

April 2004

Bad Facts, Bad Law: Feliciano v. 7-Eleven, Inc. and Self-Defense as a Substantial Public Policy

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BAD FACTS, BAD LAW: *FELICIANO* v. *7-ELEVEN, INC.* AND SELF-DEFENSE AS A SUBSTANTIAL PUBLIC POLICY

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I. INTRODUCTION

The traditional at-will employment rule permitted employers broad discretion to discharge at-will employees without cause or justification. That is, an employer could dismiss an at-will employee at any time, for any reason — good or bad, or for no reason at all.¹ However, the discretion afforded employers by the traditional at-will rule has been steadily eroding over the last half a century.² Significantly, this erosion coincides with the development and expansion of the public policy exception to the at-will employment rule.³ Generally, under the public policy exception, a dismissed employee can recover tort damages if the employee's termination violates a specific public policy interest of the state.⁴

In West Virginia, the “substantial public policy exception”⁵ has evolved into an employer's nightmare. In recent years, the West Virginia Supreme Court of Appeals has shown a propensity to liberally apply the exception, discovering public policies sufficient to support a wrongful discharge claim in “all sorts of unlikely places,” which “[w]ithout the benefit of hindsight, [make] predicting where an employee will find a public policy exception [] difficult.”⁶ For example, the court has discovered substantial public policies supporting a wrongful discharge claim in obscure state regulations governing barbers and

¹ At-will employment is “[e]mployment that is usu[ally] undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.” BLACK'S LAW DICTIONARY 430 (7th ed. 2000). For a discussion of the development of the at-will employment rule in the United States and in West Virginia, see text and notes *infra* Part III.A.

² See 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 3 (4th ed. 1998); see also, e.g., Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 93 (1996) [hereinafter Ballam, *Exploding the Original Myth*]; Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 81 (1995) [hereinafter Ballam, *Revisited*]; Deborah A. Ballam, *The Traditional View on the Origins of the Employment-At-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1, 1 (1995) [hereinafter Ballam, *Myth or Reality*]; Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 632 (1988); Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self-Interest Lie?*, 58 U. CIN. L. REV. 397, 397 (1989); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 70-73 (2000).

³ See 1 PERRITT, *supra* note 2, at 3. The public policy exception is also termed the “public policy tort” or wrongful discharge based on violation of a public policy. See 2 *id.* at 3. The public policy exception is discussed in detail *infra* Part III.B.

⁴ 2 PERRITT, *supra* note 2, at 3.

⁵ In *Harless v. First National Bank*, when the West Virginia Supreme Court of Appeals adopted the public policy exception to the at-will employment doctrine, it used the term “substantial public policy” in its holding. 246 S.E.2d 270, 275 (W. Va. 1978).

⁶ See *Self-Defense: Another Blow to the At-Will Employment Doctrine*, W. VA. EMP. L. LETTER, (Steptoe & Johnson, PLLC, Clarksburg, W. Va.), Jan. 2002, available at LEXIS Legal News, MSWVEM File.

cosmetologists⁷ and governing the licensure of hospitals.⁸ The court has even used the substantial public policy exception to circumvent clear legislative intent expressed in the West Virginia Human Rights Act.⁹ This broad application of the exception increases the attractiveness of the wrongful discharge claim for newly terminated employees and creates uncertainty for employers trying to make difficult personnel decisions.

This Comment generally discusses West Virginia's substantial public policy jurisprudence, focusing on the West Virginia Supreme Court of Appeals' decision in the case of *Feliciano v. 7-Eleven, Inc.*¹⁰ In response to a certified question, the court in *Feliciano* established a substantial public policy exception when an employee uses self-defense in response to a "lethal imminent danger,"¹¹ thus adding the common-law right of self-defense to the growing list of public policies supporting a wrongful discharge claim in the state.

This Comment asserts that the West Virginia Supreme Court of Appeals should not have adopted self-defense as a substantial public policy in *Feliciano*. First, when viewed in light of the heroic nature of the events precipitating *Feliciano*¹² and the case's temporal proximity to the tragic events of September 11, 2001,¹³ *Feliciano* represents the court creating a fact-specific, equitable remedy in an attempt to preserve a cause of action for the plaintiff. Second, three other jurisdictions had earlier considered the issue and expressly rejected self-defense as a public policy exception; however, the *Feliciano* court eschewed the guidance and reasoning of the cases from these other jurisdictions without any meaningful analysis of their persuasive effect.¹⁴

Feliciano leaves employers with little guidance when faced with an employee-employee altercation or an attack on an employee by a non-employee because ultimately the state's courts must determine whether the employee actually faced the requisite "lethal imminent danger" needed to sustain a wrongful discharge claim. The decision creates judicial second-guessing of employer management decisions and conflicts with the other specific public policies expressed by the state legislature, principally those designed to protect employees and the public.¹⁵ Along with other recent public policy exception cases,¹⁶ *Fe-*

⁷ See Syl. Pt. 5, *Kanagy v. Fiesta Salons, Inc.*, 541 S.E.2d 616 (W. Va. 2000).

⁸ See Syl. Pt. 5, *Tudor v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 554 (W. Va. 1997).

⁹ See Syl. Pt. 8, *Williamson v. Greene*, 490 S.E.2d 23 (W. Va. 1997).

¹⁰ 559 S.E.2d 713 (W. Va. 2001).

¹¹ *Id.* at 716.

¹² For a discussion of the facts from *Feliciano*, see *infra* notes 20-25 and accompanying text.

¹³ On October 2, 2001, the case was submitted to the West Virginia Supreme Court of Appeals for consideration. *Id.* at 713. The majority opinion by Justice Davis was filed on November 30, 2001. *Id.*

¹⁴ See *infra* Part V.B.2.

¹⁵ See *infra* Part V.A.1-.2.

Feliciano demonstrates that the West Virginia Supreme Court of Appeals is discovering public policies in dubious places, therefore making it increasingly difficult for employers to predict when a terminated employee may find refuge within the vast confines of the substantial public policy exception. Furthermore, when read in combination with *Blake v. John Skidmore Truck Stop, Inc.*,¹⁷ *Feliciano* places employers, like 7-Eleven, in a potential catch-22: issue a nonresistance policy,¹⁸ which invites problematic enforcement now that *Feliciano* transforms any violation into a question of fact for a jury, or, after an employee gets injured attempting to subdue a robber, be subjected to a deliberate intention claim for failing to provide adequate security measures.

Part II of this Comment outlines *Feliciano*'s factual and procedural history. Part III discusses the evolution and current state of both the at-will employment rule and the substantial public policy exception in the United States and West Virginia. Part IV examines the analysis and reasoning of the *Feliciano* majority while Part V presents several reasons why the West Virginia Supreme Court of Appeals should not have adopted self-defense as substantial public policy exception to the at-will employment rule. Part V is divided into two sections. The first section specifically addresses the negative ramifications of *Feliciano* for employers, employees, the court system, and the public and further demonstrates that self-defense as a public policy conflicts with other clear legislative expressions of public policy, i.e., protecting employees and protecting the public. The second section compares and contrasts *Feliciano* with the out-of-jurisdiction cases the court labeled as supporting its position and with those clearly rejecting self-defense as a public policy exception. Finally, the Comment concludes in Part VI by connecting *Feliciano*'s holding with the court's decision in *Blake*,¹⁹ discussing how together these two cases potentially pose an additional dilemma for employers.

II. STATEMENT OF THE CASE

Antonio Feliciano ("Feliciano") was an at-will sales clerk at a 7-Eleven, Inc. ("7-Eleven") store in Baker Heights, Berkeley County, West Virginia.²⁰ In the early morning of July 14, 2000, while Feliciano and several other employees were working, a masked, armed female entered the store and demanded that the employees give her the money.²¹ Several employees emptied the cash register.²²

¹⁶ See *infra* notes 119-27 and accompany text.

¹⁷ 493 S.E.2d 887 (W. Va. 1997).

¹⁸ This is a policy that instructs employees to cooperate and not to interfere during robberies. For a detailed discussion of these policies, see *infra* notes 93-94.

¹⁹ 493 S.E.2d 887.

²⁰ *Feliciano v. 7-Eleven*, 559 S.E.2d 713, 716 (W. Va. 2001).

²¹ *Id.*

Then, with the assailant focused on another employee, Feliciano grabbed and disarmed her, thereafter subduing her until the local police arrived.²³

To Feliciano's surprise, 7-Eleven — obviously unimpressed by his heroics — subsequently fired him, citing that he had not complied with a company policy prohibiting employees from “subduing or otherwise interfering with a store robbery.”²⁴ Feliciano then filed a suit in Berkeley County Circuit Court, alleging that 7-Eleven had wrongfully discharged him in contravention of a public policy — “exercising his right to self-defense.”²⁵

Seven-Eleven removed the suit to the United States District Court for the Northern District of West Virginia and filed a motion to dismiss.²⁶ The district court ruled that “unless the West Virginia Supreme Court of Appeals holds otherwise, . . . self-defense is not a substantial public policy in West Virginia,” which, if sustained, would have resulted in dismissal of Feliciano's case for failing to state a viable wrongful discharge claim.²⁷ However, the district court certified a question to the West Virginia Supreme Court of Appeals asking, “Whether the right of self-defense is a ‘substantial public policy’ exception to the at-will employment doctrine, which provides the basis for a discharge action?”²⁸ The West Virginia Supreme Court of Appeals answered the question affirmatively, recognizing an exception “whereby an employee may defend him/herself against lethal imminent danger.”²⁹ The court, nevertheless, qualified its holding: an employer can rebut the presumption of wrongful discharge

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 716-17 (citation omitted).

²⁸ *Id.* at 716 (internal quotations omitted). The United States District Court for the Northern District of West Virginia certified this question pursuant to West Virginia Code section 51-1A-3, which provides in pertinent part:

The supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state.

W. VA. CODE § 51-1A-3 (2003). When considering a certified question from a federal district or appellate court, the West Virginia Supreme Court “accord[s] the original court's determination thereof plenary review” but applies a de novo standard of review to the legal issues presented the question. *Feliciano*, 559 S.E.2d at 717 (citing Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 506 S.E.2d 64 (W. Va. 1998); Syl. Pt. 2, *Aikens v. Debow*, 541 S.E.2d 576 (W. Va. 2000)).

²⁹ *Feliciano*, 559 S.E.2d at 716.

by showing that the termination was based on “a plausible and legitimate business reason.”³⁰

Before deciding the issue, the court briefly reviewed the fundamental principles of employment law germane to the case — the at-will employment rule and the substantial public policy exception to the rule.³¹ Part III below elaborates on the basic rules expressed in *Feliciano*, tracking the origins and development of the at-will employment rule and the public policy exception to the rule in both the United States and West Virginia.

III. BACKGROUND

A. *At-Will Employment Rule*

The modern formulation of the at-will employment rule is frequently attributed to Horace Gray Wood’s 1877 treatise on master and servant law³² although the rule’s true historical pedigree has been long a topic of scholarly debate.³³ In his *Treatise on the Law of Master and Servant*, Wood boldly pro-

³⁰ *Id.*

³¹ *Id.* at 717-18.

³² See, e.g., LIONEL J. POSTIC, *WRONGFUL TERMINATION: A STATE-BY-STATE SURVEY*, at xix (1994) (citing H.G. WOOD, *A TREATISE ON THE LAW OF MASTER SERVANT* (1877)); see also *infra* articles cited in note 33.

³³ Compare Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118, 131 (1976) (espousing the traditional view by arguing that, prior to Wood’s formulation of the rule, America followed the English presumption of a yearly hire and requirement of reasonable notice, but that in the late nineteenth century, the at-will rule developed in America “in response to cases presented by a particular group of workers — middle managers” as “an adjunct to the development of advanced capitalism in America”) [hereinafter Feinman, *Development*]; Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 734 (1991) (responding to criticism of his 1976 article by reiterating his earlier thesis and arguing that the at-will rule was not generally accepted when Wood wrote his treatise in 1877 but rather that the issue of duration of employment was in “flux”) [hereinafter Feinman, *Revisited*]; Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 112-13 (1982) (advancing the traditional view by agreeing that none of the cases cited by Wood supported his proposition but arguing, however, that Wood did not say anything “radical” in expressing the at-will presumption but did so in rejecting the annual hiring rule); Summers, *supra* note 2, at 67 (adopting the traditional position and stating that the law was confused at time when Wood wrote treatise); and J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 & n.54 (stating that none of the four cases Wood cited supported him and analyzing the cases), with Ballam, *Exploding the Original Myth*, *supra* note 2, at 94-98 (overviewing the various theories, performing a comprehensive analysis of state law, and criticizing Feinman, Jacoby, and Morris while concluding, like Freed and Polsby, that before Wood’s treatise the at-will rule was the “norm in the United States”); Ballam, *Revisited*, *supra* note 2, at 104-05 (challenging the premise underlying Feinman’s ultimate conclusion; concluding that he was wrong because from colonial times to the nineteenth century New York law and historical evidence demonstrates that the state had always followed the at-will rule); Ballam, *Myth or Reality*, *supra* note 2, at 47-50 (1995) (analyzing employment relationships and employment law developments from colonial

claimed the doctrine of at-will employment as the unmistakable rule in America.³⁴

With us the 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 what time the party may serve. . . . [U]nless their understanding was mutual that service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. . . .³⁵

Thus, under Wood's rule, an employee hired for an indefinite period was presumed to be at-will and therefore "could be fired for any reason or no reason at all."³⁶

times to post-Civil was in Massachusetts, New York, Pennsylvania, and Maryland and concluding that the view that at-will rule suddenly was adopted in the late 1890s "appears to have been a myth" because the at-will rule was always the standard in these states); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 551, 556-57 (1990) (arguing that, although some authorities have deemed "employment at-will . . . a child of unrespectable pedigree, which lurched suddenly into existence in the late nineteenth century," an examination of the cases Wood cited as support and several before his 1877 treatise leave "little question . . . that Wood was articulating an idea that was generally accepted"); and Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment at-Will*, 59 MO. L. REV. 679, 762 (1994) (econometric analysis criticizing Feinman and Jacoby's theses on the at-will rule and concluding that the rule "was not the product of Horace Wood's mistaken analysis of the five cases, nor was it the result of the demands of the capitalist class on their judicial minions" but rather the rule was adopted in the late 1800s by the judiciary as a gatekeeping function "to evaluate evidence concerning performance by white collar, skilled workers").

³⁴ See, e.g., POSTIC, *supra* note 32, at xix; Feinman, *Development*, *supra* note 33, at 126; Feinman, *Revisited*, *supra* note 33, at 735.

³⁵ H.G. WOOD, A TREATISE ON THE LAW OF MASTER SERVANT § 134, at 272 (1877).

³⁶ 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 226 (2d ed. 1999); see Feliciano, 559 S.E.2d at 717-18 ("The practical effect of this doctrine, then, is that 'an at-will employee serves at the will and pleasure of his or her employer and can be discharged at any time, with or without cause.'") (quoting Kanagy v. Fiesta Salons, Inc., 541 S.E.2d 16, 19 (W. Va. 2000)). See generally 1 PERRITT, *supra* note 2, § 1.1-1.63 (overviewing the at-will rule's evolution and origins of public policy exception); POSTIC, *supra* note 32, at xix-xxxvi (discussing the at-will doctrine and including an exhaustive state-by-state survey of the at-will employment rule and the various limitations applied in a table format); ROTHSTEIN, *supra*, § 8.1 (discussing briefly the at-will rule); Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 319-21 (1988) (discussing the historical origin, application, and erosion of the at-will employment rule); Parween Mascari, Note, *What Constitutes a "Substantial Public Policy" in West Virginia for Purposes of Retaliatory Discharge: Making a Mountain out of a Molehill*, 105 W. VA. L. REV. (forthcoming 2004) (manuscript at 1-3, on file with law review); Note, *Protecting*

Regardless of Wood's reasons for stating the at-will employment rule,³⁷ it soon garnered widespread support in the United States, and as the twentieth century neared, the idea that an employee was terminable-at-will was "the unquestioned and central rule of employment law."³⁸ Eventually all states adopted this rule³⁹ and, currently, it applies in every state save Montana, which has

Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931, 1933-37 (1983); *supra* note 33 and articles cited therein (all discussing and debating the historical origins of the at-will employment rule).

There are three important aspects to Wood's rule for employers: the employer can freely impose conditions of employment, discharge employees for any reason at any time, and carry out the discharge in any manner. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 30 (5th ed. 2003).

³⁷ Feiman criticizes Wood for his inadequate explanation and lack of support for his formulation of the rule:

First, the four American cases he cited in support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the employment at will rule was inflexibly applied in the United States, and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed.

Feinman, *Development*, *supra* note 33, at 126 (footnotes omitted); *see also* POSTIC, *supra* note 32, at xix (noting that this formation of the law was contrary to an 1816 treatise on the employment law, but Wood's treatise did not even reference the earlier work and adding that the cases cited in Wood's 1877 treatise as support for his rule "in fact provide no support for the doctrine"). However, other commentators have concluded that the cases Wood relied on "notwithstanding the persistent assertions to the contrary, . . . do indeed support the principle for which Wood cited them" and that the cases provide "ample support for Wood's rule." Freed & Polsby, *supra* note 33, at 554; *see* Morriss, *supra* note 33, at 762 (concluding that the at-will rule "was not the product of Horace Wood's mistaken analysis of five cases"). *But see* Feinman, *Revisited*, *supra* note 33, at 736-39 (disagreeing with Freed and Polsby's analysis of the cases and regarding Wood's rule "as an innovation, unsupported in its definitive terms, which had influence in rigidifying a previously fluid body of law"). Another commentator has concluded that there is "substantial support for the proposition that the United States always has followed the employment-at-will doctrine. . . . [Therefore,] [i]t is now time to put to rest the original myth surrounding employment-at-will, that it was a creation of treatise writer Horace Wood, readily adopted by late nineteenth century jurists intent on protecting the new industrial order." Ballam, *Exploding the Original Myth*, *supra* note 2, at 130.

³⁸ ROTHSTEIN ET AL, *supra* note 36, at 226. For a discussion of the expansion of the at-will employment rule after Wood's proclamation of it, *see* generally Jacoby, *supra* note 33, at 113-16; Shapiro & Tune, *supra* note 33, at 343-347. For a detailed study of how and when states adopted the at-will employment rule, *see* generally Morriss, *supra* note 33.

³⁹ "In the realm of the employer-employee relationship, West Virginia is an 'at-will' jurisdiction." *Cook v. Heck's Inc.*, 342 S.E.2d 453, 457 (W. Va. 1986) (citing *Wright v. Standard Ultramarine & Color Co.*, 90 S.E.2d 459 (W. Va. 1955)). West Virginia first adopted the at-will rule in 1913. *See* Syl. Pt. 1, *Resener v. Watts, Ritter & Co.*, 80 S.E. 839 (W. Va. 1913) ("An employment upon a monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at-will, which either party may at any time determine at his pleasure without liability for breach of contract."). Although acknowledging that the authorities were

adopted a statute limiting termination to just cause.⁴⁰ The at-will employment rule thrived virtually uncontested through the initial half of the twentieth century.⁴¹

Nevertheless, the discretion afforded an employer in terminating at-will employees is no longer absolute.⁴² During the first quarter of the twentieth century, legislatures and courts around the country implemented strategies, e.g. constitutional restrictions,⁴³ statutory restrictions,⁴⁴ and various common-law,

“not wholly in accord,” the West Virginia Supreme Court of Appeals in *Resener* observed that “[t]he doctrine applied by the great majority of the courts, which have so far [by 1913] expressed an opinion on the subject, consists essentially in a complete repudiation of the presumption that a general or indefinite hiring was for a year, and the substitution of another presumption, viz., that such a hiring is a hiring at-will.” *Id.* at 840. In addition to relying on a number of cases from other jurisdictions the court also quoted the famous language from Wood’s treatise. *See id.* (citing WOOD, *supra* note 35, § 136 [sic]). In *Bell v. South Penn Natural Gas Co.*, the court further clarified that “an employment, unaffected by contractual or statutory provisions to the contrary, may be terminated, with or without cause, at the will of either party. . . . When the contract of employment is of indefinite duration it may be terminated at any time by either party.” 62 S.E.2d 285, 288 (W. Va. 1950) (citations omitted). For other West Virginia cases stating the at-will rule, see, for example, *Feliciano*, 559 S.E.2d at 717-18; *Bine v. Owens*, 542 S.E.2d 842, 845 (W. Va. 2000) (per curiam); *Hogue v. Cecil I. Walker Mach. Co.*, 431 S.E.2d 687, 689 (W. Va. 1993); *Mace v. Charleston Area Med. Ctr. Found.*, 422 S.E.2d 624, 629 (W. Va. 1993); *Suter v. Harsco Corp.*, 403 S.E. 2d. 751, 754 (W. Va. 1991); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 181 (W. Va. 1980); *see also Mascari, supra* note 36 (manuscript at 1-3); *Francesca Tan, Cook v. Heck’s: Erosion of Employment at Will in West Virginia*, 89 W. VA. L. REV. 379 (1987).

⁴⁰ *See* POSTIC, *supra* note 32, at xix.; ROTHSTEIN & LIEBMAN, *supra* note 36, at 999. In 1987, Montana enacted the Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2003), which includes as elements of a wrongful discharge claim that “the discharge was not for good cause and the employee had completed the employer’s probationary period of employment.” *Id.* § 39-2-904(1)(b); *see* *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989) (upholding the constitutionality of the Act under a challenge that it violated the right of “full legal redress” within the meaning of Article II, § 16 of the Montana Constitution).

⁴¹ ROTHSTEIN ET AL., *supra* note 36, at 227. Although long ago reputed by the United States Supreme Court, *see* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the right of employers to terminate at-will was essentially “transmuted into a constitutional right” during the early twentieth century. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976); *see* *Adair v. United States*, 208 U.S. 161, 174-75 (1908) (holding that the “right of the employe[e] to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe[e]”), *overruled by* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

⁴² *See Feliciano*, 559 S.E.2d at 718 (quoting *Kanagy v. Fiesta Salons, Inc.*, 541 S.E.2d 616, 623 (W.Va. 2000)). *See generally* 1 PERRITT, *supra* note 2, §§ 2.1-6.78; 2 *id.* §§ 7.1-8.26 (discussing various limits on at-will employment rule); POSTIC, *supra* note 32, at xxiv-xxxvi (discussing the various limitations applied by each respective state); ROTHSTEIN ET AL., *supra* note 36, at 33-131; *Bastress, supra* note 36, at 319-41 (discussing the limits on the at-will employment rule).

⁴³ *Bastress, supra* note 36, at 325-26. Especially in public employment, state and federal constitutional developments have limited the scope of the at-will employment rule. *See id.* Employees cannot be discharged for exercising freedom of speech or freedom of association rights; for their political affiliation; or for their race, gender, national origin, alienage, or religion or when the termination has violated some substantive due process right. *Id.*

contract-based theories,⁴⁵ designed to curtail the perceived harsh, inflexibility of Wood's rule.⁴⁶ Additionally, "[t]he most common widely-accepted common

⁴⁴ Bastress, *supra* note 36, at 321-25 (noting the importance of statutes permitting collective bargaining and unionization; the National Labor Relations Act, 29 U.S.C. §§ 151-169; Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; West Virginia Human Rights Act, W. VA. CODE §§ 5-11-3, -9; and various fair employment, worker's compensation, wage and hours, occupational safety, and pension statutes that prohibit retaliatory discharge for invoking rights under them); *see also* PERRITT, *supra* note 2 (volumes one and two discussing in detail the statutory limitations on the at-will rule, including the Americans with Disabilities Act, 42 U.S.C. § 12112 (2000)); ROTHSTEIN ET AL., *supra* note 36 (discussing these same statutory limitations in volumes one and two); Mascari, *supra* note 36 (manuscript at 7-9, discussing federal and West Virginia statutory exemptions).

⁴⁵ Bastress, *supra* note 36, at 335-40 (discussing some courts' willingness to enforce oral promises and finding exceptions to the Statute of Frauds, apply promissory estoppel, enforce provisions of employer handbooks and policies as creating a contract, and, most importantly, find exceptions based on a breach of the covenant of good faith and fair dealing); *see also* 1 PERRITT, *supra* note 2, at 319-511 (discussing in detail the various contract theories); ROTHSTEIN ET AL., *supra* note 36 (same); Leonard, *supra* note 2, at 647-57 (same); Perritt, *supra* note 2, at 398-99 (same); Mascari, *supra* note 36 (manuscript at 5-7 noting same).

⁴⁶ Commentator Richard Epstein argues that "[t]he judicial erosion of the older position has been spurred on by academic commentators, who have been almost unanimous in their condemnation of the at-will relationship, often treating it as an archaic relic that should be jettisoned along with other vestiges of the nineteenth-century laissez-faire." Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948 & n.4 (1984). He further maintains that the view that "the contract at will has outlived its usefulness . . . is mistaken," *id.* at 951, because "[c]ontracts at will are consistent with public policy and should be welcomed by it, not because they are perfect, but because in many contexts they respond to the manifold perils of employment contracts better than any rivals that courts or legislatures can devise." *Id.* at 952. According to Epstein,

The recent efforts to undermine or abolish the contract at will should be evaluated not in terms of what they *hope* to achieve, whether stated in terms of worker participation, industrial harmony, fundamental fairness, or enlightened employment relations. Instead, they should be evaluated for the generally harsh results that they actually produce. They introduce an enormous amount of undesirable complexity into the law of employment relations; they increase the frequency of civil litigation; and over the broad run of cases they work to the disadvantage of both the employers and the employees whose conduct they govern.

Id. at 953. In sum, "[n]o system of regulation can hope to match the benefits that the contract at will affords in employment relations." *Id.* at 982. However, not all commentators are as optimistic about the virtues of the at-will employment rule as Epstein. For criticisms of the rule, see, for example, Lawrence E. Blades, *Employment At Will Vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967), arguing for establishment of "abusive" discharge claim based in tort to limit the absolute dominion the outmoded at-will rule provides employers over employees and arguing that the policy justifications for the rule no longer justify the right to discharge at-will and employer overreaching; Leonard, *supra* note 2, at 671-74, arguing for courts to abandon the at-will rule in face of legislative apathy and providing three reasons for doing so: (1) "consistency with the overall substance of contemporary employment law," (2) "economics," and (3) "fairness consistent with contemporary concepts of equality and human rights"; Summers, *supra* note 2, lamenting that that the at-will rule has survived and terming it the "divine right" of employers; Summers, *supra* note 41, arguing for total abandon-

law exception . . . imposes liability on an employer who discharges a worker for reasons that contravene a substantial public policy."⁴⁷

These subsequent qualifications have transformed the at-will employment rule from a blanket presumption into a crazy quilt of limitations and exceptions. As one commentator has observed, the traditional at-will rule "has been qualified in so many ways that only bad luck prevents an unjustly discharged employee from fitting his termination into squares that could provide relief. It is the employer's poor luck if the employee's allegations fall into a category that allows him tort damages."⁴⁸ Since the question before the *Feliciano* court only concerned the substantial public policy exception, the following section focuses only on that exception, outlining its adoption in West Virginia and development of its governing principles.

B. Substantial Public Policy Exception to the At-Will Employment Rule

In 1959, the California Court of Appeals created the first "judicial chink" in the collective armor of the at-will employment doctrine when it adopted the public policy exception in *Petermann v. International Brotherhood of Teamsters*.⁴⁹ In 1978, highlighting the national trend spurred by *Petermann*,⁵⁰ the West Virginia Supreme Court of Appeals first recognized the substantial public policy exception in *Harless v. First National Bank*.⁵¹

ment of the at-will rule and the development of a statutory scheme protecting rights of employees from arbitrary and unjust dismissal.

⁴⁷ Bastress, *supra* note 36, at 326; *see also Protecting Employees*, *supra* note 36, at 1931-36. *See generally* 2 PERRITT, *supra* note 2, at 1-126 (thoroughly discussing the public policy exception and its application; includes case annotations); ROTHSTEIN ET AL., *supra* note 36, at 68-81 (discussing the general application of the exception and the four general categories in which the various exceptions usually fall under); Mascari, *supra* note 36 (manuscript at 9-11, 16-29).

⁴⁸ Bastress, *supra* note 36, at 319-20.

⁴⁹ 344 P.2d 25 (Cal. Ct. App. 1959) (holding that right to fire an at-will employee could be limited by either statute or public policy). The public policy exception is recognized in the majority of jurisdictions in the United States. 2 PERRITT, *supra* note 2, at 3; POSTIC, *supra* note 32, at xix-xx. Actually, only six states have considered the public policy exception and rejected it: Alabama, *see Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130, 1131-32 (Ala. 1977); Florida, *see Smith v. Piezo Tech. & Prof'l Admin.*, 427 So. 2d 182, 184 (Fla. 1983); Georgia, *see Goodroe v. Ga. Power Co.*, 252 S.E.2d 51, 52 (Ga. Ct. App. 1978); Louisiana, *see Tolliver v. Concordia Waterworks Dist. No. 1*, 735 So. 2d 680, 682 (La. Ct. App. 1999); New York, *see Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983); and Rhode Island, *see Pacheco v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) (*per curiam*). Additionally, courts in Nebraska have not had the opportunity to consider the issue. *See* 1 PERRITT, *supra* note 2, at 24-61 (citing public policy cases state-by-state); POSTIC, *supra* note 32, at xxiv-xxxvi (doing a state-by-state analysis in table format); ROTHSTEIN ET AL., *supra* note 36, at 261-62 (listing the same states). Arizona has legislatively codified its at-will rule and public policy exception. *See Arizona Employment Protection Act*, ARIZ. REV. STAT. ANN. §§ 23-1501 (West Supp. 2003).

⁵⁰ *See Harless v. First Nat'l Bank*, 246 S.E.2d 270, 273-75 (W. Va. 1978).

⁵¹ 246 S.E.2d 270. For a discussion of *Harless* and the development of the public policy ex-

In *Harless*, the plaintiff, Harless, the office manager of First National Bank's consumer credit department, allegedly told the upper management that the bank was intentionally and illegally engaging in conduct that violated federal and state consumer credit and protection laws.⁵² Several months later, Harless was summarily fired after he reported the violations to the bank's auditor and presented the auditor with incriminating files, which Harless had retrieved from the trash.⁵³ Consequently, Harless filed a suit, arguing that his termination violated a public policy embodied by the state Consumer Credit and Protection Act.⁵⁴ Responding to a certified question, the West Virginia Supreme Court of Appeals held that "the rule giving the employer the absolute right to discharge an at-will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge."⁵⁵

Since *Harless*, West Virginia's substantial public policy exception jurisprudence — mirroring the national development — has focused on four rough categories of protected employee conduct: when an employee (1) exercises a valuable right;⁵⁶ (2) performs a valuable public service;⁵⁷ (3) exposes or complains about employer wrongdoing;⁵⁸ or (4) refuses to engage in unlawful or

ception in West Virginia, see generally Mascari, *supra* note 36 (manuscript at 11-41).

⁵² *Harless*, 246 S.E.2d at 272.

⁵³ *Id.* at 272-73.

⁵⁴ *Id.* at 275. The West Virginia Consumer Credit and Protection Act is currently codified at W. VA. CODE §§ 46A-1-101 to 46A-8-102 (2003).

⁵⁵ *Harless*, 246 S.E.2d at 275. The West Virginia Court of Appeals has further added that "one of the fundamental rights of an employee is a right not to be the victim of a retaliatory discharge, that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy." *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001) (quoting *Kanagy v. Fiesta Salons, Inc.*, 541 S.E. 2d 616, 620 (W. Va. 2000) (citations omitted)).

⁵⁶ See, e.g., *Mace v. Charleston Area Med. Ctr. Found*, 422 S.E.2d 624 (W. Va. 1992) (rights under Veteran's Reemployment Rights Act); *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W. Va. 1990) (holding right to privacy provides right to refuse to take drug test when the test is not based upon reasonable suspicion or the employee's job does not involve public safety); *McClung v. Marion County Comm'n*, 360 S.E.2d 221 (W. Va. 1987) (right to petition for redress of grievances and seek access to courts by filing action for overtime wages); *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984) (right to privacy encompasses right to refuse to take polygraph test); *Shanholtz v. Monogahela Power Co.*, 270 S.E.2d 178 (W. Va. 1980) (right to file worker's compensation claims).

⁵⁷ See, e.g., *Page v. Columbia Natural Res.*, 480 S.E.2d 817 (W. Va. 1996) (testifying truthfully in a legal action).

⁵⁸ See, e.g., *Kanagy*, 541 S.E.2d 616 (providing truthful information to investigator concerning employer regulatory violations); *Tudor v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 554 (W. Va. 1997); *Slack v. Kanawha County Hous. & Redevel. Auth.*, 423 S.E.2d 547 (W. Va. 1992) (informing federal prosecutors of improprieties in operation of housing authority); *Collins v.*

unethical conduct.⁵⁹ These categories, although “not wholly distinct,” generally demonstrate the nature of employee conduct protected from employer retaliation.⁶⁰

Since individual states have established their own lists of derivative sources, the key issue in determining whether an employee’s termination has triggered some substantial public policy is not always clear because defining what constitutes a public policy is problematic. One court has termed this “the Achilles heel” of the public policy exception.⁶¹ As noted by the West Virginia Supreme Court of Appeals, “the outlines of public policy are elusive, describing the concept as nebulous and hard to define.”⁶² According to commentators, across the states “[t]here is a spectrum of opinions regarding the proper bases for identifying ‘public policies.’”⁶³

Elkay Mining Co., 371 S.E.2d 46 (W. Va. 1988) (refusing to falsify safety reports concerning mine safety inspection); *Wiggins v. E. Associated Coal Corp.*, 357 S.E.2d 745 (W. Va. 1987); *Harless*, 246 S.E.2d 270 (attempting to force employer to comply with consumer credit protection laws).

⁵⁹ See, e.g., *Lilly v. Overnight Transp. Co.*, 425 S.E.2d 214 (W. Va. 1992) (refusing to operate a motor vehicle with unsafe brakes).

⁶⁰ *Bastress*, *supra* note 36, at 326 (identifying and discussing cases from West Virginia and other jurisdictions fitting into each of the four categories); see also *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 379 (Wash. 1996) (identifying the same four categories); *ROTHSTEIN ET AL.*, *supra* note 36, at 261-79 (framing the four categories as (1) refusing to perform unlawful acts, (2) reporting illegal activity (whistleblowing), (3) exercising legal rights, and (4) performing public duties); Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a “Public Policy” Exception to the Employment-At-Will for Domestic Violence Victims*, 59 ANN. SURV. AM. L. 121, 134 (2003) (outlining categories as “(1) discharges for refusing to violate criminal or civil laws; (2) discharges for satisfying legal or civic obligations; (3) discharges for exercising statutory or constitutional rights or privileges; and (4) discharges for reasons deemed repugnant to public policy”); cf. *Mascari*, *supra* note 36 (manuscript at 17-29, categorizing cases by sources of public policy: the West Virginia and United States Constitution, federal and state statutes, the common law, administrative regulations, and other reasons).

⁶¹ *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

⁶² *Wounaris v. W. Va. State Coll.*, 588 S.E.2d 406, 412 (W. Va. 2003) (per curiam) (citations and quotations omitted); see *Mascari*, *supra* note 36 (manuscript at 16, indicating that what constitutes a substantial public policy is hard to define).

⁶³ *Bastress*, *supra* note 36, at 331. The narrowest form of the public policy exception requires that the policy be derived from clear and specific legislation designed to protect employees and, to state a claim, the plaintiff must show the employer contravened some specific part of that legislation. See *id.* However, courts adopting a more expansive view of public policy have taken one or more of the following steps:

- (1) Extended the kinds of state interests to be vindicated from only those protecting workers to include general concerns regarding public health, safety, welfare, morals, etc.;
- (2) Derived public policies not only from specific legislative provisions but also from broadly stated legislative goals; and
- (3) Expanded the sources for identifying public policies beyond those stated in legislation to include administrative regulations and executive rules, codes of ethics of professional organizations, constitutional provisions, and judicial decisions.

In general, however, “[p]ublic policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good even though no actual injury may have resulted therefrom in a particular case to the public.”⁶⁴ The substantial public policy exceptions “were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public interest.”⁶⁵

In West Virginia, the courts look to “established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions” to identify sources of substantial public policies.⁶⁶ But, “[i]nherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person.”⁶⁷ Furthermore, “‘substantial public policy’ implies that the policy will be clearly recognized simply because it is substantial. An employer should not be exposed to liability where a public pol-

Id.

According to Professor Perritt’s book, *Employee Dismissal Law and Practice*, the clarity element, that is, finding a public policy clear enough to support a wrongful discharge claim, can be satisfied in four basic ways, with diminishing effectiveness as one descends the hierarchy:

1. By identifying a specific provision of a statute, constitution, or administrative regulation
2. By synthesizing from several different statutes or constitutional provisions
3. By identifying a right or mode of conduct covered by the traditional common law cause of action
4. By identifying a well-recognized professional standard of trade practice.

2 PERRITT, *supra* note 2, at 21.

⁶⁴ Feliciano v. 7-Eleven, Inc., 559 S.E.2d 713, 718 (W. Va. 2001) (quoting Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 114 (W. Va. 1984) (citations and quotations omitted)).

⁶⁵ *Id.* at 724 (Maynard, J., dissenting).

⁶⁶ *Birthisel v. Tri-Cities Health Serv. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992). *But see* *Wounaris v. W. Va. State Coll.*, 588 S.E.2d 406, 413 (W. Va. 2003) (per curiam) (indicating that the court “sometimes struggle[s] with just what constitutes a substantial public policy issue that would prevent an at-will employee from being fired”). In West Virginia, there was no precise answer as to what constituted a substantial public policy principle until *Birthisel*. The standard for defining the sources of substantial public policies prior to *Birthisel* was quoted with approval from *Allen v. Commercial Casualty & Insurance Co.*, 37 A.2d 37 (N. J. 1944), which set forth the following broad sources: “among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and states governments relating to and affecting the safety, health, morals and general welfare of the people.” *Birthisel*, 424 S.E.2d at 611 (quoting *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111, 114 (W. Va. 1984)) (quotations omitted).

⁶⁷ *Birthisel*, 424 S.E.2d at 612.

icy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.”⁶⁸ Therefore, to be substantial, a public policy must not only be recognizable as such but also “must be so widely regarded as to be evident to employers and employees alike.”⁶⁹ In *Feliciano*, the United States District Court for the Northern District of West Virginia’s certified question provided the West Virginia Supreme Court of Appeals an opportunity to decide whether the common-law right of self-defense fit within this public policy exception rubric.⁷⁰

IV. FELICIANO MAJORITY OPINION

Writing for the majority, Justice Davis answered the certified question affirmatively, holding that, when an at-will employee has been fired after exercising self-defense in response to a “lethal imminent danger,” the right to use self-defense represents a substantial public policy exception to the at-will employment rule and thus can be used as a basis for a wrongful discharge claim.⁷¹ Nevertheless, the majority added that the employer may rebut the wrongful discharge presumption by a showing that the termination was based “upon a plausible and legitimate business reason.”⁷²

The majority initially noted that, in West Virginia, determining whether a public policy exists is a question of law.⁷³ Then, after a cursory overview of the at-will employment principles⁷⁴ and the basics of the substantial public policy exception,⁷⁵ the court probed the relevant sources⁷⁶ seeking a clear expression of self-defense as a substantial public policy. No such expression was found in either the West Virginia Constitution or the state’s statutes.⁷⁷ However, the majority gave much credence to the state’s jurisprudential history, explaining that “[it] clearly demonstrates the existence of a public policy favoring an individual’s right to defend him/herself.”⁷⁸

⁶⁸ *Id.* at 613.

⁶⁹ *Feliciano*, 559 S.E.2d at 718.

⁷⁰ *Id.*

⁷¹ *Id.* at 722-23.

⁷² *Id.* at 724.

⁷³ *See id.* at 717 (citing *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984)).

⁷⁴ *See id.* at 717-18. For a detailed discussion of the at-will employment rule in West Virginia, see *supra* note 39.

⁷⁵ *See id.* at 718. For a detailed discussion of the public policy exception in West Virginia, see *supra* Part III.B.

⁷⁶ *See* text accompanying note 66.

⁷⁷ *See Feliciano*, 559 S.E.2d at 718-19.

⁷⁸ *Id.* at 719.

After an extensive and detailed analysis of the nature of self-defense, the circumstances in which self-defense can be used, and the procedural rules governing self-defense as an affirmative defense in West Virginia,⁷⁹ the court stated that West Virginia has previously “recognized that the right to self-defense extends to one’s place of employment.”⁸⁰ Thus, to the majority, “it [went] without saying that an individual’s right to self-defense in West Virginia has been sufficiently established in and clarified by our State’s common law so as to render it a substantial public policy.”⁸¹

Noting that employers also have a duty to protect their customers and employees, the court, attempting to balance this duty with the employee’s right to use self-defense, held that the employee’s right “must necessarily be limited in its scope and available in only the most dangerous of circumstances,” that is, “in response to lethal imminent danger.”⁸² The court established that the employer can rebut the presumption of wrongful discharge “by demonstrating that it had a plausible and legitimate business reason for terminating its employee.”⁸³

The court concluded its opinion by adopting a new four-element test for a wrongful discharge action “as guidance for future cases”:⁸⁴

- (1) [Whether a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
- (2) [Whether] dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element).
- (3) [Whether t]he plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element).
- (4) [Whether t]he employer lacked

⁷⁹ *Id.* The court used a self-defense definition from *State v. Hughes*: “A defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.” 476 S.E.2d 189, 195 (W. Va. 1996) (citation omitted). See generally *Feliciano*, 559 S.E.2d at 719 (discussing other general definitions from West Virginia cases in footnote six, West Virginia cases concerning the reasonableness standard in footnote seven, West Virginia cases defining circumstances in which a person may claim self-defense in footnote eight, and the various procedural rules that govern assertion of self-defense as an affirmative defense in footnote nine).

⁸⁰ *Feliciano*, 559 S.E.2d at 722 (quoting Syl Pt. 7, *State v. Laura*, 116 S.E. 251 (W. Va. 1923) (“[I]n defending himself, his family or his property from the assault of an intruder, one is not limited to his immediate home or castle; his right to stand his ground in defense thereof without retreating extends to his place of business also and where it is necessary he may take the life of his assailant or intruder.”)).

⁸¹ *Id.* at 722.

⁸² *Id.* at 722-23.

⁸³ *Id.* at 723.

⁸⁴ *Id.*

overriding legitimate business justification for the dismissal (the overriding justification element).⁸⁵

V. WHY SELF-DEFENSE SHOULD NOT CONSTITUTE A SUBSTANTIAL PUBLIC POLICY EXCEPTION

A. *Negative Consequences of Feliciano*

1. Increases Risk to Public and Conflicts with Other Expressions of Public Policy

In his dissent, Justice Maynard asserted that the self-defense public policy exception could do “more harm than good.”⁸⁶ Probably, one of the most frequent instances where an employee would face a “lethal imminent danger” would be in the context of an armed robbery of a gas station or convenience store.⁸⁷ Although nothing in *Feliciano* specifically prohibits these businesses

⁸⁵ *Id.* at 723 (citing *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365 (6th Cir. 1999)); see also *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 382 (Wash. 1996) (adopting same elements). In the court’s opinion, this “succinct summation merely reiterates” the previous procedures that had been applied by West Virginia courts. *Feliciano*, 559 S.E.2d at 723. Prior to *Feliciano*, the scheme of proof required for a wrongful discharge action was as set forth in *Page v. Columbia Natural Resources, Inc.*:

[O]nce the plaintiff in an action for wrongful discharge based upon the contravention of a substantial public policy has established the existence of such policy and established by a preponderance of the evidence that an employment discharge was motivated by an unlawful factor contravening that policy, liability will then be imposed on a defendant unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.

480 S.E.2d 817, 829 (W. Va. 1996).

The origin of the four-element test adopted in *Feliciano* and cited in *Godfredson* and *Gardner* can be traced to Professor Perritt’s book, *Employee Dismissal Law and Practice*. See 2 PERRITT, *supra* note 2, at 4-5. In *Godfredson*, the court cited *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 321 (Ohio 1997), as the source of its authority for the test. *Godfredson*, 173 F.3d at 375. In turn, *Kulch* cited a law review article written by Professor Perritt that was partially based on his book. *Kulch*, 677 N.E.2d at 321; see Perritt, *supra* note 2. In *Employee Dismissal Law and Practice*, Professor Perritt discusses the ins and outs of the four-prong test, including how to approach the individual analysis under each element, and also lists cases from other jurisdictions demonstrating how the analytical framework operates. Perritt’s book may provide a good barometer of how the test will be applied in West Virginia.

⁸⁶ *Feliciano*, 559 S.E.2d at 725 (Maynard, J., dissenting).

⁸⁷ “The rate of work-related homicides exceeded 10 times the national average for gas station attendants, sales counter clerks, and police and detectives in the public sector. . . .” GUY TOSCANO & WILLIAM WEBER, U.S. DEP’T OF LABOR, VIOLENCE IN THE WORKPLACE 44 (1994), <http://stats.bls.gov/iif/oshwc/cfar0005.pdf>. “Workers in retail establishments, such as convenience stores, retail groceries, and restaurants . . . account for about half of all homicides, but make up

from issuing policies advocating non-resistance during robberies, the decision does afford employees the discretion to “take justice into their own hands” instead of obeying the employer’s policy. Should the employee choose to assert his right to self-defense under these circumstances, there is a high probability that the employee, other employees, or innocent patrons will be injured in the ensuing mêlée.⁸⁸ Therefore, even though volumes of case law recognize the common-law right to self-defense, the employer’s interest in being able to enforce a policy like 7-Eleven’s — designed to protect the safety and welfare of its employees and the general public — should be given greater deference than this individual right.⁸⁹

Additionally, recognizing self-defense as a public policy exception conflicts with other clear expressions of public policy promulgated by the West Virginia Legislature that emphasize protecting the safety and welfare of the public and employees. First, the purpose statement of the Convenience Food Stores

only a sixth of the Nation’s work force.” *Id.* In terms of occupation and industry, the workers most likely to be robbery-homicide victims are those who engaged in cash transactions, work alone or in small numbers, work in high-crime areas, sell or guard valuables, work at locations with few people and easy escape routes. *See* ERIC SYGNATUR & GUY A. TOSCANO, U.S. DEP’T OF LABOR, WORK-RELATED HOMICIDES: THE FACTS, COMPENSATION AND WORKING CONDITIONS 3, 4 (2000) (“Occupations that fit these characteristics are diverse, from managers to sales workers, guards to taxi-cab drivers.”), <http://www.bls.gov/pub/cwc/archive/spring2000art1.pdf>.

According to a 1995 Bureau of Labor Statistics report, one out of every six (1,024) of the 6,210 work-related fatalities was the result of a homicide, making it the second leading cause of job-related death. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CFOI 96-2, JOB-RELATED HOMICIDE PROFILED (1996), <http://www.bls.gov/iif/oshwc/cfoi/cftb0065.pdf>. Additionally, “[m]ost of the workplace homicides appear to result from robberies or robbery-attempts. Typically, these robberies involved store personnel, gas station attendants, or taxicab drivers being shot for cash receipts.” *Id.* Also in 1998, homicides accounted for 12% of the 6,026 work-related fatalities and of the 428 homicides where the victim-assailant relationship could be identified, two-thirds involved robbery. SYGNATUR & TOSCANO, *supra*, at 3. Therefore, in the 1992-1998 period, robbery accounted for 68% of the homicides in which the victim-assailant association was identifiable. *Id.* at 4. The *National Census of Fatal Occupational Injuries in 2000* revealed workplace homicides increased for the first time since 1994, *see* BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, USDL 01-261, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000, at 1 (2001), <http://www.bls.gov/iif/oshwc/cfoi/cfnr0007.pdf>, and that robbery was again the primary motive for work-place homicides. *See* ROSEMARY J. ERICKSON, ATHENA RESEARCH CORP., SELECTED SUMMARY OF BUREAU OF LABOR STATISTICS REPORT ON WORKPLACE VIOLENCE IN 2000, at 1, 2 (2001). According to the same report, grocery store homicides, which includes convenience stores, saw a 42% increase in 2000. *Id.*

⁸⁸ *See infra* note 93.

⁸⁹ *Cf. Escalante v. Wilson’s Art Studio, Inc.*, 135 Cal. Rptr. 2d 187, 193 (Ct. App. 2003) (“Not every right guaranteed to citizens by statute, or even the Constitution, is one which society has a rooting interest in seeing exercised. For example, the right of privacy . . . includes a woman’s right to have an abortion But that does not mean society is encouraging abortion. Instead, it is merely allowing the decision to be made by individuals, according to their own interests.”).

Safety Act (“Act”)⁹⁰ clearly evidences a strong public policy in favor of protecting the welfare of employees and customers:

The Legislature finds that it is necessary to the safety, health, public interest and general welfare of the people of the state of West Virginia that convenience food stores operating in the state be regulated to prevent the ever-present danger to the safety, health, life and general welfare of its citizens and the employees of these stores.⁹¹

Included in the Act are provisions for robbery prevention training and development of written robbery prevention programs to aid in achieving this purpose.⁹² Robbery prevention policies, like the one 7-Eleven enforced against Feliciano, usually instruct employees not to confront or resist attempted robberies.⁹³ These policies are based on the statistically proven premise that a clerk is less likely to be murdered if he or she cooperates with and appeases the assailant rather than attempts to thwart the robbery.⁹⁴ Therefore, it is clear that policies like 7-

⁹⁰ W. VA. CODE §§ 21-13-1 to -5 (2003).

⁹¹ *Id.* § 21-13-1 (Purpose).

⁹² *Id.* § 21-13-3(4) (“Any owner or employee who works between the hours of twelve o’clock a.m. and five o’clock a.m. at a convenience food store shall be trained in robbery prevention by the owner. Owners shall develop a written robbery prevention program which shall be available for inspection during regular business hours at each convenient food store, and shall base the training on the program.”).

⁹³ Seven-Eleven’s non-resistance policy at issue in *Feliciano* is just one aspect of a broader robbery and violence prevention program. Its current program is based on a data from several research studies. See Rosemary J. Erickson & Arnie Stenseth, *Crimes of Convenience*, SECURITY MGMT., Oct. 1996, at 60, 60. First, in the 1970s, the Southland Corporation, which owned and operated 7-Eleven stores, funded research by the National Institute of Justice Western Behavioral Sciences Institute (“WBSI”). *Id.* WBSI, using 7-Eleven stores to study robberies occurring at convenience stores, experimented with different techniques, such as lowering cash levels, increasing visibility and lighting, and training store employees not to resist, all in an effort to reduce robberies. *Id.* Because of the experimental techniques, robberies decreased 30 percent, and therefore, Southland instituted the program in all of its stores in 1976. *Id.* Then, in 1985, 7-Eleven supported an Athena Research Corporation study of armed robbers in prison in an effort to update the earlier research. See W.J. Crow et al., *Set Your Sights on Preventing Retail Violence*, SECURITY MGMT., Sept. 1987, at 60. Subsequently, in 1987, the National Association of Convenience Stores endorsed the 7-Eleven robbery and violence prevention program and adopted it for use by its member companies. See Erickson & Stenseth, *supra*, at 60. This research was again updated in 1995 by another Athena Research Corporation study of armed robbers that was supported by 7-Eleven. See ROSEMARY J. ERICKSON, ARMED ROBBERS AND THEIR CRIMES 1-96 (1996) [hereinafter ARMED ROBBERS]. Additionally, 7-Eleven’s program has incorporated other government, association, and university research as well as utilized many years of field experience from 7-Eleven and other convenience stores.

⁹⁴ There is “essentially universal agreement among law enforcement officials and criminologists that when faced with a gun in a commercial robbery, the victim should not resist.” Crow et al., *supra* note 93, at 62. Therefore, “[t]he public needs to learn that resistance against a gun is not

an act of courage but a form of suicide.” *Id.* Justice Maynard noted that 7-Eleven prohibits employees from interfering with attempted robberies out of recognition of the fact that employees who interfere with robbers are not only much more likely to suffer injuries themselves but are also more likely to cause harm to bystanders. *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 725 (W. Va. 2001) (Maynard, J., dissenting).

Several studies performed over the past twenty-five years emphasize that an enforced policy of non-resistance can reduce robbery-related deaths. As reported in 1986, a robbery study by Zimring and Zuehl, analyzing robbery data in Chicago for a one-year period, revealed that “[a]ctive resistance accounted for 82 percent of commercial robbery killings.” Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, J. LEGAL STUD., Jan. 1986, at 1, 18 n.32 [hereinafter *Chicago Study*]. Commercial robberies involving active resistance were estimated to be “forty-nine” times more likely than non-resistance cases to end in the victim’s death. *Id.* at 18. Furthermore, the study revealed that active non-cooperation — which included “refusal, flight, and physical force,” the type of resistance used in *Feliciano* — was “associated with a death risk . . . approximately fourteen times as great as cooperation or passive non-cooperation.” *Id.* Passive non-cooperation, where the “victim usually says he or she has no money, proved to be “about twice as likely to produce a lethal outcome as no resistance.” *Id.* The authors of the study therefore concluded that “[l]oss of life in robbery is *strongly* associated with active victim *resistance*.” *Id.* at 18 (emphasis added).

A year later, Dr. Rosemary Erickson co-authored an article that reported on a 1985 Athena Research Corporation study interviewing 181 convicted armed robbers, which reiterated the importance of non-resistance. See generally Crow et al., *supra* note 93. The study reemphasized the findings of the *Chicago Study*. When the researchers asked the robbers why people get hurt in robberies, the robbers said, “[B]ecause they wouldn’t give up the money, because they tried to fight, or because they tried to resist.” *Id.*

Finally, Dr. Erickson authored a book reporting on Athena Research Corporation’s 1995 survey that was designed to update the 1985 research. See ARMED ROBBERS, *supra* note 93, at 1-96; see also Erickson & Stenseth, *supra* note 93, at 60. This survey polled 310 armed robbers in a total of twenty different prisons from three different states. See ARMED ROBBERS, *supra* note 93, at 13. The robbers’ responses echoed the 1985 advice:

When asked why people are hurt in robberies, the answers generally looked as if they came right out of a training manual for clerks, advising victims not to resist . . . Nearly half (45%) said the victim resists or the victim tries to be a hero (26%). Then, when asked what advice they would give to someone to keep from getting hurt, the responses were almost the same, with over half saying to cooperate with the robber (53%), and 29% saying “give up the money.” Other advice included not making sudden moves, “don’t talk,” “don’t stare” and “don’t be a hero”.

Id. at 52-53. Accordingly, a combined total of 71% of the robbers said that victims get hurt because they resist; furthermore, 82% of the robbers advised victims to cooperate and just give up the money. *Id.* at 52.

As a result of the aforementioned research, government agencies with regulatory control over the workplace, in their effort to reduce workplace violence and homicide, have also emphasized non-resistance. For example in 1993, the National Institute for Occupational Safety and Health, through the Centers for Disease Control, issued an alert on preventing work-related homicide, which included avoiding resistance to robbery as one of its suggested preventive measures. See CTR. FOR DISEASE CONTROL, U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. 93-109, PREVENTING HOMICIDE IN THE WORKPLACE 5 (1993). Then, in 1998, the Occupational Safety and Health Administration issued recommendations for late-night retailers, in which it recommended that employers train employees in turning over money during a robbery and in not offering resis-

Eleven's actually serve the greater societal interests and are consistent with public policy since they are directed at the specific public interests of protecting both the public and store employees.

Second, in West Virginia Code section 21-3-1, the West Virginia Legislature expressed a strong public policy for protecting employee safety and welfare.⁹⁵ Since "[e]very employer shall furnish employment which shall be reasonably safe for the employees therein engaged," this statute creates an unambiguous duty for employers.⁹⁶ More explicitly, the statute outlines the manner in which this duty is to be fulfilled by expressing that employers not only "shall furnish and use *safety devices* and *safeguards*" but also "shall adopt and use *methods and processes* reasonably adequate to render employment and the place of employment safe."⁹⁷ Beyond these requirements, the statute mandates that employers "do *every other thing reasonably necessary* to protect the life, health, safety, and welfare of such employees."⁹⁸

By firing Feliciano for violating its nonresistance policy — a *safeguard* clearly designed and proven to ensure worker safety, 7-Eleven was conceivably only taking action it deemed as "*reasonably necessary* to protect the life, health, safety, and welfare of [its] employees."⁹⁹ An employee who fails to comply with a nonresistance policy creates a greater safety risk for himself and other employees because that employee increases the likelihood that he or she or another employee will be killed or injured during the robbery.¹⁰⁰ Firing such an employee for violating the policy therefore should be valid under section 21-3-1 because it is a reasonably necessary action designed to protect the safety of other employees. A public policy allowing for self-defense in this situation clearly conflicts with the employer's duty to take what it considers to be rea-

stance. OSHA, U.S. DEP'T OF LABOR, OSH 3153, RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION PROGRAMS IN LATE-NIGHT RETAIL ESTABLISHMENTS 8 (1998), <http://www.osha.gov/Publications/osha3153.pdf>. Moreover, these recommendations specifically acknowledged 7-Eleven's successful robbery and violence deterrence program, which included the non-resistance policy at issue in *Feliciano*. See *id.* at 6.

The lesson for commercial retailers is then clear — "establish a policy of nonresistance and give it top priority in training programs. Failure to provide adequate training may expose employers to claims of negligence in providing a safe work." Crow et al., *supra* note 93, at 62.

⁹⁵ The purpose of this section is to guarantee workers that their workplace will be safe. *Burdette v. Columbia Gas Transmission Corp.*, 480 S.E.2d 565, 566 (W. Va. 1996).

⁹⁶ W. VA. CODE § 21-3-1 (2003).

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.* (emphasis added).

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ See *supra* note 94.

sonably necessary action to protect the life, safety, and welfare of its employees.¹⁰¹

In response to the employee's claim of wrongful discharge for using self-defense, the North Carolina Court of Appeals in *McLaughlin v. Barclays American Corp.*¹⁰² stated that "[w]e do not perceive the kind of deleterious consequences for the general public, if we uphold [the employer's] action."¹⁰³ In *Feliciano*, there were likewise no deleterious consequences for the general public from 7-Eleven firing Feliciano. The threat to the public comes from employees exercising the right of self-defense under these dangerous circumstances.

2. Determining Whether "Lethal Imminent Danger" Existed and Judicial Second-Guessing

The *Feliciano* majority narrowed its holding by including the language "response to lethal imminent danger" and establishing a rebuttable presumption for the employer.¹⁰⁴ Therefore, *Feliciano* probably would not preclude an employer from firing an employee who exercised self-defense in a case with facts analogous to *McLaughlin*.¹⁰⁵ In that case, Barclays fired McLaughlin following a scuffle with one of his subordinates, in which the subordinate punched him and McLaughlin threw up his hand, striking the subordinate in the face in response.¹⁰⁶ The North Carolina Court of Appeals rejected McLaughlin's wrongful discharge claim based on violation of his right to use self-defense.¹⁰⁷

Suppose, however, that the employee in *McLaughlin* had been a small, thin man and his attacker had been much taller and heavier. With these added facts, it is conceivable that in post-*Feliciano* West Virginia, the employee could now claim that the attacker's size and weight posed a "lethal imminent danger." Initially, the employer would have to consider whether the employee acted in self-defense and whether "lethal imminent danger" actually existed. But even if the employer concluded that no such danger existed and thereafter fired the employee, *Feliciano* has opened the door for this employee to file a wrongful dis-

¹⁰¹ See *Escalante v. Wilson's Art Studio, Inc.*, 135 Cal. Rptr. 2d 187, 193 (Ct. App. 2003). "[S]tatutes imposing upon employers a duty to maintain a safe work place actually work against the [plaintiff], rather than supply him with a public policy to sustain his [wrongful discharge] claim [based on self-defense]." *Id.* at 193 (citing CAL. LAB. CODE § 6401 (2003), which provides in pertinent part that "every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees"); see also *id.* ("[T]he maintenance of a safe workplace, for the benefit of all employees, is an important interest that *could not* be bargained away.").

¹⁰² 382 S.E.2d 836 (N.C. Ct. App. 1989).

¹⁰³ *Id.* at 840.

¹⁰⁴ *Feliciano v. 7-Eleven, Inc.* 559 S.E.2d 713,724 (W. Va. 2001).

¹⁰⁵ 382 S.E.2d 836.

¹⁰⁶ *Id.* at 838.

¹⁰⁷ *Id.* at 837.

charge claim, in which the court system will second-guess the employer and make the ultimate determination as to whether the employee faced the requisite level of danger.¹⁰⁸ In other words, because of *Feliciano*, each time an employer fires an employee who claims self-defense, a jury will have to determine whether a “lethal imminent danger” actually existed, thus placing employer management decisions in the court system’s overburdened hands.¹⁰⁹

3. Leaves Employers Without Guidance and Demonstrates the Unpredictability of the Public Policy Exception

As *Feliciano* evidences, the West Virginia Supreme Court of Appeal’s application of the substantial public policy exception as an equitable device leaves employers unable to predict when a terminated employee may find safe-harbor in a previously unidentified substantial public policy. The important lesson from *Birthisel v. Tri-Cities Health Service Corp.*, which the *Feliciano* court discussed but seemingly ignored, is that “[a]n employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.”¹¹⁰ Significantly, the court in *Feliciano* added that to be “substantial,” the public policy “must not just be recognizable as such but must be so widely regarded as to be evident to employers and employees alike.”¹¹¹ Self-defense as a public policy is too general and vague to be evident to employers.¹¹²

By holding otherwise, the *Feliciano* majority ignored *Birthisel*’s lesson as well as its own directives. The majority emotionally responded to the incredible facts before it, creating a fact-specific, equitable remedy in an attempt to secure *Feliciano* a cause of action, instead of strictly adhering to the state’s public policy exception framework.¹¹³ As Chief Justice Holmes once wrote,

¹⁰⁸ See *Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 342 (Pa. Super. Ct. 1988). Whether an employee experienced a “lethal imminent danger” is a question of fact, and the standard is mostly subjective, but the burden of production does not shift back to the employee once the employer shows a legitimate reason for terminating; therefore, it will be almost impossible for a court to get rid of meritless claims by motion.

¹⁰⁹ As discussed further *infra* Part V.B.2., other jurisdictions have specifically declined to adopt self-defense as a public policy, in part, because of this problem.

¹¹⁰ *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001) (quoting *Birthisel v. Tri-Cities Health Serv. Corp.*, 424 S.E.2d 606, 612 (W. Va. 1992)).

¹¹¹ *Id.* at 718.

¹¹² For cases from other jurisdictions concluding that self-defense is not a clear mandate of public policy, see discussion *infra* Part V.B.2.a-b.

¹¹³ The West Virginia Supreme Court of Appeals considered *Feliciano* in the month following the tragic events of September 11, 2001. See *Feliciano*, 559 S.E.2d at 713 (indicating that the case was submitted to the court on October 2, 2001 and the court filed its opinion on November 30, 2001). If you recall, one of the great stories to emerge from that terrible day was the heroism of the passengers on Flight 93, who attacked their high-jackers and successfully diverted the plane

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.¹¹⁴

In *Feliciano*, with the facts exerting the “hydraulic pressure,” the majority bent the settled principles of the public policy exception to dictate what it thought to be an equitable resolution.¹¹⁵ The majority, however, never acknowledged the negative consequences that prompted other jurisdictions to earlier reject self-defense as a public policy exception.¹¹⁶ In his dissenting comments in *Gardner v. Loomis Armored Inc.*,¹¹⁷ Washington Supreme Court Justice Madsen criticized, “The result of the majority’s analysis is that the public policy exception to employment-at-will now applies to a fifth, completely incompatible category; that is, where this court disagrees with an employer’s definition of just cause for termination, as set forth in the workplace rules.”¹¹⁸ This criticism is equally applicable to the majority’s decision in *Feliciano*.

Other recent West Virginia cases also demonstrate that the Supreme Court of Appeals is discovering public polices in a variety of places.¹¹⁹ For ex-

from its intended target. Due to the overwhelming support and praise for the passengers’ use of self-defense and the temporal proximity of this case to September 11th, one can easily see how the West Virginia court could have been motivated by Feliciano’s heroics. However, “[c]ourts should proceed cautiously when making public policy determinations. No employer should be subject to suit merely because a discharged employee’s conduct was praiseworthy or because the public may have derived some benefit from it.” *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wisc. 1983).

¹¹⁴ *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

¹¹⁵ However, a federal jury was not quite as convinced that Feliciano was wrongfully terminated in this case as the majority. In October 23, 2002, in the United States District Court for the Northern District of West Virginia, a jury found, after a short deliberation, that Feliciano had not been terminated in contravention of the substantial public policy of self-defense. *See Feliciano v. 7-Eleven, Inc.*, No.3:00cv89 (N.D. W. Va. Oct. 25, 2002) (order entering judgment against Feliciano).

¹¹⁶ *See infra* Part V.B.2.a-b.

¹¹⁷ 913 P.2d 377, 387 (Wash. 1996).

¹¹⁸ *Id.* at 387 (Madsen, J., dissenting). For a discussion of *Gardner*, see *infra* notes 153-171 and accompanying text.

¹¹⁹ *See Public Policy Revisited: An Increasingly Attractive Opportunity for Employees*, W. VA. EMP. L. LETTER, (Steptoe & Johnson, PLLC, Clarksburg, W. Va.), June 2002, available at LEXIS Legal News, MSWVEM File.

ample, in *Kanagy v. Fiesta Salons, Inc.*,¹²⁰ the West Virginia Supreme Court of Appeals discovered a substantial public policy in regulations governing the Board of Barbers and Cosmetologists that require all licensees to report violations of regulations to the Board.¹²¹ The dissent in *Kanagy* reasoned that “a substantial public policy now can be found in the most obscure and petty State regulation and used to further erode the employment-at-will-doctrine. When you consider that executive agencies churn out rules like Stephen King churns out novels, this is a scary development.”¹²² Also, in *Tudor v. Charleston Area Medical Center, Inc.*,¹²³ an employee, claiming wrongful discharge after she was terminated for complaining about staffing, convinced the court that a substantial public policy existed in regulations covering licensure of hospitals.¹²⁴ The court has even used the public policy exception to circumvent clear legislative intent expressed in the West Virginia Human Rights Act,¹²⁵ by holding in *Williamson v. Greene*,¹²⁶ that

even though a discharged at-will employee has no statutory claim for retaliatory discharge under . . . the West Virginia Human Rights Act . . . the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act. . . .¹²⁷

¹²⁰ 541 S.E.2d 616 (W. Va. 2000).

¹²¹ *Id.* at 622-23.

¹²² *Id.* at 624 (Maynard, J., dissenting).

¹²³ 506 S.E.2d 554 (W. Va. 1997).

¹²⁴ *Id.* at 567.

¹²⁵ W. VA. CODE §§ 5-11-1 to -9 (2003).

¹²⁶ 490 S.E.2d 23 (W. Va. 1997).

¹²⁷ *Id.* at 33. In *Williamson*, the plaintiff did not have a claim under the West Virginia Human Rights Act (“WVHRA”) because her employer did not meet the definition of employer under the Act as proscribed by the Legislature. *Id.* at 28; see W. VA. CODE § 5-11-3(d) (requiring that, to be considered an employer under the WVHRA, the employer must “employ[] twelve or more persons within the state”). Despite the clear legislative mandate that the WVHRA not apply unless the employer in question met the definition in § 5-11-3(d), the court held that the policy expressed in the Act was sufficient to create a public policy exception. *Williamson*, 490 S.E.2d at 33. *But see* *Travis v. Alcon Laboratories, Inc.*, 504 S.E.2d 419, 433-34 (W. Va. 1998).

In *Travis*, the West Virginia Supreme Court of Appeals rejected an argument from a white, male plaintiff, under the age of forty, that “the West Virginia Human Rights Act in general, and W. Va. Code, 5-11-2 [1994] in particular, establishes a substantial public policy that no individual may be deprived of his human rights or civil rights for any reason in West Virginia.” *Id.* at 433.

Along with *Feliciano*, these cases demonstrate not only that employers will have more difficulty determining when terminating an employee violates a substantial public policy but also show that the future of the at-will rule appears dark. Analyzing cases like *Feliciano* has led one commentator to conclude that “[t]he future of employment-at-will . . . is that it has no future,”¹²⁸ but rather “[o]ne of the most important developments in employment law in the first decade of the new millennium will be the express acknowledgement of the death of this doctrine.”¹²⁹ *Feliciano* provides another blow to the weary doctrine in West Virginia.

B. *A Closer Look at Self-Defense Public Policy Cases Mentioned by the Majority*

Although an issue of first impression for the state, West Virginia was not the first jurisdiction to address whether self-defense is a public policy exception to the at-will employment rule. In the *Feliciano* majority opinion, Justice Davis mentioned that other jurisdictions confronted with the issue have reached varied conclusions.¹³⁰ This statement is somewhat misleading. On one hand, the court cited three cases, which it said stand for the proposition that self-

Instead, the court looked to the *express language* of the WVHRA, stating the “question is whether the individual was discriminated against because of race, religion, color, national origin, ancestry, sex, age [defined as over forty in the WVHRA], blindness, or handicap.” *Id.*; see W. VA. CODE §§ 5-11-2, 5-11-3(k) (2003). Accordingly, the court held that “no general public policy against harassment in the workplace is created by the West Virginia Human Rights Act for purposes of West Virginia wrongful discharge law.” *Travis*, 504 S.E.2d at 433.

According to one commentator, cases like *Williamson* are prime examples of judicial activism. See Mascari, *supra* note 36 (manuscript at 39).

In *Williamson*, the court effectively lifted the small business exemption of the WVHRA by holding an employer with less than twelve employees liable under a *Harless* claim public policy exception despite the lack of a constitutional, statutory, administrative, or common law basis. The decision . . . could also allow plaintiff employees to maintain a *Harless* claim where their employers fail to meet the definition of an “employer” under the WVHRA for other reasons, such as independent contractor relationship. This misuse of the *Harless* cause of action renders definitions and exceptions contained in WVHRA meaningless and expands the scope of the Act beyond what the legislature intended.

Id.

¹²⁸ Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L. J. 653, 686 (2000); see also Bastress, *supra* note 36, at 341 (stating that the “at-will doctrine is reeling”). But see Summers, *supra* note 2, at 73 (“The employer’s divine right to dismiss at any time, for any reason, without notice has survived with vigor.”); *Id.* at 84 (stating that “the conception of the employment relation as one of employer dominance and employee subservience continues to be a powerful, if not a prevailing, force in American labor law”).

¹²⁹ Ballam, *supra* note 128, at 686.

¹³⁰ See *Feliciano v. 7-Eleven*, 559 S.E.2d 713, 723 n.10 (W. Va. 2001).

defense constitutes a substantial public policy: *Babick v. Oregon Arena Corp.*,¹³¹ *Ellis v. City of Seattle*,¹³² and *Gardner v. Loomis Armored, Inc.*¹³³ Of these cases, however, only *Gardner* has even remotely analogous facts and none of the cases frame the public policy at issue as the right to use self-defense, therefore begging the question: Why did the *Feliciano* court cite these as supporting self-defense as a public policy exception?

On the other hand, the opinion briefly mentioned three cases, *McLaughlin v. Barclays American Corp.*,¹³⁴ *Bagwell v. Peninsula Regional Medical Center*,¹³⁵ and *Scott v. Extracorporeal, Inc.*,¹³⁶ which have all clearly rejected self-defense as a substantial public policy. However, the majority eschewed the collective wisdom of these cases without explaining why the reasoning therein was unpersuasive or inapplicable to the case before it.

The first subsection below breaks down the first set of cases, emphasizing that they fail to provide any guidance on the self-defense issue in *Feliciano*. The next subsection discusses the second set of cases, focusing on the arguments that prompted these other jurisdictions to reject self-defense as a substantial public policy.

1. Self-Defense as a Public Policy Exception Not at Issue

In *Feliciano*, the majority first cited the Oregon Court of Appeals' disposition of *Babick v. Oregon Arena Corp.*¹³⁷ as authority that self-defense is a substantial public policy, but that case is no longer good law because the Oregon Supreme Court has since reversed the intermediate court's ruling on the wrongful discharge claim.¹³⁸ Nevertheless, the case is discussed below to demonstrate that it did not consider the issue of self-defense as a public policy exception.

In *Babick*, the plaintiffs were security officers hired to provide security and medical assistance at events held in the defendant's arena.¹³⁹ The defendant trained these officers in arrest protocol and defense tactics, but after some of the officers arrested some fans and attempted to arrest others at a concert, the defendant terminated the officers who performed the arrests as well as those who

¹³¹ 980 P.2d 1147 (Or. Ct. App. 1999), *rev'd in part* by 40 P.3d 1059 (Or. 2002).

¹³² 13 P.3d 1065 (Wash. 2000).

¹³³ 913 P.2d 377 (Wash. 1996).

¹³⁴ 382 S.E.2d 836 (N.C. Ct. App. 1989).

¹³⁵ 665 A.2d 297 (Md. Ct. Spec. App. 1995).

¹³⁶ 545 A.2d 334 (Pa. Super. Ct. 1988).

¹³⁷ 980 P.2d 1147 (Or. Ct. App. 1999), *rev'd in part* by 40 P.3d 1059 (Or. 2002).

¹³⁸ *Babick v. Oregon Arena Corp.*, 40 P.3d 1059 (Or. 2002).

¹³⁹ *Id.* at 1060.

were not involved and even those who were not working that night.¹⁴⁰ All the officers were fired because of the lawful actions of those officers at the concert.¹⁴¹ In response, the discharged officers filed suit, alleging that they had been “wrongful[ly] discharge[d] . . . for fulfilling an important societal duty, *i.e.*, arresting lawbreakers.”¹⁴² As support for their position, the plaintiffs cited statutes regulating the licensing and training of private security personnel, permitting private persons to make arrests, and permitting persons to use physical force in making an arrest.¹⁴³

The Oregon Supreme Court, nevertheless, concluded that neither the statutes brought to its attention nor those the Court of Appeals relied upon supported a conclusion that “some substantial public policy requires the kinds of acts that allegedly triggered plaintiffs’ discharge”; thus, no wrongful discharge claim was stated.¹⁴⁴ Unlike *Feliciano*, the *Babick* plaintiffs neither pleaded that they were fired for using self-defense nor argued that self-defense supported their wrongful discharge claim. Therefore, since both the Oregon Court of Appeals and the Oregon Supreme Court lacked an opportunity to address the issue of self-defense as a public policy, it is unclear how this case could stand for the proposition that self-defense constitutes a substantial public policy exception.

*Ellis v. City of Seattle*¹⁴⁵ was the second case cited in *Feliciano* as support for finding that self-defense qualifies as a substantial public policy. In *Ellis*, the Supreme Court of Washington was faced with determining whether the plaintiff, a sound technician at a Seattle-area arena, presented sufficient evidence to survive a motion for summary judgment on his wrongful discharge claim.¹⁴⁶ The arena’s fire alarm system contained a feature where after the alarm was triggered, it shut off the arena’s public address system (“PA”) — a feature which allowed emergency officials to use microphones in another room to direct audience members to safety in the event of a fire.¹⁴⁷ Knowing that the fire department had not authorized his employers to bypass the PA shut-off feature, Ellis — concerned about the potential danger to the public — refused to disable it in spite of insistence from his employer.¹⁴⁸ Thereafter, Ellis was terminated for his refusal.¹⁴⁹ In response, he filed a wrongful discharge claim.¹⁵⁰

¹⁴⁰ *Id.*

¹⁴¹ *Babick*, 980 P.2d at 1148.

¹⁴² *Babick*, 40 P.3d at 1060.

¹⁴³ *See id.* at 1062.

¹⁴⁴ *Id.* at 1063.

¹⁴⁵ 13 P.3d 1065 (Wash. 2000).

¹⁴⁶ *Id.* at 1066.

¹⁴⁷ *Id.* at 1067.

¹⁴⁸ *Id.* at 1067-69.

¹⁴⁹ *Id.* at 1069.

The Washington Supreme Court held that terminating Ellis for raising questions about the legality of by-passing the PA component jeopardized the clear public policy of following the fire code mandate permitting only certified persons to work on fire alarm systems.¹⁵¹

When considering the facts and issues, it is perplexing how *Ellis* actually relates to the issue of self-defense as a substantial public policy. Neither the facts nor the public policy implicated relate to self-defense. Accordingly, *Ellis* cannot be reasonably characterized as supporting the proposition that self-defense constitutes a substantial public policy.

Turning to the third case cited in *Feliciano, Gardner v. Loomis Armored, Inc.*¹⁵² similarly involves a heroic employee being fired for violating a company policy. The plaintiff, Gardner, was a driver and guard for the defendant's armored-vehicle company.¹⁵³ At a bank stop, Gardner stayed in the vehicle's driver compartment while his partner entered the bank.¹⁵⁴ Shortly thereafter, he observed the bank's manager running out of the bank, screaming as a man armed with a knife chased her.¹⁵⁵ As she ran by the armored vehicle, the manager cried to Gardner for help.¹⁵⁶ But, as Gardner exited the vehicle to assist the manager, the attacker released her and grabbed another employee, who he dragged into the bank.¹⁵⁷ Gardner proceeded into the bank where he and his partner subdued and disarmed the attacker.¹⁵⁸ Similar to 7-Eleven's response in *Feliciano*, Gardner's employer terminated him for violating a "fundamental" company rule forbidding armored truck drivers from leaving the truck unattended,¹⁵⁹ a violation which the employee handbook set forth as grounds for termination.¹⁵⁹ Gardner filed a wrongful discharge suit in federal court claiming contravention of a public policy thereby prompting the federal court to certify a question to the Supreme Court of Washington.¹⁶⁰

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1074 ("Public policy should encourage the safe operation of fire alarm systems, and Ellis was furthering that policy by refusing, as an uncertified electrician, to work on the fire alarm system to alter the way it was designed to operate, in the absence of authority for doing so.").

¹⁵² 913 P.2d 377 (Wash. 1996).

¹⁵³ *Id.* at 378.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 379.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The United States District Court for the Eastern District of Washington certified this question to the Supreme Court of Washington: "Does it violate public policy in the State of Washington to discharge an at-will employee for violating a company rule in order to go to the

Relying on the same four-part wrongful discharge analysis adopted in *Feliciano*,¹⁶¹ the Washington Supreme Court evaluated whether three different sources of public policy met the clarity element, i.e., whether any clear mandate of public policy existed. Of the three sources Gardner offered, none were framed as self-defense: (1) a public policy encouraging citizens to assist in law enforcement; (2) a public policy embodied in the Rescue and Good Samaritan Doctrines, i.e., a policy encouraging others in need of care; and (3) a public policy encouraging the aid of a citizen in danger of serious physical injury or death.¹⁶²

Most of the *Gardner* majority's analysis focused on the third policy argument. According to the majority, "[s]ociety places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions."¹⁶³ The court accordingly framed the public policy in question as protecting human life.¹⁶⁴ As evidence of this public policy, the majority cited cases where protection of human life subordinates certain constitutional rights¹⁶⁵ and cases and statutes where protection of human life serves as a defense to criminal charges — self-defense, defense of others, and the defense of duress.¹⁶⁶ However, instead of specifically determining whether self-defense alone constituted a public policy exception, the *Gardner* majority synthesized "policies from a number of laws which [were] only tangentially related to the public policy which the majority want[ed] to find."¹⁶⁷ Thus, in its synthesis, the court did not cite these self-defense cases and statutes as proof that the right to use self-defense is a clear expression of public policy, as was the case in *Feliciano*, but rather to show that self-defense was one piece of a broader public policy puzzle. The dissent, objecting that self-defense was even evidence of the broader policy of saving others from harm, stated that "self-defense [is] aimed at protecting persons from criminal [or civil] prosecution — not at encouraging citizens to help those in need."¹⁶⁸

Moreover, the dissent warned that the *Gardner* majority had thrust a new burden upon the Washington courts. That is, "[u]nder the guise of a claim

assistance of a citizen held hostage at the scene of a crime, and/or who is in danger of serious physical injury and/or death?" *Id.*

¹⁶¹ See *supra* note 85 and accompanying text.

¹⁶² See *Gardner*, 913 P.2d at 381-82.

¹⁶³ *Id.* at 383.

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 384. For example, the court cited warrantless searches based on the exigent circumstances of preventing harm to officers or individuals as an exception to the Fourth Amendment.

¹⁶⁶ *Id.* at 384.

¹⁶⁷ *Id.* at 388 (Madsen, J., dissenting).

¹⁶⁸ *Id.* at 389 (Madsen, J., dissenting) (quotations and citations omitted).

that the public policy exception to the terminable at-will doctrine should apply, courts will now be forced to analyze an employer’s work rules to determine whether they provide a proper cause for termination.”¹⁶⁹ Like the Washington court in *Gardner*, the West Virginia court in *Feliciano* also failed to appreciate this consequence of its decision, an error made more glaring when one considers that courts in other jurisdictions, prior to *Feliciano*, had found this slippery slope a compelling reason to reject self-defense as a public policy exception.¹⁷⁰

2. Refusing to Adopt Self-Defense as a Public Policy Exception

a. North Carolina — *McLaughlin v. Barclays American Corp. and Maryland — Bagwell v. Peninsula Regional Medical Center*

McLaughlin v. Barclays American Corp.,¹⁷¹ a North Carolina decision, and *Bagwell v. Peninsula Regional Medical Center*,¹⁷² a Maryland decision, are interconnected because the court in *Bagwell* relied upon *McLaughlin* as authority for its holding that self-defense does not constitute a public policy exception to the at-will employment rule. Because of this interrelatedness, this subsection discusses the two cases in conjunction with one another.

In *Bagwell*, the plaintiff, Bagwell, worked as a security officer at the defendant hospital.¹⁷³ While Bagwell was on late-night duty in the emergency room, a patient was brought in, who was having seizures induced by overconsumption of alcohol.¹⁷⁴ Drugs given to the patient en route to the hospital had stopped the seizures; nevertheless, the patient trashed violently and berated the hospital staff with verbal abuse, even threatening to kill them if not released.¹⁷⁵ Bagwell, complying with the attending physician’s orders, joined with other staff in restraining the patient.¹⁷⁶ While secured with leather straps, the patient bit Bagwell on the wrist — prompting him to strike the patient on the head.¹⁷⁷ After the incident, Bagwell was terminated. In response, he filed sev-

¹⁶⁹ *Id.* at 392 (Madsen, J., dissenting).

¹⁷⁰ *See infra* Part V.B.2. a-b.

¹⁷¹ 382 S.E.2d 836 (N.C. Ct. App. 1989).

¹⁷² 665 A.2d 297 (Md. Ct. Spec. App. 1995).

¹⁷³ *Id.* at 302.

¹⁷⁴ *Id.* at 303.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* In this case, there was a dispute as to whether Bagwell responded reflexively in self-defense or later hit the patient in retaliation. However, in reviewing the lower court’s summary judgment of the case, the court looked at the facts in the light most favorable to Bagwell and determined that he had reacted in self-defense. *See id.* at 306.

eral causes of action, including a wrongful discharge claim.¹⁷⁸ Bagwell argued that his termination contravened two public policies: his duties as a security officer and his right to self-defense.¹⁷⁹ As support for his self-defense argument, Bagwell relied on *Watson v. Peoples Security Life Insurance*, which held that a person's right to seek legal redress for actionable torts represents a public policy exception to the at-will doctrine.¹⁸⁰

The Maryland Court of Special Appeals, however, rejected Bagwell's self-defense argument for two reasons. First, the court distinguished *Watson*, stating the case "never considered whether the right to act violently, even in self-defense, is protected by a clear mandate of public policy."¹⁸¹ Second, the court found the North Carolina Court of Appeals' reasoning in *McLaughlin v. Barclays American Corp.*¹⁸² to be particularly persuasive.¹⁸³

In *McLaughlin*, the plaintiff, McLaughlin, was counseling one of his subordinates, but during their conversation, the subordinate grew argumentative, and McLaughlin asked him to leave the room, which the subordinate refused to do.¹⁸⁴ McLaughlin decided that he would just leave the room instead, but as he neared the door, the subordinate punched him in the chest.¹⁸⁵ In response, McLaughlin threw up his hand to defend himself, and in the process, struck the subordinate in the face.¹⁸⁶ Several days after the incident, Barclays fired McLaughlin.¹⁸⁷ Thereafter, McLaughlin filed a wrongful discharge claim in which he urged the court to recognize self-defense as a public policy exception.¹⁸⁸

The North Carolina Court of Appeals rejected McLaughlin's self-defense argument. The court first emphasized that North Carolina's public policy exception cases have "focused on the harm to the public at large."¹⁸⁹ Accordingly, the courts in both *McLaughlin* and *Bagwell* held that in the facts before them, public policy implications were not present and there were no "dele-

¹⁷⁸ See *id.* at 302.

¹⁷⁹ *Id.* at 310.

¹⁸⁰ See *id.* at 312 (citing *Watson v. Peoples Sec. Life Ins.*, 588 A.2d 760 (Md. 1991) (involving an employee discharged for suing a co-worker for assault and battery)).

¹⁸¹ *Id.* at 312.

¹⁸² 382 S.E.2d 836 (N.C. Ct. App. 1989).

¹⁸³ *Bagwell*, 665 A.2d at 312.

¹⁸⁴ *McLaughlin*, 382 S.E.2d at 837.

¹⁸⁵ *Id.* at 838.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 838-39.

¹⁸⁹ *Id.* at 840.

terious consequences for the general public” if the discharges were upheld.¹⁹⁰ Second, both courts looked to whether bad faith was involved.¹⁹¹ Although the courts determined that the employer decisions at issue may have been “indifferent and illogical,” both courts emphasized that they did not “demonstrate the kind of bad faith that has prompted courts to recognize causes of action [for wrongful discharge].”¹⁹² Third, the *McLaughlin* court realized that finding a cause of action in this case would open the floodgates, i.e., “every employee involved in an altercation would assert a self-defense justification, spawning the very deluge [of spurious claims previously] warned against.”¹⁹³ The *Bagwell* court also found this argument convincing.¹⁹⁴

Although the facts in these two cases were not as emotionally charged as those in *Feliciano*, all three jurisdictions dealt with the same question of law: whether firing an employee for using self-defense “has a tendency to be injurious to the public or against the public good.”¹⁹⁵ As both *McLaughlin* and *Bagwell* first emphasized, firing an employee for an altercation, even though he or she claims self-defense, does not result in any injurious consequences for the public at-large. The *Feliciano* majority, however, never addressed why firing someone for exercising self-defense injures or threatens the public or is against the public good. Instead, the *Feliciano* court focused solely on the wealth of West Virginia civil and criminal cases that have recognized self-defense as an individual defense to civil and criminal liability.¹⁹⁶ However, Maryland, North

¹⁹⁰ *Id.* at 840, *quoted in*, *Bagwell v. Peninsula Reg’l Med. Ctr.*, 665 A.2d 297, 312 (Md. Ct. Spec. App. 1995).

¹⁹¹ *See McLaughlin*, 382 S.E.2d at 840; *Bagwell*, 665 A.2d at 312-13.

¹⁹² *McLaughlin*, 382 S.E.2d at 840, *quoted in*, *Bagwell*, 665 A.2d at 312-13.

¹⁹³ *McLaughlin*, 382 S.E.2d at 840.

¹⁹⁴ *See Bagwell*, 665 A.2d at 313.

¹⁹⁵ *Feliciano v. 7-Eleven*, 559 S.E.2d 713, 718 (W. Va. 2001) (quotations and citations omitted).

¹⁹⁶ The California Court of Appeals recently considered whether an employer could fire an employee for using his “constitutionally-guaranteed right to self-defense” in *Escalante v. Wilson’s Art Studio, Inc.*, 135 Cal. Rptr. 2d 187, 188 (Ct. App. 2003), *review denied*, No. S117605, 2003 Cal. LEXIS 6651 (Cal. Sept. 10, 2003) (unpublished opinion). While the court conceded that “the laws of our state certainly *allow* one to engage in self-defense,” *id.* at 191, the court concluded that “nothing in any of these provisions . . . specifically encourages individuals to exercise their right of self-defense in a given situation for the benefit of the public.” *Id.* at 192. Moreover, the court added, “Not every right guaranteed to citizens by statute, or event the Constitution, is one which society has a rooting interest in seeing exercised.” *Id.* In a comment particularly relevant to the West Virginia Supreme Court’s hasty determination that “an individual’s right to self-defense in West Virginia has been sufficiently established in and clarified by our State’s common law so as to render it a substantial public policy,” *see Feliciano*, 559 S.E.2d at 722, the California court added that “the Penal Code provisions do nothing more than establish that reasonable self-defense is not a crime itself. But exempting certain conduct from criminal sanction is not the same as advocating it.” *Escalante*, 135 Cal. Rptr. at 192.

Carolina, and Pennsylvania,¹⁹⁷ all states that rejected self-defense as a public policy exception pre-*Feliciano*, have also recognized self-defense as an affirmative defense in the civil and criminal contexts.¹⁹⁸

Additionally, the *McLaughlin* and *Bagwell* courts warned that finding self-defense as a public policy would open the floodgates to wrongful discharge claims based on this exception. As emphasized before,¹⁹⁹ the *Feliciano* court failed to heed this warning, and thus, has created a situation where employers now have little guidance and management decisions concerning how to handle fighting or disruptive employees will be second-guessed by the courts. The problem of judicial second-guessing of employer management decisions was the exact basis for the Superior Court of Pennsylvania's rejection of self-defense as a public policy exception in *Scott v. Extracorporeal, Inc.*²⁰⁰

b. *Pennsylvania — Scott v. Extracorporeal, Inc.*

The following facts were before the court in *Scott*. The plaintiff had been arguing with a co-worker.²⁰¹ Following a joint meeting with their supervisor, the co-worker hit the plaintiff from behind, knocking her unconscious.²⁰² While on the ground, the co-worker jumped on the plaintiff and pulled her hair.²⁰³ The plaintiff was fired for the fight, and subsequently filed a wrongful discharge claim against the defendant company.²⁰⁴ She claimed that self-defense was a public policy exception to the at-will employment rule and that this public policy was embodied in a statute justifying the use of self-defense.²⁰⁵ The Pennsylvania Superior Court, however, disagreed, holding

¹⁹⁷ See *infra* Part V.B.2.b.

¹⁹⁸ Maryland, *see, e.g.*, *DeVaughn v. State*, 194 A.2d 109 (Md. 1963) (self-defense as defense to criminal liability); *Balt. Transit Co. v. Faulkner*, 20 A.2d 485 (Md. 1941) (self-defense as a defense to civil liability); North Carolina, *see, e.g.*, *State v. Webster*, 378 S.E.2d 748 (N.C. 1989); *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (both stating the rule for use of self-defense as a defense to criminal liability); Pennsylvania, *see* 18 PA. CONS. STAT. ANN. § 503(a) (West 2003) (statute outlining the defense of justification in the criminal context); *id.* § 505; *Kitay v. Halpern*, 158 A. 309, 310 (Pa. Super. Ct. 1932) (stating that the law governing self-defense in civil cases is much the same as that in criminal cases; i.e., “while a man may inflict grievous bodily harm or kill another in self defense, he may not do so if he has other probable means of escape”).

¹⁹⁹ See *supra* Part V.A.1-3.

²⁰⁰ 545 A.2d 334 (Pa. Super. Ct. 1988).

²⁰¹ *Scott*, 545 A.2d at 335.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 335-36.

²⁰⁵ See *id.* at 340-41 (citing 18 PA. CONS. STAT. ANN § 505 which states: “The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other

in the context of the facts of this case, the public policy asserted by [the plaintiff] — the right to exercise self-defense — strikes entirely too near the employer’s legitimate interest To reverse [the lower court’s holding against the plaintiff] would have the unwise effect of transferring to the judicial forum the duty of evaluating the propriety of management decisions.²⁰⁶

Because of *Feliciano*, West Virginia is the lone jurisdiction to have addressed the issue and declared that self-defense constitutes a substantial public policy exception to the at-will employment rule. In so holding, the *Feliciano* majority ignored arguments against such a position that these other jurisdictions found quite compelling.²⁰⁷ By not following the guidance of *McLaughlin*,

person on the present occasion.”).

²⁰⁶ *Id.* at 342-43 (quotations and citations omitted).

²⁰⁷ Since *Feliciano*, only one other jurisdiction, California, has addressed self-defense as a public policy exception. The California court in *Escalante v. Wilson’s Art Studio, Inc.*, also found that the right to use self-defense did not support the plaintiff’s wrongful discharge claim. 135 Cal. Rptr. 2d 187 (Ct. App. 2003), *review denied*, No. S117605, 2003 Cal. LEXIS 6651 (Cal. Sept. 10, 2003) (unpublished opinion); *see supra* note 195. In *Escalante*, the plaintiff, Escalante, was physically attacked by a co-worker. *Escalante*, 135 Cal. Rptr. 2d at 189. At one point, Escalante left the room where the incident occurred, but the co-worker followed him and eventually threw a box of screws, striking Escalante in the back. *See id.* Thereafter, Escalante abandoned his retreat, rushed his co-worker and grabbed him in a bear hug. *Id.* At this time, the co-worker hit Escalante in the head with a large metal cap, which caused a gash on Escalante’s head resulting in substantial bleeding. *Id.* Disagreeing with his decision to abandon his flight, Escalante’s employer terminated him after hearing his side of the story. *Id.* Escalante thereafter brought a wrongful discharge claim based on violation of his right to use self-defense. *Id.* at 1189-90.

After a jury award in favor of Escalante, his employer moved for judgment notwithstanding the verdict and for a new trial on the grounds that the damages were excessive and that self-defense was not the type of public policy that supports a wrongful discharge claim. *Id.* at 190. The trial court denied both motions as to the self-defense issue. *See id.* at 190.

In its analysis, the California court more precisely focused on whether the aspect of self-defense permitting a person not to retreat from a fight promoted the public interest. *Id.* at 193. The court emphasized that, while the laws of California “allow” a person to use self-defense, *id.* at 191-92, nothing in California law “specifically encourages individuals to exercise their right in a given situation for the benefit of the public.” *Id.* at 192. According to the court, “the public interest is not harmed by a requirement that employees must avoid physical conflict, *whenever possible*, in the work place.” *Id.* at 193. Furthermore, the court reasoned that “the maintenance of a safe workplace, for the benefit of all employees, is an important interest that cannot be bargained away.” *Id.* To the court, Escalante choosing to abandon his retreat “did not tend to promote workplace safety.” *Id.* Therefore, the court reasoned that “statutes imposing upon employers a duty to maintain a safe work place actually work[ed] against Escalante, rather than supply him with the public policy to sustain his claim.” *Id.* Accordingly, the court held that Escalante’s termination violated no public policy. *See id.* at 194. However, it is important to note that the Escalante court indicated in dicta that “[t]here may be some circumstances under which an employee’s decision to engage in self-defense would be promotive of a public policy”; however, the public policy the court cited was not self-defense but rather the preservation of human life. *Id.* at 193 (providing as an example that “an employee were backed into a corner by his attacker, with no

Bagwell, and *Scott*, the West Virginia Supreme Court of Appeals has potentially created great problems for both the state's employers and its judiciary.

VI. ADDITIONAL CONSIDERATIONS: *FELICIANO AND BLAKE v. JOHN SKIDMORE TRUCK STOP, INC.* AND THEIR POTENTIAL IMPLICATIONS FOR EMPLOYERS

In his dissent in *Feliciano*,²⁰⁸ Justice Maynard connected the majority's holding with the court's earlier ruling in *Blake v. John Skidmore Truck Stop, Inc.*, in which he also dissented.²⁰⁹ In *Blake*, the plaintiff was working as cashier at John Skidmore's store, when an unknown assailant stabbed her during a robbery.²¹⁰ She sued Skidmore, claiming his failure to provide basic security measures exposed her to greater risk of a criminal attack, therefore constituting a deliberate intention claim.²¹¹ On appeal, the West Virginia Supreme Court of Appeals held that an employer's worker's compensation immunity for workplace injuries could be abrogated under the deliberate intention exception for employee injuries caused by third-party criminal acts.²¹² In other words, the court held that a third-party criminal act, such as a robbery, could be grounds for a deliberate intention claim. The *Blake* court pointed to evidence demonstrating that Skidmore's store constituted an unsafe working environment since it lacked adequate security safeguards, which included Skidmore's failure to instruct Blake as to what to do in case of a robbery.²¹³

In *Feliciano*, 7-Eleven fired Feliciano for failing to comply with a company policy prohibiting employees "from subduing or otherwise interfering with a store robbery."²¹⁴ This policy was designed to protect both employees and customers from the harm that is likely to result if employees interfere under such dangerous circumstances. Accordingly, this policy was one of the com-

means of escape, we might agree that the general policy favoring the preservation of human life would prevent his employer from firing him for fighting back in self-defense").

²⁰⁸ 559 S.E.2d 713, 725 (W. Va. 2001) (Maynard, J., dissenting).

²⁰⁹ 493 S.E.2d 887, 897-99 (W. Va. 1997) (Maynard, J., dissenting).

²¹⁰ *Id.* at 889. The deliberate intention exception to an employer's workers' compensation immunity is found at W. VA. CODE § 23-4-2(c) (2003). See generally *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15, 18-21 (W. Va. 1990).

²¹¹ See *Blake*, 493 S.E.2d at 889-90. A deliberate intention claim refers to a claim where an employee brings a suit against his/her employer for a workplace injury that was "in whole or in part caused by the employer's 'deliberate intention' to subject such employee to some workplace hazard." Phillip R. Strauss, *Deliberate Intention Claims Based on Third-Party Criminal Acts: Blake v. John Skidmore Truck Stop, Inc.*, 101 W. VA. L. REV. 515, 516 (1999). In general employee injuries fall under worker's compensation and the employer is immune; however, when a deliberate intention is found, an exception is applied and the employer loses its immunity. *Id.*

²¹² *Blake*, 493 S.E.2d at 897.

²¹³ *Id.* at 895-96.

²¹⁴ *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 716.

pany's time-tested security safeguards.²¹⁵ As Justice Maynard pointed out, however, when combined, the decisions in *Feliciano* and *Blake* pose a dilemma for companies like 7-Eleven. *Feliciano* practically renders 7-Eleven's safety policy unenforceable as a means of protecting employees during a robbery because the policy invites problematic enforcement and its mere existence transforms any violation into a question of fact for a jury. "Nevertheless, [in light of *Blake*,] the absence of this policy would probably cause this Court to uphold a deliberate intention action against 7-Eleven arising from an injury to an employee caused when he or she attempted to subdue a robber."²¹⁶ Therefore, instead of 7-Eleven being able to terminate an at-will employee who interferes with a robbery without any liability, the company and similar businesses now face being subjected to either a wrongful discharge claim or a deliberate intention claim, if the employee is injured, in addition to any potential claims from customers also injured during such an altercation.

VII. CONCLUSION

In response to the certified question in *Feliciano*,²¹⁷ the West Virginia Supreme Court of Appeals established a substantial public policy exception to the at-will employment rule whereby an employee may use self-defense in response to a "lethal imminent danger."²¹⁸ This decision leaves employers with little guidance since courts will ultimately have to determine whether a "lethal imminent danger" existed. It also creates judicial second-guessing of employer management decisions and conflicts with the other specific public policies expressed by the legislature: protecting employees and the public. More generally, along with other recent public policy cases, *Feliciano* demonstrates that the West Virginia Supreme Court of Appeals is discovering public policies in dubious places, thus predicting where an employee will find a public policy exception is growing more difficult.

Being that the issue was before the court on a certified question of law, the court was not at liberty to decide the case on its facts. However, the heroic and emotional nature of events triggering the cause of action and their temporal proximity to the September 11th tragedy no doubt influenced the majority's decision. *Feliciano* represents the court's attempt to achieve equitable results for the plaintiff; a result that ultimately comes at the expense of the rule of law and has negative ramifications for employers, employees, and the general public.

²¹⁵ See *supra* notes 93-94 discussing 7-Eleven's policy and statistics on robbery nonresistance policies.

²¹⁶ 559 S.E.2d at 724 (Maynard, J., dissenting).

²¹⁷ 559 S.E.2d 713 (W. Va. 2001).

²¹⁸ *Id.* at 716.

The state's substantial public policy exception is rapidly turning in to an employer's nightmare. Since West Virginia adopted the public policy exception in 1978,²¹⁹ the court seems willing to discover public policy exceptions almost wholesale. If one of the most significant employment law developments in the last quarter of the twentieth century was the steady "erosion of the employment at-will rule,"²²⁰ one of the most significant developments in the first decade of the new millennium may be the final demise of this doctrine.²²¹ In West Virginia, the Supreme Court of Appeals may not expressly abolish the at-will doctrine in the near future, but it will likely continue to except the at-will rule — pulling out any remaining "teeth" it has left.

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²¹⁹ See *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

²²⁰ PERRITT, *supra* note 2, at 3.

²²¹ See Ballam, *supra* note 128, at 686.

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