Employee's Allegation of Wrongful Termination for Failing to Comply with Illegal Order by Employer States Cause of Action.

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CASENOTES

MASTER AND SERVANT—Employment at Will—Employee's Allegation of Wrongful Termination for Failing to Comply With Illegal Order by Employer States Cause of Action

Hauck v. Sabine Pilots, Inc.,
672 S.W.2d 322 (Tex. App.—Beaumont 1984, writ granted).

Michael Andrew Hauck was discharged by his employer, Sabine Pilots, Inc.[1] The termination of employment[2] was allegedly due to Hauck's refusal to "pump the bilges"[3] of Sabine's boat in a manner prohibited under federal law.[4] Claiming that he was discharged because he refused to commit an illegal act, Hauck sued Sabine Pilots, Inc., for wrongful termination.[5] The trial court granted the employer summary judgment.[6] Hauck

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1. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted).

2. *See id.* at 323. Sabine Pilots, Inc., claimed that Hauck's employment was for an indefinite time and was, thus, terminable at will for any reason or no reason. *See id.* at 323; *see also* Deposition of Plaintiff at 7-8, 32, Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. App.—Beaumont 1984, writ granted). Hauck understood that his verbal employment agreement was for an indefinite time, that he could be terminated at any time, and that he was free to leave. *See id.* at 7-8, 32.

3. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted); *see also* Defendant's Answers to Interrogatories at 3, Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. App.—Beaumont 1984, writ granted). "Pumping the bilges" into the ocean involves discharging seawater from the bottom of its accumulation in the boat's bilges. *See id.* at 3. This process is to be halted before it reaches any mixture of oil waste which floats to the top of the water. *See id.* at 3. *But cf.* Deposition of Plaintiff at 26-27, Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322 (Tex. App.—Beaumont 1984, writ granted) (Hauck claims he was ordered to pump bilges dry so that everything was out, including oil waste).

4. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted); *see also* Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(3) (1982) (prohibiting discharge into navigable waters of oil or hazardous substances "in such quantities as may be harmful as determined by the President"); *construed in* United States v. Chevron Oil Co., 583 F.2d 1357, 1363 (5th Cir. 1978) (law allows de minimus discharges).

5. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted).

perfected an appeal to the Beaumont court of appeals.[7] Held—*Reversed.* An employee's allegation of wrongful termination for failing to comply with an illegal order by an employer states a cause of action.[8]

A master and servant relationship arises out of an express or implied employment contract[9] and exists when the employer has the privilege to direct what shall be done and how it shall be performed.[10] This right of control includes the power to discharge.[11] In developing the area of master-servant law, colonial America looked to English law, which pre-

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6. *See id.* at 323.

7. *See id.* at 323.

8. *See id.* at 323-24.

9. *See, e.g.,* Newspapers, Inc. v. Love, 380 S.W.2d 582, 589 (Tex. 1964) (contractual arrangement between master and servant either express or implied); Pioneer Casualty Co. v. Bush, 457 S.W.2d 165, 169 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.) (employer-employee relationship founded in express, implied, oral, or written contract); Riverbend Country Club v. Patterson, 399 S.W.2d 382, 383 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (employee defined as person serving under any express or implied contract of hire); *see also* Alexander Film Co. v. Williams, 102 S.W.2d 514, 516 (Tex. Civ. App.—Fort Worth 1937, no writ) (master-servant relationship found in express or implied employment contract) (citing 39 C.J. *Master & Servant* § 1 (1925)).

10. *See, e.g.,* Jackson v. Phinney, 266 F. Supp. 835, 836 (W.D. Tex. 1967) (fundamental factor is whether employer's right to control includes determining manner and method of employee's performance); Newspapers, Inc. v. Love, 380 S.W.2d 582, 591 (Tex. 1964) (essential question in master-servant relationship is whether employer has right to control employee in details of work); Evans v. Fort Worth Star Tel., 548 S.W.2d 819, 820 (Tex. Civ. App.—Fort Worth 1977, no writ) (master-servant test is right to control details of work); *see also* Texas Real Estate & Ins. Co. v. Tyler, 464 S.W.2d 723, 725 (Tex. Civ. App.—Waco 1971, no writ) (true test in master-servant relationship whether master has right to control servant); Gulfcraft, Inc. v. Henderson, 300 S.W.2d 768, 772 (Tex. Civ. App.—Galveston 1957, no writ) (degree of control exerted determines employment relationship); El Paso Laundry Co. v. Gonzales, 36 S.W.2d 793, 794-95 (Tex. Civ. App.—El Paso 1931, writ dism'd) (master-servant relationship requires employer's power and duty to control work done and manner of performance).

11. *See, e.g.,* Jackson v. Phinney, 266 F. Supp. 835, 836-37 (W.D. Tex. 1967) (right to discharge evidence of right to control); City of Waco v. Hurst, 131 S.W.2d 745, 746-47 (Tex. Civ. App.—Waco 1939, writ dism'd judgmt cor.) (master-servant relationship includes employer's right to hire and fire employee); El Paso Laundry Co. v. Gonzales, 36 S.W.2d 793, 795 (Tex. Civ. App.—El Paso 1931, writ dism'd) (power to discharge essential to master-servant relationship). The right to control is the most important element of the master-servant relationship. *See, e.g.,* Dennis v. Mabee, 139 F.2d 941, 944 (5th Cir. 1943) (right to direct control is vital issue), *cert. denied per curiam,* 322 U.S. 750, 750 (1944); Prater v. United States, 357 F. Supp. 1044, 1045 (N.D. Tex. 1973) (right to control most significant factor in determining servant status); Jackson v. Phinney, 266 F. Supp. 835, 836 (W.D. Tex. 1967) (right to control fundamental factor determining whether employer-employee relationship exists); *see also* Newspapers, Inc. v. Love, 380 S.W.2d 582, 590 (Tex. 1964) (most important test for determining existence of master-servant relationship is right to control); National Cash Register Co. v. Rider, 24 S.W.2d 28, 30 (Tex. Comm'n App. 1930, holding approved) (essential question is right to direct control).

sumed that an employment contract for an indefinite period would extend for one year.[12] This presumption could be rebutted by showing that custom of trade recognized a specific term of duration.[13] Without proof of a term of duration, however, some nineteenth-century American courts recognized that either party to an employment contract could cease performance without liability.[14] An 1877 treatise, by Horace Wood,[15] brought this doctrine into focus by explaining that an employment contract for an indefinite period could be terminated at the will of either party.[16] More specifically, the "employment-at-will" doctrine provides that where an employment contract lacks a term of duration, the employer may discharge the employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."[17]

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12. *See* 1 W. BLACKSTONE, COMMENTARIES *425 (law construes general hirings to be for one year); Feinman, *The Development of the Employment At Will Rule,* 20 AM. J. LEGAL HIST. 118, 123 n.40 (1976) (general hiring presumed to be for one year) (citing C. SMITH, MASTER AND SERVANT 41 (1852)).

13. *See* G. FRIDMAN, THE MODERN LAW OF EMPLOYMENT 469 (1963) (custom in particular area of employment could operate when contract's term questionable); Feinman, *The Development of the Employment At Will Rule,* 20 AM. J. LEGAL HIST. 118, 123 n.41 (1976) (one year presumption rebuttable by evidence of custom) (citing C. SMITH, MASTER AND SERVANT 41 (1852)); *see also* Perry v. Wheeler, 12 Ky. (1 Bush) 541, 548-49 (1877) (employee's "permanent rector" status meant to continue working until contracting parties discharged him "upon fair and equitable terms, and after reasonable notice").

14. *See, e.g.,* Harper v. Hassard, 113 Mass. 187, 189-90 (1873) (under contract for indefinite term, employer only obliged to continue employment at employer's own election); Hathaway v. Bennett, 10 N.Y. 108, 112 (1854) (Parker, J., concurring) (under contract without term of duration, one party does not have action against other for not continuing to perform); Coffin v. Landis, 46 Pa. 426, 433-34 (1864) (where contract for undefined period, neither was obliged to remain in relationship longer than desired). *See generally* C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 8 (1983) (early American courts adopted English rule that custom in particular trade may determine employment duration).

15. *See* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

16. *See id.* at 272. Contrary to the claims of recent commentators and some courts, Professor Wood was not the first to formulate America's employment-at-will doctrine. *See* C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 8 (1983) (verifying at-will doctrine's existence in America five years before Wood's treatise) (citing former Cal. Civ. Code § 1999 (1872)). *But see* Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931, 1933 (1983) (Wood introduced America to employment-at-will doctrine in his 1877 treatise); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 341 (1974) (Wood formulated America's at-will rule).

17. *See* Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884) (either party may terminate employment relationship at will), *overruled on other grounds,* Hutton v. Watters, 179 S.W. 134, 134 (Tenn. 1915); *see also* Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983) (employment for indefinite time freely terminable "at any time for any reason or even for no reason" by either party); East Line & R.R.R.

The employment-at-will doctrine gained American constitutional protection at the turn of this century,[18] but lost this protection in *NLRB v. Jones & Laughlin Steel Corp.*[19] This United States Supreme Court case addressed the constitutionality of the National Labor Relations Act, which protected employees' right to unionize from the coercive acts of employers.[20] By holding this act constitutional, the Court effectively undermined an employer's ability to use the right to discharge as a coercive tool against employees who sought unionization.[21] Since that decision, federal and state laws have eroded the traditional at-will doctrine by restricting an employer's right to arbitrarily discharge an employee.[22] Additionally, the majority of state courts have limited the traditional employment-at-will doctrine,[23] through either contract[24] or tort theories.[25] The tort theories

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v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (either party in employment contract with term of duration "may put an end to it at will, and so without cause").

18. *See* Adair v. United States, 208 U.S. 161, 175-76 (1908) (statutes which prohibit employers from discharging employees at will violate fifth amend. by depriving employer of property right without due process).

19. *See* 301 U.S. 1, 45-46 (1937) (employer may not discharge for employee self-organization in order to intimidate employees).

20. *See id.* at 45-46 (employees have right to unionize under National Labor Relations Act without fear of termination).

21. *See id.* at 45-46 (prevents employers from using right of discharge as means of intimidation and coercion).

22. *See* Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (1982) (prohibits discharge for serving on jury); National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), (4) (1982) (may not fire employee because of union activity); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1982) (exercising rights to minimum wage and overtime cannot be basis for termination); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1982) (prohibits discharge because of age); Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (1982) (prohibits any program or activity receiving federal financial assistance from discriminating against handicapped employee by terminating); Employee Retirement Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1982) (may not prevent employee from attaining vested pension rights by discharging); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982) (protection against retaliatory discharge for instituting or causing proceedings or testifying against employer for violations); Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021(b)(1), 2024(c) (1982) (for limited period, returning service people may only be discharged for just cause); Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982) (prohibits discharge because of one's sex, race, religion, color, or national origin); TEX. REV. CIV. STAT. ANN. art. 5207a (Vernon 1971) (prohibits discharge because of union membership or nonmembership); *id.* art. 8307c (Vernon Supp. 1984) (may not discharge for filing of state workers' compensation claim). *See generally* Heinsz, *The Assault on the Employment At Will Doctrine: Management Considerations,* 48 MO. L. REV. 855, 856 (1983) (harshness of employment-at-will doctrine has been substantially modified without judicial action); Kauff & Weintraub, *Recent Developments in the Law of Unjust Dismissal,* 13 ANN. INST. ON EMPLOYMENT L. 151, 154-62 (1984) (listing federal and state laws limiting at-will doctrine).

23. *See* Cathcart & Dichter, *Employment-At-Will: A State by State Survey,* 1983 A.B.A. REP. OF THE EMPLOYMENT-AT-WILL SUBCOMMITTEE, EMPLOYMENT & LAB. REL. L. COM-

MITTEE, LITIGATION SEC. 1-177. The thirty-two states which have either limited or expressed a willingness to limit the traditional at-will doctrine are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Washington, West Virginia, and Wisconsin. *Id.* at 1-177; *see also* C. BAKALY & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS 207-70 (1983) (survey of case law in each jurisdiction highlighting at-will doctrine's erosion); Kauff & Weintraub, *Recent Developments in the Law of Unjust Dismissal,* 13 ANN. INST. ON EMPLOYMENT L. 151, 163-217 (1984) (analysis of case law modifying at-will doctrine); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 668 n.14 (1984) (lists states which have adopted exception to at-will doctrine).

24. *See, e.g.,* Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir. 1982) (California employee's extended service can impose good faith discharge obligation on employer); Gilbreath v. East Ark. Planning & Dev. Dist., Inc., 471 F. Supp. 912, 923 (E.D. Ark. 1979) (by implied contract, at-will employee might be entitled to continued employment); Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (recognizes express, but not implied, promise to limit right of termination in employee handbook). The following states recognize a cause of action in contract as an exception to the at-will doctrine: Alaska, Arizona, Arkansas, California, Connecticut, Idaho, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, Oklahoma, Oregon, and South Dakota. *See* Cathcart & Dichter, *Employment-At-Will: A State by State Survey,* 1983 A.B.A. REP. OF THE EMPLOYMENT-AT-WILL SUBCOMMITTEE, EMPLOYMENT & LAB. REL. L. COMMITTEE, LITIGATION SEC. 1-177; *see also* Kauff & Weintraub, *Recent Developments in the Law of Unjust Dismissal,* 13 ANN. INST. ON EMPLOYMENT L. 151, 163-82 (1984) (analysis of case law modifying at-will doctrine under contract theory); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 670 n.31 (1984) (lists jurisdictions recognizing exceptions to at-will doctrine based on contract right). While seven states allow an at-will exception by implying a covenant of good faith in employment contracts, fourteen states imply contracts from employee handbooks, manuals, or company policy. *See* Cathcart & Dichter, *Employment-At-Will: A State by State Survey,* 1983 A.B.A. REP. OF THE EMPLOYMENT-AT-WILL SUBCOMMITTEE, EMPLOYMENT & LAB. REL. L. COMMITTEE, LITIGATION SEC. 1-177.

25. *See, e.g.,* Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 494 (W.D. Ark. 1982) (Arkansas would recognize public policy exception in tort under proper situation); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1337, 164 Cal. Rptr. 839, 846 (1980) (allows public policy exception in tort where employer terminates employee for not participating in unlawful conduct); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (tort cause of action where reason for discharge contravenes public policy). The following twelve states have adopted an at-will exception in tort based on public policy: California, Connecticut, Illinois, Indiana, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, Oregon, Pennsylvania, and West Virginia. *See* Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 493 (W.D. Ark. 1982) (would recognize exception to at-will doctrine); *see also* Cathcart & Dichter, *Employment-At-Will: A State by State Survey,* 1983 A.B.A. REPORT OF THE EMPLOYMENT-AT-WILL SUBCOMM., EMPLOYMENT & LABOR RELATIONS L. COMM., LITIGATION SEC. 1-177. Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 677 n.83 (1984) (lists states adopting at-will exception in tort). The following fifteen states indicate that they are willing to adopt an at-will exception in tort based on public policy under appropriate facts: Arizona, Arkansas, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mex-

are based primarily on public policy,[26] which ranges from personal rights or duties that are statutorily conferred[27] to matters that "strike at the heart of a citizen's social rights, duties, and responsibilities . . . ."[28] Because of the obvious difficulty in precisely defining public policy,[29] many states have declined to judicially adopt such public policy exceptions to the at-will doctrine,[30] recognizing this as a task for the legislature.[31]

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ico, Vermont, Washington, and Wisconsin. *See* Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 493 (W.D. Ark. 1982); *see also* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 677 n.83 (1984) (refers to states indicating would adopt at-will tort exception under proper facts); Note, *Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort,* 13 CONN. L. REV. 617, 622 (1981) (growing minority of states have created at-will exception in tort).

26. *See, e.g.,* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 846 (1980) (tort exception based on public policy that employer may not coerce employees by unlawful directions and discharging); Sventko v. Kroger Co., 245 N.W.2d 151, 153 n.1 (Mich. Ct. App. 1976) (may not discharge at will when motive contravenes public policy); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (tort exception where reason for discharge contrary to substantial public policy).

27. *See* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980) (must have either "exercised a statutorily conferred personal right or . . . fulfilled a statutorily imposed duty" before exception to at-will doctrine recognized).

28. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878-79 (Ill. 1981) (public policies must strike at citizen's rights, duties, and responsibilities). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 677-84 (1984) (discusses various definitions and sources of public policy adopted for at-will exceptions).

29. *See, e.g.,* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977) (public policy is "too nebulous a standard" to justify adoption); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1337, 164 Cal. Rptr. 839, 846 (1980) (Manuel, J., concurring) (public policy vague and ill-defined); Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ind. 1981) (definition of "public policy" is "Achilles' heel" of retaliatory discharge exception); *accord* Geary v. United States Steel Corp., 319 A.2d 174, 177-78 (Pa. 1974) (difficult for employee to prove employer's motive for firing was contrary to public policy); Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931, 1950 (1983) (balancing public interests in order to determine public policy basis for at-will exceptions has led to arbitrary modifications of doctrine). *But cf.* Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule,* 51 UMKC L. REV. 189, 233 (1983) (most courts' boundaries for wrongful discharge tort are fairly distinct and precise).

30. *See, e.g.,* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131-32 (Ala. 1977) (public policy inherently vague and imprecise); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874-75, 877 (Miss. 1981) (modifying at-will doctrine based on public policy is legislature's job); Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983) (refuses to adopt tort for abusive discharge); *see also* Catania v. Eastern Airlines, 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980) ("[n]ot every violation of public policy is a tort"); Andress v. Augusta Nursing Facilities, 275 S.E.2d 368, 369 (Ga. Ct. App. 1980) (employer's motive for discharge of nurse irrelevant because at-will doctrine controls); Gil v. Metal Serv. Corp., 412 So. 2d 706, 708 (La. Ct. App. 1982) (refuses to hear broad policy

Texas has not recognized an exception to the traditional employment-at-will doctrine under either contract[32] or tort law theories.[33] Texas courts have consistently held that an employer's motive for terminating an em-

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considerations creating exceptions to at-will doctrine), *cert. denied,* 414 So. 2d 379, 379 (La. 1982); Bottijliso v. Hutchison Fruit Co., 635 P.2d 992, 997-98 (N.M. Ct. App. 1981) (changes in at-will doctrine should be made by legislature); Peterson v. Scott Const. Co., 451 N.E.2d 1236, 1239 (Ohio Ct. App. 1982) (court recognizes trend of other jurisdictions but refuses to deviate from traditional doctrine); Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981) (no change from traditional at-will doctrine and any substantial change should be microscopically analyzed to determine effect on state's commerce). *See generally* Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule,* 51 UMKC L. REV. 189, 251 n.414 (1983) (listing southern block states declining to adopt tort of wrongful discharge). *But see* 1A CORBIN ON CONTRACTS §§ 96, 152 (C. Kaufman 3d ed. 1985) (employer cannot fire employee for illegal reason unless in conjunction with good cause).

31. *See, e.g.,* Bottijliso v. Hutchison Fruit Co., 635 P.2d 992, 997-98 (N.M. Ct. App. 1981) (change in at-will doctrine should be made by legislature); Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 89-90, 461 N.Y.S.2d 232, 235-36 (1983) (deciding relevant policy is best left to legislature); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (refuses to supersede legislature by creating new cause of action); *see also* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 667, 687-88 (1984) (legislative exception to at-will doctrine necessary).

32. *See* Watson v. Zep Mfg. Co., 582 S.W.2d 178, 179-80 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (offer of "steady job" not promise of job security because neither Texas Supreme Court nor legislature have recognized implied covenant of good faith in contract); *cf.* English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) (refusing to recognize covenant of good faith in all contracts). Texas courts have also refused to imply contracts from company handbooks. *See* Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. App.—Corpus Christi 1982, no writ) (employee handbooks do not constitute employer-employee contract, but are only general guidelines). *But cf.* Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983) (company rule book could be part of collective bargaining agreement).

33. *See, e.g.,* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (rejects wrongful discharge allegation for refusing to act illegally); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (refuses to create public policy exception in tort where employee fired for responding to obligation under law); Scruggs v. George A. Hormel & Co., 464 S.W.2d 730, 731 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (plaintiff's wrongful discharge allegation cites no cause of action); *accord* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1057 (5th Cir. 1981) (no indication Texas might recognize public policy exception to at-will doctrine). The Dallas court of appeals recognized the position that

> the privilege to discharge employees at will is an important aspect of management that cannot be denied without sacrificing efficiency of operations and loss of confidence in worker loyalty. . . . [I]f employers must be prepared to prove to a jury a "just cause" for every discharge, they will be deterred from pruning their organizations of marginal workers whose attitude is uncooperative and whose productivity is low.

Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

ployee is immaterial.[34] The courts have followed this rule even when an employee is discharged for failing to act illegally as ordered by the employer.[35] In *Maus v. National Living Centers, Inc.*,[36] an employee alleged she was discharged in retaliation for reporting, as required by law, a nursing home's negligence and abusive conduct.[37] The Austin court of appeals declined to recognize a cause of action and held the employer's motive for firing to be immaterial.[38] Likewise, in *Molder v. Southwestern Bell Telephone Co.*,[39] the Houston court of appeals held that an employee's allegation that he was fired for refusing to act illegally, as ordered by his employer, did not state a cause of action.[40]

The only exceptions modifying the employment-at-will doctrine in Texas have been legislatively created.[41] These statutory exceptions allow

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34. *See* East Line & R.R.R. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). "It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause." *Id.* at 75, 10 S.W. at 102; *see also* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (employer may discharge at-will employee any time and for any reason); Advance Aluminum Castings Corp. v. Schulkins, 267 S.W.2d 174, 180 (Tex. Civ. App.—Beaumont 1954, no writ) (when term of personal service contract indefinite, continues at party's will); Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 159 (Tex. Civ. App.—Austin 1935, writ ref'd) (no liability for terminating at-will contract because motive immaterial). The preceding cases were cited by *Hauck* in support of Texas' employment-at-will doctrine. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted); *see also* Claus v. Gyorkey, 674 F.2d 427, 433 (5th Cir. 1982) (employer may discharge employee for good reason, bad reason, or no reason, without liability); Perdue v. J.C. Penney Co., 470 F. Supp. 1234, 1239 (S.D.N.Y. 1979) (without contractual relations, employer may fire employee regardless of cause); St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 484, 171 S.W. 703, 704 (Tex. 1914) (elevating Texas at-will doctrine to constitutional principle); Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (rejecting wrongful discharge allegation for refusing to illegally act as employer ordered); *accord* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1055-56 (5th Cir. 1981) (failing to perceive any indication of Texas modifying its settled at-will doctrine).

35. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (refuses new cause of action based on employee's discharge for failing to illegally act at employer's behest); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 677 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (declines to recognize a new retaliatory discharge cause of action).

36. 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

37. *See id.* at 675.

38. *See id.* at 677 (Shannon, J., concurring) (employer may discharge at-will employee at any time and for any reason).

39. 665 S.W.2d 175 (Tex. App.—Houston 1983, writ ref'd n.r.e.).

40. *See id.* at 177 (declining, as an intermediate court, to create new cause of action).

41. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5207a (Vernon 1971) (prohibits discharge because of union membership or nonmembership); *id.* art. 5207b (Vernon Supp. 1983) (private employer may not fire permanent employee for serving on jury); *id.* art. 5221k, § 5.01 (protects workers from being discharged arbitrarily based on age, sex, handicap, race, color,

causes of action which were formerly unrecognized in Texas courts.[42] For instance, before legislation was passed, Texas courts refused to recognize a cause of action from a termination based solely on the employee's attempt to pursue workers' compensation benefits.[43] An exception for a discharge resulting from an employee's refusal to act illegally, however, has not been statutorily created[44] and, until the present, was not judicially recognized.[45]

In *Hauck v. Sabine Pilots, Inc.*,[46] the Beaumont court of appeals held that an employee's allegations of wrongful termination for failing to comply with an illegal order from an employer states a cause of action.[47] The court approached its decision by first recognizing that Texas has consistently followed the employment-at-will doctrine.[48] In addition, it noted its

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religion, or national origin); *see also id.* art. 5765, § 7A (Vernon Supp. 1984) (prohibits discharge for active duty in Texas military forces); *id.* art. 6252-16a (supervisor subject to maximum civil penalty of $1,000.00 if terminates public employee for reporting law violation); *id.* art. 8307c (may not discharge for filing of state workers' compensation claim).

42. *See* Note, *Remedies for Wrongful Discharge Under the Texas Workmen's Compensation Act—The Need for Revision,* 4 TEX. TECH L. REV. 387, 388 (1973) (art. 8307c was action by legislature in area where "no sanctions have existed"); *accord* Santex, Inc. v. Cunningham, 618 S.W.2d 557, 559 (Tex. Civ. App.—Waco 1981, no writ) (intent of art. 8307c to prevent employer from discharging employee for filing workers' compensation claim); Texas Steel Co. v. Douglas, 533 S.W.2d 111, 115 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (legislature's reason for art. 8307c was to prevent discharge for individuals pursuing compensation entitled them).

43. *See* TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1984) (prohibits employer firing employee for pursuing workers' compensation claim); *see also* Note, *Remedies for Wrongful Discharge Under the Texas Workmen's Compensation Act—The Need for Revision,* 4 TEX. TECH L. REV. 387, 388-89 (1973) (before art. 8307c, injured worker had no protection of employment if fired solely for claiming compensation benefits).

44. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (refusing to precede legislature and Texas Supreme Court in dealing with employee's discharge for failing to illegally act); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (issue of retaliatory discharge is first impression in Texas, and either legislature or Texas Supreme Court should modify at-will doctrine where motive for firing violates public policy). The policy behind Texas' staunch support of the at-will doctrine lies in a citizen's fourteenth amendment right to "liberty of contract" under the United States Constitution, which includes the privilege to make a contract where either party may quit his service or performance at any time. *See* St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 484, 171 S.W. 703, 704 (Tex. 1914).

45. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (at-will doctrine not applied where employee for indefinite term was fired for refusing to pump bilges of boat in illegal manner as employer ordered).

46. 672 S.W.2d 322 (Tex. App.—Beaumont 1984, writ granted).

47. *See id.* at 323-24.

48. *See id.* at 323. The court cited the following cases supporting Texas' at-will doctrine: Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1054-55 (5th Cir. 1981); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.); Advance Aluminum Castings Corp. v. Schulkins, 267 S.W.2d 174, 180 (Tex.

duty as an intermediate court to follow such law as set out by the Texas Supreme Court.[49] The court of appeals, however, distinguished previous employment-at-will cases in Texas from the instant case, in that none of these prior cases involved an employee terminated for failing to perform "an illegal act ordered by the employer."[50] The court then cited cases from other jurisdictions which have recognized a cause of action for termination due to an employee's refusal to act illegally.[51] In reversing the summary judgment, the court recognized a cause of action for appellant, employee Hauck.[52] Finally, the court declared that its decision should not be construed as repudiating Texas' employment-at-will doctrine.[53]

The court, in *Hauck,* expressly recognized its duty to follow Texas law, which has long held an employer's motive for firing an at-will employee to be immaterial.[54] After asserting that the question at issue was unprece-

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Civ. App.—Beaumont 1954, no writ); Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 159 (Tex. Civ. App.—Austin 1935, writ ref'd); Hunter v. Strong, 265 S.W. 539, 539 (Tex. Civ. App.—San Antonio 1924, writ dism'd). *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted).

49. *See id.* at 323.

50. *See id.* at 323 ("we have been cited to" no cases involving the direct question at issue in instant case).

51. *See id.* at 323-24; *see also* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 846 (1980) (employee states cause of action for wrongful discharge where fired for refusing to participate in illegal price fixing scheme); Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (at-will doctrine not applied to employee's termination for failing to testify falsely under oath as employer ordered); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980) (at-will exception where employee discharged for complying with state statute); O'Sullivan v. Mallon, 390 A.2d 149, 150 (N.J. 1978) (x-ray technician may not be fired for refusing to perform activity in which neither trained nor licensed); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (at-will doctrine not applied where employee terminated for trying to force bank's compliance with consumer credit protection laws).

52. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 324 (Tex. App.—Beaumont 1984, writ granted) (grant of summary judgment reversed because fact question existed as to whether Hauck wrongfully discharged).

53. *See id.* at 324.

54. *See id.* at 323. Texas case law substantially supports the employment-at-will doctrine. *See, e.g.,* East Line & R.R.R. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (in contract with indefinite term, either party may end it at will and without cause); Advance Aluminum Castings Corp. v. Schulkins, 267 S.W.2d 174, 180 (Tex. Civ. App.—Beaumont 1954, no writ) (contract without term of duration continues at parties' will); Magnolia Petroleum Co. v. Dubois, 81 S.W.2d 157, 159 (Tex. Civ. App.—Austin 1935, writ ref'd) (motive for terminating at-will employment immaterial); *see also* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (absent a contrary contract term, employee may quit or be fired with or without cause); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (at-will employee may be discharged any time and for any reason); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ) (employer may ter-

dented, however, the Beaumont court of appeals recognized an exception to the at-will doctrine.[55] Unfortunately, the court's oversight of pertinent case law,[56] as well as an absence of reasoning for its departure from Texas precedent,[57] has consequently rendered uncertain a previously clear area of law in Texas.[58]

Although the court indicated that the question at issue was unprece-

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minate at-will employee with or without cause); Hunter v. Strong, 265 S.W. 539, 539 (Tex. Civ. App.—San Antonio 1924, writ dism'd) (at-will doctrine well-settled law). Although the Dallas court of appeals did not rule on this point, the defendant in a Texas employment-at-will case argued:

> [T]he privilege to discharge employees at will is an important aspect of management that cannot be denied without sacrificing efficiency of operations and loss of confidence in worker loyalty. . . . [I]f employers must be prepared to prove to a jury a "just cause" for every discharge, they will be deterred from pruning their organizations of marginal workers whose attitude is uncooperative and whose productivity is low.

See Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

55. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted). The court held, in pertinent part:

> [w]hile many of the cases we cite above . . . say that the employer's motive is immaterial in discharging an employee, we have been cited to none where the direct question involved is: Does an employee state a cause of action when he alleges wrongful termination because of his or her failure to commit an *illegal* act ordered by the employer?

Id. at 323 (emphasis in original). The court then recognized a cause of action for Hauck. *See id.* at 323-24.

56. *See* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (plaintiff claims wrongful termination for refusing to act illegally as ordered by employer); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (plaintiff alleges wrongful discharge for acting as required by law).

57. *See, e.g.,* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (discharge of at-will employee may be at any time and for any reason); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ) (employer may fire at-will employee with or without cause); Hunter v. Strong, 265 S.W. 539, 539 (Tex. Civ. App.—San Antonio 1924, writ dism'd) (under contract for indefinite period, either party may terminate at will, without reason).

58. *See* Hunter v. Strong, 265 S.W. 539, 539 (Tex. Civ. App.—San Antonio 1924, writ dism'd) (employment-at-will doctrine well-settled law); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (at-will employee's termination may be any time, regardless of reason); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ) (cause for at-will employee's discharge is immaterial). *But see* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (exception to at-will doctrine where employer's motive for firing is due to employee's refusal to act illegally). The only other exceptions to the at-will doctrine in Texas have been statutorily based. *See, e.g.,* TEX. REV. CIV. STAT. ANN. art. 5207a (Vernon 1971) (prohibits discharge because of union membership or nonmembership); *id.* art. 5765, § 7A (Vernon Supp. 1984) (may not terminate employee for active duty in Texas military forces); *id.* art. 8307c (filing state workers' compensation claim cannot be reason for firing).

dented,[59] at least two Texas cases have addressed whether to allow an exception to the at-will doctrine for employees discharged for refusing to act illegally.[60] As recently as 1983, the court, in *Maus v. National Living Centers, Inc.,*[61] refused to recognize a cause of action for the termination of a nurse in retaliation against her reporting negligence by a nursing home as required by law.[62] A careful analysis of *Maus* reveals that the question at issue is closely analogous to that in *Hauck.*[63] While *Hauck* involves the termination of an employee for refusing to act illegally,[64] *Maus* addresses the discharge of an employee for acting as required by law.[65] The plaintiff's claim in *Hauck,* however, could just as easily have been stated as it

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59. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted) (no cases involving direct question at issue).

60. *See* Molder v. Southwestern Bell Tel. Co., 655 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (plaintiff claimed wrongful discharge for "refusal to engage in illegal conduct at the behest of his employer"); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) ("[S]hould the traditional notion that an employer may fire at at-will employee at any time, for any reason be modified where the motive for the firing violates a substantial, stated public policy?").

61. 633 S.W.2d 674 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

62. *See id.* at 675-76. The court stated that "this is a case of first impression in Texas. Appellant has a compensable legal claim, if and only if, this jurisdiction will recognize an exception to the traditional employment at-will doctrine for firings inspired by retaliatory motives." *Id.* at 675-76. Instead of recognizing such an exception, the court chose to exercise judicial restraint. *Id.* at 675-76. The fact pattern in *Maus* matches at least one of the situations in the cases cited from outside states in the *Hauck* opinion. *Compare* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (refuses at-will exception where employee was fired for acting as required by law) *with* Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 386, 389 (Conn. 1980) (recognizes at-will exception where employee insisted on compliance with state law and consequently was fired), *cited in* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted). It is noteworthy that, when faced with a fact pattern analogous to one faced by the Connecticut Supreme Court, the Austin court of appeals declined to recognize an exception to Texas' at-will doctrine. *Compare* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (at-will doctrine applied even though nurse terminated for adhering to state statute) *with* Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 386, 389 (Conn. 1980) (exception to at-will doctrine where employee fired for insisting on compliance with state law).

63. *Compare* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (whether to allow wrongful discharge cause of action for acting as required by law) *with* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted) (whether to allow wrongful discharge cause of action for refusing to act illegally).

64. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted) (employer fires employee for refusing to pump oil waste from boat's bilges into sea as ordered).

65. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (state statute required nursing home employees to report abuse or neglect; failure to do so was criminal offense).

was in *Maus*: wrongful termination for acting as required by law.[66] Thus, the cases are analytically indistinguishable.[67] In addition, the Houston court of appeals, in *Molder v. Southwestern Bell Telephone Co.*,[68] specifically refused to allow a cause of action for wrongful termination due to a failure to act illegally.[69] The courts in *Maus* and *Molder* recognized the basic tenet of Texas' at-will doctrine, which maintains that motive is immaterial.[70] The *Hauck* court's emphasis on the unprecedented nature of the case before it was, therefore, misguided.[71]

The consequence of the court's oversight is magnified by the fact that the unprecedented nature of the case appears to be the sole basis given for its decision.[72] Even if the question at issue were actually unprecedented, sparse rationale behind the court's departure from the at-will doctrine

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66. *Compare* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted) (wrongful discharge for refusing to act illegally) *with* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (wrongful discharge for acting legally).

67. *Compare* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323 (Tex. App.—Beaumont 1984, writ granted) (fired for refusing to act legally) *with* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (terminated for acting illegally). *See generally* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 BAYLOR L. REV. 677, 681 (1984) ("[f]ulfilling a statutory obligation is analogous to refusing to violate a law").

68. 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

69. *See id.* at 177 ("appellant further alleges that he was terminated because of his refusal to engage in illegal conduct at the behest of his employer").

70. *See id.* at 177 (at-will doctrine enables employee to quit or be discharged without liability and with or without cause); Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (either party in at-will contract may terminate relationship "at any time, for any reason"). Furthermore, both courts stressed that it would be the role of the Texas Supreme Court or legislature to deviate from this law. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref'd n.r.e.). "As neither the Texas Legislature nor the Texas Supreme Court has established the State's position in this sensitive area, this Court must exercise judicial restraint and refrain from creating this new right of recovery. To do otherwise would be to exceed our proper authority within the legal framework." *Id.* at 676; *see also* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). "Until our legislature or Texas Supreme Court has dealt with this issue, we, as an intermediate court, do not have the authority to create a new cause of action." *Id.* at 177.

71. *Cf.* Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (addresses same question at issue as in *Hauck); Maus* v. National Living Centers, Inc., 633 S.W.2d 674, 677 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (employee does not state cause of action where alleges wrongful firing for complying with state law).

72. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (may be implied that court allows cause of action merely because "cited to [no cases] where the direct question involved" was question at issue in instant case).

makes a once settled area of Texas law unclear.[73] Under the present reasoning of *Hauck, any* unprecedented fact pattern may allow departure from the Texas employment-at-will doctrine.[74] If exceptions can be based on lack of precedent, then the at-will doctrine may ultimately be limited to the specific fact patterns of previous Texas cases.[75] This is especially true since the court failed to outline a rationale to guide future decisions.[76] Although the cases cited from other jurisdictions may have *implied* that the *Hauck* court's rationale was founded on public policy,[77] the court made no mention of these cases' particular exceptions or underlying reasoning;[78] the court merely mentioned the holdings in the cases.[79] Even though the

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73. *See id.* at 323-24 (offers no discussion of rationale behind conclusion). *But see* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (termination of at-will employee may be at any time and for any reason); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ) (employer may discharge at-will employee with or without cause); Hunter v. Strong, 265 S.W. 539, 539 (Tex. Civ. App.—San Antonio 1924, writ dism'd) (employment-at-will doctrine well-settled law).

74. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted). Interestingly, the only basis expressly given by the court for its departure from the at-will doctrine was the unprecedented nature of the fact pattern in the instant case. *See id.* at 323-24. At least one case involving an unprecedented situation encountered the at-will doctrine's rigidity and determined to follow it. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (although case of first impression, court applies at-will doctrine).

75. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (in recognizing exception to at-will doctrine, court merely noted unprecedented nature of issue). In the past, however, at least one Texas court has applied the at-will doctrine to a situation which, at the time, was unprecedented. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (applies at-will doctrine despite unprecedented nature of case, where employee's discharge inspired by retaliatory motive).

76. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (fails to discuss any public policy rationale upon which to base its conclusion).

77. *See id.* at 323-24. The court cited Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (at-will exception recognized where employee terminated for refusing to fix prices illegally); Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (did not apply at-will doctrine to employee's discharge for failing to follow employer's orders to testify falsely under oath); Sheets v. Teddy's Frosted Foods, 427 A.2d 385 (Conn. 1980) (employee's termination for complying with state statute warrants at-will exception); O'Sullivan v. Mallon, 390 A.2d 149 (N.J. 1978) (exception to at-will doctrine where x-ray technician fired for not performing activity in which neither licensed nor trained); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (where employee discharged for attempting to compel bank to comply with consumer credit protections laws).

78. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (only offers brief explanation of facts of each case cited).

79. *See id.* at 323-24 (cites what foreign cases held, not their reasoning).

court claims that its decision is not a repudiation of the at-will doctrine,[80] in reality, under this decision an employer's motive is no longer immaterial.[81] Therefore, based on *Hauck,* courts faced with an unprecedented

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80. *See id.* at 324 ("[t]his opinion should not be construed as a repudiation of the 'at will' doctrine").

81. *Compare* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (even though employer's reason for firing was for acting as required by law, at-will doctrine applied) *with* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (where employer's reason for firing was for refusing to act illegally, at-will doctrine not applied). Courts from other jurisdictions adopting a public policy exception to the at-will doctrine offer more rationale than *Hauck. See* Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27-28 (Cal. Dist. Ct. App. 1959) (offers three public policy definitions, and reasons that, in order to discourage criminal conduct by employer and employee, civil law must limit employer's right to discharge so as to more fully effectuate state's declared policy against perjury); Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 388-89 (Conn. 1980) (discusses similar recent cases and concludes exception to at-will doctrine where public policy, represented in relevant state statutes, is violated). *But see* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (no discussion of public policy rationale). The California court's discussion of its public policy reasons, however, did not render their exception to the at-will doctrine immutable; its scope has broadened since 1959. *Compare* Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (public policy exception where employee terminated for refusing to act illegally) *with* Hentzel v. Singer Co., 188 Cal. Rptr. 159, 166 (Ct. App. 1982) (at-will employee could state cause of action where discharged in retaliation for seeking smoke-free work area, even though administrative remedy already available). Judicially adopting a public policy exception not only seems to lead to broader exceptions, but additional exceptions as well. *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1337, 164 Cal. Rptr. 839, 848 (1980) (wrongful discharge cause of action in contract expanded to include tort). For instance, *Tameny* is interpreted as allowing punitive damages where they were previously not available. *See* Comment, *"Good Cause": California's New "Exception" To The At-Will Employment Doctrine,* 23 SANTA CLARA L. REV. 263, 271 n.42 (1983). In fact, California appellate courts have even recognized a "good cause" exception to the at-will doctrine. *See* Cleary v. American Airlines, 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (contract exception to at-will doctrine where employer terminates employee without "good cause"); *cf.* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 925-27 (Ct. App. 1981) (did not apply "good cause" exception; other contract exception sufficient where employer's conduct constituted implied promise not to arbitrarily discharge). *See generally* Comment, *"Good Cause": California's New "Exception" To The At-Will Employment Doctrine,* 23 SANTA CLARA L. REV. 263, 266 (1983) (traces development and application of California's at-will exceptions). Thus, if California is any indication, the first *judicially-made* exception to the traditional employment-at-will doctrine is not the last. *See id.* at 266; Murphy v. American Home Prod., 448 N.E.2d 86, 90, 461 N.Y.S.2d 232, 236 (1983). "If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants." *Id.* at 236; Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). The *Watson* court maintained:

> the primary agency to declare the policy of the state is the legislature. Although legislative processes may be imperfect, appeals for judicial legislation based on legislative

fact pattern will no longer be able to stand as confidently on the once firm ground of the Texas employment-at-will doctrine.[82] In addition, because the opinion does not outline the rationale utilized by the court, other courts will not be able to look to *Hauck* for guidance.[83]

By declining to apply the at-will doctrine to an employee's termination for refusing to act illegally, the Beaumont court of appeals not only contradicted Texas law but offered a sparse discussion of the rationale behind its holding. In omitting sufficient discussion of its reasoning, the court gave no guidance to future courts deciding whether to apply the at-will doctrine and to what extent. The ultimate effect of *Hauck,* however, is to render material the once immaterial motive for an employer's firing of an employee in Texas.

Alton Craig Chapman

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inaction betray a loss of faith in democratic government. In the long run the popular will, as expressed in legislation, may be a more reliable means to social progress than the employment of the adversary process of an already overloaded judicial system as a remedy for every social ill.

Id. at 80.

82. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (does not apply at-will doctrine because employee's allegation of wrongful termination for refusing to act illegally states cause of action). *But see* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (applies at-will doctrine despite unprecedented nature of case).

83. *See* Hauck v. Sabine Pilots, Inc., 672 S.W.2d 322, 323-24 (Tex. App.—Beaumont 1984, writ granted) (no public policy guidelines or discussion of basis for conclusion).