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Three New Exceptions to the Employment at Will Doctrine—Thompson v. St. Regis Paper Co., 102 Wn. 2d 219, 685 P.2d 1081 (1984)

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THREE NEW EXCEPTIONS TO THE EMPLOYMENT AT WILL DOCTRINE—*Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 685 P.2d 1081 (1984).

In *Thompson v. St. Regis Paper Company*,[1] the Washington Supreme Court limited the employer's right to discharge at will employees by carving out three specific exceptions to the at will rule.[2] This approach is a tentative step toward protection of the interests of employees in Washington. However, because many unjustly discharged employees will be unable to frame a complaint that falls within one of these narrow exceptions, the *Thompson* decision falls short of a comprehensive solution to the problem of unfair discharge.[3]

I. BACKGROUND

Early Washington decisions held that a hiring for an indefinite period constituted a hiring at will and that such employment could be terminated at the employer's discretion without resulting liability.[4] These holdings were consistent with the classical contract theory of the late nineteenth century, which was based on the assumption that individuals have complete social freedom.[5] Unless the duration of the employment relationship

1. 102 Wn. 2d 219, 685 P.2d. 1081 (1984).

2. *Id.* at 228–32, 685 P.2d. at 1087–89. The common law rule that an employee hired for an indefinite term is subject to termination at any time and for any reason is known as the "at will" rule. For a comprehensive treatment of its development, see P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 132–37 (1969); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

3. Estimates of the number of unjustifiable discharges occurring annually in this country vary. Professor Stieber of Michigan State University calculates that 50,000 to 100,000 of the non-union employees discharged every year could get their jobs back if they had access to an impartial tribunal. *See The Employment-At-Will Issue*, (Nov. 22, 1982) LAB. REL. REP. (BNA) vol. 111, No. 23, at 24. Professor Peck of the University of Washington estimates that close to 300,000 discharge and discipline cases in the non-unionized sector would have been negotiated in grievance procedures if they had occurred within a collective bargaining relationship. *See* Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 10 (1979).

4. *See, e.g.*, Webster v. Schauble, 65 Wn. 2d 849, 852, 400 P.2d 292, 294 (1965) (in absence of contract of employment for specified period, employer has right to discharge at any time with or without cause); Lasser v. Grunbaum Bros. Furniture Co., 46 Wn. 2d 408, 410, 281 P.2d 832, 833 (1955) (general or indefinite hiring is at will and either party may terminate at any time); Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 688, 271 P. 878, 879 (1928) (citing H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877), for the proposition that employment of indefinite duration could be terminated at will).

5. *See* Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980).

was specified, the employer was presumed to retain the right to terminate at will.[6]

The application of the at will rule to nineteenth and early twentieth century employment relationships did not produce harsh results for two reasons. First, an individual seldom maintained a long-term employment relationship with any one employer.[7] Job security was not an expectation in the mobile frontier society. Second, employment by another for wages was not the chief source of economic security for most people of that era.[8] The family farm, which provided a back-up subsistence living, and the extended family unit, which offered medical care as well as disability and old age protection, made job security much less important.[9]

With the demise of agrarian society and the extended family, job security took on new significance.[10] As rigid application of the at will rule began to produce inequitable results,[11] courts, armed with modern tort and contract principles, modified the rule.[12]

Two narrow exceptions to the at will rule were recognized in Washington prior to the *Thompson* case.[13] First, a contract for "permanent" or "steady" employment, even though indefinite in duration, is terminable

6. *Id.* at 1825–26.

7. *See* Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 U.M.K.C. L. REV 189, 191 (1983).

8. *Id.*

9. *Id.*

10. *Id.* at 196.

11. Where the rule has been applied as a substantive limitation on contract formation, at will employees have been unable to enforce even explicitly negotiated job termination restraints. *See, e.g.*, Shaw v. S.S. Kresge Co., 328 N.E.2d 775, 779 (Ind. App. 1975) (indefinite duration of employment agreement precluded cause of action for breach of express contract to limit employer's power to discharge). Courts, relying on the at will doctrine, have also dismissed suits against employers who used the termination power to undermine public policy. *See, e.g.*, Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (employee discharged for refusing to falsify medical records denied remedy); Bell v. Faulkner, 75 S.W.2d 612 (Mo. App. 1934) (no cause of action where employee discharged for refusing to vote as instructed by employer).

For criticism of the rule, see generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM L. REV 1404 (1967); DeGiuseppe, *The Effect of the Employment-at-will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URBAN L.J. 1 (1981); Peck, *supra* note 3; Peirce, Mann & Roberts, *Employee Termination At Will: A Principled Approach*, 28 VILL L. REV 1 (1982); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV 481 (1976); Comment, *supra* note 5; Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *Termination of the At Will Employee: The General Rule and the Wisconsin Rule*, 65 MARQ. L. REV 637 (1982); Comment, *Employment At Will: When Must an Employer Have Good Cause for Discharging an Employee?*, 48 MO. L. REV 113 (1983); Note, *Implied Contract Rights to Job Security*, 26 STAN L. REV 335 (1974).

12. *See generally* Annot., 12 A.L.R. 4th 544 (1982).

13. An isolated case that recognized a policy exception is Krystad v. Lau, 65 Wn. 2d 827, 846, 400 P.2d 72, 83 (1965) (termination of at will employee for joining a union violated public policy and provided basis for civil action).

by the employer only for just cause, if there is an implied agreement to that effect.[14] Second, the employer is limited to just cause for discharge in situations where the employee has given consideration in addition to contemplated services.[15]

II. THE *THOMPSON* DECISION

Kenneth Thompson had worked for St. Regis Paper Company for seventeen years when he was asked to resign because he had "stepped on somebody's toes."[16] He sued St. Regis, alleging bad faith and violation of the employment agreeement.[17] The trial court granted St. Regis' motion for summary judgment, finding that an implied contract had not been created and that Mr. Thompson had not given any additional consideration.[18]

The Washington Supreme Court agreed with the trial court that the two previously recognized exceptions to the at will rule did not apply.[19] Nevertheless, the court reversed the grant of summary judgment for St. Regis, holding that there were material issues of fact with regard to three additional exceptions.[20]

First, the court held that an employee and employer may contractually modify a terminable at will relationship.[21] Policies in an employment manual, the court noted, can become part of the employment contract if they are expressly included in the contract negotiations.[22] A question of fact remained, therefore, as to whether Mr. Thompson and his employer had contractually agreed that general policy statements in the employment manual were to be a part of the employment contract.[23]

Second, the court stated that even in the absence of formal bargaining, an employer can be bound by written promises of specific treatment in specific situations if those promises create an atmosphere of job security and fair treatment that induces the employee to remain on the job and not

14. Roberts v. Atlantic Richfield Co., 88 Wn. 2d 887, 894, 568 P.2d 764, 768–69 (1977); Parker v. United Airlines, Inc., 32 Wn. App. 722, 725–27, 649 P.2d 181, 183–84 (1982).
15. Roberts, 88 Wn. 2d at 894–96, 568 P.2d at 768–69.
16. Thompson v. St. Regis Paper Co., 102 Wn. 2d 219, 221, 685 P.2d 1081, 1083 (1984).
17. *Id.* at 221–22, 685 P.2d at 1083.
18. *Id.* at 223, 685 P.2d at 1084.
19. *Id.* at 223, 685 P.2d at 1085.
20. *Id.* at 233–34, 685 P.2d at 1089–90.
21. *Id.* at 228–29, 685 P.2d at 1087.
22. *Id.*
23. *Id.* at 233–34, 685 P.2d at 1089–90.

seek other work.[24] This exception, the court explained, is based on the justifiable reliance the employee places on such promises.[25]

Third, the court recognized a cause of action in tort for wrongful discharge in cases where the discharge contravenes a clear mandate of public policy.[26] This exception, the court said, applies only if the employee can show that a legislatively or judicially recognized public policy has been contravened.[27] A question of material fact is presented, the court concluded, by Mr. Thompson's allegation that he was discharged for instituting accounting practices in compliance with the Foreign Corrupt Practices Act.[28]

The court rejected a broader limitation on the employer's right to terminate an at will employee when it refused to read an implied covenant of good faith and fair dealing into all employment contracts.[29] Such an exception, the court stated, would not strike the proper balance between the employer's interest in running the business and the employee's interest in maintaining employment.[30]

III. ANALYSIS

The employer's absolute right to terminate employees "for good cause, for no cause or even for cause morally wrong,"[31] is inconsistent with the needs and expectations of modern society. Employment and employment-related benefits are now the chief source of economic security for most people.[32] As individuals become increasingly dependent on employment relationships for the "substance of life,"[33] their interest in maintaining those relationships must be recognized. Similarly, where the implementation of public policy is frustrated by the employer's ability to discharge for any reason, accomodation of the conflicting interests must be made. The Washington Supreme Court has now modified the at will rule so that it does not override society's interest in protecting public values. Further modification will be necessary, however, if the employee's increased interest in job security is to be properly protected.

24. *Id.* at 230, 685 P.2d at 1088.
25. *Id.*
26. *Id.* at 232, 685 P.2d at 1089.
27. *Id.*
28. *Id.* at 234, 685 P.2d at 1090.
29. *Id.* at 227, 685 P.2d at 1086.
30. *Id.*
31. Payne v. Western & A. R.R. Co., 81 Tenn. 507, 519–20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134, 138 (1915).
32. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951); *see also* Krauskopf, *supra* note 7, at 196.
33. *See* Krauskopf, *supra* note 7, at 196 (citing F. TANNENBAUM, *supra* note 32, at 9).

A. *Public Interest*

Recognizing a cause of action for wrongful discharge furthers society's interest in implementing its laws and important public policies. Legislatively created rights, such as workers' compensation benefits, are of little use to an employee who must risk job loss in order to secure them.[34] Similarly, the enforcement of certain criminal provisions may be frustrated if employees fear retaliatory discharge for initiating a complaint.[35] Allowing employees to recover for discharges that contravene public policy encourages them to withstand improper demands by their employers.[36] As a result, obstruction of public policy through employer coercion is minimized.

B. *Employees' Interests*

Allowing an at will employee to bring suit based on explicitly negotiated job security provisions protects those employees who possess sufficient bargaining power to demand such provisions. Because prior Washington law was silent on the enforceability of such provisions, it remained possible that the at will rule precluded contractual restrictions on the employer's right to terminate.[37] The court's holding that an employee and employer can contractually modify the terminable at will relationship, however, implies that the at will rule is a rule of construction rather than a rule of substantive limitation on contract formation.[38] This means that the

34. *See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425, 427 (1973) (fear of being discharged will deter employees from filing claims for deserved compensation).

35. *See* Blades, *supra* note 11, at 1412 (employee probably will not risk unrecompensed loss of job by filing complaint against employer).

36. *Id.* at 1414.

37. A court could have found that a contractual agreement limiting the employer's power to discharge was incompatible with employment relationships of indefinite duration. If the employment at will rule requires all employments of indefinite duration to be terminable at will, then the parties to such an employment relationship cannot alter its at will character, even by mutual agreement. This reasoning is implicit in cases holding that the absence of a specific duration of employment precludes inquiry into the existence of contractual restrictions on the employer's power of termination. *See; e.g.*, Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1062–63 (Ind. App. 1980) (covenant not to discharge at will employee for reporting dangerous employer practices unenforceable as a matter of law); Toussaint v. Blue Cross Blue Shield, 79 Mich. App. 429, 262 N.W.2d 848, 851 (1977) (contract of indefinite duration cannot be made other than terminable at will by provisions limiting discharge), *rev'd*, 408 Mich. 579, 292 N.W.2d 880 (1980); Shaw v. S.S. Kresge Co., 328 N.E.2d 775, 779 (Ind. App. 1965) (indefinite duration of employment agreement precluded cause of action based on express contract to limit employer's power to discharge).

38. For a more explicit holding of this type see Pine River St. Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), which stated

> The cases which reason that the at-will rule takes precedence over even explicit job termination restraints, simply because the contract is of indefinite duration, misapply the at-will rule of construction as a rule of substantive limitation on contract formation. . . . There is no reason

parties are now free to contractually limit the situations in which termination would be justified without altering the indefinite duration of the employment.[39]

The exception provides little practical protection, however, because only a few unusually valuable employees will be able to exact such guarantees from their employers.[40] The majority will be offered positions on a take-it-or-leave-it basis with no opportunity to negotiate individual provisions.[41] Thus, this exception will provide a cause of action only for a limited number of unjustly discharged employees.[42]

The employee's interest in job security is furthered to a greater extent by the court's holding that unilateral promises contained in employee policy manuals can, in appropriate situations, bind the employer. Thus, an employee who justifiably relies on specific promises when comparing the relative merits of various employment agreements can now recover if the employer later fails to provide the promised benefits.[43] This holding

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why the at-will presumption needs to be construed as a limit on the parties' freedom to contract. If the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so.

Id. at 628 (citations omitted).

39. Job security provisions that would not change the indefinite duration of the employment relationship are those that establish the bases upon which discharge would be justified, such as good cause, unsatisfactory performance, or incompetence, or those that provide certain procedural protections against unfair discharge, such as a requirement of written warnings, review of termination decision by a supervisor, or a hearing.

40. *See* Blades, *supra* note 11, at 1411–12.

41. *See* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1443 (1975).

42. The employee's freedom to bargain for enforceable job security provisions in an employment contract of indefinite duration should not be undermined by a requirement that the employee furnish consideration in addition to contemplated services in exchange for those provisions. The requirement of additional or special consideration is based on the rationale that where only the employer is obligated to continue the employment relationship, and the employee reserves the right to end it at any time and for any reason, there is no mutuality of obligation. Thus, under this reasoning, unless the employee supplies some additional valuable consideration, the restrictions on the employer's power to terminate cannot be enforced. For cases using this analysis, see Ryan v. J.C. Penney Co., 627 F.2d 836, 838 (7th Cir. 1980); Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.) *cert. denied*, 379 U.S. 914 (1964); Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872, 874 (1936); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587, 590 (1967).

The modern doctrine of consideration, on the other hand, requires only that some consideration support a promise, it does not demand equivalence in the values exchanged. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 comment c (1979); 1A A. CORBIN, CONTRACTS § 152, at 13–17 (1963); Blades, *supra* note 11, at 1419–20. An employee's continued labor should be ample consideration to support both the wages paid and the employer's promises of job security. *See* Pine River St. Bank v. Mettille, 333 N.W.2d 622, 628–29 (Minn. 1983) (employee's continued performance is ample consideration for employer's promises to pay wages and to refrain from arbitrary dismissal); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, 925 (1981) (employee's rendition of services may support employer's promise to pay wage and to refrain from arbitrary dismissal).

43. Although the court did not explicitly rely on § 90 of the RESTATEMENT (SECOND) OF CON-

should discourage employers from making job security promises unless they intend those promises to be binding. As a result, employees will get a better understanding of what, if any, protection their employers actually mean to provide. Their subsequent decisions with regard to other job opportunities can be made on the basis of more accurate information.

Unfortunately, this exception offers no protection to employees whose employers do not promise any procedural protection against unfair termination. Similarly, it provides no protection for employees whose employers retain the discretionary power to modify their promises at any time.[44] Many unfairly discharged employees will therefore be left without a remedy.

In the future Washington courts will encounter employees who have been terminated unfairly and yet who, even under *Thompson,* cannot survive their employers' motions to dismiss. Faced with such cases, the courts should continue to modify the outdated "American" rule.[45] *Thompson* will not be, nor should it be, the last word.

Susan Ward

TRACTS, this exception appears to fit within that framework. Section 90 provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). This section has rarely been used as a basis for recovery in at will employment situations, but there are a few jurisdictions which have used it in related situations. *See* Scott v. Lane, 409 So. 2d 791, 794 (Ala. 1982) (employer who knew that employee was giving up other employment to begin new work under new contract cannot terminate relationship at will); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (pharmacist who gave up other employment to work for new employer allowed to bring suit for failure to employ him); Nilsson v. Cherokee Candy & Tobacco Co., 639 S.W.2d 226, 228 (Mo. App. 1982) (bonus offer may have induced employee to stay and therefore it will be enforced). *See also* Brower v. Holmes Transp., Inc., 430 Vt. 114, 435 A.2d 952, 954 (1981) (discussing cause of action for discharge where employee alleged reliance on job security provisions in employee manual, but holding evidence insufficient); Edwards v. Citibank, N.A., 74 A.D.2d 553, 425 N.Y.S.2d 327, 329 (1979) (Kupferman, J., dissenting) (employer estopped from terminating employment except on specifically stated grounds where employee relied on such representations).

44. The *Thompson* court explicitly recognized that employers could avoid liability based on statements in policy manuals if they reserved the right to modify those statements or to exercise discretion in their application. 102 Wn. 2d at 231, 685 P.2d at 1088.

45. The United States is among the last industrialized countries in the world to not provide general protection against unjust dismissal. For a thorough discussion of the protection offered in other countries see Summers, *supra* note 11, at 508–19.