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Introduction

At least two earlier articles[1] have expressed the thought that references to probationary employment periods in employment applications, employee handbooks, and company policy manuals could subject employers to liability for wrongful discharge in spite of the employment-at-will doctrine. The purpose of this paper is to examine recent case law to determine the strength of the above theory.

To do so, the authors reviewed 22 appellate court decisions from 14 jurisdictions. Twenty-one of the 22 appellate cases reviewed were decided between the years of 1983 and 1989. In addition, one 1987 lower trial court decision, which specifically involved a probationary period of employment from the Delaware state court system, was also examined. Table 1 following the text of this article summarizes the holdings in the various cases by states in alphabetical order. Table 2, entitled "Case Citations," gives the citations to the cases summarized in Table 1.

The Doctrine

At the onset, let it be said that at least one of the co-authors of this paper is somewhat critical of the employment-at-will doctrine and fully agrees with Texas Supreme Court Justice Kilgarlin, who stated in **Sabine Pilot Service, Inc. v. Hauck** that "(a)bsolute employment-at-will is a relic of early industrial times, conjuring up visions of sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law."[2]

The employment-at-will doctrine is also often referred to as the termination-at-will rule. Simply stated, the rule holds that an employment agreement for an indefinite period is presumed to be "at-will" and that the agreement may be terminated by either party at any time, for any reason. Most often this means that the employer is deemed to have the right to fire an employee at any time for no reason at all, or even for a bad reason, or as the Supreme Court of Mississippi recently stated

> (The typical case) . . . presents us with a story all the more depressing for being sadly familiar. Willis Perry served Sears, Roebuck faithfully and with distinction for some twenty years. He was almost within sight of retirement when Sears unceremoniously dumped him because of a personality conflict with his immediate supervisor.[3]

Unfortunately for Mr. Perry, all the Mississippi court could say was that the Golden Rule is not a rule of law. Relying upon the traditional

employment-at-will doctrine, the court upheld a summary judgment in favor of the employer.

Judicial Inroads

Some judicial inroads have been made upon the termination-at-will rule and they can generally be classified as falling into one of three major categories:

1) tort actions for wrongful discharges in violation of public policy,
2) contract actions for breach of implied-in-fact contractual limitations on the rule, and
3) contract actions for breach of contract based on implied in-law duties of good faith and fair dealing.

Numerous commentators have previously dealt with the various tort theories based on public policy and with the contract theories based upon the implied-in-law duties of good faith and fair dealing. Accordingly, the scope of this paper is limited to the legal effect, if any, of employer references to probationary employment periods in employment applications, employee handbooks, and/or company policy manuals under the implied-in-fact contract theory of recovery.

Professors James P. Jolly and James G. Frierson in a June 1989 study of American Society for Personnel Administration (ASPA) members found that 8% of the respondents' firms still made reference to probationary periods of employment in their job application forms.[4] Moreover, among the health care industry firms responding to their survey, Professors Jolly and Frierson found that 24% of the firms referred to probationary or temporary periods of employment ranging anywhere from two weeks to six months.

The Probationary Premise

Under these circumstances, the argument that could be made by a disgruntled, discharged employee in a wrongful discharge suit seems obvious. If an employee is a temporary or probationary employee who can be terminated at any time for any reason during some arbitrary probationary period of employment, at the expiration of that probationary period, the employee who is not discharged must become something else, i.e., a "permanent" employee who can no longer be discharged without good and/or just cause.

Surprisingly, the authors of this paper were unable to discover any appellate court decisions squarely on point that directly addressed the above theory. A significant number of appellate court decisions did hold that the terms of an employment agreement between the employer and the employee could include, in appropriate circumstances, statements made by the employer in job application forms, employee handbooks, company policy manuals and occasionally even oral statements of the employer.[5] However, a large number of cases examined held, that in the presence of an express disclaimer by the employer indicating an intent not to be bound by such statements, that the employer was not so bound.[6] States adopting the former view include Arizona, Idaho, Massachusetts, Michigan, Minnesota, New Jersey, New Mex-

ico, South Dakota, Utah and Washington. The states of Arizona, California, Idaho, Mississippi, Massachusetts, Pennsylvania, and Wisconsin also accept the latter position which, in effect, allows an employer to negate the earlier proposition.

The only decision that the authors uncovered which expressly dealt with a probationary period of employment was a Delaware trial court decision, **Edwards v. Lutheran Social Services of Dover, Inc.**[7] This case is not reported in the Atlantic 2d reporter. However, it may be found in West Law under #10271. In **Edwards**, the plaintiff argued that he was wrongfully discharged by the Board of Directors of Lutheran Social Services after the expiration of his initial probationary period of employment because the directors did not state the reason for his termination. The trial court appears to have rejected Edwards' argument due to the fact that the directors had previously voted to extend his probationary period of employment and he was fired during that extended probationary period. Hence, the court did not reach the issue of what would have happened had the directors attempted to fire the plaintiff without cause after the expiration of the probationary period.

Notwithstanding the dearth of case law on the issue, some employers are currently being advised to practice defensive employment practices and to delete any references to probationary periods of employment, causes for termination, and/or progressive discipline procedures from all job applications, employee handbooks, company policy manuals, and company policy statements. A few employers have gone further and have included disclaimers expressly negating any intent to be bound by their own policy statements and reasserting in their various company forms, handbooks, manuals and policy statements that the employment of the employee is at-will and that the employment may be terminated by the employer at any time, for any reason, even where that action might conflict with other statements or with implied policies of the employer. The majority of the appellate court decisions examined by the authors seemed all to eager to uphold such disclaimers.[8]

Conclusion

To say that the elimination of references to probationary periods of employment in company forms, handbooks, manuals, and policy statements is an effective defensive legal practice is not to say, however, that it is a desirable social policy, or even an effective business practice. Indeed, the employer's strategy of rigidly adhering to an outmoded termination-at-will doctrine may prove to be counterproductive in terms of lower employee morale and decreased productivity.[9]

TABLE 1
Summary Of Case Law

Case Ref.	Date	State	Employee Prevails	Legal Theory
1.	1985	Ariz.	Yes	Held that provisions in employee handbook can modify the employment-at-will rule.
2.	1988	Ariz.	No	Written termination-at-will clause in contract overrode same contract's express three year term.
3.	1983	Calif.	No	Written disclaimer in contract over-rode conflicting terms of employee manual.
4.	1987	Delaware	No	Employee hired on "90-day probationary status" and fired during a second extension of that "probationary status" was an at-will employee unable to successfully challenge summary judgment in favor of defendant-employer.
5.	1987	Idaho	No	Disclaimer in employee handbook negated claim that handbook created an implied employment contract.
6.	1988	Idaho	No	States that Idaho does recognize theory that employment-at-will doctrine can be modified by an express or implied agreement and that the terms of the implied contract can be found in an employee handbook. (Rev'd on other grounds).
7.	1980	Mass.	Yes	Provisions in employee manual can constitute part of contract of employment.
8.	1988	Mass.	Yes	Provisions in hospital's "staff by-laws" can also constitute part of contract of employment.
9.	1988	Mass.	No	Employers' retained right to modify employee manual at any time negated claim that manual created an implied contract of employment.
10.	1980	Mich.	Yes	Held that employer policy statements can create terms of an implied contract of employment and evidence of those terms can be found in employee manuals even where employer retains the right to modify policies and terms of manuals at any time. (Contrast with Massachusetts rule above).
11.	1983	Minn.	Yes	Job security provisions in employee handbook negated presumption of employment-at-will; it does not matter whether handbook is given to employee before or after employment; and no further consideration is required from employee after receiving handbook other than continued service.
12.	1986	Minn.	No	Mere long term service and good job performance by an employee is not enough to convert at-will employment contract into one requiring good cause for dismissal.
13.	1989	Minn.	Yes	Conflict between provisions in company handbook and express at-will statements in contract of employment are not automatically resolved in favor of express at-will statements; issue is one for jury and summary judgment for employer is precluded.

14.	1987	Miss.	No	Explicit statements in personnel handbook negating any implication of employee rights and restating company's right to terminate employee at-will were binding even upon an employee with over twenty years good service with the employer.
15.	1985	New Jer.	Yes	Company's employee manual held to create terms of an implied contract of employment unless the manual contains a prominent disclaimer.
16.	1986	New Jer.	Yes	Issue as to whether at-will employees have implied contracts of employment based on employer's personnel policy manuals is a material question of fact for jury precluding summary judgment for employer.
17.	1988	New Mex.	No	Court recognized that an implied contract between employee and employer could modify the at-will presumption, but court failed to find an implied contract in this case.
18.	1986	Penn.	No	Rejected employee's argument that just cause statements in employee handbook could modify the at will presumption. Holds that unilaterally issued handbooks are not binding on employers in Pennsylvania.
19.	1983	South Dak.	Yes	Held that unless the employer's employee handbook contained an explicit disclaimer, employer could not unilaterally disregard express provisions of handbook setting forth causes and procedures for dismissal.
20.	1988	South Dak.	No	Like Minnesota this court rejected the notion that longevity alone can create an implied obligation modifying the termination-at-will rule.
21.	1989	Utah	Yes	Recognizes possibility of an implied-in-fact contract and holds that such an implied contract can be based upon an employer's written disciplinary policy. Rejects employer's arguments based on lack of mutuality of obligation and lack of independent consideration doctrines. Goes further to hold that implied duties of good faith and fair dealing also apply to employment contracts. Summary judgment for employer reversed and remanded.
22.	1983	Wash.	No	Court recognized that an implied contract of employment could exist and that such an implied contract could modify the termination-at-will rule, but the court failed to find that employer's incentive bonus plan created an implied contract in this case.
23.	1983	Wisc.	No	Express written statement, signed by employee at time of hire, acknowledging that employment could be terminated at any time, by either party for any reason negated possibility of implied contract based on conflicting disciplinary policies of employer.

TABLE 2
Case Citations

1. **Wagenseller v. Scottsdale Memorial Hospital**, 147 Ariz. 370, 714 P.2d 412 (1984).

2. **Norman v. Recreation Centers of Sun City, Inc.**, 156 Ariz. 425, 752 P.2d 514 (1988).

3. **Crain v. Burroughs Corporation**, 560 F. Supp. 849 (Calif. 1983).

4. **Edwards v. Lutheran Social Services of Dover, Inc.**, not reported in A.2d 1987 West Law 10271 (Del. Super. 1987).

5. **Arnold v. Diet Center, Inc.**, 113 Idaho 581, 746 P.2d 1040 (Idaho App. 1987).

6. **Nilsson v. Mapco**, 115 Idaho 18, 764 P.2d 95 (Idaho App. 1988).

7. **Garrity v. Valley View Nursing Home**, Mass. App., 406 N.E.2d 423 (1980).

8. **Hobson v. McLean Hospital Corporation**, 402 Mass. 413, 522 N.E.2d 975 (1988).

9. **Jackson v. Action for Boston Community Development, Inc.**, 403 Mass. 8, 525 N.E.2d 411 (1988).

10. **Toussaint v. Blue Cross & Blue Shield of Michigan**, Mich., 292 N.W.2d 880 (1980).

11. **Pine River State Bank v. Mettille**, 333 N.W.2d 622 (Minn. 1983).

12. **Dumas v. Kessler & Maguire Funeral Home, Inc.**, 380 N.W.2d 544 (Minn. App. 1986).

13. **Bratton v. Menard, Inc.**, 438 N.W.2d 116 (Minn. App. 1989).

14. **Perry v. Sears, Roebuck & Co.**, 508 So.2d 1086 (Miss. 1987).

15. **Woolley v. Hoffman-LaRoche, Inc.**, 99 N.J. 284, 491 A.2d 1257 (1985).

16. **Giudice v. Drew Chemical Corp.**, 210 N.J. Super. 32, 509 A.2d 200 (1986).

17. **Melnick v. State Farm Mutual Automobile Ins. Co.**, 106 N.M. 726, 749 P.2d 1105 (1988).

18. **Martin v. Capital Cities Media, Inc.**, 511 A.2d 830 (Pa. Super. 1986).

19. **Osterkamp v. Alkota Manufacturing, Inc.**, 332 N.W.2d 275 (S.D. 1983).

20. **Breen v. Dakota Gear & Joint Co., Inc.**, 433 N.W.2d 221 (S.D. 1988).

21. **Berube v. Fashion Center, Ltd.**, 771 P.2d 1033 (Utah 1989).

22. **Goodpaster v. Pfizer, Inc.**, 35 Wash. App. 199, 665 p.2d 414 (1983).

23. **Holloway v. K-Mart Corporation**, 113 Wis. 2d 143, 334 N.W.2d 570 (Wisc. App. 1983).

Footnotes

[1]Jolly, James P. and James G. Frierson, "Playing It Safe," **Personnel Administrator** 34 (June 1989): 44-50 and Koys, Daniel J., Steven Briggs and Jay Grenig, "State Court Disparity and Employment-at-Will," **Personnel Psychology** 40, (1987): 565-577.

[2]**Sabine Pilot Service, Inc. v. Hauck**, 687 S.W. 2d 733 (Tex. 1985).

[3]**Perry v. Sears, Roebuck & Co.**, 508 So.2d 1086 (Miss. 1987).

[4]Jolly and Frierson, 1989, p. 49.

[5]**Wagenseller v. Scottsdale Memorial Hospital**, 147 Ariz. 370, 714 P.2d 412 (1984). **Nilsson v. Mapco**, 115 Idaho 18, 764 P.2d (Idaho App. 1988); **Garrity v. Valley View Nursing Home**, Mass. App., 406 N.E.2d 423 (1980); **Toussaint v. Blue Cross & Blue Shield of Michigan**, Mich., 292 M.W.2d 880 (1980); **Pine River State Bank v. Mettille**, 333 N.W.2d 622 (Minn. 1983); **Bratten v. Menard**, 438 N.W.2d 116 (Minn. App. 1989); **Guidice v. Drew Chemical Corp.**, 210 N.J. Super. 32, 509 A.2d 200 (1986); **Melnick v. State Farm Mutual Automobile Ins. Co.**, 106 N.M. 726, 749 P.2d 1105 (1988); **Osterkamp v. Alkota Manufacturing, Inc.**, 332 N.W.2d 275 (S.D. 1983); **Berube v. Fashion Center, Ltd.**, 771 P.2d 1033 (1989); and **Goodpaster v. Pfizer, Inc.**, 35 Wash. App. 199, 665 P.2d 414 (1983).

[6]**Norman v. Recreation Centers of Sun City, Inc.**, 156 Ariz. 425, 752 P.2d 514 (1988); **Crain v. Burroughs Corporation**, 560 F. Supp. 849 (Calif. 1983); **Arnold v. Diet Center, Inc.**, 113 Idaho 581, 746 P.2d 1040 (Idaho App. 1987); **Perry v. Sears, Roebuck & Co.**, 508 So.2d 1086 (Miss. 1987); **Jackson v. Action for Boston Community Development, Inc.**, 403 Mass. 8, 525 N.E.2d 411 (1988); and **Holloway v. K-Mart Corporation**, 113 Wis.2d 143, 334 N.W.2d 570 (Wisc. App. 1983).

[7]**Edwards v. Lutheran Social Services of Dover, Inc.**, not reported in A.2d, 1987 West Law #10271 (Del. Super. 1987).

[8]**Norman v. Recreation Centers of Sun City, Inc.**, 156 Ariz. 425, 752 P.2d 514 (1988); **Crain v. Burroughs Corporation**, 560 F. Supp. 849 (Calif. 1983); **Arnold v. Diet Center, Inc.** 113 Idaho 581, 746 P.2d 1040 (Idaho App. 1987); **Perry v. Sears, Roebuck & Co.**, 508 So.2d 1086 (Miss. 1987); **Jackson v. Action for Boston Community Development, Inc.**, 403 Mass. 8, 525 N.E.2d 411 (1988); and **Holloway v. K-Mart Corporation**, 113 Wis.2d 143, 334 N.W.2d 570 (Wisc. App. 1983).

[9]Koys, et al., 1987, p.576.

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