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Labor and Employment Law: Recent Developments - At-Will Termination of Employment Has Not Been Terminated

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I. INTRODUCTION

According to recent case law and commentary on labor and employment matters, the general concept recognized at common law that employees can be "terminated-at-will" is still recognized today. Employees who are not provided with written agreements setting forth a definite employment term are characterized as employees "terminable-at-will," or "employees-at-will."[1] Under the employment-at-will doctrine, an employer may terminate the employee at any time for good reason, bad reason, or no reason at all.[2]

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1. *See* Dewachter v. Scott, 657 So. 2d 962 (Fla. 4th Dist. Ct. App. 1995).

2. DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980). The court held that "where the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate

The employee also has the opportunity to terminate employment at any time.[3]

The employment-at-will concept was developed under common law. In the 1970s and 1980s, the concept of terminating employees-at-will was rejected in many jurisdictions which felt that the prevailing trend allowed the judiciary to take a second look at common law theories involved in employment law.[4] Courts in such jurisdictions applied more liberal assessment of employee rights.[5] Jurisdictions such as California favored public policy considerations forbidding employees from being terminated-at-will and imposed "just cause" requirements in termination cases. However, even liberal jurisdictions, such as California, restricted their initial inclination to totally abandon the employment-at-will concept. Instead, these jurisdictions modified their public interest concerns and "just cause" concepts.[6]

Florida courts, on the other hand, have been somewhat reluctant to reverse the common law, concluding that it is a process for the legislative and not the judicial branch.[7] However, there have been indications over the past fifteen years that Florida might be moving in a direction perceived by some as a more liberal humanitarian approach.[8]

The experiences of other jurisdictions, the increasing statutory rights afforded to employees in the work place, and reevaluation of public policy considerations all suggest that the employment-at-will doctrine is advantageous—not only for the jurisdiction but the employees in it. Recently, the doctrine has been accepted further through the courts' recognition that the

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it at any time and no action may be maintained for breach of the employment contract." *Id.* at 136.

3. *See* Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); *Dewachter*, 657 So. 2d at 962; Catania v. Eastern Airlines Inc., 381 So. 2d 265, 266 (Fla. 3d Dist. Ct. App. 1980) (noting that, in Florida, "if the period of employment is indefinite either party may terminate it at any time"); *DeMarco*, 360 So. 2d at 136; Hope v. National Airlines, Inc., 99 So. 2d 244 (Fla. 3d Dist. Ct. App. 1957), *cert. denied*, 102 So. 2d 728 (Fla. 1958).

4. For an interesting overview of the evolution from common law to the more recent decisions which have challenged the utilization of the employment-at-will concept, see WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 342 (1985) [hereinafter HOLLOWAY & LEECH].

5. *See* source cited *supra* note 4.

6. *Cf.* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 728 (Ct. App. 1980) (discussing the implied covenant to use a duty of just cause in termination cases).

7. *See Arrow Air*, 645 So. 2d at 424.

8. *See id.*; *see also* Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182, 185 (Fla. 1983) (Overton, J., concurring) (stating that he would "proceed a step further [than the majority] and establish a common law tort for retaliatory discharge").

employment-at-will doctrine is not only an appropriate continuation of the common law, that should not be abandoned, but also benefits all of the parties concerned.

This article presents an overview of the current status of the employment-at-will doctrine in Florida. Part II provides an analysis of the recent case law interpreting the doctrine. Part III presents commentary on the employment-at-will concept and the discrepancies between the legislative and judicial interpretations of the doctrine.

II. RECENT DEVELOPMENTS IN THE EMPLOYMENT-AT-WILL DOCTRINE

A. *Definition of Employment-At-Will*

In a recent Florida case, *Dewachter v. Scott*,[9] the court identified basic concepts found in employment-at-will contracts.[10] In *Dewachter*, the plaintiff filed suit for breach of contract alleging that her employer induced her to leave full-time employment by orally promising her employment for life or at least until she reached the age of sixty-five. The court held that oral contracts for lifetime employment are terminable-at-will.[11] The court reasoned that absent an employment contract expressly providing for a definite term of employment, the employment is indefinite and, therefore, terminable-at-will by either party.[12]

Under the common law employment-at-will doctrine, which has been supplemented by the *Florida Statutes*, certain statutory rights enable the employee to recover unpaid wages for work performed. Additionally, there are statutory rights which permit employers to place restrictions on subsequent competition in consideration for an employment-at-will contract.[13]

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9. 657 So. 2d 962 (Fla. 4th Dist. Ct. App. 1995).

10. *Id.* at 962-63.

11. *Id.* (citing *Smith*, 427 So. 2d at 182).

12. *Id.* The court also held that even though the plaintiff:

> couched her complaint as fraud in the inducement rather than breach of contract, . . . her claim is still barred as it attempts to circumvent the bar to a breach of contract action based on an oral contract terminable at will. Since the parties clearly cannot be restored to the status quo that existed before the alleged contract, as might be sought in an action based on fraud in the inducement, the measure of damages Dewachter sought here would be the same as breach of contract damages.

Id.

13. FLA. STAT. § 542.33(2)(a) (1993).

These statutes, which also apply to written contracts of employment,[14] clearly expand the benefits and the obligations that relate to employment-at-will situations. For example, under the employment-at-will doctrine, the employee is entitled to receive the appropriate pay for the work that has been performed. The legislature has supplemented common law rights by allowing employees to sue not only for wages, but for unpaid commissions which have been earned and not yet paid. Should the employees prevail, they can also seek statutory attorneys' fees.[15]

In 1994 and 1995, the state courts in Florida reconfirmed the validity of the employment-at-will doctrine as the appropriate rule for judicial interpretation of employee rights. Courts have held that where there are no definite terms of employment, that employment is and should be regarded as "at-will." For example, in *Arrow Air, Inc. v. Walsh*,[16] the Supreme Court of Florida confirmed that employees are terminable "at-will" unless there is a specific statutory provision to the contrary.[17] The court noted that the legislature has the authority to change the employment-at-will concept and can limit the ability of an employer to terminate its employees.[18] *Arrow Air* is significant because the supreme court rejected the lower court's ruling which had enabled a terminated employee to retroactively assert a Whistle-blowing claim[19] before the statute had been enacted.[20]

The Third District Court of Appeal noted that the termination-at-will rule was harsh.[21] In fashioning a judicial interpretation of whether a statutory provision such as the Whistle-blower's Act should be interpreted retroactively, the court found that public policy pervaded the situation.[22] The court found that statutory provisions, whether they were enacted before or after the events in question, suggest a more liberal attitude towards employees.[23] As a result, employees are able to overcome defenses raised

14. *See generally* Sanz v. R.T. Aerospace Corp., 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).

15. FLA. STAT. § 448.104 (1993). The statute states that "[a] court may award reasonable attorney's fees, court costs, and expenses to the prevailing party." *Id.*

16. 645 So. 2d 422 (Fla. 1994).

17. *Id.* at 424.

18. *Id.*

19. FLA. STAT. § 112.3187 (1993).

20. *Arrow Air*, 645 So. 2d at 425.

21. Walsh v. Arrow Air, Inc., 629 So. 2d 144, 148 (Fla. 3d Dist. Ct. App. 1993), *rev'd*, 645 So. 2d 422 (Fla. 1994).

22. *Id.* at 147.

23. *Id.*

by employers that a statute is inapplicable because the event occurred before the law was enacted.

The Supreme Court of Florida, however, rejected this reasoning, finding the statutes to be prospective only.[24] *Arrow Air* is consistent with other recent Florida cases which found that although the legislature has the ability to change the law so as to preclude employment terminations without meeting or satisfying statutory prerequisites, employees can be terminated for good reason, bad reason, or no reason at all, unless there is a statutory provision to the contrary. As the Third District Court of Appeal noted in *Hartley v. Ocean Reef Club, Inc.*,[25] "[t]he established rule in Florida is that when the term of employment is discretionary or indefinite, either party may terminate the employment at any time for any reason or no reason without assuming any liability."[26]

B. *Statutory Restrictions on Noncompete Agreements*

Courts have refused to uphold claims by employees seeking a continuation of an employment relationship which is terminable-at-will. In addition, courts have refused to enforce oral employment agreements not to be performed within the space of one year. However, an employer does have the ability to enforce an agreement not to compete even in a terminable-at-will situation as long as the restriction on such competition is consistent with the statute of frauds. In other words, the enforcement does not occur for a period of more than one year.

In *Sanz v. R.T. Aerospace Corp.*,[27] the Third District Court of Appeal held that an agreement not to compete entered into by an employee who continued working under an oral agreement was not enforceable because of the statute of frauds.[28] The court refused to extend a written agreement which barred the employee from competing for two years following termination of employment to a subsequent oral agreement.[29] The court noted that:

> Under the statute of frauds, any agreement that is not to be performed within the space of one year from its making must be reduced to

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24. *Arrow Air*, 645 So. 2d at 424-25 (citing Landgraf v. USI Films Prods., 114 S. Ct. 1483 (1994) (applying Title VII prospectively only)).

25. 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985).

26. *Id.* at 1328.

27. 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).

28. *Id.* at 1060.

29. *Id.* at 1059.

> writing in order to be enforceable. Further, Sanz's continued performance after the expiration of the written agreement pursuant to any oral agreement with R.T.A. cannot serve to remove the agreement from the confines of the statute of frauds. The law is clear that the doctrine of partial performance of an oral agreement has no applicability to personal service contracts.[30]

In addition, the legislature has placed other restrictions on noncompete agreements such as restraining employees from competing when their employer sells the goodwill of the business.[31] However, it is inconsistent to maintain that an employer can terminate an employee in a wrongful manner while, simultaneously, being allowed to enforce a noncompete agreement. Thus, the courts have generally recognized that where there is a noncompete clause preventing the employee from taking advantage of confidential business information, the employer will be prohibited from enforcing that otherwise enforceable covenant after wrongfully discharging the employee.[32]

As William Holloway and Michael Leech note in *Employment Termination Rights and Remedies*:[33]

> The governing principle of contract law is that any material failure of performance by one party that is not justified by the conduct of the other discharges the latter's duty to perform under the contract. Accordingly, if an employer wrongfully discharges the employee prior to expiration of the contract, the employee is relieved from honoring a covenant not to compete. Any other outcome would strip the employee of his ability to earn a livelihood.[34]

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30. *Id.* at 1060 (citations omitted).

31. *See, e.g.*, FLA. STAT. § 542.33(2)(a) (1993); Lovell Farms, Inc. v. Levy, 641 So. 2d 103, 105 (Fla. 3d Dist. Ct. App. 1994) (noting that even if a noncompete agreement were enforceable, a court, before determining that it would grant an injunction to enforce such an agreement, must engage in a balancing test). The court also noted that it must "weigh the public interest, the potential effects on the employee, and the legitimate interests of the employer, to determine the enforceability of the non-compete contract." *Lovell Farms*, 641 So. 2d at 105.

32. *See* HOLLOWAY & LEECH, *supra* note 4, at 409.

33. *Id.*

34. *Id.*

C. *Federal Decisions*

Federal courts that have interpreted Florida law in the past few years have also recognized that employees cannot maintain that they have a public policy right to challenge employment decisions terminating their employment at-will in the absence of a contract or specific statutory right. Moreover, employees cannot raise oral contractual claims that they could only be terminated for cause, or assert that they can contest their termination based on contract claims, when they were employed at-will. For example, the court in *Golden v. Complete Holdings, Inc.*,[35] stated that "the employment-at-will doctrine is the law in Florida."[36] The court stated that: "'[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained *for breach of employment contract.*'"[37]

Federal courts have also rejected the theory that an employee's retaliatory termination could constitute a tort of retaliatory termination. In *Zombori v. Digital Equipment Corp.*,[38] the court noted:

> Florida's at-will employment doctrine may be "cold-hearted, draconian and out-dated," but it is the law of Florida. Notably, Florida's legislature and courts have created exceptions to the at-will doctrine allowing employees to assert wrongful discharge claims in defined circumstances. By doing so, Florida's legislators and judges have attempted to conform the doctrine to current public policy. Given these officials are elected and appointed by the people of Florida, it is their duty to define Florida law on this and other subjects.
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> While the Court regularly interprets Florida law to resolve claims in diversity cases, it is not the Court's place to expand Florida's common law by creating new causes of action. Federal courts are entrusted to apply state law, not make it. As of today, Florida does not

35. 818 F. Supp. 1495 (M.D. Fla. 1993) (confirming that an employee can be terminated as an employee-at-will for good reason, bad reason or no reason at all).

36. *Id.* at 1497.

37. *Id.* (quoting DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134, 136 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (Fla. 1980)) (alteration in original). The court in *Golden* also noted Florida cases such as *Hartley*, which confirmed that a plaintiff cannot sue based on a type of contract theory. However, the court also noted allegations involving attempts to humiliate the plaintiff into resigning and other misconduct which did not relate to contractual allegations, but rather, to possible tort claims. *Id.* at 1496-99.

38. 878 F. Supp. 207 (N.D. Fla. 1995).

permit employees to sue employers for retaliatory discharge based on a common law prima facie tort theory.[39]

III. A REVIEW OF THE LITERARY COMMENTARY

An increase in conservative philosophy caused a rise in recent analysis of the benefits of the employment-at-will doctrine by commentators. This is due in part because conservative commentators seek to prevent judicially made law from eroding the termination-at-will doctrine. Another reason for the increased analysis may be the numerous legislative humanitarian rights provisions allowing employees to sue their employers. As a result, the factors that caused concern over the employers exploitation of employees and the excessive control employers possessed over the employees have changed. Undoubtedly, the enactment of statutes relating to labor and employment law which give employees more rights to challenge their employers' decisions (especially in the more progressive jurisdictions) has also contributed to the rise in recent commentary. Thus, a review of the basic texts on labor and employment law will illustrate the increase in such laws as well as the decrease in the need to question the employment-at-will doctrine.[40]

Peter Panken, a management labor lawyer, provided an illustration of the availability of employee rights in a fairly liberal jurisdiction, such as New York or California.[41] Panken concluded that "[o]ne act by an employee can give rise to 36 or more causes of action."[42] Panken also noted that if an employer were to "[f]ire a 42-year-old minority woman shop steward with a bad back and 4 years 11 months seniority, [the employer] may face at least *36* different litigations . . . ."[43] Some examples of these include unemployment insurance claims, grievances, and arbitration of grievances under the collective bargaining agreement.[44] Examples of

39. *Id.* at 209-10.

40. *See generally* SECTION OF LABOR & EMPLOYMENT LAW, AMERICAN BAR ASSOCIATION, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (Patrick Hardin, et al., eds., 3d ed. 1992 & Raymond L. Wheeler, et al., eds., Supp. 1994); BARBARA LINDEMAN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1982 & David A. Cathcart & R. Lawrence Ashe, Jr., eds., Supp. 1989).

41. Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90s*, *in* 2 AIRLINE AND RAILROAD LABOR AND EMPLOYMENT LAW 553, 553-54 (ALI-ABA 1994).

42. *Id.* at 553.

43. *Id.*

44. *Id.*

discrimination charges under the Equal Employment Opportunity Commission ("EEOC") include charges complaining of failure to hire, failure to promote, or discharge due to age, sex, race, national origin, and religion.[45]

Despite the expanding statutory remedies, employees still raise alternate theories for recovery when challenging an employer's decision to terminate. This occurs where employees fail to satisfy the statutory prerequisites for jurisdiction over a particular claim, where jurisdiction was satisfied pursuant to pendant jurisdiction, or where various counts where filed to supplement the statutory claims. Often, there are allegations that the employee was improperly terminated because the employer did not have "just cause." Thus, employees argue that the courts should ignore, modify or establish exceptions to the common law rule that employees can be terminated at-will.

However, because of the numerous remedies available to employees, it may be more difficult for courts to reach the conclusion that continuation of the termination-at-will doctrine will result in management abuse. Even in those jurisdictions recognizing the employment-at-will doctrine, there are numerous vehicles which provide protection for employees, and enable employees to challenge employment decisions that are inconsistent with laws

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45. *Id.* The remaining causes of action include:

State (or city) administrative charges of discrimination on the basis of:
(9) Disability; (10) Gender; (11) National origin; (12) Race; and (13) Age;

NLRB charges of:
(14) Discrimination for union activities (exercising § 7 rights to form, join and assist labor organizations) even as the union is charged with (15) Breach of its Duty of Fair Representation;

Federal lawsuits for discrimination on the basis of:
(16) Age (over 40); (17) Race; (18) Sex; (19) National origin; and (20) Disability;

Federal lawsuits on the basis of:
(21) Violation of 42 U.S.C. § 1981; (22) Complicity with union in its violation of its Duty of Fair Representation; and (23) ERISA § 510 lawsuits (termination to avoid obtaining or payment of benefits);

State lawsuits for discrimination on the basis of:
(24) Race; (25) Gender; (26) National Origin; (27) Disability; and (28) Age;

State lawsuits on the basis of:
(29) Wrongful termination for whistleblowing; (30) Discharge for a reasons "against public policy"; (31) Libel; (32) Slander; and when all else fails (33) Intentional; and (34) Negligent infliction of emotional distress as well as (35) Prima Facie tort; and finally (36) Retaliation for filing any of the above charges.

Panken, *supra* note 41, at 553.

protecting employees. For example, these laws include causes of action for discharge due to ethnicity, sex, age, disability, family status, Whistle-blowing activities, and statutes which preclude retaliation because the employee chooses to file suit.[46]

However, these statutory provisions are so extensive that they counter-balance the equities previously used by the courts to evaluate whether the employment-at-will doctrine should be rejected due to the doctrine's unfairness to employees. Courts also have to consider the viability of the historical argument that management has all of the power and control in the work place. Thus, numerous commentators recognize that by undermining the management rights and prerogatives through statutory provisions, the balance has shifted.[47]

In many instances, however, commentators are industry-oriented. As a result, many have relocated to states with a favorable labor climate, such as Florida. These right-to-work jurisdictions are less restrictive and tend to influence commentators' evaluation of the employment-at-will doctrine.[48] In addition, the increase in articulate spokespersons from the conservative "Chicago School" of thought has resulted in a number of publications and texts which document the advantages of the doctrine. One leading proponent for this type of analysis is Richard Epstein, author of *Simple Rules for a Complex World*,[49] who comments extensively on the validity

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46. Examples of statutes providing protection for employees who elect to file a cause of action against their employer for statutory violations include: civil, workers' compensation, and Whistle-blowing statutes.

47. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 46, 133-44 (1994).

48. *See, e.g.*, David Tuller, *Moviemakers Come to Mainstreet*, N.Y. TIMES, Apr. 27, 1986, at 4. The article notes that California had $4 billion in estimated revenues from motion pictures and featured television production, New York had $1.7 billion, and Florida had $114 million in revenues and was third in national ranking. *Id.* The article further notes that the "action" is not just in California and New York because the other 48 states are wooing and winning film producers as well. In addition to state underwriting of expenses, the article concludes that another advantage to operating in states other than New York and California relates to lower labor costs because "[l]abor costs in right-to-work states like Florida, North Carolina, and Texas can be as much as 25 percent lower than those in New York." *Id.* Since employers in most cases are the ones that determine whether they are going to operate in a state, this right-to-work provision creates an initial attraction. This ultimately increases motion picture productions in these right-to-work states by assisting employers. Even employees and unions may benefit by virtue of increased work, although unions constantly press to eliminate the right to work provisions and do not agree with the management approach that there are advantages for a state to exercise its right to work option. *Id.*

49. RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

of the "contract at will."[50] Epstein notes that there are advantages for a "contract at will." Such a contract is basically terminable-at-will, and as such:

> provides both sides with a *secured obligation.* The point sounds strange given that one side can quit and the other side can fire, without any explanation. For most people, the idea of security connotes a mortgage or a lien on some form of property — the home mortgage is perhaps the most familiar example. But it is appropriate to expand our horizons on this point. The employer who decides to fire a worker has to pay a price, that is, he will no longer be able to reap the benefits of the worker's labor. Conversely, the worker who decides to quit will no longer be able to command the wage. Each obligation is held hostage to the other. Before quitting or firing, one has to make a hard decision about whether the benefit forgone is worth the labor or the wages that can now be retained. But once a decision to sever the arrangement is made, the security on the other side is instantly realized, without the formalities and delay of foreclosure proceedings. The worker instantly recovers her labor, and the employer his cash. Knowing the efficiency of the security arrangement, people will move with caution, given that it is always costly to exercise the right to quit or to fire.[51]

In addition, Epstein notes that the right to quit, or to fire, created by the termination-at-will doctrine has "powerful and desirable incentive effects. In particular, it serves as an effective check against the advantage-taking open to either side in a continuous relationship."[52] Epstein notes additional advantages to the doctrine such as "moderating" influences which tend to prevent either party from obtaining an advantage over the other, and the "durability" of the doctrine due to its "fragile" legal nature.[53] Because either party can terminate the employment at any time, a fragile employment relationship results. This relationship is thus strengthened, and hence durable, because the parties are not required to enter into long-term agreements which often cause additional demands and disputes over the employment terms. Epstein argues further that "[t]he utility of the contract at will is also strengthened by reputational forces. The employer with a large work force is constrained in dealing with any particular employee. Firing the first worker for reasons that other workers perceive as unfair will

50. *Id.* at 156-59.
51. *Id.* at 157-58.
52. *Id.* at 158.
53. *Id.*

have powerful ripple effects throughout the firm."[54] In concluding, Epstein suggests that the "ease of its enforcement" is a final major advantage of the termination-at-will doctrine.[55] The author states that:

> The legal position is this: I quit, or you fire me; judgment for the defendant. The entire system takes about two words to explicate in the standard case. "Anything goes" within the legal system precisely because anything will not go in the business setting. Simplicity has its dividends, for both sides can share in the administrative savings in the form of higher profits and higher wages. Only the lawyers lose when the contract at will is fully respected.[56]

IV. INCONSISTENCIES BETWEEN LEGISLATIVE AND JUDICIAL INTERPRETATION

It has been suggested that the statutory provisions are inconsistent because they allow an employee who was terminated for exercising a workers' compensation claim to be able to obtain reinstatement of that employment, while not extending similar protection to all employees in Florida.[57] This statutory right permitting an employee to return to work effectively eliminates the termination-at-will concept. However, statutory provisions reflect important for public policy reasons. As a result, they do not permit the same right to be asserted in other situations such as to prevent a retaliatory firing of a employee at-will. The difference is due to the legislative intent of a particular provision of the statute. Such legislative intent has been articulated in the workers' compensation and Whistle-blowing statutory provisions.

In these situations, the legislature reached conclusions resulting in legislative provisions which changed the relationship between the parties in the employment field by designating certain conduct as protected, and thus, precluding termination because of it. The distinction between the statutory provisions and the ability of courts to legislate policies through judicial

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54. EPSTEIN, *supra* note 49, at 158.

55. *Id.* at 159.

56. *Id.*

57. *See, e.g.*, Stephen G. DeNigris, *The Public Policy Exception: The Need to Reform Florida's At-Will Employment Doctrine After* Jarvinen v. HCA Allied Clinical Laboratories *and* Bellamy v. Holcomb, 16 NOVA L. REV. 1079 (1992) (arguing that conservative jurisprudence notwithstanding, the termination-at-will doctrine should be abandoned or reformed); Mark E. Walker, Comment, *Workers' Compensation: Florida's Resistance to Nonstatutory Limits to the Employment-At-Will Doctrine*, 43 FLA. L. REV. 583 (1991).

decisions is the difference which the courts have recognized, and utilized, in their decisions not to strike down the termination-at-will concept.

As recent decisions have indicated, the increase in statutory provisions also makes it very difficult for the judiciary to formulate public policy arguments to undermine or eliminate the employment-at-will doctrine. Difficulties exist not only because of the complexity of laws but because of the inconsistencies in the statutory provisions. Additional inconsistencies result where judges attempt to fashion a common law remedy which is precluded under the statutory provisions. One example of this problem is found where the inconsistencies in federal statutory provisions have caused litigants to seek judicial resolution of the inconsistencies. For example, in *Sears, Roebuck & Co. v. Attorney General of the United States*,[58] the employer sought declaratory and injunctive relief to eliminate conflicting legislative mandates and to "coordinate its equal opportunity laws."[59] The opinion provided the employer's arguments:

> [S]ocial attitudes, economic realities and earlier government policies — specifically veterans preference schemes — combined to produce a business environment in which most of the responsible and remunerative posts were occupied by white males. Sears complains that these previously established priorities in employment conflict with subsequently established priorities in employment.
>
> . . . .
>
> In the second part of the complaint, Sears attempts to attribute the alleged shortage of well-qualified female and minority applicants to the government's failure to enforce equal opportunity laws in housing, education and employment.[60]

Despite such allegations, the United States District Court for the District of Columbia ruled that the judiciary could not resolve inconsistencies in federal legislation because of Article III of the Constitution which prohibits the resolution of matters that do not involve an actual case or controversy.[61] The court ruled that "'a controversy in [the Article III] sense involves considerably more than mere abstract philosophical disagree-

58. 19 Fair Empl. Prac. Cas. (BNA) 916 (D.D.C. 1979).
59. *Id.* at 916.
60. *Id.* at 917.
61. *Id.* (discussing U.S. CONST. art. III).

ment with the wisdom, propriety, or desirability of specific governmental activities . . . .'"[62]

In addition to the statutory inconsistency problem, there are also problems with statutory provisions that preclude a judicially mandated "just cause" standard. For example, in *McKennon v. Nashville Banner Publishing Co.*,[63] an employee was discharged due to age in violation of the Age Discrimination in Employment Act ("ADEA"). The employer subsequently discovered that the employee was guilty of misconduct that would have supported the termination had the employer been aware of the conduct at the time. The court held that although an employer may possess after acquired evidence that would give him just cause to discharge the employee, the employer is precluded from doing so because of an express statutory provision to the contrary.[64] In other words, although courts might conclude that the employee could have been terminated because of the employee's improper conduct, the statutory policy, which favors relief for the employee, may override and excuse the misconduct.[65] As a result, just cause to terminate an employee cannot be the sole standard applied in evaluating whether the employment decision complained of by the employee was proper.

A judicial body of law, which undermines the employment-at-will doctrine and requires the establishment of the "just cause" standard for termination, may not answer the question of whether the statutory prerequisites have been complied with for the purpose of protecting statutory rights. Federal statutory rights may preclude the need to evaluate a state common law system which uses "just cause" because even establishing such a standard would not resolve the question of whether a federal statute had been violated.

In the same sense, Florida courts interpreting Florida statutes will also have to evaluate the prerequisites for statutory protection. For example, an employee who satisfied the requisites for suing under the Whistle-blowing provisions[66] of the *Florida Statutes* might have acted in a manner that would justify the employee's termination under a judicially created "just cause" standard. However, if the employee establishes that the employee was also terminated because of retaliation for Whistle-blowing activity,

62. *Id.* (quoting Gaillot v. Dep't of Health, Educ. & Welfare, 464 F.2d 598 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972)) (alteration in original).

63. 115 S. Ct. 879 (1993).

64. *Id.* at 883-84.

65. *Id.*

66. FLA. STAT. §§ 448.101(5), .102 (Supp. 1994).

which is protected under the statute, further judicial proceedings would be required.

Thus, balancing the inconsistencies in the federal and state statutory provisions and adding the fact that statutory provisions take precedence over the common law issues may further reduce the reasons for the courts to undermine the termination-at-will doctrine. On the other hand, it is equally argued that courts can create a common law doctrine and should not be dissuaded from doing so merely because, in certain cases, that doctrine may be eliminated by statutory provisions. However, the courts would then be faced with the proposition that the legislature has not yet eliminated the termination-at-will doctrine in enacting various additional employment rights. Thus, adding judicial modifications to the common law that conflict with existing and expanding statutory provisions might be counterproductive.

V. CONCLUSION

It appears that conservative commentators now suggest additional policy reasons for the continuation of the employment-at-will doctrine. Moreover, the liberal commentaries, which are now decreasing, have also conceded that more judges are now deferring to the legislature. Thus, the question to be resolved in future years is whether a retreat from complex employment rights created by statutory laws would cause a resurgence of judicial opinions evaluating the employment-at-will doctrine. At this point, however, the legislature has not decreased the rights and protections afforded employees. Notwithstanding the conservative commentary and plentiful rhetoric in both federal and state legislative bodies, there does not appear to be a retreat from employment regulation in the work place by virtue of state and federal laws. For this reason, the recent decisions which have sustained the doctrine of employment-at-will in view of increasing statutory labor and civil rights laws, appear to demonstrate a trend which will continue. Based upon recent judicial rulings and trends, it appears that the employment-at-will doctrine will be with us for some time to come.