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Civil Rights - Master and Servant - Employment at Will - Discharge by Reason of Handicap or Disability

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CIVIL RIGHTS — MASTER AND SERVANT — EMPLOYMENT AT WILL — DISCHARGE BY REASON OF HANDICAP OR DISABILITY — The United States Court of Appeals for the Third Circuit has held that a job applicant not hired or an at-will employee discharged on the basis of handicap or disability does not have a non-statutory cause of action for wrongful discharge based on the public policy exception to the employment at will doctrine since adequate remedy is available under the Pennsylvania Human Relations Act.

Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir.1982).

In October, 1978, Clare Bruffett responded to an advertisement for an advertising designer placed by Franklin Mint Corporation (Franklin), a subsidiary of Warner Communications (Warner), in a Philadelphia newspaper.¹ Bruffett was interviewed and hired by Franklin in November, 1978, on a two-week trial basis.² On November 30, 1978, Bruffett was offered by letter a permanent job contingent upon his successfully passing the company medical and security examinations.³ He underwent a medical examination by a company doctor who subsequently requested he be further examined by non-company physicians.⁴

After the completion of these examinations, Franklin orally informed Bruffett, on January 12, 1979, that he would not be hired on a permanent basis.⁵ In response, Bruffett offered to forfeit company health insurance benefits in exchange for a job.⁶ He continued to work on a free lance basis until April 16, 1979, when Franklin rejected his offer and told him to leave by May 11, 1979.⁷

Bruffett claimed the company's refusal to hire him for full-time employment was unreasonable and without cause, since his kidney condition did not affect the quality of his work as an advertising

1. *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 911 (3d Cir. 1982).

2. *Id.*

3. *Id.*

4. *Id.* The medical examinations revealed that Bruffett had a history of diabetes and the new appearance of heavy proteinuria without the full nephrotic syndrome. *Id.* at 913.

5. *Id.* at 911. The parties dispute whether or not these examinations were completed successfully. *Id.*

6. *Id.* Bruffett offered a "waiver and release from Franklin's medical insurance coverage for any matters disclosed in the medical examinations." *Id.*

7. *Id.*

designer.⁸ He filed a complaint in the United States District Court for the Eastern District of Pennsylvania, alleging four causes of action.⁹ Count I charged Warner with breach of contract in refusing to honor its November 30, 1978 offer of permanent employment.¹⁰ Count II alleged Warner intentionally caused Bruffett to suffer emotional distress by telling him the medical examinations revealed a likelihood of serious kidney malfunction.¹¹ Count III asserted Warner's conduct violated public policy opposing job discrimination against the handicapped or disabled as expressed in the Pennsylvania Human Relations Act (PHRA).¹² Count IV claimed Warner's discharge of Bruffett without cause or justification from full-time free lance employment and refusal to hire him

8. *Id.* at 911-12.

9. *Id.* at 911. See *Bruffett v. Warner Communications, Inc.*, 534 F. Supp. 375 (E.D.Pa. 1982), *aff'd*, 692 F.2d 901 (3d Cir. 1982). The district court had jurisdiction by diversity of citizenship. 28 U.S.C. § 1332(a)(1) (1976). 692 F.2d at 918. Bruffett could have invoked an administrative remedy for Warner's alleged discrimination under the Pennsylvania Human Relations Act (PHRA), PA. STAT. ANN. tit. 43, §§ 951-963 (Purdon 1964 & Supp. 1983-1984). The PHRA established, in the Department of Labor and Industry, an administrative commission, the "Pennsylvania Human Relations Commission," to administer the Act. *Id.* § 956. If the Commission finds that "probable cause exists for crediting the allegations" of an aggrieved employee's complaint, it "shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation, and persuasion." *Id.* § 959(c). If these measures do not work, a hearing will be held. *Id.* § 959(d)-(g). If the Commission finds from the evidence presented at the hearing that unlawful discrimination has occurred, it shall issue an order requiring the respondent "to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay. . . ." *Id.* § 959(f).

10. 692 F.2d at 911.

11. *Id.* at 911-12.

12. *Id.* at 912. Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 952(a)-(b) (Purdon Supp. 1983-1984). Bruffett referred to the following public policy statement:

(a) The practice or policy of discrimination against individuals . . . by reason of their . . . handicap or disability . . . is a matter of concern of the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, . . . and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare

(b) It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . handicap or disability . . . and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals

PA. STAT. ANN. tit. 43 § 952(a)-(b) (Purdon Supp. 1983-1984). See 692 F.2d at 912.

on a permanent basis breached an implied contractual covenant of good faith and fair dealing.¹³

Warner moved for summary judgment¹⁴ and attached to the motion an affidavit by a physician who examined Bruffett.¹⁵ Warner cited *Bonham v. Dresser Industries, Inc.*,¹⁶ which held that the PHRA was the exclusive remedy for discrimination claims, as precluding the plaintiff's contract claims and argued that the plaintiff's tort claim for intentional infliction of emotional distress was barred by Pennsylvania's two-year statute of limitations.¹⁷

In response to Warner's motion, Bruffett filed an affidavit stating that his diabetic condition did not detract from the quality of his work as an advertising designer.¹⁸ He further averred that Warner's failure to respect its employment obligation to him caused him damages in the form of lost wages and benefits since May 11, 1979, and that Warner's prediction of future health problems caused him mental distress which manifested itself physically after December 16, 1979.¹⁹

The district court granted the defendant's motion for summary

13. 692 F.2d at 912.

14. *Id.* See FED. R. CIV. P. 56(b). The district court treated Warner's motion for summary judgment as a motion for judgment on the pleadings under FED. R. CIV. P. 12(b)(6) because the motion was made before matters outside the pleadings were presented. 692 F.2d at 912. See *Bruffett v. Warner Communications, Inc.*, 534 F. Supp. 375, 376 (E.D. Pa. 1982), *aff'd*, 692 F.2d 910 (3d Cir. 1982).

15. 692 F.2d at 912. The affidavit of Franklin's staff physician Dr. Marvin L. Lewbart stated, *inter alia*: "Mr. Bruffett was rejected on medical grounds, based on the totality of the evidence available, because of my professional opinion of the significant probability of major future medical complications associated with Mr. Bruffett's heavy proteinuria." *Id.*

16. 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In *Bonham*, a former employee claimed he was discharged because of his age in violation of the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981), and Pennsylvania common law. 569 F.2d at 189. The court dismissed *Bonham's* common law claim in which he had asserted that Pennsylvania recognized a cause of action for breach of contract when the discharge was in violation of Pennsylvania's stated public policy against age discrimination in employment as expressed in the PHRA. *Id.* at 194-95. PA. STAT. ANN. tit. 43, § 952 (Purdon Supp. 1983-1984). The *Bonham* court stated, "we believe that the courts of Pennsylvania, if directly confronted with the issue, would hold that the Pennsylvania Human Relations Act and the procedures established therein provide the exclusive state remedy for vindication of the right to be free from discrimination based on age." 569 F.2d at 195.

17. 692 F.2d at 912. See 42 PA. CONS. STAT. ANN. § 5524 (Purdon Supp. 1983-1984).

18. 692 F.2d at 912. In his affidavit Bruffett stated he has "had diabetes since approximately 1950 which has been under control continuously since that date by use of insulin and diet measures" and "had not affected [his] ability to perform as an advertising designer." *Id.*

19. *Id.*

judgment, and the plaintiff appealed.²⁰

The United States Court of Appeals for the Third Circuit first considered the issue of breach of contract.²¹ Bruffett contended that since he produced evidence of a written offer of employment, successful compliance with the conditions of the offer, and breach of contract by Warner, his claim should not have been dismissed for failure to state a claim upon which relief could be granted.²² The Third Circuit held that an individual offered a job contingent upon successful completion of a medical examination who is denied the job when the examination reveals a health problem unrelated to employee's ability to perform the job does not have a common law claim against the employer for breach of express contract or implied covenant of fair dealing.²³ The court rejected Bruffett's argument that successful completion meant that the examination failed to reveal any conditions which would impair the applicant's ability to perform the particular job.²⁴ The court of appeals stated that Pennsylvania follows a subjective standard in interpreting employment offers that are contingent upon satisfactory completion of an employer's conditions.²⁵ Even if an objective standard were used, the majority reasoned, Bruffett's contract claim should fail as long as Pennsylvania adheres to the discharge at will doctrine.²⁶ Since Bruffett could be discharged at Warner's will, the appellate court affirmed the district court's judgment to treat Bruffett's separate counts averring breach of expressed contract for permanent employment, unlawful discharge and breach of implied covenant of good faith and fair dealing as one claim.²⁷

20. *Id.* See *Bruffett v. Warner Communications, Inc.*, 534 F. Supp. 375 (E.D. Pa. 1982), *aff'd*, 692 F.2d 910 (3d Cir. 1982).

21. 692 F.2d at 912-13. Circuit Judge Sloviter wrote the opinion for a majority which included Judge Weis. Judge Gibbons dissented. *Id.* at 920.

22. *Id.* at 912-13.

23. *Id.* at 913.

24. *Id.*

25. *Id.* See *Kramer v. Philadelphia Leather Goods Corp.*, 364 Pa. 531, 533, 73 A.2d 385, 386 (1950). In *Kramer*, a skilled leather worker entered a written employment contract with a manufacturer of leather goods. The contract contained a clause conditioning the employee's continued employment on "satisfaction" of the employer. The employee was discharged allegedly because his employer was not satisfied. In a breach of contract suit brought by the employee, the court held that adequate performance is a matter of subjective evaluation and that any dissatisfaction must not be in bad faith. *Id.*

26. 692 F.2d at 913. The *Bruffett* court cited *Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 570-71, 422 A.2d 611, 616 (1980), in support of the proposition that, where an employment contract does not contain an express or implied term, it is ordinarily terminable by either party. 692 F.2d at 913.

27. *Id.* *Bruffett* cited *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978), *aff'd*

The court of appeals next addressed Bruffett's assertion that the district court erred in holding that his cause of action for intentional infliction of emotional distress accrued on January 12, 1979, the date he was notified by the company that he would not be hired for permanent employment.²⁸ The court held that under Pennsylvania case law a cause of action for intentional infliction of emotional distress accrued at the moment the claimant was confronted with the instrumentality of distress and knew or should have known that the defendant's conduct caused the injury.²⁹ The court said Bruffett was aware of all of the operative facts of his claim for intentional infliction of emotional distress³⁰ on January 12, 1979, and this was, therefore, the date on which the two-year statute of limitations³¹ began to run. In so holding, the court rejected Bruffett's argument that the statute of limitations should be measured by reference to the date on which Bruffett discovered that his physical suffering was the result of Warner's wrongful conduct.³²

The court of appeals next addressed what it considered Bruffett's primary allegation of error: that the district court erred in relying on *Bonham* in dismissing Bruffett's claims of wrongful discharge.³³ Bruffett argued that the Third Circuit's holding in *Bon-*

mem., 624 F.2d 1092 (3d Cir. 1980), in support of his breach of express contract claim. 692 F.2d at 913. The majority stated that *Wagner* did not apply to this case. *Id.* In *Wagner*, a discharged at-will employee was able to withstand summary judgment in a breach of contract suit by alleging that his discharge violated provisions of the employer's personnel manual which based discharging of employees on seniority. 458 F. Supp. at 519-20.

28. 692 F.2d at 913-15.

29. *Id.* at 913-14. See *Gibson v. Commonwealth*, 490 Pa. 156, 162, 415 A.2d 80, 83 (1980). The *Gibson* court held that a cause of action in tort accrues on the date of the alleged injury. *Id.*

30. *Id.* at 914. Citing *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979) (en banc), the court of appeals noted that Pennsylvania has adopted the principles enumerated in the RESTATEMENT (SECOND) OF TORTS § 46 (1965) which requires the plaintiff to establish four elements in order to prevail on a claim for intentional infliction of emotional distress: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe. *Id.* See 692 F.2d at 914.

31. 42 PA. CON. STAT. ANN. § 5524(2) (Purdon Supp. 1983-1984).

32. 692 F.2d at 914. Bruffett argued that Pennsylvania's "discovery rule" tolled the statute of limitations. *Id.* The "discovery rule" applies in cases where the plaintiff was unaware of the causal relationship between his injury and defendant's conduct. *Id.* Bruffett stated in an affidavit filed with the district court that on December 16, 1979, he began experiencing "loss of sleep, hypertension, and other pain and suffering" as a result of defendant's wrongful conduct. . . . *Id.* He asserted that this is the date on which the statute of limitations should have begun to run. *Id.*

33. 692 F.2d at 915-20. See *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978). See also *supra* note 16 and accompanying text.

ham, that in Pennsylvania a discharged employee does not have a common law cause of action for breach of contract in addition to a statutory remedy pursuant to the Pennsylvania Human Relations Act, was a misreading of the Act.³⁴ Bruffett cited the Supreme Court of Pennsylvania's post-*Bonham* decision of *Fye v. Central Transportation, Inc.*,³⁵ as support for his allegation of error.³⁶ He pointed to the language in *Fye* where the supreme court interpreted section 12(b) of the Act as providing a discharged employee with an option to seek relief under the PHRA or other remedies which may be available.³⁷ Bruffett reasoned that, since he did not seek relief under the Act, the statute's exclusivity provision did not apply to him.³⁸

The court of appeals found merit in appellant's argument.³⁹ It held that its decision in *Bonham* was "modified" to the extent that the Pennsylvania Supreme Court in *Fye* interpreted section 12(b) of the Act as granting aggrieved employees alternative but exclusive remedies.⁴⁰ Circuit Judge Sloviter said the *Fye* court did not establish what other remedies qualified as alternatives.⁴¹ She stated that to the extent the *Fye* court cited *Daly v. Darby Township School District*,⁴² an aggrieved employee could seek relief under a statute other than the PHRA, where another statute ap-

34. 692 F.2d at 915. Bruffett was referring to section 12(b) of the PHRA, PA. STAT. ANN. tit. 43, § 962(b) (Purdon Supp. 1983-1984) which states in relevant part:

[A]s to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this act, [she] may not subsequently resort to the procedure herein

Id.

35. *Fye v. Central Transp., Inc.*, 487 Pa. 137, 409 A.2d 2 (1979). In *Fye*, a female employee sued her former employer for unlawful discrimination based on sex. The employee left her bus driving job due to pregnancy. After having her baby she sought to get her job back, but the employer refused to rehire her. Prior to instituting this common law claim, the employee sought redress under the PHRA. *Id.* at 139, 409 A.2d at 2. The *Fye* court held that once an employee seeks redress under the PHRA for sex discrimination, the jurisdiction of an equity court over the subject matter is divested. The *Fye* court based its holding on the exclusivity provision of the Act. *Id.* at 140-41, 409 A.2d at 4.

36. 692 F.2d at 915.

37. *Id.* at 915-16. See *Fye v. Central Transp., Inc.*, 487 Pa. at 140-41, 409 A.2d at 4.

38. 692 F.2d at 916.

39. *Id.*

40. *Id.*

41. *Id.*

42. 434 Pa. 286, 252 A.2d 638 (1969). The *Daly* court held that the exclusivity provision of the PHRA did not preclude a plaintiff's constitutional claim or claim for violation of the Pennsylvania School Code. *Id.* at 289-90, 252 A.2d at 640.

plied.⁴³ Judge Sloviter also declared the *Fye* holding could be extended to include arbitration under a collective bargaining agreement or action under the common law, in lieu of the PHRA remedy, where the discharged employee had a legally recognized injury.⁴⁴

In light of *Fye*, the *Bruffett* court examined the plaintiff's contention that discharge of or refusal to hire an employee because he has a physical handicap is a claim cognizable under the common law.⁴⁵ Judge Sloviter reiterated the common law employment at will doctrine, which states that, absent an employment contract, an employer may dismiss an employee whenever he chooses, regardless of the employee's loyalty or length of service.⁴⁶ She recognized labor unions and certain federal⁴⁷ and state⁴⁸ statutes as limitations on the employer's right to discharge at will.⁴⁹ The court, in expressing concern for the plight of unorganized workers in the private sector who are without protection from unjust discharge by their employer, cited Massachusetts as a jurisdiction in which the judiciary has construed the employment at will doctrine as containing an implied requirement of good faith.⁵⁰

The court held that Pennsylvania did not imply a requirement of good faith in the employment at will doctrine.⁵¹ It cited *Geary v.*

43. 692 F.2d at 916.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 916-17. The court cited the following federal statutes as offering protection for employees, where they apply: Federal Railroad Safety Authorization Act of 1980, 45 U.S.C. § 441(a) (Supp. IV 1980), Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1976 & Supp.V 1981), and Occupational Safety and Health Act of 1974, 29 U.S.C. § 660(c) (1976) (all prohibiting discharge based on an employee's exercise of statutory rights); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 663(a) (1976 & Supp. V 1981) (prohibiting discharge based on age); Government Organization and Employees Act of 1966, 5 U.S.C. § 7513 (1982) (prohibiting a federal agency from firing a public employee unless the agency's efficiency will be increased by doing so); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, -3(a) (1976 & Supp. IV 1980) (prohibiting discharge based on race, religion, sex, or national origin); National Labor Relations Act of 1935, 29 U.S.C. §§ 8(a)(1), (3), (4), 158(a)(1), (3), (4), (1976 & Supp. IV 1980) (prohibiting discharge based on union activities).

48. 692 F.2d at 916-17. Circuit Judge Sloviter stated that a number of states have statutes discouraging discharge for reasons of race, national origin, sex or religion. She specifically cited PA. STAT. ANN. tit. 71, § 741.807 (Purdon Supp. 1983-1984) as protection from discharge without cause for public employees in Pennsylvania. 692 F.2d at 917.

49. 692 F.2d at 916-17.

50. *Id.* at 917. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

51. 692 F.2d at 917.

*United States Steel Corp.*⁵² as the most recent decision in which the Supreme Court of Pennsylvania upheld an employer's right to terminate an employment relationship as he saw fit.⁵³ Judge Sloviter pointed out that the *Geary* court held that a discharged employee did not have a common law cause of action for termination of an at-will relationship, where the complaint revealed that the employer had a legitimate reason for the termination and no recognized public policy was violated.⁵⁴ However, she interpreted *Geary* as revealing a responsiveness on the part of the state's highest court to the possibility that public policy limited an employer's capacity to fire an employee at will.⁵⁵ According to Judge Sloviter, the *Geary* court had declined to define what the specific public policy limitations were, and this court would also decline to do so.⁵⁶ The court did say that it was certain that Bruffett's claim — that after *Geary* an employer must justify his discharge of an employee in a common law suit for wrongful discharge — was not supported by the *Geary* public policy exception.⁵⁷

With respect to Bruffett's reasoning that the PHRA expressed a Pennsylvania public policy, that Warner violated that policy, and that Bruffett, therefore, had a common law cause of action for damages he suffered as a result of Warner's conduct, the majority of the court of appeals held that it was not the role of a federal court in a diversity action to alter a state's common law to appease its own social policy inclinations.⁵⁸ However, Judge Sloviter stated that a federal court sitting in diversity must be sensitive to trends in the law of the state.⁵⁹ The court referred to its prediction in *Bonham*, a case decided after *Geary*, that Pennsylvania courts would not recognize an independent common law cause of action for breach of contract in addition to remedies available under the PHRA for an employee discharged at the will of his employer.⁶⁰

52. 456 Pa. 171, 319 A.2d 174 (1974). *Geary* was a steel products salesman. He went over the head of his immediate superior to protest to a company vice president what he considered to be insufficient testing of a new product the company had recently introduced into the market. The product was subsequently pulled out of the market, but *Geary* was fired for allegedly causing disharmony in the company. *Geary* filed a common law complaint for wrongful discharge. The court held the complaint was not actionable. *Id.*

53. 692 F.2d at 917.

54. *Id.* at 917-18. See 456 Pa. at 184-85, 319 A.2d at 180.

55. 692 F.2d at 918.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* See *Bonham v. Dresser Indus., Inc.*, 569 F.2d at 195.

The court held that the later Supreme Court of Pennsylvania decision in *Fye* did not indicate that the *Bonham* prediction was inaccurate.⁶¹

Judge Sloviter stated that the *Geary* public policy exception which afforded an aggrieved employee an alternative to the PHRA was a narrowly defined exception.⁶² She indicated that the *Geary* court's refusal to recognize retaliatory firing of an employee as contrary to public policy was evidence of the lack of breadth to the Pennsylvania exception.⁶³

Having stated its rationale for holding that Pennsylvania would not recognize a common law claim for termination of an at-will contract in addition to administrative relief to the discharged employee under the PHRA, the court reiterated its view that principles of federalism forbid a federal court from revising state common law, particularly in an area of the law such as wrongful discharge where the state itself is in the process of redefining its public policy.⁶⁴ The court also held that since Pennsylvania did not recognize an employee's common law right to allege wrongful discharge based on handicap or disability, the state would logically not recognize such a right for a job applicant who was not hired because of the same infirmities.⁶⁵ The majority, therefore, affirmed the district court's dismissal of Bruffett's complaint on all counts.⁶⁶

Circuit Judge Gibbons dissented.⁶⁷ He stated that he agreed with the majority's holding that Bruffett did not have a claim for breach of an express contract and that his cause of action for intentional infliction of emotional distress was untimely.⁶⁸ He stated, however, that if Bruffett did have a valid claim, it was for termination of an at-will employment relationship for reasons violative of

61. 692 F.2d at 918.

62. *Id.* at 918-19.

63. *Id.* Judge Sloviter cited to other jurisdictions which, in contrast, have held that retaliatory discharge gives rise to a cause of action. *Id.* at 918. *See, e.g.,* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). However, she stated that other states are consistent with Pennsylvania and construe the public policy exception narrowly. *See, e.g.,* *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981) (*per curiam*) (four judges dissenting); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980), *petition to transfer denied mem.*, 421 N.E.2d 1099 (Ind. 1981) (one judge dissenting); *DeMarco v. Publix Super Markets, Inc.*, 360 So.2d 134 (Fla. Dist. Ct. App. 1978), *aff'd per curiam*, 384 So.2d 1253 (Fla. 1980) (two judges dissenting).

64. 692 F.2d at 920.

65. *Id.*

66. *Id.*

67. *Id.* at 920-24 (Gibbons, J., dissenting).

68. *Id.* at 920 (Gibbons, J., dissenting).

expressed Pennsylvania public policy.⁶⁹

Judge Gibbons asserted that the Third Circuit *Bonham* court clearly misread the PHRA when it affirmed summary judgment on the basis of the Act's exclusivity provision.⁷⁰ In support of his assertion, the dissenting judge cited the Pennsylvania Supreme Court's decision in *Fye*, in which that court held that an aggrieved employee could forego invoking his claim under the PHRA and seek relief through other remedies which may be available to him.⁷¹ Judge Gibbons stated that the court's duty in applying post-*Fye* Pennsylvania law was to predict whether the Pennsylvania Supreme Court would recognize a common law claim for termination of an at-will contract due to an employee's non-disabling diabetes.⁷²

Judge Gibbons stated that a divided Pennsylvania Supreme Court in *Geary* reaffirmed the state's adherence to the employment at will doctrine.⁷³ But, he continued, the *Geary* court also recognized that a public policy exception to the doctrine may exist in some instances, although discharge for going over the head of one's immediate supervisor to protest a defective product was not such an instance.⁷⁴ Judge Gibbons noted that all four members of the *Geary* majority have left the court.⁷⁵ He declared that the federal court cannot assume that today's supreme court would take a simi-

69. *Id.*

70. *Id.* See *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); PA. STAT. ANN. tit. 43, § 962(b) (Purdon Supp. 1983-1984).

71. 692 F.2d at 920-21 (Gibbons, J., dissenting). See *Fye v. Central Transp.*, 487 Pa. 137, 140-41, 409 A.2d 2, 4 (1979).

72. 692 F.2d at 921 (Gibbons, J., dissenting).

73. *Id.* Judge Gibbons stated that the common law employment at will doctrine was developed in the nineteenth century industrialization period. The doctrine was once thought to be constitutionally protected. *Id.* at 921 n.2. See *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adair v. United States*, 208 U.S. 161 (1908) (both holding that the due process clause protects an employee's right to join or not to join a union at his will without coercion from his employer).

74. 692 F.2d at 921-22 (Gibbons, J., dissenting). Judge Gibbons quoted the following excerpt from *Geary* in support of his contention that the *Geary* court recognized a public policy exception to the employment at will doctrine:

[T]here are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, *particularly where some recognized facet of public policy is threatened*. The notion that substantive due process elevates an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited.

Id. (emphasis in original). See *Geary v. United States Steel Corp.*, 456 Pa. at 184, 319 A.2d at 180.

75. 692 F.2d at 922 (Gibbons, J., dissenting).

larly restricted view of the parameters of public policy and must bear in mind in deciding the case the progressive tendency of the present state supreme court in other areas of the law.⁷⁶

Judge Gibbons postulated that even the *Geary* court would have recognized Bruffett's claim as within the public policy exception.⁷⁷ He said that the divided *Geary* court held against the claimant in a situation where no legislative declaration of public policy existed.⁷⁸ In Bruffett's case, however, there was a clear statutory expression of policy in the PHRA.⁷⁹

Judge Gibbons stated that every Pennsylvania decision since *Geary* which has addressed the employment at will doctrine has recognized a public policy qualification.⁸⁰ He cited the Third Circuit's *Perks v. Firestone Tire and Rubber Co.*⁸¹ as one of those decisions.⁸² Judge Gibbons declared that *Perks* stands for two propositions which should be dispositive in *Bruffett*: (1) Pennsylvania statutory statements of public policy are included in the common law exception to the employment at will doctrine; and (2) the Third Circuit's decision in *Bonham* was incorrect in holding that the PHRA remedy was exclusive.⁸³ Judge Gibbons reasoned that since there is a common law right of action for termination of an at-will employment relationship for causes which violate statutorily stated public policy, the majority was incorrect in interpreting the issue in *Bruffett* to be whether such a public policy existed.⁸⁴ He said the issue was whether discharge for a non-disabling physical condition was one of the public policies limiting the employment at will privilege.⁸⁵ He declared that is was and that he would,

76. *Id.*

77. *Id.* at 923 (Gibbons, J., dissenting).

78. *Id.* See *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 176 (1974).

79. 692 F.2d at 923 (Gibbons, J., dissenting). See PA. STAT. ANN tit. 43, § 952(a)-(b) (Purdon Supp. 1983-1984). See *supra* note 12 for the text of this section.

80. 692 F.2d at 923. See, e.g., *Hunter v. Port Auth. of Allegheny County*, 277 Pa. Super. 4, 419 A.2d 631(1980), a case in which refusal to hire a job applicant for employment as a bus driver because he had been convicted fourteen years earlier of aggravated assault and battery was held to be contrary to public policy; *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979), where the claim of an at-will employee discharged for failure to submit to a polygraph test was held to be within the public policy exception; *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978), in which an at-will employee was held to have a cause of action based on the public policy exception when he was fired for missing work to serve jury duty.

81. 611 F.2d 1363 (3d Cir. 1979).

82. 692 F.2d at 923 (Gibbons, J., dissenting).

83. *Id.*

84. *Id.*

85. *Id.*

therefore, reverse the district court's judgment and remand the case.⁸⁶

The majority and dissenting members of the *Bruffett* court agreed that Pennsylvania has traditionally followed the common law employment at will doctrine. On this issue, Pennsylvania law is in accord with the law of the majority of jurisdictions in the United States⁸⁷ and with the Restatement of Torts.⁸⁸

In 1974, the Supreme Court of Pennsylvania, in *Geary v. United States Steel Corp.*, upheld an employer's privilege to terminate an at-will employee's job provided the employer's complaint reveals a plausible and legitimate reason for the termination and no public policy was violated.⁸⁹ There is also language in *Geary* which has been interpreted as permitting a cause of action in tort for wrongful discharge where there is evidence of an employer's specific intent to cause his employee harm.⁹⁰ The *Geary* court stated that evidence of a general intent to harm, however, is never sufficient to establish a claim since some harm is always foreseeable to a discharged employee.⁹¹ If such a claim were recognized, an employer's

86. *Id.* at 924 (Gibbons, J., dissenting).

87. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 175, 319 A.2d 174, 176 (1974).

88. RESTATEMENT OF TORTS § 762 (1939). This section, entitled "Privileges of Selecting Persons for Business Relations," states:

One who causes intended or unintended harm to another merely by refusing to enter into a business relation with the other or to continue a business relation terminable at his will is not liable for that harm if the refusal is not

(a) a breach of the actor's duty to the other arising from the nature of the actor's business or from a legislative enactment, or

(b) a means of accomplishing an illegal effect on competition, or

(c) part of a concerted refusal by a combination of persons of which he is a member.

Id. Comment (c) provides:

(c) Motive for refusal. The privilege stated in this Section exists regardless of the actor's motive for refusing to enter business relations with the other and even though the sole motive is a desire to harm the other.

Id. at Comment (c).

89. 456 Pa. at 183-85, 319 A.2d at 180.

90. *Id.* at 177-78, 319 A.2d at 177. See *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979), a case not cited in *Bruffett*, and *O'Neill v. ARA Services*, 457 F. Supp. 182, 186 (E.D. Pa. 1978), interpreting *Geary* to give an employee a cause of action for wrongful discharge where the employer was motivated by a specific intent to harm the employee. See also, *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230, 1232-33 n.4 (E.D. Pa. 1981); *Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 573 n.5 422 A.2d 611, 618 n.5 (1980); *Lekich v. International Business Machine Corp.*, 469 F. Supp. 485, 488 (E.D. Pa. 1979), all disagreeing with the *O'Neill* interpretation of *Geary* and holding that specific intent to harm does not in itself give rise to a cause of action for wrongful discharge but may be the motivation behind conduct contrary to public policy.

91. 456 Pa. at 178, 319 A.2d at 177.

privilege to discharge would be effectively eliminated.⁹² By comparison, courts in other jurisdictions have held that evidence that an employer acted in bad faith in terminating an at-will employment relationship is enough to establish a cause of action for breach of contract.⁹³

Geary was the first Pennsylvania decision to impose any limitation on an employer's privilege to terminate an employment relationship and recognize a possible non-statutory cause of action arising from an employee's discharge.⁹⁴ The Supreme Court of Pennsylvania, recognizing that employment conditions had changed since its decision in *Henry v. Pittsburgh and Lake Erie Railroad*,⁹⁵ stated that modern employees were dependent on large and powerful corporations for their livelihood and movement from job to job was more restricted than in earlier times.⁹⁶ The *Geary* court created a public policy exception, but it declined to define the parameters of that exception.⁹⁷ The court reasoned that recognition by the judiciary of a wrongful discharge claim on the facts before it would create a flood of litigation, evidence problems, and an undesirable restraint on the employer's ability to manage his business.⁹⁸

In 1977, a federal district court, in *Wehr v. Burroughs Corp.*,⁹⁹ restricted the availability of the *Geary* public policy exception to the wrongfully discharge employee. It held that discharge of an at-

92. *Id.*

93. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), where a female employee's job as a machine operator was phased out allegedly because she refused her foreman's sexual advances. The *Monge* court held

[A] termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.

Id. at 133, 316 A.2d at 551-52. See also *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). The Massachusetts Supreme Court relied on the *Monge* rationale to find that an at-will employee had a claim for breach of contract when his employer discharged him to avoid paying him a sales commission. *Id.*

94. 456 Pa. at 174, 319 A.2d at 175.

95. 139 Pa. 289, 21 A.2d 157 (1891).

96. 456 Pa. at 176, 319 A.2d at 176. For commentary on the changed nature of the employment relationship, see *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 *COLUM. L. REV.* 1404 (1967).

97. 456 Pa. at 184, 319 A.2d at 180.

98. *Id.* at 181-82, 319 A.2d at 179.

99. 438 F. Supp. 1052 (E.D. Pa 1977), *aff'd and modified on other grounds*, 619 F.2d 276 (3d Cir. 1980).

will employee based on age discrimination violated a public policy against discrimination expressed in the PHRA but that the employee did not have a common law remedy in contract.¹⁰⁰ The *Wehr* court stated that where the aggrieved employee had a statutory remedy he was precluded from seeking relief for the same injury at common law.¹⁰¹

Consistent with *Wehr*, the Third Circuit Court of Appeals, in *Bonham v. Dresser Industries, Inc.*,¹⁰² held that discharged based on an employee's age violated Pennsylvania public policy but that, since the claimant had an administrative remedy before the Pennsylvania Human Relations Commission, he did not have a common law cause of action in contract for wrongful discharge.¹⁰³ The *Bonham* court interpreted *Geary* to create a public policy remedy available only to wrongfully discharged employees who were overlooked by the legislature.¹⁰⁴ It cited the exclusivity provision of the PHRA¹⁰⁵ as support for its holding.¹⁰⁶

Subsequently, in *Fye v. Central Transportation, Inc.*,¹⁰⁷ the Supreme Court of Pennsylvania held that the exclusivity provision of the PHRA did not bar a discharged employee's right to seek remedies other than those available to him under the Act. Justice Nix wrote for the *Fye* court that a complainant may seek relief under the PHRA or by another remedy which may be available; but once the complainant initiated one, he could not subsequently seek relief under the other.¹⁰⁸

Although the breadth of the public policy exception capable of supporting a claim for wrongful discharge in Pennsylvania is constricted,¹⁰⁹ there have been decisions which have held employees'

100. 438 F. Supp at 1054. See PA. STAT. ANN. tit. 43, § 952 (Purdon Supp. 1983-1984).

101. 438 F. Supp. at 1055-56.

102. *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

103. *Id.* at 195. *Bonham* held that *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975), was wrong to hold that an at-will employee discharged because of his age had a common law cause of action in contract. 569 F.2d at 195.

104. 569 F.2d at 195.

105. See PA. STAT. ANN. tit 43, § 962(b) (Purdon Supp. 1983-1984).

106. 569 F.2d at 195 n.9.

107. 487 Pa. 137, 409 A.2d 2 (1979).

108. *Id.* at 140-41, 409 A.2d at 4. As support for this proposition, the supreme court cited its previous decision in *Daly v. Darby Township School Dist.*, 434 Pa. 286, 252 A.2d 638 (1969), and *Pennsylvania Human Relations Comm'n. v. Feeser*, 569 Pa. 173, 364 A.2d 1324 (1976). Neither *Fye* nor *Bruffett* cited *Pennsylvania Human Relations Comm'n v. Zamtakis*, 478 Pa. 454, 387 A.2d 70 (1978), which also supports the proposition that the PHRA is only exclusive when invoked.

109. See *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 919 (3d Cir. 1982).

claims to be within the exception. The public policy exceptions in these cases involved broad societal interests which extended beyond a concern with discrimination against or fair treatment of the individual employee. These courts have shown a common concern with the implications that the discharges have had on important objectives of government.

In the 1977 case of *Reuther v. Fowler & Williams, Inc.*,¹¹⁰ an at-will employee was held to have a cause of action for wrongful discharge based on the *Geary* public policy exception when he was discharged for missing a week of work to serve on jury duty.¹¹¹ The *Reuther* court stressed the importance of the jury system to the legal process.¹¹² It cited sections of the Pennsylvania and United States Constitutions to emphasize that trial by jury was protected by the highest enactments of public policy.¹¹³

In 1979, in *Perks v. Firestone Tire and Rubber Co.*,¹¹⁴ the Third Circuit Court of Appeals relied on *Reuther* in finding the claim of an employee discharged for failure to submit to a polygraph test to be within the public policy exception.¹¹⁵ The *Perks* court stated that the Pennsylvania legislature proscribed the use of the polygraph by employers and that the public has an interest in protecting the individual from abusive use of the polygraph.¹¹⁶

Also in 1979, a federal court, in *McNulty v. Borden, Inc.*,¹¹⁷ overruled summary judgment against an at-will employee who was discharged for refusing to participate in a price fixing scheme which violated the Clayton Act.¹¹⁸ The *McNulty* court held that firing for refusal of an employee to commit a crime and firing as a step in the perpetration of a crime were two reasons for discharge which fell within the *Geary* public policy exception to the employment at will doctrine.¹¹⁹ As in *Reuther*, the underlying rationale in *Mc-*

See generally *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230, 1235-37 (E.D. Pa. 1981).

110. 255 Pa. Super. 28, 386 A.2d 119 (1978).

111. *Id.* The *Reuther* court stated that trial by jury was of the highest importance to the legal process and "the necessity of having citizens freely available for jury service is just the sort of 'recognized fact of public policy' alluded to by our Supreme Court in *Geary*; an employer's 'intrusion into [this] area by virtue of [his] power of discharge' should 'give rise to a cause of action.'" *Id.* at 32-33, 386 A.2d at 120-21.

112. *Id.*

113. *Id.* See U.S. CONST. amend. VI, PA. CONST. art. I § 6.

114. 611 F.2d 1363 (3d Cir. 1979).

115. *Id.* at 1364.

116. *Id.* at 1365. See 18 PA. CONS. STAT. ANN. § 7321(a) (Purdon 1973).

117. 474 F. Supp. 1111, (E.D. Pa. 1979).

118. *Id.* at 1119-20.

119. *Id.*

Nulty may involve the interest of the court in upholding the criminal justice system. Sanctioning discharge for refusal of an employee to commit a crime would have induced employees to participate in their employer's crimes which could have increased the number of criminals in society and reduced the number of potential witnesses available to testify against criminal employers.

The effectiveness of the criminal justice system was also an issue in the 1980 case of *Hunter v. Port Authority of Allegheny County*.¹²⁰ In *Hunter*, an applicant for employment as a bus driver was denied the job because he had been convicted fourteen years earlier of aggravated assault and battery, a conviction which the Governor unconditionally pardoned.¹²¹ The court held that refusal to hire was contrary to society's interest in rehabilitating former offenders and reintegrating the individual into society.¹²²

In another 1980 case, *Yaindl v. Ingersoll-Rand Co.*,¹²³ the Pennsylvania Superior Court relied upon *Hunter* and *Reuther* in holding that an employee discharged for promoting the public's health may have a claim under the public policy exception to the employment at will doctrine.¹²⁴ As in *Hunter*, *Reuther*, *Perks* and *McNulty*, the *Yaindl* opinion manifested a concern with the well-being of society.¹²⁵ The *Yaindl* court stated that those courts which have applied the public policy exception have appreciated that an employer's interest in running his business may have to yield to society's interests.¹²⁶

Similarly, other jurisdictions have recognized claims for wrongful discharge where the employer's conduct trespassed on institutions created to keep society functioning smoothly. Common law causes of action have been upheld where an employee lost his job for informing law enforcement officials that a fellow employee may be violating the criminal code,¹²⁷ for refusing to follow the employer's request to commit perjury,¹²⁸ for missing work to serve jury

120. 277 Pa. Super. 4, 419 A.2d 631 (1980).

121. *Id.* at 6-7, 419 A.2d at 632.

122. *Id.* at 12-14 n.5, 419 A.2d at 635-36 n.5.

123. 281 Pa. Super. 560, 422 A.2d 611 (1980).

124. *Id.* at 571-72, 422 A.2d at 616-17.

125. *Id.*

126. *Id.*

127. *Palmateer v. International Harvester Co.*, 84 Ill. 2d 124, 421 N.E.2d 876 (1981).

128. *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). For a case denying an employee a cause of action for discharge based on refusal to commit perjury, see *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981).

duty,¹²⁹ for filing a workers' compensation claim,¹³⁰ and for seeking the employer's compliance with consumer protection laws.¹³¹

Promoting some of these Pennsylvania and out-of-state precedents, the discharge at-will employee in *Bruffett* sought to convince the Court of Appeals for the Third Circuit that discrimination in hiring or retaining an employee because of his non-job related handicap or disability violated the public policy exception enunciated in *Geary*. He cited the PHRA as the expression of that policy.¹³² Section 952 of the Act is entitled "Findings and declaration of policy."¹³³ In 1974, this section was amended to make it applicable to handicapped or disabled persons. Section 952(b) presently reads, "It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . handicap or disability . . . , and to safeguard their right to obtain and hold employment without such discrimination" ¹³⁴ Further, section 954, entitled "Definitions," states:

(p) The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related.¹³⁵

Bruffett argued that in these sections of the PHRA he had found an expression of public policy directly applicable to his situation.¹³⁶ His claim was that he had diabetes which was controlled by using insulin and maintaining a proper diet, and that neither his diabetes nor the kidney weakness from which Warner alleged he suffered interfered with his capacity to function as an advertisement designer.¹³⁷ Bruffett further argued that he was discharged or refused employment because of his condition¹³⁸ and that he, therefore, had a non-statutory claim for wrongful discharge based on the public policy exception to the employment at will privilege as

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

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

131. *Harless v. First National Bank*, 246 S.E.2d 270 (W. Va. 1978).

132. PA. STAT. ANN. tit 43, §§ 951-62 (Purdon Supp. 1983-1984).

133. *Id.* § 952 (Purdon Supp. 1983-1984). See *supra* note 12 for the text of § 952.

134. PA. STAT. ANN. tit 43, § 952(b) (Purdon Supp. 1983-1984).

135. *Id.* § 954 (p) (Purdon Supp. 1983-1984).

136. 692 F.2d at 912.

137. *Id.*

138. *Id.* at 911.

set forth in *Geary*.¹³⁹

The claim that a discharge was based on discrimination declared unlawful by the public policy statement of the PHRA was not novel. In prior Pennsylvania cases employees who had lost their jobs allegedly because of age discrimination sought a non-statutory remedy under the same PHRA expression of public policy as Bruffett.¹⁴⁰ In *Wehr*, *McGinley*, and *Bonham*, the courts all agreed with the claimant-employee that the PHRA was an expression of public policy which forbids discrimination based on age.¹⁴¹ *Wehr* and *Bonham*, however, upheld summary judgment against the claimants by interpreting the *Geary* public policy exception to apply only to terminated employees without an alternative statutory remedy.¹⁴² This interpretation was subsequently held erroneous by the Supreme Court of Pennsylvania in *Fye*¹⁴³ and, therefore, was arguably not an obstacle to Bruffett's claim.

Precedent was clearly available for the Third Circuit to overrule the district court's summary judgment: the PHRA expresses a public policy within the exception created by *Geary*;¹⁴⁴ the fact that Bruffett had an alternative remedy was not controlling since he had not invoked the PHRA proceeding.¹⁴⁵ Warner had refused to grant Bruffett permanent employment solely because of a non-job related handicap or disability,¹⁴⁶ and there was an indication that the discharge was motivated by a desire on Warner's part to prevent an increase in its insurance premiums,¹⁴⁷ which is not a

139. *Id.* at 917-18. See 456 Pa. at 184-85, 319 A.2d at 180.

140. See *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd and modified on other grounds*, 619 F.2d 276 (3d Cir. 1980); *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975).

141. See cases cited *supra* note 140.

142. See 438 F. Supp. at 1055; 569 F.2d at 195.

143. 487 Pa. 137, 140-41, 409 A.2d 2, 4 (1979).

144. See PA. STAT. ANN. tit. 43, § 952 (Purdon Supp. 1983-1984).

145. *Id.* § 962(b). See *Fye v. Central Transp., Inc.*, 487 Pa. 137, 140-41, 409 A.2d 2, 4 (1980); *Pennsylvania Human Relations Comm'n v. Zamantakis*, 478 Pa. 454, 458-59, 387 A.2d 70, 72-73 (1978); *Pennsylvania Human Relations Comm'n v. Feeser*, 469 Pa. 173, 178, 364 A.2d 1324, 1326 (1976); *Daly v. Darby Township School Dist.*, 434 Pa. 286, 289-90, 252 A.2d 638, 640 (1969). These cases stand for the proposition that an aggrieved employee may elect to seek relief under the PHRA or any other remedy which may be available to him, but that once he invokes one of the options it is exclusive.

146. 692 F.2d at 912. Warner attached an affidavit of Dr. Lewbart, its staff doctor, to its motion for summary judgment. The affidavit stated that Bruffett had been rejected on medical grounds. There was nothing in the affidavit or the Third Circuit's opinion to indicate that his disability was job related. *Id.* at 912.

147. *Id.* at 911. Bruffett's complaint alleged that after he had undergone a medical examination by company and non-company physicians he was informed he had not "suc-

legally recognized reason for employment discrimination.¹⁴⁸ Even with all of this in *Bruffett's* favor, the court determined as a matter of law that he failed to state a claim upon which relief could be granted.

The *Bruffett* opinion manifests the continued strength of the employment at will doctrine in Pennsylvania. Despite the holdings of *Geary* and its progeny that a common law cause of action for wrongful discharge exists based on an undefined public policy which presents a terminated employee with an alternative to any statutory remedy which may be available, the *Bruffett* court rationalized why the claimant before it did not come within the exception. The Third Circuit Court of Appeals declared that those courts which had found a discharged employee's claim to be within the public policy exception could not be used as precedent by *Bruffett* because, unlike *Bruffett*, those employees did not have a statutory remedy to which they could resort.¹⁴⁹ This holding overlooks the *McNulty*¹⁵⁰ decision, which recognized a discharged at-will employee's common law cause of action for wrongful discharge where he had an alternative cause of action under the Clayton Act. Further, the *Bruffett* court only paid lip service to the Supreme Court of Pennsylvania's holding in *Fye*, which stated that the PHRA remedy was only exclusive if invoked.¹⁵¹ The Third Circuit insisted that since a statutory remedy was available to *Bruffett* he had no common law claim for wrongful discharge.¹⁵² This reasoning seems to be a strained interpretation of *Fye* which stated in reference to the PHRA:

Although attempting to fashion a special remedy to meet this illusive and

cessfully completed" the examination and would, therefore, be denied permanent employment. Subsequently, he offered to work on a permanent basis "in exchange for a waiver and release from Franklin's medical insurance coverage for any matters disclosed in the medical examination." Warner allowed *Bruffett* to continue on a "full-time free lance basis" for four months while it considered this offer. *Id.*

The case was before the Third Circuit on appeal from summary judgment. In an appeal from summary judgment "all properly pleaded facts are to be taken as admitted for the purpose of testing the sufficiency of the complaint." *See Geary v. United States Steel Corp.*, 456 Pa. 171, 174, 319 A.2d 174, 175 (1974). There is no indication in the *Bruffett* opinion that these facts were not properly pleaded. A reasonable inference can, therefore, be drawn from the facts pleaded that Warner's refusal to hire *Bruffett* on a full-time basis was motivated by a concern with what effect *Bruffett's* disability would have on their insurance costs.

148. *See* PA. STAT. ANN. tit 43, § 954(p) (Purdon Supp. 1983-1984).

149. 692 F.2d at 918 n.3.

150. 474 F. Supp. 1111 (E.D. Pa. 1979).

151. 692 F.2d at 916. *See* 487 Pa. at 140-41, 409 A.2d at 4.

152. 692 F.2d at 918.

deceptive evil, the General Assembly did not withdraw the other remedies that might be available depending upon the nature of the injury sustained Thus, PHRA provides that when the statutory procedure is invoked, it is exclusive (citation omitted). Likewise, when the complaining party initially seeks relief without resorting to the provisions of the PHRA, he or she is barred from subsequently doing so (citation omitted).¹⁵³

Similarly, *Geary* did not establish the existence of an alternative remedy to a discharged employee as a defense to an employer sued for wrongful discharge.¹⁵⁴ Pennsylvania's highest court stated in *Geary* that "we hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge."¹⁵⁵

The *Bruffett* case is significant in that an at-will employee in Pennsylvania discharged for reason of his or her "race, color, religious creed, ancestry, handicap or disability, use of a guide dog because of blindness or deafness of the user, age, sex or national origin"¹⁵⁶ has no cause of action for wrongful discharge based on the public policy exception enunciated in *Geary* in any court which follows *Bruffett* as precedent. The public policy exception in Pennsylvania has been more precisely delineated by the *Bruffett* opinion, but the exception has never been so narrowly defined against the interest of the at-will employee. Arguably, the public policy exception based on age discrimination, as recognized in *Bonham* and *Wehr*, has been effectively superseded.

The practical effect of this is that discharged employees with a claim under the PHRA should pursue that administrative remedy and not expect the courts to recognize their claims. Certainly, the federal courts are not the forum in which to bring a complaint for unlawful discharge based on discrimination. The Third Circuit stated in *Bruffett* that it recognized at-will employees in modern times need protection from their large corporate employers, but that it was unwilling to develop the common law exception in Pennsylvania because of the federal appeals court's view of its role in a federal system.¹⁵⁷ The *Bruffett* court commented that it was

153. 487 Pa. at 140-41, 409 A.2d at 4.

154. 456 Pa. at 184-85, 319 A.2d at 180.

155. *Id.*

156. See PA. STAT. ANN. tit 43, § 952 (Purdon Supp. 1983-1984). These are the characteristics specifically stated in the PHRA as giving rise to a claim under that Act when used as a basis of discharge.

157. 692 F.2d at 918.

dealing with an important and evolving area of the law.¹⁵⁸ Consequently, the court, consistent with many cases before it,¹⁵⁹ found a reason to uphold summary judgment against the employee. Perhaps underlying these holdings was a fear that if the issue of whether the discharge was motivated by discrimination or specific intent to injure was ever presented to the finder of fact, a jury may sympathize with the discharged employee. The *Bruffett* majority's hesitancy to build upon the public policy exception evidences its unwillingness to increase the volume of litigation, a possibility raised in *Geary*, or to subordinate the interest of the employer in managing his business.¹⁶⁰

If the common law employment at will privilege is to be tempered in favor of the employee, the forum which will probably make the change is the state courts. The Supreme Court of Pennsylvania, in its decision in *Geary* was the first court in the state to place any limitation on the employer's interest.¹⁶¹ It created a public policy exception yet it declined to define what were the boundaries of that exception.¹⁶² In *Fye*,¹⁶³ the supreme court extended further protection to employees by telling them, in effect, that if they were the victims of discrimination, they could come to court for relief, provided they chose not to go before the PHRC.¹⁶⁴ It appears that the Pennsylvania Supreme Court will be the next court to make any major judicial change in this important area of the common law. Perhaps it would be receptive to an argument embraced by the superior court in *Yaindl v. Ingersoll-Rand Co.*¹⁶⁵ that in applying the public policy exception a court "must weigh several factors, balancing against [the employee's] interest in making a living, his employer's interest in running its business, its motive in discharging [the employee] and its manner of effecting the discharge, and any social interest or public policies that may be

158. *Id.* at 920.

159. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974). See also *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230 (1981); *Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 422 A.2d 611 (1980); *Fye v. Central Transp., Inc.*, 487 Pa. 137, 409 A.2d 2 (1979); *O'Neill v. ARA Services*, 457 F. Supp. 182 (E.D. Pa. 1978); *Bonham v. Dresser Indus., Inc.*, 469 F.2d 187 (3d Cir. 1979), *cert denied*, 439 U.S. 821 (1978); *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (1977), *aff'd and modified on other grounds*, 619 F.2d 276 (3d Cir. 1980).

160. 456 Pa. at 181-82, 319 A.2d at 179.

161. *Id.* at 184-85, 319 A.2d at 180.

162. *Id.*

163. 487 Pa. 137, 409 A.2d 2 (1979).

164. *Id.* at 140-41, 409 A.2d at 4.

165. 281 Pa. Super. 560, 422 A.2d 611 (1980).

implicated in the discharge."¹⁶⁶ This test would provide a much needed guideline for employees who must assess their probability of success in court before they opt to forego any administrative remedies which may be available to them, for employers in clarifying what their duties are, and for the state and federal courts which must apply the public policy exception. As suggested by Judge Gibbons in his dissenting opinion in *Bruffett*, the present members of Pennsylvania's highest court may be ready to make such a change.¹⁶⁷

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166. *Id.* at 577, 422 A.2d at 620.

167. 692 F.2d at 922 (Gibbons, J., dissenting).