Florida Law Review

Volume 46 | Issue 4 Article 5

September 1994

Prima Facie Tort and the Employment-At-Will Doctrine in Florida

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NOTES

PRIMA FACIE TORT AND THE EMPLOYMENT-AT-WILL DOCTRINE IN FLORIDA

*Thomas G. Norsworthy**

I. INTRODUCTION

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.
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> —Oliver Wendell Holmes[1]

The State of Florida is one of the few jurisdictions in this country whose judiciary strictly adheres to the 19th century common law

* A heartfelt thanks to my family who has always believed in me, and my friend Nancy Richiuso who, in my time of doubt, refused to let me give up. Special thanks to a group of unsung heroes, the Law Review candidates, whose research work hours are crucial to the success of this publication.

1. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

doctrine of at-will employment.[2] Despite criticism that this approach fails to provide 20th century solutions for modern employment problems,[3] Florida courts have declined to accept any proposed solutions. Instead, the courts have deferred all worker protection issues to the state's legislature,[4] reasoning that only uncertainty would result from judicially altering the longstanding rule.[5] Consequently, Florida workers have been unprotected from abusive or wrongful termination by their employers.[6]

This note begins by reviewing the development of the employment-at-will doctrine in the United States[7] and its application in Florida.[8] Next, it summarizes the development of the prima facie tort doctrine.[9] The note then examines challenges to the employment-at-will doctrine based on a prima facie tort cause of action.[10] Finally, the note considers whether Florida courts would adopt the prima facie tort to limit an employer's right to terminate an employee at will.[11]

II. EMPLOYMENT AT WILL

A. Development of the Rule and Its Exceptions

The employment-at-will doctrine is a creation of the American judiciary.[12] Simply stated, this doctrine allows an employer to discharge an employee for "good cause, or bad cause, or no cause at all."[13] The

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2. *See generally* Edward T. Ellis, *Common Tort-Based Theories of Wrongful Discharge*, C947 ALI-ABA 381, 383 (1994), *available in* WESTLAW, JLR Database (noting that "nearly all states recognize . . . limitations" to the strict employment-at-will doctrine).

3. *See, e.g.*, Stephen G. De Nigris, *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, 1116-22 (1992); Debra Greenberg, Note, *Employment At Will: A Proposal to Adopt the Public Policy Exception in Florida*, 34 FLA. L. REV. 614, 630-34 (1982); Amy D. Ronner, Case Comment, Brockmeyer v. Dun & Bradstreet: *The Narrow Public Policy Exception to the Terminable-At-Will Rule*, 38 U. MIAMI L. REV. 565, 582-87 (1984); Mark E. Walker, Case Comment, *Workers' Compensation: Florida's Resistance to Nonstatutory Limits to the Employment-at-Will Doctrine*, Scott v. Otis Elevator Co., 572 So. 2d 902 (Fla. 1990), 43 FLA. L. REV. 583, 591-92 (1991).

4. *See* Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182, 184 (Fla. 1983).

5. *See, e.g.*, Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985).

6. *See, e.g.*, Greenberg, *supra* note 3, at 628-29.

7. *See infra* part II.A.

8. *See infra* part II.B.

9. *See infra* part III.

10. *See infra* part IV.

11. *See infra* part V.

12. *See* Greenberg, *supra* note 3, at 618.

13. NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956).

at-will doctrine was a departure from the English common law which viewed the employment relationship as continuing except where the employer dismissed the employee for reasonable cause.[14] The English rule on employment had developed by analogy from the feudal relationship of lord and tenant.[15] As a consequence of this analogy, courts imposed reciprocal rights and duties on employers and employees to protect the employment relationship and prevent an unjust termination.[16]

These rights and duties were initially imposed to protect employers from employees quitting prior to the end of their agreed term of employment.[17] The catastrophic effects of the 14th century bubonic plagues left England with an extreme labor shortage, and a need to protect employers from losing workers to their competitors.[18] Although America originally followed the English rule, changes in American society associated with the industrial revolution led to the creation of the employment-at-will doctrine and its acceptance by American courts.[19]

The second half of the 19th century was a period of tremendous economic growth in this country.[20] Yet, despite this growth, a wildly fluctuating economy created an increased risk of business failures.[21] To

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14. Ronner, *supra* note 3, at 566.

> The employment-at-will doctrine supplanted English employment law. The Statute of Labourers provided that "no master can put away his servant" during or at the end of his term of employment and that apprentices could be dismissed only upon "reasonable cause." . . . The courts determined that when an employment contract contained the mention of an annual salary, the employer implicitly agreed to a one-year term of employment unless there was reasonable cause to discharge.

Id. at 566-67 (footnotes omitted); *see also* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980) (discussing the origins of the at-will employment doctrine within laissez-faire and freedom of contract principles); Henry P. Farnham, Annotation, *Duration of Contract of Hiring Which Specified No Term, but Fixes Compensation at a Certain Amount per Day, Week, Month, or Year*, 11 A.L.R. 469, 470 (1921) (discussing the English rule for employment).

15. *See* Daniel A. Matthews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438 (1975).

16. *Id.* at 1438-39.

17. *Id.* at 1439 n.17.

18. *Id.* The Ordinance of Labourers, 23 Edward III, c. 2 (1349), followed by a series of Statutes of Labourers, were enacted to protect employers. *Id.* There is some indication that the same restraints on termination were later used to protect workers and curb unemployment. *Id.*

19. *See* Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U. PITT. L. REV. 641, 644-48 (1990).

20. *See* Greenberg, *supra* note 3, at 618.

21. *See* Matthews, *supra* note 15, at 1440 n.23. The economic shifts included falling prices, three financial panics, and a seven-year depression in the last third of the century. *Id.*

protect entrepreneurs, expand industry, and promote the country's economic growth, courts embraced a laissez-faire legal policy that incorporated employment law into a developing body of contract law.[22] A key element in this legal policy was the freedom of contract—allowing parties to define their employment relationship without government interference.[23]

Horace Wood, the leading authority on employment law at the time, first announced the employment-at-will doctrine in his 1877 *Treatise on the Law of Master and Servant*.[24] Wood's Rule provided that

> a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [U]nless [the employer's and the employee's] understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.[25]

Although Wood cited four cases as authority for his rule, none of them supported this proposition.[26] Despite this lack of authority, seven years later the Tennessee Supreme Court in *Payne v. Western & Atlantic Railroad Co.*[27] became the first jurisdiction to adopt the employment-at-will doctrine.[28] By the turn of the century, the doctrine had become the prevailing rule controlling an employer's right to discharge employees.[29]

With widespread adoption of Wood's rule and a judicial embrace of laissez-faire economic principles, the employers' freedom to contract

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22. *See id.* at 1440; Greenberg, *supra* note 3, at 618.

23. *See* Squire, *supra* note 19, at 644-45; Matthews *supra* note 15, at 1441; Greenberg, *supra* note 3, at 618 n.39. Because the theory presumed that the parties possessed equal bargaining power, there would be no need for any outside force to bind either party to the relationship. *Id.*

24. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

25. *Id.*

26. *See* Farnham, *supra* note 14, at 476; Squire, *supra* note 19, at 643 ("Wood's rule, as the at-will doctrine became known, was without precedent, principle, or legal foundation.").

27. 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

28. *See* Ronner, *supra* note 3, at 568. The *Payne* court held that employers may "dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne*, 81 Tenn. at 519-20.

29. *See* Matthews, *supra* note 15, at 1440. Therefore, "[i]n the absence of a written contract for a specific term, the employment was at will and the employer's freedom to discharge was absolute; the employment relation was considered to be strictly contractual." *Id.*

labor became an absolute power to discharge employees.[30] The freedom of contract theory presupposed that parties to the contract possessed equal bargaining power.[31] But, in 20th century industrialized America, such equality was illusory.[32] Corporations had grown in size and power to be life-long employers of some workers, who, in turn, became "anonymous entities" to the corporations.[33]

The zenith of judicial economic laissez-faire in employment relations came with the United States Supreme Court's decisions in *Adair v. United States*[34] and *Coppage v. Kansas*.[35] In *Adair*, the Court held a federal statute protecting employees' right to unionize unconstitutional because it imposed an unreasonable restraint on the employer's Fifth Amendment right to terminate the employment relationship.[36] Similarly, in *Coppage*, the Court struck down a Kansas statute that prohibited "yellow dog" contracts which preconditioned employment on employees' promises not to join a union.[37] Thus, the Court's decisions gave the at-will doctrine, and an employer's absolute power to discharge employees, constitutional protection from any state or federal regulation.[38]

The employer's complete freedom to act was short-lived, however.[39] Continuing societal changes soon forced courts to abandon laissez-faire principles and contractual formalism to address "real world" concerns.[40] The effects of the Great Depression slowly led to the realization that the State has a responsibility to alleviate adverse economic conditions affecting the country.[41] Furthermore, the measures necessary to provide relief required some restrictions on individual rights.[42] Concerned with the inability of employees to obtain a fair contract when dealing with

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30. *See* Greenberg, *supra* note 3, at 618.
31. *See* Squire, *supra* note 19, at 645.
32. *Id.* at 646.
33. *Id.* at 645.
34. 208 U.S. 161 (1908).
35. 236 U.S. 1 (1915).
36. *Adair*, 208 U.S. at 172, 180. " 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.' " *Id.* at 173 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 278 (1880)).
37. *Coppage*, 236 U.S. at 26.
38. *See* Note, *supra* note 14, at 1826.
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*

powerful employers, the United States Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*[43] began to limit the power of employers to freely discharge employees.[44]

In *Jones & Laughlin*, the Court upheld the National Labor Relations Act[45] which protected employees' right to unionize from employer harassment or intimidation.[46] While leaving the at-will doctrine intact, the Court recognized that Congress had the authority to protect employees' right to organize for collective bargaining agreements with their employer.[47] Examining employment contract rights from a public policy viewpoint, the Court concluded that Congress could limit an employer's right to discharge employees because of a superseding public interest.[48] Subsequently, many states enacted additional statutory provisions that limited an employer's absolute right to discharge an employee at-will.[49]

Because the at-will doctrine was judicially created, some state courts began to use the common law to limit the employers' absolute right to discharge employees.[50] Generally, these common law modifications fall into three categories: (1) finding that an employer has a duty to terminate an employee only in good faith,[51] (2) finding implied contract terms in employers' handbooks and policy manuals that protect

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43. 301 U.S. 1 (1937). Although the decision did not alter the at-will doctrine, it marked the beginning of judicial acceptance of government intervention in the workplace. *See* Ronner, *supra* note 3, at 569.

44. *Jones & Laughlin*, 301 U.S. at 33.

45. National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151-169 (1988 & Supp. V 1993).

46. *See* Greenberg, *supra* note 3, at 619-21.

47. *Jones & Laughlin*, 301 U.S. at 33.

48. *Id.* Jones & Laughlin Steel Corp. was the fourth largest producer of steel in the United States. *Id.* at 26. Its steelworkers had brought suit for discriminatory labor practices, alleging that the company was firing workers for being members of a union. *Id.* at 22. Concerned that labor difficulties could cripple steel manufacturing while the nation was beginning to recover from the Depression, the Court determined that the public interest in maintaining a free flow of commerce could require a limitation on an employer's unfettered discretion to fire employees. *Id.* at 30-33.

49. *See, e.g.*, FLA. STAT. § 295.14(1)-(2) (1993) (prohibiting discharge based on military service); FLA. STAT. § 532.04(2) (1993) (prohibiting discharge based on employee's refusal to authorize employer to deposit wages directly); FLA. STAT. § 760.10 (1993) (prohibiting discharge based on race, color, age, sex, religion, national origin, handicap, or marital status). Further support can be found in the Florida Constitution. *See* FLA. CONST. art. I, § 6 (prohibiting discharge based on union activity or refusal to participate in union activity).

50. *See* cases cited *infra* notes 51-53.

51. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 374 (Cal. 1988); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977); K Mart Corp. v. Ponsock, 732 P.2d 1364, 1370-72 (Nev. 1987).

employee job rights,[52] and (3) finding a public policy exception to the general employment rule.[53] The most significant and widely accepted common law limitation has been the public policy exception.[54]

Public policy exceptions to the at-will doctrine allow an employee to bring a wrongful discharge claim against the employer based either in contract or tort.[55] Recovery is allowed in tort when a court determines that an employer has discharged an employee in violation of established public policy.[56] While defining public policy often proves elusive,[57] courts have identified three general circumstances where discharging an employee violates public policy. These circumstances include an employee's refusal to commit an unlawful or criminal act,[58] an employee's "whistleblowing" or refusing to violate a code of ethics,[59] and an employee's exercise of a statutory right or privilege.[60] In each circumstance the court uses a statute to define the state's public policy and then fashions a remedy to provide relief for a wrongfully discharged employee.[61]

Although the public policy exception is the most widely accepted common law limit on at-will employment, it has been criticized for

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52. *See, e.g.*, Staggs v. Blue Cross of Maryland, 486 A.2d 798, 803 (Ct. Spec. App.), *cert. denied*, 493 A.2d 349 (Md. 1985); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1264 (N.J.), *modified*, 499 A.2d 515, 515 (N.J. Super. Ct. App. Div. 1985).

53. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1332-33 (Cal. 1980); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974).

54. *See* Ronner, *supra* note 3, at 571-75.

55. *See Monge*, 316 A.2d at 551 (contract); *Tameny*, 610 P.2d at 1331 (tort).

56. *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (discussing the historical framework underlying prevailing public policy concerns relating to at-will employment).

57. Courts have held that "public policy" could be found in legislation, administrative rules and regulations or judicial decisions. *Tameny*, 610 P.2d at 1335-36; *see also* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1033-35 (Ariz. 1985) (en banc) (emphasizing that public policy is expressed not only through legislation but also in the common law).

58. *See, e.g.*, Petermann v. International Bd. of Teamsters, 344 P.2d 25, 26 (Cal. Ct. App. 1959) (employee fired for refusing to commit perjury before a state legislative committee); Sides v. Duke Hosp., 328 S.E.2d 818, 822 (Ct. App.) (employee fired for refusing to commit perjury), *rev. denied*, 335 S.E.2d 13 (N.C. 1985).

59. *See, e.g., Tameny*, 610 P.2d at 1336-37; Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981).

60. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding that the retaliatory firing of an employee who filed state-mandated workers' compensation claim was actionable and unconscionable); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. Ct. App. 1976) (discussing wrongful termination by employer to avoid paying statutory workers' compensation benefits).

61. *See* Greenberg, *supra* note 3, at 624.

offering employees inadequate protection.[62] Commentators argue that employees would receive additional protection if most courts did not exclusively define public policy by previously enacted statutes and regulations.[63] Consequently, some courts have held that an employee's discharge can violate public policy although no statute expressly prohibits the employer's actions.[64]

B. Florida Courts and the At-Will Doctrine

Although Wood's Rule[65] initially appeared in an 1887 treatise,[66] the Florida Supreme Court first cited the rule in 1901 to resolve an employment dispute.[67] And, it was not until the court's 1955 decision in *Wynne v. Ludman Corp.*[68] that the at-will doctrine was "firmly cemented . . . in Florida jurisprudence."[69]

The state's legislature subsequently tempered this common law rule by enacting statutes that limit an employer's absolute power to discharge an employee.[70] In contrast, Florida's courts have consistently rejected any common law modification to the at-will employment rule.[71] The courts have refused to find an employer liable for breach of a policy

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62. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983).

63. *Id.* at 1935; *see also* Ronner, *supra* note 3, at 573-74 ("[T]his narrow approach to modifying the at-will doctrine leads to an extreme reluctance on the part of the courts to provide redress for the wrongfully discharged employee. Some states merely recognize the exception in principle without actually applying it.").

64. *See* Greenberg, *supra* note 3, at 625.

65. *See supra* text accompanying note 25 (providing that a general hiring was indefinite and terminable at the will of either party).

66. *See supra* note 24 and accompanying text.

67. Savannah, F. & W. Ry. v. Willett, 31 So. 246 (Fla. 1901). For a detailed case overview of the Florida Supreme Court and the development of at-will employment, see De Nigris, *supra* note 3, at 1090-95.

68. 79 So. 2d 690 (Fla. 1955).

69. De Nigris, *supra* note 3, at 1096.

70. *See, e.g.*, FLA. STAT. § 40.271 (1993) (prohibiting discharge of employee for appearing for jury duty); FLA. STAT. § 92.57 (1993) (prohibiting discharge of employee for willingness to testify under judicial subpoena); FLA. STAT. § 104.081 (1993) (prohibiting discharge of employee for voting or failing to vote in an election); FLA. STAT. § 112.3187(8) (1993) (prohibiting discharge of public employee for "whistleblowing"); FLA. STAT. § 440.205 (1993) (prohibiting discharge of employee for asserting a claim for workers' compensation benefits); FLA. STAT. § 448.102 (1993) (prohibiting discharge of employee in privately owned business for "whistleblowing").

71. *See, e.g.*, Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182, 184 (Fla. 1983) (holding that the Florida workers' compensation law section governing coercion of employees created a statutory wrongful discharge action for an employee fired for pursuing a workers' compensation claim).

manual's provisions,[72] and have not implied a duty of good faith and fair dealing in the at-will employment relationship.[73] Thus, the courts have not recognized any public policy exceptions to the rule beyond those defined by the state's legislature.[74]

Further, to merit judicial recognition as a legislative public policy exception, the courts have required that state statutes clearly indicate the legislature's intent to narrow the scope of the at-will rule. Thus, in *Catania v. Eastern Airlines*,[75] an appellate court held that a "right to work" statute[76] did not express a public policy that prevented an employer from discharging employees at-will.[77] Although the statute expressed a need to protect an employee's right to work,[78] the court rejected an employee's claim that the statute imposed a duty on employers to discharge employees only for just cause.[79] Instead, the court found the statute's general language inadequate to impose a specific duty that was contrary to the at-will doctrine.[80] The *Catania*

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72. *See, e.g.*, Lurton v. Muldon Motor Co., 523 So. 2d 706, 709 (Fla. 1st DCA 1988).

73. *See, e.g.*, Kelly v. Gill, 544 So. 2d 1162, 1164 (5th DCA), *rev. denied*, 553 So. 2d 1165 (Fla. 1989), *cert. denied*, 494 U.S. 1029 (1990); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. 2d DCA 1982).

74. *See, e.g.*, Aszkenas v. J.B. Robinson Jewelers, 560 So. 2d 1193, 1194 (Fla. 3d DCA 1990) (upholding employee discharge for sitting on a federal jury); Jarvinen v. HCA Allied Clinical Lab., 552 So. 2d 241, 242 (Fla. 4th DCA 1989) (upholding employee discharge for testifying against employer at trial); Ochab v. Morrison, Inc., 517 So. 2d 763, 764 (Fla. 2d DCA 1987) (upholding employee discharge for refusing to violate state dram shop laws).

75. 381 So. 2d 265 (Fla. 3d DCA 1980). In *Catania*, former airline pilots brought suit against Eastern alleging wrongful discharge. *Id.* at 266. The pilots claimed compensatory and punitive damages in tort based on violation of public policy and intentional infliction of mental and emotional distress. *Id.*

76. FLA. STAT. § 447.01 (1979) which provided in relevant part:

> (1) Because of the activities of labor unions affecting the economic conditions of the country and the state, . . . it is the sense of the Legislature that such organizations affect the public interest and are charged with a public use. The working man, unionist or nonunionist, must be protected. The right to work is the right to live.
>
> (2) It is here now declared to be the policy of the state . . . to regulate the activities and affairs of labor unions. . . .

Id.

77. *Catania*, 381 So. 2d at 267.

78. See *supra* note 76 for the text of the statute.

79. *Catania*, 381 So. 2d at 267.

80. *Id.* "We reject the plaintiffs' invitation to be a 'law giver' in this case . . . . Not every violation of public policy is a tort in the absence of an allegation of acts constituting a breach of the plaintiffs' legal rights and causing injury to the plaintiffs' person, property or reputation." *Id.*

court's refusal to recognize a public policy exception to the at-will doctrine was consistent with the Florida Supreme Court's holding in *DeMarco v. Publix Super Markets*.[81]

In *DeMarco*, a former employee claimed he was wrongfully discharged after he filed suit against his employer on his daughter's behalf.[82] In his appeal to the court the employee argued that, by terminating his employment, defendant had violated his constitutional right of access to the courts.[83] The court disagreed and held that the state's constitution did not provide a civil cause of action for interference with the right of access to the state's courts.[84] In accepting the lower court's reasoning, the *DeMarco* court affirmed that, absent a clear indication otherwise, the employment-at-will rule prevents employees from maintaining an action for wrongful discharge against an employer.[85]

The decisions in *Catania* and *DeMarco* reflect the state courts' strict doctrinal approach to the employment relationship. This approach supports the parties' freedom of contract and refuses to recognize limits to the at-will employment rule, as would have been the case if the court had established a common law tort for retaliatory discharge.[86] However, this strict approach does allow a tort action where the legislature has expressly limited the at-will employment rule, as the Florida Supreme Court explained in *Smith v. Piezo Technology & Professional Administrators*.[87]

In *Smith*, the Florida Supreme Court held that Florida Statutes

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81. 384 So. 2d 1253 (Fla. 1980).

82. *Id.* The employee's daughter suffered a severe eye injury when a soda bottle exploded while she was shopping with her mother at a Publix supermarket. *See* DeMarco v. Publix Super Mkts., 360 So. 2d 134, 135 (Fla. 3d DCA 1978). Once the employee had filed the suit, Publix told him either to withdraw the suit or be fired. *Id.* The employee refused and was fired. *Id.*

83. *DeMarco*, 384 So. 2d at 1253-54. The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.

84. *DeMarco*, 384 So. 2d at 1254; *see also DeMarco*, 360 So. 2d at 136. The court also noted that plaintiff's suit on behalf of his daughter was pending at the time the district court issued its opinion. *DeMarco*, 384 So. 2d at 1254. Therefore, he had not been denied access to the courts to seek redress of his daughter's injury. *Id.*

85. *DeMarco*, 384 So. 2d at 1254. The Florida Supreme Court noted: " 'The established law is that where 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 the employment contract.' " *Id.* (quoting *DeMarco*, 360 So. 2d at 136).

86. *See, e.g.*, Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985) ("[T]he creation of a cause of action for retaliatory firing of an at-will employee would abrogate the inherent right of contract between employer and employee.").

87. 427 So. 2d 182 (Fla. 1983).

section 440.205[88] created a cause of action in tort for employees wrongfully discharged for filing a workers' compensation claim.[89] While noting that it had not joined other states in recognizing judicial exceptions to the at-will doctrine,[90] the court acknowledged that the legislature could temper the doctrine's effects.[91] Thus, the court created an inconsistency in the law—the state's legislature, but not its courts, could modify the common law at-will employment doctrine.[92] Yet, while refusing to modify the law itself, the Florida Supreme Court has expanded the relief available to a wrongfully discharged employee.

In *Scott v. Otis Elevator*,[93] the Florida Supreme Court held that an employer who wrongfully discharged an employee in violation of Florida Statutes section 440.205[94] was liable for the employee's resulting emotional distress.[95] The court began its analysis by noting that the common law tort of retaliatory discharge is an intentional, rather than negligent, tort.[96] It then concluded that, because the statute created a cause of action in tort for retaliatory discharge,[97] an employee could recover intentional tort damages as the remedy for an employer's violation of the statute.[98] Although *Scott* specifically addressed a workers' compensation statute, the Third District Court of Appeal in

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88. The statute stated: "No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law." FLA. STAT. § 440.205 (1979).

89. *Smith*, 427 So. 2d at 183.

90. *Id.* at 184. "Some jurisdictions have recognized exceptions to [the at-will] rule and one exception takes the form of a common law tort for retaliatory discharge. Florida has not followed that path." *Id.* (citations omitted).

91. *Id.* "[B]ecause the legislature enacted a statute that clearly imposes a duty and because the intent of the section is to preclude retaliatory discharge, the statute confers by implication every particular power necessary to insure the performance of that duty." *Id.* (citing Mitchell v. Maxwell, 2 Fla. 594 (1849)).

92. *See id.*

> I am concerned with the lack of consistency in the law as it now exists in this state. In this case, we approve a statutory cause of action for the retaliatory discharge of an employee who seeks compensation for injuries to himself. . . . In *DeMarco* [we] denied the same cause of action to an employee who sought compensation for his injured child. There is neither a logical nor justifiable reason for this inconsistency to remain in our law.

Id. at 185 (Overton, J., concurring).

93. 572 So. 2d 902 (Fla. 1990).

94. FLA. STAT. § 440.205 (1979). See *supra* note 88 for the text of the statute.

95. *Scott*, 572 So. 2d at 903.

96. *Id.*

97. *See supra* notes 87-92 and accompanying text.

98. *Scott*, 572 So. 2d at 903.

Walsh v. Arrow Air[99] followed the Florida Supreme Court's reasoning when it reviewed another employee protection measure, Florida Statutes section 448.102.[100]

In *Walsh*, the district court held that section 448.102 provides an employee a cause of action in tort for retaliatory discharge.[101] And, although the legislation became effective two years after the employee was fired,[102] the court concluded it could apply the statute retroactively to provide the employee his requested relief.[103] The court reasoned that because the legislature promulgated the statute to alleviate the harshness of the at-will rule in "whistleblower" cases,[104] the statute was remedial and could be applied to cases pending when it became effective.[105] Thus, by applying the statute retroactively, the court provided the employee a remedy without fashioning a pure judicial exception to the at-will rule.[106] Further, the tone of the court's opinion indicates its

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99. 629 So. 2d 144 (Fla. 3d DCA 1993).

100. FLA. STAT. § 448.102 (1993) provides:

> Prohibitions.—An employer may not take any retaliatory personnel action against an employee because the employee has:
>
> (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

Id.

101. *Walsh*, 629 So. 2d at 149. In *Walsh*, an employer fired a flight engineer three weeks after the employee, against the employer's wishes, had grounded a commercial flight because of a hydraulic systems leak. *Id.* at 146. The employee brought suit, claiming the employer had wrongfully discharged him. *Id.* The court applied a public policy exception to the at-will doctrine which would protect employees who refuse to participate in employment activities that violate law or regulations from dismissal. *Id.* at 147. Although Florida Statutes § 448.102 expands whistleblower protection to cover the circumstances of this case, it was not enacted until after the employee had been dismissed from his job. *Id.* at 147-48.

102. *Id.* at 147-48.

103. *Id.* at 149.

104. *See id.* at 148. The court determined that the legislature had passed the measure only after the state's courts had dismissed similar wrongful termination cases as "a matter for legislative intervention." *Id.*

105. *Id.* at 148-49.

106. In doing so, it successfully avoided a conflict with Florida Supreme Court's

willingness to view the employer-employee relationship from a wider perspective than the narrow confines of a strict contractual approach. As the court stated in denying Arrow Air's motion for rehearing, "[T]he power of an employer to terminate an employee for doing that which the law requires, or for any reason clearly contrary to a strong public policy, . . . is not a substantive right based on any concept of justice, ethical correctness, or principles of morals."[107] The court continued, quoting Justice Holmes:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.[108]

But, if the third district court intended to open debate on the judiciary's strict contractual analysis of employment relations in the state, the Florida Supreme Court never noticed. On review it quashed the decision to apply the statute retroactively[109] without addressing the lower court's comments on applying public policy limits to an employer's freedom to discharge employees. Thus, *Walsh* leaves two questions unanswered: first, does the lower court's opinion reflect growing judicial dissatisfaction with the limits of a strict contractual analysis to employment issues? Second, if the judiciary could recognize public policy limits to at-will employment, how should it determine whether these policies are strong enough to merit an exception to the rule?

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established precedent of not recognizing a common law tort for retaliatory discharge. *See supra* notes 82-98 and accompanying text.

107. *Id.* at 150 (per curiam).

108. *Id.* (per curiam) (quoting Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).

109. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994). The Florida Supreme Court acknowledged that Florida Statutes § 448.102 created a new cause of action allowing private employees to bring suit against employers who dismissed them for reporting or refusing to violate laws that protect the public. *Id.* at 424. However, the statute created this cause of action by changing the existing common law. *See id.* Thus, the statute provides employees substantive rights they did not have under the common law. *Id.* at 425.

While the court recognized that most remedial legislation can be applied to cases pending before courts, it noted a clear exception. *Id.* at 424. If a legislative act attaches new legal consequences to events completed before its enactment, it cannot, absent clear legislative intent, be applied retroactively. *Id.* at 424-25. Therefore, because Florida Statutes § 448.102 created new substantive rights for employees, it could not be applied retroactively to Arrow Air. *Id.* at 425.

III. PRIMA FACIE TORT

Unlike the uniquely American doctrine of at-will employment, the theory of a prima facie tort has its origins in the English writ system.[110] In early English law, a plaintiff seeking relief from harm caused by another had to petition the King for a writ.[111] If the plaintiff sought relief for actions that did not fall within established categories, then the plaintiff had no redress for his injury.[112]

The original action available under the writ system was an action for trespass.[113] The writ of trespass developed in the 13th century as the remedy for all forcible, direct, and immediate injuries to a person.[114] To obtain the writ, a plaintiff alleged that a defendant caused injury to his person or property "by force and arms and against the king's peace."[115] The plaintiff did not have to prove that the defendant acted with an intent to harm.[116]

The writ of trespass provided a remedy where the defendant had directly caused the plaintiff's injury.[117] However, a plaintiff could not recover if he was indirectly injured by the defendant's same actions.[118] Therefore, in the 14th century, the courts developed the writ of trespass on the case.[119] These "actions on the case" provided plaintiffs' relief for a variety of miscellaneous negligence actions.[120] To prove a writ of trespass on the case, a plaintiff had to demonstrate that the defendant acted negligently, thereby causing the plaintiff's injury.[121] As in a writ of trespass, a plaintiff did not have to prove that the defendant acted with intent or with a substantial certainty that the plaintiff would be

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110. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 6, at 28-31 (5th ed. 1984).

111. *Id.* at 29.

112. *Id.*

113. *Id.* For a detailed history on the action of trespass, see George E. Woodbine, *The Origins of the Action of Trespass (pts. 1 & 2)*, 33 YALE L.J. 799 (1924); 34 YALE L.J. 343 (1925).

114. *See* KEETON ET AL., *supra* note 110, at 29.

115. 2 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 526 (2d ed. 1968).

116. Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 451 (1990).

117. *See id.*

118. *See id.*

119. *Id.* Historians disagree on the exact time and manner by which the action on the case was created. *Id.* at 451 n.24.

120. *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 363 (1951).

121. *See* Vandevelde, *supra* note 116, at 451-52.

harmed by the defendant's actions.[122] These two writs served as controlling tort law until the middle of the 19th century.[123]

By that time, a dissatisfaction with the constraints of the writ system and a movement towards a code system led to changes in the tort system in the United States.[124] In this country, two competing methods of organizing tort law appeared.[125] The first was a rights-based approach.[126] This approach regarded the law of torts as providing remedies for the invasion of personal rights which are possessed by all citizens.[127]

The second organizational method, developed by Oliver Wendell Holmes, divided tort law into the three distinct categories of strict liability, negligence, and intentional tort.[128] As opposed to the rights-based approach, Holmes believed that tort liability was imposed by the State for policy reasons, not moral fault.[129] In constructing his initial model, Holmes recognized a general theory of negligence, and a theory of discrete, recognizable causes of action for intentional tort.[130]

In contrast, Sir Frederick Pollock, an English scholar, believed that there was a general unifying principle of tort law.[131] Rather than relying upon state policy reasons to define distinct intentional torts, he concluded that there was "a general proposition of English law that it is a wrong to do wilful harm to one's neighbour without lawful justification or excuse."[132] Eight years later in *Privilege, Malice, and Intent*,[133] Holmes adopted a similar concept that "the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause."[134]

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122. *See* JOSEPH H. KOFFLER & ALLISON REPPY, HANDBOOK OF COMMON LAW PLEADING 176 (1969).

123. *Id.* at 174.

124. *See* Vandevelde, *supra* note 116, at 454-55.

125. *See id.* at 456.

126. *See id.* at 456-57.

127. COOLEY, *supra* note 36, at 23-47, 64-74.

128. OLIVER W. HOLMES, THE COMMON LAW 104, 116-17 (Mark D. Howe ed., 1963).

129. *See* Vandevelde, *supra* note 116, at 458.

130. *Id.* at 458-59.

131. *See* FREDERICK POLLOCK, LAW OF TORTS IN OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 22 (3d Eng. ed. 1894).

132. POLLOCK, *supra* note 131, at 22. Pollock admitted that he had no express authority to support his supposition. Vandevelde, *supra* note 116, at 472. He was simply expounding a general principle from his analysis of many cases, none of which directly addressed the subject. *Id.*

133. Oliver W. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

134. *Id.* at 3.

Holmes' change in thinking resulted from his willingness to acknowledge a theory he had previously dismissed in constructing his tripartite division of tort law—that the actual malice of an individual could be the basis of imposing tort liability.[135] By acknowledging that an individual's motive could effect liability, Holmes rejected his previous construction of separate, discrete intentional tort causes of action and embraced the concept of a general theory of liability for intentional tortious acts.[136]

As a member of the Supreme Judicial Court of Massachusetts and the United States Supreme Court, Justice Holmes began to write his new theories on intentional tort into law.[137] Perhaps the most well known statement of his doctrine appeared in *Aikens v. Wisconsin*.[138] There, writing the opinion for United States Supreme Court, he stated that: "It has been considered that, prima facie, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[139] Thus, Holmes' doctrine that a defendant's malicious acts could lead to liability under a general theory of intentional tort would bear the name "prima facie tort."[140]

In 1977 the American Law Institute revised section 870 of the *Restatement (Second) of Torts* to reflect Holmes' doctrine of a general theory of intentional tort.[141] Section 870 provides: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."[142]

Section 870 describes an analytical scheme to determine whether liability for an intentional tort should be imposed in specific factual circumstances.[143] The section states a general principle, and does not

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135. *See* Vandevelde, *supra* note 116, at 474.

136. *Id.* at 473-74. Holmes still believed that the foreseeability of harm was measured by an objective test. *Id.* at 474. However, he now believed that determining whether the actor was justified in his acts depended, in part, on the actor's subjective state of mind. *Id.*

137. *See, e.g.*, Aikens v. Wisconsin, 195 U.S. 194 (1904); *infra* text accompanying notes 138-40.

138. 195 U.S. 194 (1904).

139. *Id.* at 204.

140. Holmes' doctrine was first described as a "prima facie tort" in Advance Music Corp. v. American Tobacco Co., 70 N.E.2d 401, 403 (N.Y. 1946).

141. *See* RESTATEMENT (SECOND) OF TORTS § 870 (1977).

142. *Id.*

143. *Id.* § 870 cmt. a.

define a specific tort.[144] However, to establish a prima facie tort, a plaintiff must prove four elements: (1) the defendant's intent to injure plaintiff (2) without justification where (3) the defendant acts to cause (4) plaintiff's injury.[145]

The intent and causation elements are easily defined. A plaintiff does not have to prove that the defendant acted purposefully to cause the injury.[146] Instead, the element may be established if plaintiff can show that the defendant "knows or believes that the consequence[s] [are] certain, or substantially certain, to result from his act[ions]."[147] The causation element requires an analysis similar to the one used in evaluating other torts.[148]

In contrast, the justification element is difficult to define, as it involves questions of policy. To succeed in a claim, the plaintiff must demonstrate an injury to a legally protected interest.[149] Therefore, one of the issues facing a court is whether to recognize an injury pleaded by the plaintiff as a legally cognizable harm.[150] This is a policy decision which requires the court to weigh a variety of factors, including the nature and severity of the injury, problems of proof, and how difficult the injury is to inflict.[151] Once the court has decided that a plaintiff's injury is legally cognizable, it must then determine whether the defendant's actions under the circumstances were justified.[152]

In making this decision, the court must again consider several factors. Here, the factors include the nature and the seriousness of the harm incurred, the defendant's motive, and the means the defendant used to harm the plaintiff.[153] In addition to the individual defendant's motives, a court must also weigh the social utility of the defendant's conduct.[154] Thus, regardless of a defendant's motive, the nature and significance of the defendant's actions could provide such benefits to

144. *Id.*

145. *Id.* § 870 cmt. e; *accord* Kenneth J. Vandevelde, *The Modern Prima Facie Tort*, 79 KY. L.J. 519, 528 (1991).

146. RESTATEMENT (SECOND) OF TORTS § 870 (1977).

147. *Id.* § 870 cmt. b.

148. *Id.* § 870 cmt. l.

149. *Id.* § 870 cmt. m.

150. *Id.* § 870 cmts. e, f.

151. *See* Vandevelde, *supra* note 145, at 549. This is one method to limit the scope of prima facie tort because, as the *Restatement* notes, minor injuries incurred in the course of everyday life should not be a legally recognized injury. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 870 cmt. f (1977)).

152. RESTATEMENT (SECOND) OF TORTS § 870 (1977) (stating conduct must be "generally culpable and not justifiable under the circumstances").

153. *Id.* § 870 cmt. e.

154. *Id.*

society that the actions are "justifiable."[155] In these circumstances, the plaintiff could not recover for any injury incurred as a result of the defendant's conduct.[156]

Because section 870 requires a judicial determination of public policy, few states have been willing to adopt the provision.[157] In those states that have accepted the prima facie tort, courts have promulgated rules to restrict its use.[158] One reason for the restrictions is a fear that adopting section 870 would burden courts and potential defendants with a flood of plaintiffs seeking redress for any injury.[159] Yet, these criticisms ignore the advantage of the *Restatement*'s position, which allows courts to dismiss spurious claims by deferring to previous policy determinations, and to recognize meritorious novel claims by providing a method to expand existing law to protect new interests.[160]

Courts applying section 870 have been conservative in making policy determinations that could lead to increased liability for defendants.[161] Further, any criticism that the doctrine provides a "blank check" for courts is unjustified. Courts have historically recognized new causes of action to meet changing economic and social conditions.[162] The prima facie tort doctrine merely provides an established methodology to provide judicial recognition for new and developing claims.[163] The doctrine serves as a framework to protect emerging areas of interest without forcing a court to define the elements of a new tort or to manipulate an existing tort category to "cover" the harm incurred.[164]

IV. PRIMA FACIE TORT APPLIED TO EMPLOYMENT AT WILL

The employment-at-will doctrine permits an employer to discharge his employees "for good cause, for no cause or even for cause morally

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155. *Id.*

156. *See id.* § 870 cmt. f ("There are many harms that individuals must bear as the price of living in a society composed of many individuals.").

157. Courts in nearly half of the states have considered adoption of the prima facie tort. *See* Vandevelde, *supra* note 145, at 525-28 nn.29-60. Many of those courts have recognized it. *Id.* Fewer have actually adopted it or found it applicable to the facts presented. *Id.*

158. *See, e.g.*, Angrisani v. City of New York, 639 F. Supp. 1326, 1338 (E.D.N.Y. 1986); Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo. Ct. App. 1980).

159. Joseph W. Ginn, Note, *Prima Facie Tort*, 11 CUMB. L. REV. 113, 129 (1980).

160. *Id.* at 122 & nn.69-70 (citing Letter from Professor John W. Wade, reporter for volumes three and four of the *Restatement*, to Joseph W. Ginn III (Nov. 8, 1979), which explained that § 870 is to be used "to provide guidelines to a court considering expanding an old tort or creating a new one").

161. Vandevelde, *supra* note 145, at 553.

162. *See* Ginn, *supra* note 159, at 124-25.

163. *See id.*; Vandevelde, *supra* note 145, at 554.

164. Vandevelde, *supra* note 145, at 554.

wrong."[165] The prima facie tort provides remedies for "the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage . . . if done without just cause."[166] These two legal doctrines are in direct conflict when an employer discharges an employee with an intent to harm the employee. This section reviews the wrongful discharge decisions of the courts which have recognized the prima facie tort in their jurisdictions.

In jurisdictions where the prima facie tort is accepted, courts have limited its application.[167] Thus, courts which recognize the employment-at-will doctrine have generally refused to use a prima facie tort to fashion relief for an employee claiming a wrongful discharge.[168] This reluctance is demonstrated by the similar rationales stated in the controlling cases of the two leading jurisdictions recognizing prima facie tort, New York and Missouri.

In *Murphy v. American Home Products Corp.*[169] and *Dake v. Tuell*,[170] the highest courts of these two states rejected wrongful discharge actions that were not based on a statutory provision, "being of the opinion that such a significant change in our law is best left to the Legislature."[171] The courts feared that recognizing a prima facie tort cause of action would "render near impotent" the at-will doctrine.[172] However, the courts acknowledged that the legislature could carve out exceptions to the at-will rule without damaging the rule itself.[173]

But would a judicial determination that an employer wrongfully discharged an employee actually destroy the at-will doctrine? When a court reviews an employee's discharge under a prima facie tort claim, it renders a decision based on the specific facts and circumstances of that case.[174] In determining whether the particular discharge was

165. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915); *see also supra* notes 13-29 and accompanying text (discussing the origins of the at-will employment doctrine).

166. Holmes, *supra* note 133, at 2-3; *see also supra* part III (discussing the prima facie tort).

167. *See supra* notes 158-59 and accompanying text.

168. *See, e.g.*, Dake v. Tuell, 687 S.W.2d 191, 192 (Mo. 1985) (en banc) ("The sole issue in this case is whether discharged at will employees can maintain a suit for wrongful discharge against their former employers by cloaking their claims in the misty shroud of prima facie tort.").

169. 448 N.E.2d 86 (N.Y. 1983).

170. 687 S.W.2d 191 (Mo. 1985).

171. *Murphy*, 448 N.E.2d at 89; *accord Dake*, 687 S.W.2d at 192-93.

172. *Dake*, 687 S.W.2d at 193.

173. *Murphy*, 448 N.E.2d at 89; *accord Dake*, 687 S.W.2d at 194.

174. *See infra* notes 176-95 and accompanying text.

justified, the court must consider whether the employee had a legally cognizable interest in maintaining his job and whether the employer was justified in discharging the employee.[175]

To make these decisions, the court must consider the interests of the employer, the employee, and the public.[176] Thus, a court, like the legislature, could determine when, and if, an exception to the at-will doctrine is merited based on "the conflicting interests of the litigants in the light of the social and economic interests of society in general."[177] And, because the decision would be based on specific facts, the end result would be an exception to the at-will doctrine, not its destruction.

For example, in *Nees v. Hocks*,[178] the Supreme Court of Oregon held that an employee fired for serving on a jury could recover compensatory damages from her employer.[179] Although avoiding the term "prima facie tort,"[180] the court concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."[181]

In reaching this decision, the court balanced the interest of the employer to freely discharge employees under the at-will doctrine with the community or public interest in having citizens serve on jury duty.[182] The court noted that the state's constitution and statutes indicated that the jury system was a highly regarded institution in the state.[183] And, if an employer could freely discharge an employee for

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175. *See supra* notes 153-56 and accompanying text.

176. *See supra* notes 153-60 and accompanying text.

177. RESTATEMENT (SECOND) OF TORTS § 870 cmt. c (1977).

178. 536 P.2d 512 (Or. 1975) (en banc).

179. *Id.* at 516. Because the case was one of first impression, the court did not allow punitive damages. *Id.* at 516-17.

180. The court stated that, "We are of the opinion that the term [prima facie tort] serves no purpose in Oregon and we will advance the jurisprudence of this state by eliminating it." *Id.* at 513. The court rejected any label on its actions, noting that it had never hesitated to recognize new torts when confronted with injuries they believed should be compensated. *Id.* at 514. Thus, the principal issue in the case, as restated by the court, was whether the plaintiff alleged and proved defendant's conduct which amounted "to a tort of some nature." *Id.* at 512.

181. *Id.* at 515.

182. *Id.* at 516.

> [T]he immediate question can be stated specifically,—is the community's interest in having its citizens serve on jury duty so important that an employer, who interferes with that interest by discharging an employee who served on a jury, should be required to compensate his employee for any damages she suffered?

Id.

183. *Id.*

serving this institution, "[t]he will of the community would be thwarted."[184] Thus the court, using an analysis similar to section 870, carved a judicial exception to the state's at-will employment doctrine.[185]

Nor would every claim of wrongful discharge under prima facie tort succeed, thereby "rendering impotent" the at-will doctrine, as its critics contend.[186] In *Lundberg v. Prudential Insurance Co. of America*,[187] a Missouri appeals court, using a section 870 analysis, rejected a plaintiff's claim that his employer had wrongfully demoted him.[188] In affirming the lower court's summary judgment for the defendant,[189] the court noted that the facts the plaintiff-employee provided at trial were insufficient to establish his employer's intent to injure him.[190]

In determining whether the plaintiff had a legally protected interest, the court found that the employer demoted the plaintiff for legitimate business reasons.[191] Thus, the court could find no improper means or motive of the employer in firing the plaintiff, and no societal interest in restricting the employer from discharging the plaintiff.[192] Therefore, summary judgment for the employer was appropriate.[193]

Both *Nees* and *Lundberg* demonstrate that courts, in a "[d]isciplined exercise of judicial responsibility,"[194] could use a prima facie tort to punish those employers who engage in actions society will not tolerate, while rejecting claims involving purely private interests.[195]

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184. *Id.*

185. *See id.*

186. *See Dake*, 687 S.W.2d at 193.

187. 661 S.W.2d 667 (Mo. Ct. App. 1983). The plaintiff was a sales manager for the defendant and was employed in an at-will position. *Id.* at 668. The plaintiff was demoted after his sales staff failed to reach production goals mandated by his immediate supervisor. *Id.* at 669. The plaintiff acknowledged a personality conflict with his supervisor and alleged that personal jealousy may have lead to his demotion. *Id.*

188. *Id.*

189. *Id.* at 672.

190. *Id.* at 670-71. Unlike the *Restatement*, Missouri requires a plaintiff to prove the defendant's actual intent to injure the plaintiff, and not simply the defendant's intent to do the act which purportedly caused the injury. *Id.* at 670 (citing Porter v. Crawford & Co., 611 S.W.2d 265, 269 (Mo. Ct. App. 1980)).

191. *Id.* at 671 ("Under an unadulterated 'balancing of interests' process, conversion of employment relationships terminable at will to employment relationships terminable only for good cause under the guise of prima facie torts will have to be postulated on facts vastly different from those presented by the instant case.").

192. *Id.*

193. *Id.* at 672.

194. *Id.* at 670.

195. *See* Greenberg, *supra* note 3, at 625.

V. PRIMA FACIE TORT IN FLORIDA WRONGFUL DISCHARGE CASES

Would Florida consider adopting the prima facie tort for use in deciding wrongful termination cases? Given the courts' past contractual interpretation of at-will employment,[196] it seems doubtful. However, the courts have moved away from this strict contractual analysis and imposed tort liability on employers where the legislature has specifically defined exclusions to the at-will rule.[197] The next logical step in a movement from a contract to tort analysis of the employment relationship would allow the courts to determine whether employer conduct in specific situations is justified. The prima facie tort provides a court the methodology to conduct this tort analysis without destroying the at-will doctrine.[198]

The Florida Supreme Court's decisions in *Smith*[199] and *Scott*[200] recognized that an employer could commit an intentional tort by wrongfully discharging an employee.[201] And, the third district court's opinion in *Walsh*[202] indicates that state courts are not blind to changing social situations that may require a new perspective on employment at-will.[203]

These cases indicate that courts might be willing to modify their strict contractual analysis of the employment relationship and, in specific situations, substitute a tort analysis. However, this change would require the courts to act independently of the legislature and impose an additional duty on employers by modifying the common law doctrine of employment at-will.

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196. *See supra* notes 85-86 and accompanying text.

197. *See supra* notes 87-98 and accompanying text.

198. Squire states:

> The prima facie tort doctrine offers a legal means to protect employee and her or his interest in a chosen occupation or trade while allowing the employer the prerogative to efficiently operate a business. Reflection of changes in our modern policy towards labor and management is easily mirrored in the prima facie tort doctrine with its "justification" and "balancing of rights" requirements.

See Squire, *supra* note 19, at 662.

199. Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182 (Fla. 1983); *supra* text accompanying notes 87-92.

200. Scott v. Otis Elevator, 572 So. 2d 902 (Fla. 1990); *supra* text accompanying notes 99-108.

201. *See supra* notes 95-99 and accompanying text.

202. Walsh v. Arrow Air, Inc., 629 So. 2d 144 (Fla. 3d DCA 1993); *supra* notes 99-108 and accompanying text.

203. *See Walsh*, 629 So. 2d at 146-47.

The Florida Supreme Court has previously modified the state's common law as a result of changing social situations, despite longstanding rules or legislative action.[204] For example, in *Hoffman v. Jones*,[205] the court adopted a comparative negligence rule and rejected a contributory negligence doctrine it had adopted eighty-seven years earlier.[206] One stumbling block to changing the common law was Florida Statutes section 2.01 which made the general English common law part of this state's statutory law.[207]

However, the *Hoffman* court noted that section 2.01 did not apply to contributory negligence.[208] Researching the origins of the contributory negligence doctrine, the court noted that the rule was judicially created in 1809.[209] However, the court found earlier conflicting caselaw that did not establish a clear common law rule.[210] The court concluded that this conflict indicated that the doctrine of contributory negligence must have evolved from "judicial thinking" rather than "judicial pronouncement" of the common law.[211] Therefore, because the rule was not "clear and free from doubt," it would not have been adopted as part of the statutory law through Florida Statutes section 2.01.[212]

Reflecting on the origins of the contributory negligence rule, the court referred to its previous decision in *Ripley v. Ewell*[213] where it had stated:

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204. *See, e.g.*, Farmer v. City of Ft. Lauderdale, 427 So. 2d 187, 191 (Fla.), *cert. denied*, 464 U.S. 816 (1983) (holding that employee's refusal to submit to polygraph examination was not grounds for public employee discharge); Gates v. Foley, 247 So. 2d 40, 44 (Fla. 1971) (establishing woman's right to recover for loss of husband's consortium); Banfield v. Addington,. 140 So. 893, 899 (Fla. 1932) (removing married woman's common law exemption from causes of action in contract).

205. 280 So. 2d 431 (Fla. 1973).

206. *Id.* at 434, 438. The court had specifically established contributory negligence as the law of Florida in Louisville & Nashville R.R. v. Yniestra, 21 Fla. 700, 709 (Fla. 1886).

207. FLA. STAT. § 2.01 (1989) provided:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Id.

208. *Hoffman*, 280 So. 2d at 435.

209. *Id.* at 434.

210. *Id.* at 434-35.

211. *Id.*

212. *Id.* at 435.

213. 61 So. 2d 420 (Fla. 1952) (en banc).

> When the rules of the common law are in doubt, or when a factual situation is presented which is not within the established precedents, we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion. It is only proper that in such cases we take into account the changes in our social and economic customs and present day conceptions of right and justice. When the common law is clear we have no power to change it.[214]

The *Hoffman* court then abandoned the contributory negligence rule, noting that the social conditions that once made the doctrine useful to society had now changed.[215]

Thus, the court is not unfamiliar with altering established common law doctrine to reflect changes in society. As noted above, the employment-at-will doctrine was not part of the English common law when the United States declared its independence from Great Britain.[216] Therefore, the employment-at-will doctrine would not be considered part of Florida's statutory law. Moreover, its questionable origins would place the doctrine in the court's category of "judicial thought" rather than "judicial pronouncement."[217] As a result, the employment-at-will doctrine, like the contributory negligence rule, is a common law rule the court could freely change or modify as changing societal conditions warrant.

Employment at-will was a doctrine promulgated to meet changing social conditions in this country which supported the growth of

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214. *Id.* at 423.

215. *Hoffman*, 280 So. 2d at 436-37. The court stated:

> One reason for the abandonment of the contributory negligence theory is that the initial justification for establishing the complete defense is no longer valid. It is generally accepted that, historically, contributory negligence was adopted "to protect the essential growth of industries, particularly transportation." Modern economic and social customs, however, favor the individual, not industry.

Id. (citations omitted).

216. *See supra* notes 24-29 and accompanying text.

217. *See supra* text accompanying note 211. While the court never fully explained the difference between the two categories in *Hoffman*, the at-will rule appears to fit neatly into "judicial thought," as Wood appears to have made the rule up without the benefit of legal precedent. *See supra* note 26 and accompanying text. Even if the *Hoffman* court arbitrarily made a distinction between "judicial thought" and "judicial pronouncement" merely to legitimize its abrogation of the contributory negligence rule, no such strained construction of the past is necessary when the same analysis is applied to the at-will doctrine of employment.

industries.[218] Today, however, there is a need to protect the individual, especially considering the power of the modern corporation and the disparity in bargaining power of the individual employee.[219] Therefore, following *Hoffman* it would appear that given egregious factual situations,[220] the court should act to provide relief, in tort, for some discharged employees. A pure contractual analysis of employment relations contradicts the court's guidance in *Hoffman* that " 'the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated.' "[221] The court continued, noting that " '[l]egislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.' "[222] The prima facie tort, as defined by section 870, would allow the court to meet this goal without destroying the employment-at-will rule.

Analyzing a wrongful discharge claim under a prima facie tort analysis would allow the court to recognize and balance the interests of the employer, the employee, and the public. This analysis would balance the employer's interest to be free to discharge nonproductive or disruptive employees against the employee's interest in being free from the effects of an abusive or retaliatory discharge. As in *Nees*,[223] the court would recognize the public's interest to resolve any conflict between the employer's and employee's interests.

As demonstrated in *Lundberg*, an employee bears a heavy burden to overcome the presumption of an at-will employment.[224] However, this limit would preclude spurious employee claims and present true issues of societal conflict to the court. Using prior legislation as a guide, the court could measure the public's interest in providing an exception.[225] Thus, the court could carve out limited exceptions to the at-will rule similar to those established by the legislature, without abolishing the at-

218. *See supra* notes 20-23 and accompanying text.

219. *See supra* notes 38-49 and accompanying text.

220. *See, e.g.*, Ochab v. Morrison, Inc., 517 So. 2d 763, 763-64 (Fla. 2d DCA 1987) (employee discharged for refusing to violate dram shop laws); Jarvinen v. HCA Allied Clinical Lab., 552 So. 2d 241, 242 (Fla. 4th DCA 1989) (employee discharged for testifying against employer at trial).

221. *Hoffman*, 280 So. 2d at 435 (quoting Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957)).

222. *Id.* at 435-36 (quoting Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971)).

223. Nees v. Hocks, 536 P.2d 512 (Or. 1975); *supra* notes 178-85 and accompanying text.

224. Lundberg v. Prudential Ins. Co. of Am., 661 S.W.2d 667 (Mo. Ct. App. 1983); *supra* notes 187-95 and accompanying text.

225. *See, e.g., Nees*, 536 P.2d at 516; Walker, *supra* note 3, at 591.

will doctrine.[226]

Societal changes have forced the Florida legislature to temper the harshness of the employment-at-will doctrine. The courts have also recognized these changes and provided employees relief, in tort, for employer violations of the legislature's specific exemptions to the at-will doctrine. If adopted in Florida, the prima facie tort would provide a methodology for courts to analyze competing interests in an employment-at-will relationship, define a limited exception to the at-will doctrine, and provide immediate relief to wrongfully discharged employees.

226. *See supra* notes 178-95 and accompanying text.