original).

116. 716 F.2d 378 (6th Cir. 1983).

117. *Id.* at 381.

118. *Id.*

119. *Id.*

120. *Id.* at 387.

121. *Id.*

122. *Id.* Section 4.5 of the by-laws of the Michigan National Bank provided:

Other officers. The board of directors may appoint one or more assistant vice presidents, one or more trust officers, one or more assistant secretaries, one or more assistant cashiers, one or more managers and assistant managers of branches and such other officers and attorneys in fact as from time to time may be required or desirable to transact the business of the association. Such officers shall respectively exercise such powers and perform such duties as pertain to their several offices, or as may be conferred upon, or assigned to, them by the board of directors, the chairperson of the board, or the president.

Id.

123. 716 F.2d at 387.

124. *Id.*

125. Judge Wellford authored the dissenting opinion and argued that the bank's by-laws granted the president authority to appoint and dismiss bank officers. Judge Wellford concluded

The Oregon Court of Appeals reached a similar conclusion in *McWhorter v. First Interstate Bank*.¹²⁶ In *McWhorter*, a terminated vice-president/branch manager brought an action against his former employer for breach of implied and express contract, outrageous conduct, and deceit.¹²⁷ The Oregon Court of Appeals cited *Wiskotoni* and held that the bank could not raise the National Bank Act as a defense because the bank's board of directors did not approve the dismissal of the plaintiff.¹²⁸

Likewise, the court in *McWhorter* avoided addressing the issue of the delegation of authority to appoint and dismiss officers. Without citing *Mahoney*, the court noted that the *Wiskotoni* opinion did not address the delegation issue.¹²⁹ Nevertheless, the *McWhorter* court, "assum[ed]" that the authority to appoint and dismiss officers was delegable, and thereby avoided this issue, and ruled that there was "nothing in this record that would allow us to conclude either that the power was delegated or that it was lawfully delegated."¹³⁰

Recently, in *Alfano v. First National Bank of Highland*,¹³¹ the New York Supreme Court finessed the issue of whether the appointment and dismissal of an officer by the board of directors of a bank are necessary prerequisites to use the National Bank Act as a defense to a wrongful discharge claim. Without specifically discussing this issue, the *Alfano* court merely concluded that the plaintiff had been appointed and dismissed by the bank's board of directors.¹³²

CONCLUSION

Judicial thought continues to ebb and flow in the wrongful discharge area. For many years, employers could terminate employees at-will. Recently, the judiciary has entered the employer-employee relations arena and has attempted to tip the scales of justice in the employee's favor. Although the *Mahoney-Wiskotoni-McWhorter-Alfano* cases leave many questions unanswered, they clearly demonstrate the judiciary's desire to erode the employment at-will rule through strict statutory construction of the Bank Acts. Questions still remain concerning the extent of the judicial limitations developed by *Mahoney* and its progeny. Issues such as the ability of a bank's board of directors to delegate authority to appoint and dismiss covered

that "[t]he Bank's Board acted through the Bank president in hiring and firing Wiskotoni; Wiskotoni should be deemed an 'officer' within the meaning of the Act; he occupied a position of responsibility and discretion." *Id.* at 396.

126. 67 Or. App. 435, 678 P.2d 766 (1984).

127. *Id.* at 437, 678 P.2d at 767.

128. *Id.* at 439, 678 P.2d at 768-9.

129. *Id.* at 439 n.3, 678 P.2d at 768 n.3.

130. *Id.* at 439, 678 P.2d at 768-9.

131. 490 N.Y.S.2d 56 (N.Y. App. Div. 1985).

132. *Id.* at 58.

employees remain unanswered.¹³³ Also unclear is the level in a bank's hierarchy that an employee must occupy to fall within the purview of the bank's dismissal at-will authority.¹³⁴ Furthermore, courts still wrestle with the issue of which common law causes of action, such as emotional distress, interference with contractual relations, and fraud, the Bank Acts preempt.¹³⁵

Nevertheless, banks covered by any of the Bank Acts should ensure that their board of directors effectuate all employee appointments and dismissals covered under the "dismissal at pleasure" sections, or ensure that these duties are assigned to individuals clearly vested with authority under the bank's articles or by-laws. Absent such precautions, covered banks could be exposed to increasing liability in wrongful discharge lawsuits.

133. See *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 396 (6th Cir. 1983); *McWhorter v. First Interstate Bank*, 67 Or. App. 435, 678 P.2d 766, 768-69 (1984).

134. See *supra* note 65.

135. See *Alexander v. American Nat'l Bank*, No. 149703 (Cal. Super. Ct. Santa Barbara County Mar. 14, 1984). In an unpublished decision, the court partially granted defendant's motion for summary judgment under the National Bank Act and dismissed plaintiff's cause of action for breach of the covenant of good faith and fair dealing, breach of contract, and sex discrimination. The court, however, denied defendant's motion for summary judgment with respect to causes of action for emotional distress and loss of consortium to the extent these causes of action were "based upon the wrongful conduct of defendant at the time the termination took place." The *Alexander* court held in this regard:

It is inconceivable that Congress intended that the National Bank Act would relieve a Bank from responsibility from the tortious acts committed by its agents on the occasion of an officer's formal termination of her employment. It seems certain that defendants would not contend that a battery committed upon a terminated officer would be an activity protected by the National Bank Act. While not as dramatic as a battery, the torts alleged are distinct and have no relation to the Bank's decision to terminate plaintiff's employment.

See also *supra* note 81; *Rohse v. First Deposit Nat'l Bank*, 497 A.2d 1214 (N.H. 1985) (National Bank Act permits fired bank officers to sue former employer for deceit or misrepresentation related to their contract negotiations as bank officers).

