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LABOR—EMPLOYMENT AT WILL—PUBLIC POLICY EXCEPTION RECOGNIZED. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

On October 31, 1983, Sterling Drug, Inc. (Sterling) discharged Charles Oxford from its employment. Oxford worked for Sterling from 1963 until October 1983 under a contract for an indefinite term. In 1984 Oxford filed suit in Garland County Circuit Court alleging that Sterling engaged in a systematic campaign to force his resignation from the company. Sterling officials believed Oxford had reported Sterling to the General Services Administration (GSA) for pricing violations.¹ At trial, Oxford denied reporting Sterling to the GSA. Following the alleged report, Sterling demoted Oxford to the lowest position in his division. Over an eighteen month period, Sterling officials repeatedly criticized and reprimanded Oxford and denied him stock he won in a company sales contest.

The trial court instructed the jury on both wrongful discharge and the tort of outrage. The jury returned a general verdict in Oxford's favor, awarding compensatory and punitive damages.² The trial court denied Sterling's motion for judgment notwithstanding the verdict or, in the alternative, a new trial. The Arkansas Supreme Court reversed the trial court's judgment and remanded for further proceedings. The court held that Sterling's conduct was not so outrageous "as to go beyond all possible bounds of decency,"³ and denied a cause of action for outrage.

The Arkansas Supreme Court upheld Oxford's claim for wrongful discharge, however, and for the first time granted relief based on a public policy exception to the employment at will doctrine. The court held that the remedy for this cause of action lies exclusively in contract, rather than in tort. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

The American employment at will doctrine allows an employer or employee to terminate the employment relationship at any time,

1. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 242, 743 S.W.2d 380, 381 (1988). Sterling's violations resulted in a 1984 settlement with the federal government in which Sterling paid \$1,075,000. *Id.*

2. The jury awarded \$201,700 in compensatory damages and \$150,000 in punitive damages. *Id.*

3. *Id.* at 243, 743 S.W.2d 380, 382 (quoting *M.B.M. Co., v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980)).

for any reason, where the contract does not specify duration.⁴ This common law rule has its roots in English history.⁵ The English law of duration of service contracts came to prominence through the rule espoused by Blackstone in 1765.⁶ Blackstone construed a service contract with an unspecified duration as a hiring for one year.⁷ The rule relied largely on the paternalistic nature of the master-servant relationship which imposed obligations on the employer as a matter of public policy.⁸

Initially, the American colonies accepted the English doctrine of imposing a specified length of service where proof of custom, trade usage, or agreement between the parties was present.⁹ However, by the mid-nineteenth century, the emergence of freedom of contract and socio-economic theories of freedom of enterprise and laissez-faire resulted in a divergence from English law.¹⁰ The traditional master-servant status gave way to large numbers of employees and commercial relationships that quickly outgrew the reasoning behind the former laws.¹¹

Propounded by Horace Gray Wood in 1877, the employment at will doctrine stated that a general or indefinite hiring would be, *prima facie*, a hiring at will.¹² The doctrine offered a solution to the confusion of the times and quickly became established as the majority rule.¹³ The past two decades, however, have resulted in the gradual erosion of the employment at will doctrine.¹⁴ Advocates of the rule's

4. 9 S. WILLISTON, *CONTRACTS* § 1017 (3d ed. 1967).

5. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 119 (1976).

6. *Id.* at 120.

7. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 425 (1978). Although Blackstone was primarily concerned with protecting the common laborers from seasonal hiring and firing, the rule applied to all classes of servants.

8. Comment, *Employment-At-Will: Defining the Parameters*, 16 CUMB. L. REV. 377, 390 (1986).

9. Note, *Wrongful Discharge—Sexual Harassment Equated With Prostitution to Find Public Policy Exception*, 8 UALR L.J. 49, 51 (1986).

10. 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, 782.

11. See Feinman, *supra* note 5, at 123.

12. H.G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* § 134 (1st ed. 1877).

13. Feinman, *supra* note 5, at 125-26.

14. *Crowell v. Transamerica Delaval, Inc.*, 206 N.J. Super. 298, 502 A.2d 573 (1984) (discharge of at will employee violated public policy supporting doctrine of equitable estoppel); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (at will employee wrongfully discharged for refusing to commit illegal act); *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987) (provisions in employee handbook modified at will contract); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985) (wrongful discharge finding

abolition generally point to the importance of job security in modern times and the evils of employer coercion as primary reasons for its demise.¹⁵ Congressional legislation has created a number of exceptions to the rule making it unlawful to discharge an employee on the basis of sex, race, creed or religion,¹⁶ for engaging in union activities,¹⁷ or solely on the basis of age.¹⁸

In addition, judicial intervention has modified the rule, resulting in four general classes of exceptions.¹⁹ One exception to the lawful discharge of an at will employee involves proof of implied-in-fact promises of employment for specific duration or reliance on a promise of job security.²⁰ A second exception created by some jurisdictions exists through an implied duty to terminate only in good faith—a reliance on the covenant of good faith and fair dealing that exists in all contracts.²¹ Third, courts protect the at will employee by imposing tort obligations within the contract.²² Arkansas recognizes the tort of outrage as a remedy for employees subjected to malicious treatment by their employers.²³ Finally, a general public policy exception may

upheld where at will employee fired for threatening to report employer violation of federal regulations); *Hauck v. Sabine Pilots, Inc.*, 672 S.W.2d 322 (Tex. App. 1984), *aff'd* 687 S.W.2d 733 (Tex. 1985) (at will employee wrongfully discharged for refusing to violate federal statute).

15. *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413-14 (1967).

16. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).

17. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1982).

18. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1982). See Comment, *supra* note 10, at 784-85 for further discussion of state and federal legislation.

19. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

20. *Id.* at 1820-21. See *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987) (Arkansas Supreme Court recognized, for first time, a good cause exception to the employment at will doctrine where discharged employee relied on a personnel manual governing conduct for termination). See also *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 283 N.W.2d 713 (1979) (employee relied on defendant's promise of job security in leaving competitor).

21. Note, *supra* note 19, at 1821. In *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), the court held that an employee's refusal to date her foreman violated good faith and fair dealing which is implied in every contract—whether at will or definite. In *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984), the court held that Arkansas case law supports this implied covenant, even in at will contracts. However, the court in *Scholtes v. Signal Delivery Service, Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982) rejected the implied covenant in at will contracts as a term implied in law.

22. Note, *supra* note 19, at 1821. See *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (at will employee dismissed in retaliation for his insistence that employer comply with federal regulations, sufficiently alleged cause of action in tort for wrongful discharge); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (tort cause of action for wrongful discharge upheld where employee was terminated for filing workman's compensation claim).

23. The tort of outrage was first defined in *M.B.M. Co. v. Counce*, 268 Ark. 269, 596

exist where an employer discharges an employee in violation of the public good.²⁴

The public policy exception eludes clear definition, resulting in its label by one court as the "Achilles' heel" of the wrongful discharge principal.²⁵ The leading case in this area is *Petermann v. Local 396, International Brotherhood of Teamsters*.²⁶ *Petermann* held that the discharge of an employee for refusing to commit perjury for his employer violated public policy.²⁷ Although the decision rested on an act specifically prohibited by a California criminal statute,²⁸ the court held that the public policy exception could extend to non-criminal conduct as well.²⁹

After *Petermann*, courts in other jurisdictions followed suit in recognizing this exception.³⁰ In addition to protecting at will employees from discharge for refusal to violate a criminal statute, courts began recognizing public policy exceptions for the exercise of statutory rights³¹ and statutory duties.³² Still other courts created exceptions in the absence of any statutory authority and found certain acts of retaliation and discharge to be repugnant to the general public policy of the state.³³

The Arkansas Supreme Court first hinted at a possible accept-

S.W.2d 681 (1980). "By extreme and outrageous conduct, we mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* at 280, 596 S.W.2d at 687.

24. Note, *supra* note 19, at 1822. See *Savodnik v. Korvettes, Inc.*, 489 F. Supp. 1010 (E.D.N.Y. 1980) (public policy exception recognized where at will employee was discharged to avoid the vesting of his pension); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (employee who was terminated for hiring an attorney to negotiate a claim that employer violated minimum wage laws had cause of action). See generally Comment, *Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981).

25. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981).

26. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

27. *Id.* at 185, 344 P.2d at 28.

28. CAL. PEN. CODE § 118 (West 1988) makes perjury unlawful.

29. 174 Cal. App. 2d at 186, 344 P.2d at 28.

30. See Comment, *supra* note 24, at 735-40.

31. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge of at will employee for filing workman's compensation claim was violation of public policy).

32. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (wrongful discharge found where employee fired for taking time off to serve on jury).

33. See cases cited *supra* note 24 and *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) ("bad faith" termination of at will employee whose discharge enabled employer to avoid payment of bonuses).

ance of the public policy exception in *M.B.M. Co. v. Counce*.³⁴ Although the court rejected Ms. Counce's argument that her employer's breach of contract violated public policy, the court indicated it *would* consider a claim for wrongful discharge in a case involving a statutory right or duty, or "some other well established public policy."³⁵

In subsequent decisions, however, the Arkansas courts failed to embrace the exception.³⁶ In *Lucas v. Brown & Root, Inc.*,³⁷ the Court of Appeals for the Eighth Circuit remanded on the grounds that Arkansas *may* recognize the public policy exception.³⁸ *Lucas* involved the discharge of an at will employee who rejected the sexual advances of her foreman. The Eighth Circuit equated the foreman's actions with solicitation of prostitution. Because prostitution is illegal by statute,³⁹ the court found the plaintiff's discharge violated public policy.⁴⁰ However, at least one commentator has criticized *Lucas* as reaching "well beyond the bounds of any Arkansas case decided [previously]."⁴¹

Twice in 1987 the Arkansas Supreme Court alluded to its willingness to recognize a public policy exception, but was unable to apply the exception to the facts, as outlined in *Counce*.⁴² It was not until the present case, *Sterling Drug, Inc. v. Oxford*,⁴³ that the court found itself squarely faced with whether or not to recognize the public policy exception and, more importantly, with how to define it.

Addressing Oxford's claim of outrage, the court relied on the *Counce*⁴⁴ test that an employer's conduct must be so extreme as to

34. 268 Ark. 269, 596 S.W.2d 681 (1980).

35. *Id.* at 273, 596 S.W.2d at 683.

36. *Newton v. Brown & Root*, 280 Ark. 337, 658 S.W.2d 370 (1983) (public policy exception rejected where employee contributed to hazardous working conditions); *Jackson v. Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984) (lack of sufficient facts precluded adoption of public policy exception in demurrer to complaint).

37. 736 F.2d 1202 (8th Cir. 1984).

38. *Id.* at 1203.

39. ARK. CODE ANN. § 5-70-102 (1987).

40. 736 F.2d at 1205.

41. Note, *supra* note 9, at 57.

42. In *Proctor v. East Cent. Ark. EOC*, 291 Ark. 265, 267, 724 S.W.2d 163, 165 (1987), the court noted that "[a]bsent a valid contract the only other theory to allow recovery for an aggrieved employee would be based upon public policy considerations," but found that an employee manual did not create a valid contract because it did not assure employment for a definite term. In *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987), although the court recognized a good cause exception, it declined to find a public policy violation.

43. 294 Ark. 239, 743 S.W.2d 380 (1988).

44. 268 Ark. 269, 280, 596 S.W.2d 681, 687 (1980).

exceed "all possible bounds of decency," and be so "atrocious," as to be "utterly intolerable in a civilized society."⁴⁵ Acknowledging Sterling's conduct, which included continuous criticism and assignment of menial and unreasonable tasks over an eighteen month period, and the stress in Oxford's personal life, the court, nevertheless, felt that Sterling's actions did not rise to the required level of "outrageous" conduct.⁴⁶

Citing two recent Arkansas Supreme Court decisions⁴⁷ in which tort of outrage actions were affirmed, the court emphasized particular facts in distinguishing *Oxford*. The emphasis in *Tandy Corp. v. Bone*⁴⁸ was on the fact that despite knowledge of the employee's weakened mental state, the employer refused him medication during interrogation. The court stressed in *Hess v. Treece*⁴⁹ that the employer's harassment continued over a two year period. Apparently, the court felt Sterling's conduct was inapposite to the above cases and denied the claim.⁵⁰

The court next addressed the cause of action for wrongful discharge. After first reaffirming Arkansas' allegiance to the employment at will doctrine,⁵¹ the court pointed to its most recent modification of the rule found in *Gladden v. Arkansas Children's Hospital*.⁵² The court traced the progression of its softening attitude toward the employment at will doctrine⁵³ beginning with its initial leanings in *Counce*.⁵⁴ The court noted public policy exceptions recognized by other jurisdictions such as termination of an employee for refusing to violate a specific statute,⁵⁵ termination for exercising a statutory right⁵⁶ and for complying with a statutory duty,⁵⁷ employer conduct involving bad faith or malice,⁵⁸ implied covenants of good

45. *Id.*

46. 294 Ark. 239, 743 S.W.2d 380 (1988).

47. *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985); *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984).

48. 283 Ark. 399, 678 S.W.2d 312 (1984).

49. 286 Ark. 434, 693 S.W.2d 792 (1985).

50. 294 Ark. at 245, 743 S.W.2d at 383.

51. *Id.* (citing *Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982)).

52. 292 Ark. 130, 728 S.W.2d 501 (1987) (good cause provision allowed).

53. 294 Ark. at 245-46, 743 S.W.2d at 383.

54. 268 Ark. 269, 596 S.W.2d 681 (1980).

55. 294 Ark. at 245-46, 743 S.W.2d at 383. *See, e.g., Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (employee refusal to assist in illegal price fixing).

56. 294 Ark. at 246, 743 S.W.2d at 384. *See, e.g., Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employee participation in union activities).

57. 249 Ark. at 246, 743 S.W.2d at 384.

58. *Id.*

faith and fair dealing,⁵⁹ and termination for "whistle blowing."⁶⁰

The court made special reference to *Palmateer v. International Harvester*⁶¹ and *Wagner v. City of Globe*.⁶² The court approvingly quoted the holding in *Palmateer* that "there is no public policy more basic . . . than the enforcement of a State's criminal code . . . and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy."⁶³ *Wagner* was favorably cited for its holding that "whistle blowing" is an important public policy of the state.⁶⁴ The court's focus on these cases indicates a particular affinity to the public policy exception where statutory law protects the employee's actions. Concluding its survey, the court "followed [its] lead" in *Counce* and held that "an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state."⁶⁵

Although dicta by the court stated that "an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public,"⁶⁶ the court purported to narrow its definition of the public policy exception by securing its foundation in constitutional and statutory law.⁶⁷ The court relied on statutory authority⁶⁸ which makes it unlawful to retaliate against a witness, informant, or juror. The state thus has a strong public interest in encouraging reports of illegal activity. "The public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law."⁶⁹ Oxford's alleged disclosure of Sterling's pricing violations and his subsequent termination consti-

59. *Id.*

60. *Id.* at 248, 743 S.W.2d at 384. See *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) (report of adulterated milk to health authorities).

61. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

62. 150 Ariz. 82, 722 P.2d 250 (1986).

63. 294 Ark. at 248, 743 S.W.2d at 385 (quoting *Palmateer*, 85 Ill. 2d 124, 132, 421 N.E.2d 876, 879). In *Palmateer* officials discharged an employee for aiding the investigation of a co-worker's suspected criminal activities.

64. *Id.* (citing *Wagner*, 150 Ariz. 82, 722 P.2d 250 (1986)). *Wagner* involved the wrongful discharge of a police officer who reported the illegal detention of a prisoner.

65. *Id.* at 249, 743 S.W.2d at 385.

66. *Id.*

67. *Id.* "It is generally recognized that the public policy of a state is found in its constitution and statutes." *Id.* at 249, 743 S.W.2d at 385.

68. ARK. CODE ANN. § 5-53-112 (1987) provides:

(a) A person commits the offense of retaliation against a witness, informant, or juror if he harms or threatens to harm another by any unlawful act in retaliation for anything lawfully done in the capacity of witness, informant, or juror.

(b) Retaliation against witnesses, informants, or jurors is a Class A misdemeanor.

69. 294 Ark. at 250, 743 S.W.2d at 386.

tuted wrongful discharge in violation of that policy.⁷⁰

Upon its election to recognize the public policy exception, another decision facing the court was the resolution of an appropriate remedy. The court noted that the majority of jurisdictions recognize actions in tort.⁷¹ Courts which imply a covenant of good faith and fair dealing generally recognize a contract remedy,⁷² while other jurisdictions acknowledge that both theories are available.⁷³

The court adhered, however, to the reasoning in *Brockmeyer v. Dun & Bradstreet*,⁷⁴ a 1983 Wisconsin case. Wisconsin is the only state that has adopted an exclusive contract remedy for wrongful discharge based on the public policy exception.⁷⁵ The *Brockmeyer* case points to the fundamental difference between contract and tort actions.⁷⁶ The tort objective lies in protection of freedom from harm while contract actions seek to ensure that promises are performed.⁷⁷ The Arkansas Supreme Court reasoned that a wrongful discharge action is premised on the theory that the employer has breached an implied promise not to discharge in violation of public policy.⁷⁸ A contract action "strikes a fair balance" in that it protects employees from retaliation while limiting the remedy to damages in contract, rather than in tort.⁷⁹ The court further reasoned that a cause of action for outrage is always available for those cases in which the employer's conduct is extreme.⁸⁰

Of the several potential issues for remand, the court was primarily concerned with damage calculation.⁸¹ The court contrasted the computation of damages for a wrongfully discharged employee under

70. The court found there was sufficient evidence that Sterling had campaigned to force Oxford's resignation, thus resulting in constructive discharge. The court also held that substantial evidence will support a jury verdict for wrongful discharge. *Id.*

71. 294 Ark. at 249, 743 S.W.2d at 385 (citing *Palmateer*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981)).

72. *Id.* at 249, 743 S.W.2d at 385 (citing *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977)).

73. *Id.* (citing *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (action in contract predicated on breach of implied provision not to discharge in violation of public policy and tort action based on *duty* not to discharge)).

74. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

75. 294 Ark. at 249, 743 S.W.2d at 385.

76. 113 Wis. 2d at 575 n.14, 335 N.W.2d at 841 n.14.

77. *Id.*

78. 294 Ark. at 249, 743 S.W.2d at 385. *Brockmeyer* stated that "since the primary concern in these actions is to make the wronged employee 'whole,' " reinstatement and back pay are most appropriate. 113 Wis. 2d at 575, 335 N.W.2d at 841.

79. 294 Ark. at 249, 743 S.W.2d at 385.

80. *Id.*

81. *Id.* at 251, 743 S.W.2d at 386. The court also held that the trial court properly admit-

a contract for a fixed term⁸² with damages under a contract for an indefinite term.⁸³ The court concluded that the latter approach was too speculative and limited damages to lost wages from the date of termination until trial date, minus any sum the employee earned or could have earned with due diligence.⁸⁴

In his dissent, Justice Purtle felt that both the wrongful discharge and tort of outrage claims should have been affirmed.⁸⁵ As to the latter, he felt that Sterling's conduct far exceeded that complained of in *Hess v. Treece*⁸⁶ and that by reversing Oxford's claim of outrage, the court was "in effect punishing the appellee for the alleged performance of his duty as a citizen."⁸⁷

Noting his approval of the public policy exception, Justice Purtle extracted a broad definition from the majority opinion. "I agree . . . that 'a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interests of the economic system or the public good and constitutes a breach of the employment contract.'"⁸⁸ The dissent made no mention of the majority's emphasis on statutory law as a basis for defining the boundaries of public policy.

Justice Purtle strongly criticized the court's limitation of recovery to contract remedies.⁸⁹ He explained that the employee who suffers physical and emotional pain as well as financial losses will remain uncompensated while the employer will go virtually unpunished.⁹⁰ Employers will feel little threat from the knowledge that their retaliatory conduct will result only in payment of back wages to the employee.

Oxford is significant in two respects. First, *Oxford* finally opens

ted evidence of the federal government's audit and negotiated settlement concerning the pricing violations.

82. *Id.* (citing *Seaman Stores v. Porter*, 180 Ark. 860, 23 S.W.2d 249 (1930) (employee recovers lost wages from date of termination up to trial date, or if trial occurs after expiration date, the amount of agreed wages for the term)).

83. *Id.* The court referred to various factors such as number of years employed, average seniority, and the employee's intention of remaining with the company.

84. *Id.* at 251-52, 743 S.W.2d at 386-87. The court held that it is also possible to recover for any other tangible benefits lost. Future damages are not recoverable. The court further held that Oxford's income from the sale of real estate did not amount to "earnings" for consideration of mitigation. *Id.*

85. *Id.* at 253, 743 S.W.2d at 387 (Purtle, J., dissenting).

86. 286 Ark. 434, 693 S.W.2d 792 (1985).

87. 294 Ark. at 254, 743 S.W.2d at 388.

88. *Id.*

89. *Id.* at 255-A, 743 S.W.2d at 388.

90. *Id.*

the door to the public policy exception. The question is "how wide?" Although the court acknowledges, in a broad sense, that employers should not be allowed to terminate at will employees for acts "done for the good of the public,"⁹¹ it appears to confine its *specific* holding to employer conduct in violation of statutory law.⁹²

Nonetheless, the court approvingly noted a number of cases from other jurisdictions which spanned the length of the spectrum in the public policy arena.⁹³ This may indicate that although the court seems to feel most comfortable in relying on statutory law to define the boundaries of this exception, it has not ruled out the possibility of widening its parameters.

Should the court decide, however, to confine the boundaries to conduct addressed only in the statutes, it will be interesting to see how far judicial interpretation of the law will extend to find public policy violations. It is not a drastic step for courts to infer a remedy from statutes which clearly give an employee certain rights; for example, an employee who is discharged for filing a workman's compensation claim.⁹⁴ However, as one commentator suggests, when both the remedy *and* the right must be inferred, the court "must be in a position to rationalize a broad reading of the policy-setting statute(s) involved."⁹⁵ By recognizing "whistle blowing" as an employee right deserving of protection through the public policy exception, the Arkansas Supreme Court goes beyond the sphere of basic employment relationships. The court comes closer to the Eighth Circuit's "activist" approach in *Lucas v. Brown & Root, Inc.*⁹⁶ Although the statute on which the court relies in *Oxford* appears to be more closely tailored to the employer's offense than was the statute in *Lucas*, the court has, nonetheless, established a precedent of implying employee rights and remedies from law outside the employment field.

Speculation remains open as to whether the court will eventually extend the exception to expressions of public policy outside the stat-

91. *Id.* at 249, 743 S.W.2d at 385.

92. *Id.*

93. See *supra* text accompanying notes 55-60.

94. See *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

95. Comment, *supra* note 10, at 793.

96. 736 F.2d 1202 (8th Cir. 1984). The Eighth Circuit's equation of a statute outlawing prostitution with an employer's retaliatory discharge of an employee who refused his sexual advances to find a public policy exception has been criticized as going beyond Arkansas law. See text accompanying note 41. But see Youngdahl, *The Erosion of the Employment-At-Will Doctrine in Arkansas*, 40 ARK. L. REV. 545, 556-57 (1987) ("Without a doubt a requirement that an employee commit prostitution to keep a job would be actionable in Arkansas.")

utes,⁹⁷ or even more significantly, to court-created concerns in the absence of any written authority.⁹⁸ The latter approach, as one writer notes, depends on a court's "jurisprudential views regarding judicial activism."⁹⁹ The Arkansas Supreme Court continues to cling to the employment at will doctrine by limiting the public policy exception to employer conduct based on statutory law. But its grasp is slipping. This is good news for employees.

Unfortunately for the employee, the remedy for wrongful discharge in contravention of public policy essentially limits the employee to back pay.¹⁰⁰ Regardless of any mental or physical pain and suffering experienced by the employee, the employee's remedy lies only in contract, which includes lost wages from the time of discharge up until the date of trial.¹⁰¹ Although the court provides assurance that the tort of outrage is still available for egregious cases, decisions involving this theory appear inconsistent. As Justice Purtle explains in his dissent, the application of the facts to the test for outrage as set forth in *Counce*¹⁰² seems to vary from case to case. In addition, the tort of outrage is difficult to prove.¹⁰³

One proponent of the contract remedy, however, argues that basing a cause of action simply on the monetary value of its remedial award defeats the purpose of allowing redress for wrongful discharge.¹⁰⁴ Threatening employers with punitive damages, as in tort actions, may greatly impair the chances of promoting healthier relationships in the workplace.¹⁰⁵ Justice Purtle however, vigorously argues the opposite, stating that "'wrongful discharge' by its very terms is a tort."¹⁰⁶ In adhering to the *Brockmeyer*¹⁰⁷ exclusive contract approach, Arkansas becomes part of a distinct minority, and "by far the

97. See *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (unless an employee identifies a specific expression of public policy, he may still be terminated without cause). One example of non-statutory policy is the Professional Code of Responsibility.

98. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). *Monge* was significant in that the employee's action for wrongful discharge for refusing to go out with her employer was upheld with no reference to statutes or to the constitution.

99. Comment, *supra* note 8, at 387.

100. 294 Ark. at 251, 743 S.W.2d at 387.

101. *Id.* at 254-A, 743 S.W.2d at 386-87.

102. 268 Ark. 269, 596 S.W.2d 681 (1980).

103. Youngdahl, *supra* note 98, at 557.

104. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 487 (1980).

105. *Id.*

106. 294 Ark. at 254-C, 747 S.W.2d at 580.

107. 113 Wis. 2d 561, 335 N.W.2d 834 (1983). See text accompanying note 75.

most regressive state in protecting workers and the public welfare.”¹⁰⁸

The *Oxford* decision may thus prove to the at will employee that “all that glitters is not gold.” While a cause of action for wrongful discharge based on the public policy exception now appears reasonably attainable, a realistic recovery for employer misconduct lies only in the rather unpredictable action for outrage. Nonetheless, at will employees may at least see the opening of the door to the public policy exception continue to widen as Arkansas loosens its long held grasp on the employment at will doctrine.

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108. 294 Ark. at 254-C, 747 S.W.2d at 580.