St. Mary's Law Journal

Volume 35 | Number 3 Article 6

1-1-2004

# For Any Reason or No Reason at All: Reconciling Employment-at-Will With the Rights of Texas Workers after Mission Petroleum Carriers Inc. v. Solomon.

Jason P. Lemons

# FOR ANY REASON OR NO REASON AT ALL: RECONCILING EMPLOYMENT-AT-WILL WITH THE RIGHTS OF TEXAS WORKERS AFTER *MISSION PETROLEUM CARRIERS, INC. v. SOLOMON*

**JASON P. LEMONS**



## I. INTRODUCTION

Since its inception, Texas has been a favored destination for both upstart entrepreneurs and established corporations.[1] Businesses of all types have flocked to the state for a variety of reasons: a growing population

1. *See* Sanford Nowlin, *S.A. Gets Toyota Plant; Japanese Automaker Makes the Decision Official*, SAN ANTONIO EXPRESS-NEWS, Feb. 5, 2003, at 1A, *available at* 2003 WL 5585300 (describing the attractiveness of Texas, and San Antonio in particular, as a destination for large-scale manufacturing).

base,[2] a continuous flow of immigration,[3] a skilled and diverse labor force,[4] a cutting-edge high-tech industry,[5] and a strong presence in international trade, buoyed by the I-35/NAFTA corridor.[6] The Central Texas and Arlington-Dallas/Fort Worth regions have recently experienced the most prolific economic growth in the state, thanks in part to continuing corporate relocation.[7] The Houston area has enjoyed significant job growth due to its long-time prominence in international business, banking, and diplomacy.[8] Toyota's recent decision to make San Antonio its

---

2. *See* M. Ray Perryman, *Economic Forecast Is Sunny*, ARLINGTON MORNING NEWS, Nov. 21, 1999, at 13A (attributing Texas's population growth to "high birth rates, a strong economy that draws newcomers from across the nation and an ongoing influx of immigrants"); *see also* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 422-24 (Louise L. Hornor ed., 2002) (illustrating Texas's remarkable population growth from 1970 to 2000). Texas's population swelled dramatically in the course of the last four censuses: from 11,198,655 in 1970 to 20,851,820 in 2000. *Id.* In this thirty-year span, Texas climbed from fourth to second in state population rankings. *Id.* And this trend shows no sign of slowing; Texas's projected population in 2025 is estimated at 27,183,000. *Id.*

3. *See* M. Ray Perryman, *Economic Forecast Is Sunny*, ARLINGTON MORNING NEWS, Nov. 21, 1999, at 13A (pointing out that Texas's dramatic population increase in the 1990s is partially attributed to immigration). This constant flow of new immigrant labor is, in no small part, a reason that Texas's labor force is envied by other states. *Id.*

4. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 437 (Louise L. Hornor ed., 2002) (revealing that Texas's civilian labor force was estimated in 2000 at 10,325,000, second only to California); *see also* William McKenzie, *Defining Texas: Bush's Candidacy Can Help Break Stereotypes of State*, DALLAS MORNING NEWS, July 11, 2000, at 15A (noting that Texas's diverse citizenry presents the state with a number of gifts and difficulties that reflect the challenges our nation faces at the beginning of the new century).

5. *See* John Shinal, *High-Tech Numbers; State Took the Fall for Industry's Job Losses Across U.S., Electronics Group Survey Finds, but This Year, Layoffs Are Abating*, S.F. CHRON., Nov. 19, 2003, at B1, *available at* 2003 WL 3768602 (noting that Texas trails only California in the number of high-tech jobs in 2002). Additionally, among the eight high-tech sectors surveyed in 2002 by the American Electronics Association, Texas ranks second in all but one. *Id.*

6. *See* M. Ray Perryman, *Economic Forecast Is Sunny*, ARLINGTON MORNING NEWS, Nov. 21, 1999, at 13A (crediting the influx of trade coming along Interstate 35 as one of the state's most significant job creators).

7. *See id.* (attributing greater growth to corporate relocations in the Austin and Dallas areas); *see also* Clay Robison, *Perry Pitches Texas to New York; Governor Declares Lone Star State Is 'Open for Business,'* HOUS. CHRON., Oct. 7, 2003, *available at* 2003 WL 57448072 (describing Governor Perry's efforts to encourage out-of-state businesses to establish, relocate, or expand their operations in Texas).

8. *See* M. Ray Perryman, *Economic Forecast Is Sunny*, ARLINGTON MORNING NEWS, Nov. 21, 1999, at 13A (noting that the city's prominent higher education and health care infrastructure also ensure that Houston remains an attractive business destination); *see also* Anuradha Raghunathan, *New Year May See New Jobs; Survey Finds Employers Offer Best Outlook in 6 Years for the Area*, DALLAS MORNING NEWS, Dec. 16, 2003, at 1, *available at*

newest North American manufacturing site was also a major victory for Texas business.[9] Toyota's choice was difficult; four other states were in the running, and Texas offered the fewest incentives of any of the suitors.[10] But the auto manufacturer could not resist the attractive intangibles Texas offered, including a friendly business environment, favorable tax rates, public infrastructure, and the area's accessibility to other markets.[11] In both high and hard times, Texas's business and political leaders have worked hard to ensure that Texas remains one of the premier business destinations in the country.[12]

One of the less heralded, but nonetheless significant factors that makes Texas so attractive to businesses is its long-standing devotion to the doctrine of at-will employment. The doctrine generally states that any employment relationship not governed by contract or a statutory provision is terminable at any time by either the employer or the employee for any reason or no reason at all.[13] At-will employment has been praised by

---

2003 WL 68990019 (reporting that twenty-nine percent of Houston employers surveyed by Manpower Inc. are planning to hire more employees in the first quarter of 2004). The results of this recent survey are encouraging, as all major metropolitan areas anticipate increases in job hiring, with Amarillo, El Paso, and Waco leading the state in hiring projections. *Id.*

9. *See* Sanford Nowlin, *S.A. Gets Toyota Plant; Japanese Automaker Makes the Decision Official*, SAN ANTONIO EXPRESS-NEWS, Feb. 5, 2003, at 1A, *available at* 2003 WL 5585300 (describing the impact this North American facility will have on Texas's economy); *see also* John W. Gonzalez, *San Antonio Revels in Toyota Win; Texas Truck Buyers Lynchpin in Choice*, HOUS. CHRON., Feb. 6, 2003, at 1 (noting that one of Toyota's main factors in choosing the San Antonio site was to permeate the Texas truck market that has long been dominated by domestic automakers).

10. Jim Steinberg & Rick McLaughlin, *Washington State's Incentive Package Hurts California's Bid for Boeing Plant*, SAN BERNARDINO COUNTY SUN, June 13, 2003, *available at* 2003 WL 56922095. Patrick Shaughnessy, a spokesperson for the Texas Department of Economic Development, notes that considerations of long-run profitability often trump incentive packages offered by other states, giving Texas a formidable advantage in attracting businesses to the state. *Id.*

11. *Id.*; *see also* David Hendricks, *San Antonio 2003: The Year in Business; San Antonio's Economic Outlook Had Its Bright Spots and Dark Moments This Year*, SAN ANTONIO EXPRESS-NEWS, Dec. 28, 2003, at 1L, *available at* 2003 WL 68737156 (observing that the $133 million incentive package concocted by San Antonio and state officials was significantly smaller than packages offered by other competitors, which ranged from $150 to $300 million).

12. *See* Clay Robison, *Perry Pitches Texas to New York; Governor Declares Lone Star State Is 'Open for Business,'* HOUS. CHRON., Oct. 7, 2003, *available at* 2003 WL 57448072 (announcing that Governor Rick Perry has worked with state legislators to increase funding for services that benefit employees, such as health care and education, without raising the state's comparatively low tax rates to preserve Texas's reputation as a business-friendly state).

13. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 467 (1980). "Assurances of 'steady,' 'regu-

courts and commentators for the flexibility it offers both parties in decision-making.[14] To the employer, the at-will doctrine grants the latitude to fill open positions as the employer sees fit.[15] To employees, the at-will doctrine is supposed to give them the freedom to pursue more fulfilling options when they are unsatisfied with the opportunities available to them in their current employment.[16]

However, the at-will doctrine is not without its detractors. At-will employment has been widely criticized for the sweeping power it grants employers over employees.[17] Additionally, others assert that the doctrine

---

lar,' or even 'permanent' employment are usually held to create an employment at will which either party may terminate without liability." *Id.* at 467-68.

14. *See* Wisehart v. Meganck, 66 P.3d 124, 126 (Colo. 2002) (pointing out that at-will employment "promotes flexibility and discretion for employees to seek the best position to suit their talents and for employers to seek the best employees to suit their needs," thereby creating "a free market in employment analogous to the free market in goods and services generally"); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984) (promoting the flexibility created by the at-will doctrine that permits employers and employees to make the many types of minor adjustments necessary to counter changes in the marketplace).

15. *See Wisehart*, 66 P.3d at 126 (describing the main benefit to the employer); Mackenzie v. Miller Brewing Co., 608 N.W.2d 331, 342 (Wis. 2001) (noting that applying a duty to disclose to the employer would frustrate the flexibility that the at-will doctrine affords to employers, creating a litany of unforeseen events that the employee could use against the employer).

16. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 973 (1984) (observing that employees have additional power within the relationship, due to the transactional costs the employer is faced with whenever he or she considers firing an employee); *see also* Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 743 (Wis. 2001) (describing employment-at-will as "a practical manifestation of our nation's values such as freedom of movement and entrepreneurial spirit," providing "employees with the means to take control of their livelihoods"); John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 468-69 (1980) (explaining that the doctrine of at-will employment reflected social and economic concerns of the nineteenth century, thus allowing employees a newfound freedom to opt out of unfavorable work arrangements in ways that were unavailable under earlier systems). However, the advantages that employment-at-will offered employees diminished as the employer obtained greater economic and political power. *Id.* at 469. Eventually, the balance of power shifted so far to the employer's advantage that employees turned to unionization to protect their interests under the at-will system. *Id.*

17. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (describing the comparative imbalance of power and threat to an employee's freedom "whenever he becomes dependent upon a private entity possessing greater power than himself"); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 6-7 (1979) (listing a staggering number of documented instances in which employers attempted to abuse their powers and ultimately discharged employees for refusing to comply with demands falling outside the realm of their employment duties, including refusal to commit perjury, filing worker's compensation claims, refusing to vote as in-

allows, even encourages, employers to "tail" their employees relentlessly, looking for any infraction, no matter how minor, as justification for termination of employment.[18] When employers are given this paternalistic power, it serves as a license to "drive bulldozers through the walls of their workers' private lives."[19] However, this is not to say that employers lack the right to look into the background of the persons they hire. There are a number of legitimate reasons why employers check up on their employees, including keeping the cost of health care and other benefits manageable[20] and ensuring that performance in the workplace is not compromised by the abuse of illicit drugs.[21]

Sadly, drug abuse in the United States has risen significantly in recent years.[22] The Department of Health and Human Services reported that

---

structed by an employer in an election, declining to fabricate medical records, filing a statement with state investigators alleging illegal use of corporate monies, reporting to superiors that prior testing of metal tubing was inadequate to ensure consumer safety, refusal by employees to acquiesce to employer requests to fraternize outside of the workplace or engage in sexual relations, and attempting to clarify or rectify deceptive statements made by employers regarding company activities); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482 (1976) (asserting that judicial decisions supporting at-will employment essentially "leave employees totally vulnerable to arbitrary or malicious discharge"). Professor Summers points out that express and implied just-cause termination clauses in collective bargaining agreements have helped even the playing field between employee and employer, but this privilege is enjoyed by less than a third of the nation's labor force. *Id.* at 482-83.

18. Peter T. Kilborn, *The Boss Only Wants What's Best for You*, N.Y. TIMES, May 8, 1994, at 3. Under the at-will doctrine, "[e]mployers can use any legal means to spot infractions, from tailing a worker driving home to examining a strand of hair from the desk for evidence of drug use weeks earlier." *Id.*

19. *Id.*

20. *See id.* (stating that recent estimates indicate that employers pay roughly $4,000 annually for each employee's health insurance). This estimate increases precipitously when chronic medical conditions and other unhealthy personal choices are factored in, including an unhealthy diet, smoking, alcoholism, and risky leisure activities. *Id.*

21. *See id.* (noting that some forms of intrusion are necessary to protect public interests); *see also* Baggs v. Eagle-Picher Indus., Inc., 750 F. Supp. 264, 272 (1990) (citing that the employer had a right to order employees to undergo drug testing, in the interest of ensuring worker safety and plant productivity).

22. *See* Svetlana Kolchik, *More Americans Used Illegal Drugs in 2001, U.S. Study Says*, USA TODAY, Sept. 6, 2002, at 2A (reporting that the number of persons who used illegal drugs rose by almost two million from 2000 to 2001); *see also* KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 286-87 (1987) (citing government estimates "that between three and seven percent of American employees use some form of illegal drug on a regular basis"). This figure becomes more alarming when considering evidence that a significant amount of drug abuse occurs in the workplace, directly impacting productivity and safety. *Id.*

almost 16 million Americans admitted to illegal drug use in 2001.[23] In 2002, the number of Americans using illegal drugs rose to 19.5 million, or 8.3% of the population ages 12 and up.[24] Additionally, 17.4% of unemployed adults used illegal drugs in 2002, compared to 8.2% of full-time employees and 10.5% of part-time employees.[25] Roughly 74.6% of the nation's 16.6 million drug abusers were employed full or part-time.[26]

This national problem has become an ongoing concern for employers, who have both pecuniary[27] and human resources interests in securing a safe and healthy workforce.[28] Experts estimate that the American economy loses $276 billion each year due to drug and alcohol abuse.[29] Many employers choose to combat this epidemic by requiring their employees and prospective employees to undergo drug testing.[30]

---

23. Svetlana Kolchik, *More Americans Used Illegal Drugs in 2001, U.S. Study Says*, USA TODAY, Sept. 6, 2002, at 2A. The Department of Health and Human Services estimates that almost two million more people used illegal drugs and alcohol in 2001 than in 2000. *Id.* Most distressingly, drug use among the young climbed considerably, from 9.7% of teenagers and 15.9% of persons age 18-25 using illicit drugs in 2000 to 10.8% of teens and 18.8% of adults ages 18-25 in 2001. *Id.*

24. Substance Abuse and Mental Health Services Administration (2003), *Overview of Findings from the 2002 National Survey on Drug Use and Health* (Office of Applied Studies, NHSDA Series H-21, DHHS Publication No. SMA 03-3774), *available at* http://www.DrugAbuseStatistics.SAMHSA.gov (on file with the *St. Mary's Law Journal*).

25. *Id.*

26. *Id.*

27. *See* Wayne Tompkins, *Drugs on the Job; Despite Companies' Best Efforts, Drug Use Bedevils the Workplace*, LOUISVILLE COURIER-J., Sept. 5, 1999, at 1A (reporting that a drug-free workplace reduces workers' compensation claims by up to fifty percent and cuts employer health costs by twenty-five percent). Additionally, it is cheaper for employers to provide drug treatment to an existing employee than it is to hire and train a replacement. *Id.* Additionally, many employers enjoy substantial premium discounts on workers' compensation insurance after they enact a drug-free workplace program. *Id.*

28. *See* KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 286 (1987) (reporting that employees with substance abuse problems "may have an absentee rate 16 times greater than the average employee and an accident rate four times greater"); Wayne Tompkins, *Drugs on the Job; Despite Companies' Best Efforts, Drug Use Bedevils the Workplace*, LOUISVILLE COURIER-J., Sept. 5, 1999, at 1A (noting that drug abusers miss three times more work than other employees and "are five times more likely to file workers' compensation claims"). Additionally, many employers have learned that thorough treatment of employees with drug problems can substantially reduce "medical claims, absenteeism and disability, and has increased productivity." *Id.*

29. *See* Deborah Williams, *A Drinking Problem; New Scientific Studies that Praise the Health Benefits of Moderate Alcohol Consumption Tend to Deflect Public Attention from the Many Problems of Too Much Alcohol Consumption*, BUFF. NEWS, Mar. 23, 2003, at H1 (reporting that this staggering cost is apportioned among lost productivity, health care and treatment, crime, auto accidents, and other miscellaneous factors).

30. *See Four Out of Five Bosses Ready to Test for Drugs*, W. DAILY PRESS, July 18, 2003, at 77, *available at* 2003 WL 56540315 (reporting on a survey of 204 employers revealing that four out of five were willing to require employee drug testing if they believed

Employer drug testing can take any of three forms: pre-employment screening, in which applicants are required to submit to a drug test before the employer makes a formal offer of employment;[31] for cause testing, which is initiated by the employer when he or she has a "reasonable suspicion" that one of his or her employees is under the influence of alcohol or illicit drugs;[32] and random testing, in which a random sampling of employees is compelled to undergo screening at any given time.[33] Each of these tests has grown more prevalent since workplace drug testing first

---

that company productivity was threatened); Carol Marbin Miller, *Employee Sues After Dismissal Over Drug Test; Analyst Roderick H. Wenzel Says the Department of Juvenile Justice Had No Right to Force Him to Take a Mandatory Drug Test, Then to Fire Him for Refusing*, MIAMI HERALD, Dec. 18, 2003, at 4, *available at* 2003 WL 71418431 (stating that a number of employers compel drug testing for both prospective hires and current employees who exhibit symptoms of drug or alcohol abuse in their work product); Rodd Zolkos, *Screening Weeds Out Potential Bad Hires: Testing Can Avert Costly Mistakes*, BUS. INS., Oct. 13, 2003, at 13, *available at* 2003 WL 9139167 (noting that employers rely mainly on drug testing and criminal background checks in screening potential hires). However, across-the-board random testing of private employees with jobs unrelated to public safety is uncommon, due partially to the Supreme Court's requirement that comprehensive testing be related to public safety concerns. Carol Marbin Miller, *Employee Sues After Dismissal Over Drug Test; Analyst Roderick H. Wenzel Says the Department of Juvenile Justice Had No Right to Force Him to Take a Mandatory Drug Test, Then to Fire Him for Refusing*, MIAMI HERALD, Dec. 18, 2003, at 4, *available at* 2003 WL 71418431. *But see* Noelle Knox, *Earning It; Drug Abuse Problems Are on the Rise As the Labor Pool Shrinks*, N.Y. TIMES, Feb. 22, 1998, § 3, at 11 (acknowledging that testing programs have reduced drug use in the office, but have mainly impacted casual users while failing to affect the behavior of addicts). Ellen Weber, a policy director for the Legal Action Center, a nonprofit organization dedicated to drug and employment issues, believes that employer testing "eliminated use among individuals who could stop . . . [but] was never an effective tool for people who are dependent on drugs." *Id.*; *see also* Aline McKenzie, *Faking It: From Freeze-Dried or Synthetic Urine to Prosthetic Body Parts, Some Workers Go Amazing Lengths to Beat Drug Tests*, DALLAS MORNING NEWS, Apr. 10, 2001, at 1C (discussing the various and ingenious ways employees in the modern workforce try to outsmart employer drug testing programs).

31. *See* KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 287 (1987) (suggesting that prospective employees should be notified of the pre-employment screening process and should be given the opportunity to disclose to the screener any prescription medication that they are currently using). It is important to make these disclosures to reduce the possibility of erroneous results or abuse of prescription medication. *Id.*

32. *See id.* (asserting that most employers have the ability to test for cause whenever an employee exhibits unusual behavior, sharp changes in mood, or significant productivity problems). However, for cause testing is exercised most frequently in the aftermath of an industrial accident. *Id.*

33. *See id.* (announcing that random testing is normally utilized to deter employees from using controlled substances). This method of testing has proved to be fraught with controversy and is subject to a number of challenges in courts. *Id.*

gained popularity in the 1980s.[34] Now, 97% of Fortune 500 companies and roughly 15% of small businesses have some system of drug testing.[35] Government, from the municipal to the federal level, has also embraced drug testing, offering incentives to private employers[36] and subjecting their own employees to the tests.[37] However, with most government agencies, an existing employee can be tested only if a reasonable suspicion exists.[38] Whether in the public or private sectors, employer drug testing has become a permanent fixture in the twenty-first century workplace.[39]

In 1987, the United States Senate, recognizing an overriding interest to protect the national transportation system from drug abuse, proposed

---

34. *See* Jeanne Peck, *Drug Tests Work*, CHI. TRIB., Jan. 21, 1998, at 7 (speculating that President Reagan's War on Drugs sparked the prevalence of workplace drug testing); *see also* Kirstin Downey Grimsley, *Like It or Not, Here's the Cup; Drug Testing Has Fast Become Essential to Getting and Keeping a Job*, WASH. POST, May 10, 1998, at H1 (reporting that the number of Fortune 200 companies requiring employee drug screening has leapt from six in 1983 to 196 in 1991).

35. Aline McKenzie, *Faking It: From Freeze-Dried or Synthetic Urine to Prosthetic Body Parts, Some Workers Go Amazing Lengths to Beat Drug Tests*, DALLAS MORNING NEWS, Apr. 10, 2001, at 1C. Additionally, many companies that rely on government contracts are required by federal law to conduct employee drug tests. *Id.*

36. *See* Jeanne Peck, *Drug Tests Work*, CHI. TRIB., Jan. 21, 1998, at 7 (describing Florida's drug-free workplace program, where employers enjoy a five percent discount on workers' compensation premiums if they subject their employees to pre-employment and follow-up tests).

37. *See id.* (noting that the Navy has conducted random drug tests on sailors for over thirty years); *see also* Kirstin Downey Grimsley, *Like It or Not, Here's the Cup; Drug Testing Has Fast Become Essential to Getting and Keeping a Job*, WASH. POST, May 10, 1998, at H1 (recounting how a 1982 accident on the USS Nimitz prompted the Navy to mandate the first across-the-board system of random drug testing in the federal government). The success of the Navy's testing regime encouraged the remaining branches of the armed services to follow suit shortly thereafter. *Id.* Additionally, random testing spread to "safety-sensitive government agencies such as the Nuclear Regulatory Commission, and [was] mandated for government contractors with contracts worth more than $25,000." *Id.*

38. Jeanne Peck, *Drug Tests Work*, CHI. TRIB., Jan. 21, 1998, at 7. The requirements are more stringent for government employees whose positions are "safety-sensitive," such as police officers and bus drivers. *Id.*

39. Kirstin Downey Grimsley, *Like It or Not, Here's the Cup; Drug Testing Has Fast Become Essential to Getting and Keeping a Job*, WASH. POST, May 10, 1998, at H1; *see also* Noelle Knox, *Earning It; Drug Abuse Problems Are on the Rise as the Labor Pool Shrinks*, N.Y. TIMES, Feb. 22, 1998, § 3, at 11 (speculating that as drug testing becomes more widespread among businesses, greater numbers of the unemployed are likely to test positive for drug use). In essence, employers who have not yet adopted testing procedures are forced to implement screening programs to ensure that their businesses are not stuck with a labor pool featuring a disproportionately high number of drug abusers. *See id.* (discussing the anecdotal evidence employers receive indicating high rates of drug use). This problem becomes even more noticeable under a growing economy with a low rate of unemployment. *Id.*

legislation that required 300,000 airline and railroad workers and three million truck and bus drivers to submit to random drug testing.[40] The proposed testing regime called for employers, under the guidance of the Department of Transportation, to conduct both pre-employment testing and random testing of existing employees.[41] Testing is also permissible when a worker's supervisor determines that probable cause exists for substance abuse.[42] This legislation was spurred by reports from the Insurance Institute of Highway Safety showing that roughly eighteen percent of truck drivers who underwent drug screening tested positive for illicit drug use.[43] A number of Senators expressed reservations about the legislation, citing fears that the mandated testing was error prone, invaded worker privacy, and could be manipulated by unethical employers and their agents.[44] The Senate's proposal led to the Procedures for Transportation Workplace Drug and Alcohol Testing Programs,[45] which establish a comprehensive set of regulations and guidelines for employers and employees to follow when conducting the required testing program.[46]

Despite the legitimate interest employers have in securing a drug-free workforce, a number of commentators fear that drug testing further erodes employees' rights.[47] In a time when employee rights are already

---

40. *Senate Unit Backs Drug Tests for Transportation Workers*, N.Y. TIMES, Mar. 11, 1987, at B8. The measure was promoted strongly by the Reagan Administration to address concerns of drug abuse in the transportation industry. *Id.* It passed through the Commerce Committee on a 19-to-1 vote before it moved on to the Senate. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* The study was based on examinations conducted on 300 Tennessee truck drivers. *Id.*

44. *Id.* Senator John Kerry of Massachusetts, who nevertheless supported the legislation, conceded that random testing could lead to an explosion of litigation and disturb workers' privacy. *Id.* Additionally, Senator Kerry cited concerns that false readings could occur on up to half the tests, possibly frustrating what the federal government was trying to remedy with this legislation. *Id.* Senator Larry Pressler of South Dakota was the only member of the Commerce Committee to vote against the measures, basing his decision on fears that the testing program would unduly burden smaller truck and rail operators. *Id.*

45. 49 C.F.R. § 40 (2002).

46. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 C.F.R. § 40 (2002).

47. *See* KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 287 (1987) (noting that "[b]y its very nature, [drug] testing intrudes upon the employee's solitude and physical integrity" and must be carefully "balanced against competing interests and objectives"); Aline McKenzie, *Faking It: From Freeze-Dried or Synthetic Urine to Prosthetic Body Parts, Some Workers Go Amazing Lengths to Beat Drug Tests*, DALLAS MORNING NEWS, Apr. 10, 2001, at 1C (recounting 1960s activist Abbie Hoffman's belief "that [drug] testing was a police-state tactic that punishes the innocent along with the guilty"); James B. Meadow, *Is Big Brother Hiring You?*, PITTSBURGH POST-GAZETTE, Sept. 5, 1993, at B11

compromised by the at-will doctrine,[48] random drug testing erodes privacy interests and further widens the power chasm between employer and worker to alarming levels.[49] A recent Texas case, *Mission Petroleum Carriers, Inc. v. Solomon*,[50] highlights the danger this inequality poses to workers who submit to drug screening. The Texas Supreme Court held that an employer administering a drug test mandated by the Department of Transportation (DOT) did not owe a duty of reasonable care to his employee, despite the fact that the test, as conducted by the supervisor, violated a number of DOT regulations.[51] The at-will doctrine shielded the employer from having to exercise any level of care when conducting the test, thus protecting the employer from any consequences arising from negligence.[52] This adherence to at-will principles may protect the interests of Texas businesses, but in this case, it also imposed significant harm on the employee, who is now unable to find employment in his chosen line of work and has no legal recourse, despite the errors committed by the employer in administering the test.[53]

---

(reporting that employer drug tests and programs have grown significantly more invasive in recent years, with employees forced to comply to hold on to their jobs).

48. *See* Clyde W Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 482 (1976) (fearing that judicial support for the doctrine of at-will employment exposes workers to frivolous and unfair treatment at the hands of employers).

49. *See* KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 300 (1987) (arguing that employer tests for use of controlled substances "become an unwarranted employment privacy intrusion when they detect matters unrelated to safe and efficient job performance"); James B. Meadow, *Is Big Brother Hiring You?*, PITTSBURGH POST-GAZETTE, Sept. 5, 1993, at B11 (noting that "[w]hile federal laws, such as the Americans With Disabilities Act and the Polygraph Protection Act, and occasional local protective state statutes, have added some muscle to employee privacy protection, the balance of power still lies with employers – especially in an economy where jobs are far from plentiful"). Professor L. Camille Hebert further argues that drug testing opens the door to even more intrusive forms of medical screening that can be easily abused, including genetic testing to monitor employee propensity for genetically-based diseases and "integrity" testing, where a psychological profile is created to help employers gauge an employee's predilection for dishonesty or problems with figures of authority. *Id.*

50. 106 S.W.3d 705 (Tex. 2003).

51. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 715 (Tex. 2003).

52. *See Mission Petroleum Carriers*, 106 S.W.3d at 716 (refusing to adopt any new liability theories based on Mission's negligent drug testing).

53. *See id.* at 717 (Enoch, J., concurring) (observing that the majority's adherence to the at-will doctrine inflicts serious harm on Solomon); Mary Alice Robbins, *Employers Don't Have a Duty to Exercise Reasonable Care When Drug Testing*, TEX. LAW., May 26, 2003, at 1 (reporting the assertion by the plaintiff's attorney that neither the federal regulatory scheme relied on by the Supreme Court nor the DOT complaint process provided an adequate means of addressing the injury inflicted on his client).

This Comment will explore Texas's adherence to the doctrine of at-will employment and how it relates to the rights of a worker who claims that mandatory testing for drug abuse is conducted in a negligent manner. Part II of the Comment will examine the background of at-will employment in the United States and in Texas. Additionally, Part II will discuss the specifics of the *Mission* case, scrutinizing the details of the case and the reasoning behind the court's decision. Part III will discuss the advantages and disadvantages of at-will employment and the measures recommended by commentators and adopted by courts and legislatures to ameliorate the harsh effects the doctrine places on workers. Part IV will discuss the current state of employment-at-will in Texas and will introduce a workable adjustment to the doctrine that acknowledges the interests of employers, yet protects workers and the general public from the malevolent effects of employer negligence in conducting drug tests.

## II. BACKGROUND

### A. *Employment-At-Will: An Instrument of American Enterprise*

The doctrine of at-will employment, in its purest form, stands for the uncontested right of an employer to dismiss an employee for any reason whatsoever.[54] It matters not whether the justification for the firing is legitimate or illegitimate because the doctrine protects the employer's decision, regardless of motivation.[55] The Fourteenth District of the Texas Court of Appeals succinctly defined the effect of employment-at-will in a recent case, observing that "[i]n the absence of an applicable statutory or judicially-created exception, an at-will employee may be terminated for a good reason, a bad reason, or no reason."[56]

Most legal scholars agree that the doctrine of at-will employment originated in America near the end of the nineteenth century.[57] This doc-

---

54. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 667 (1984); *see also Mission Petroleum Carriers*, 106 S.W.3d at 715 (characterizing at-will employment in Texas as the employer's ability to "terminate an at-will employee for any reason or no reason at all"); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994) (extolling the straightforwardness of the at-will doctrine and the default rule that arises when the term of contract is indefinite, freeing both employee and employer "to terminate the contract without liability at any time").

55. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 667 (1984).

56. Urdiales v. Concord Tech. Del., Inc., 120 S.W.3d 400, 407 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

57. *See* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 335 (1974) (noting that the at-will doctrine was "designed to

trine differed from the common law presumption England codified in the fourteenth century, when the Statute of Labourers was passed to combat serious labor shortages brought about by the Black Death.[58] The statute created the presumption that workers hired for an indeterminate period had been hired for one year, and their employment relationship could not be terminated without reasonable cause.[59] The Statute of Labourers was eventually repealed, but its influence lingered as English courts continued to construe indefinite employment contracts in one-year increments.[60] Until the 1880s, American courts also adhered to this common law philosophy.[61]

---

protect freedom of enterprise" at the expense of employees). *But see* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994) (disputing the conventionally held views as to the origin and rise of at-will employment in the nineteenth century). Professor Morriss asserts that the first recorded adoption of the at-will doctrine occurred in Louisiana in 1808, almost seventy years prior to the conventionally held introduction of at-will employment. *Id.* at 699. According to Morriss, the first common law jurisdictions to adopt the at-will doctrine were Maine in 1851 and Mississippi in 1858. *Id.* at 704. Additionally, Morriss attacks the conventional belief that laissez-faire economics accelerated the adoption of employment-at-will, arguing that the philosophy's libertarian impulses are incompatible with the common criticism of at-will employment because it "overrid[es] the intention of the parties to conclude a binding agreement." *Id.* at 690. Thus, in applying the laissez-faire label to criticize at-will employment, scholars misstate their own description of the rule as "active state intervention in favor of employers rather than state neutrality." *Id.*

58. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 667 (1984).

59. 1 WILLIAM BLACKSTONE, COMMENTARIES *425 (1967).

> The first sort of servants therefore, acknowledged by the laws of England, are *menial servants* . . . [t]he contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well [as] when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term . . . and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.

*Id.* at *425-26; *see also* Kurt H. Decker, *At-Will Employment: A Proposal for its Statutory Regulation*, 1 HOFSTRA LAB. & EMP. L.J. 187, 189 (1983) (providing a more concise interpretation of Blackstone's description of the Statute of Labourers).

60. *See* Kurt H. Decker, *At-Will Employment: A Proposal for its Statutory Regulation*, 1 HOFSTRA LAB. & EMP. L.J. 187, 189 (1983) (noting that "[e]mployee and employer rights within the United States trace their beginnings to England's Statute of Labourers").

61. *See id.* at 190 (citing several examples where courts applied the common law one year rule); *see also* Adams v. Fitzpatrick, 26 N.E. 143, 144 (N.Y. 1891) (applying and restating the English rule "[w]here one serves another under a contract for a year's service, and holds over, continuing in the same service after the expiration of the year, there is a presumption, analogous to the presumption in the case of yearly leases, that the parties assent

The advent of the Industrial Revolution ushered in the notions of laissez-faire economics and the freedom of contract, and American courts largely migrated away from the common law employment theories.[62] Most commentators believe the doctrine of at-will employment was first advanced by Horace G. Wood in 1877,[63] where he asserted that any hiring for an undetermined period of time was terminable at the will of either the employer or the employee.[64] The integrity of Wood's scholarship has been a source of controversy in academic circles,[65] but his theories

---

to the continuance through another year of the contract of service"); Bascom v. Shillito, 37 Ohio St. 431, 433-34 (Ohio 1881) (inferring a hiring for the term of one year under a verbal employment contract).

62. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 667 (1984); *see also* Marsha Weisburst, Note, *Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 618-19 (1981) (theorizing that additional concerns, such as class tensions between business owners and managers and the contractual concept of mutuality of obligation, may also have advanced the courts' movement toward employment-at-will). It is hypothesized that courts applied mutuality of obligation to grant employers a certain flexibility that employees alone had enjoyed under the common law. *Id.* at 619.

63. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 273 (1877).

64. *Id.* at 272-74.

> With us the rule is inflexible, 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. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . This is put upon the ground that in all contracts of hiring the intention of the parties, as gathered from the contract, is to control, and that in cases of this character the clear intention of the parties in the first instance is, that the master may put an end to the contract at will, while in the last instance the words "at the employer's option" clearly import that the option can only be exercised as to the *number of years'* service he will accept.

*Id.* at 274.

65. *Compare* Theodore J. St. Antoine, *You're Fired!*, 10 HUM. RTS. 32, 33 (1982) (insisting that Wood's rule had no basis in the common law and instead "sprang full-blown in 1877 from the busy and perhaps careless pen of an American treatise writer"), *and* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974) (observing that "Wood offered no analysis to justify the assertion of this rule or his rejection of the English tradition"), *and* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976) (criticizing the "comprehensiveness and concern for detail [that] were absent in his treatment of the duration of service contracts"), *with* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994) (defending the legal and historical foundation of Wood's rule). Professor Feinman submitted three general problems with Wood's scholarship in support of employment-at-will: (1) the American case law that Wood relied on to buttress his legal theory was largely taken out of context and failed to adequately substantiate his claims; (2) Feinman asserts that

proved irresistible to industry-friendly American courts. Presumably acting in the interest of economic development,[66] American courts almost universally adopted Wood's rule within the next twenty years.[67] Texas explicitly adopted the doctrine of employment-at-will in 1888, in *East Line & Red River R.R. Co. v. Scott*.[68] Nationwide judicial acceptance of the at-will doctrine broadened to the point that it was afforded constitutional protection from 1908 until 1937.[69]

The economic catastrophe brought about by the Great Depression forced the judiciary to rethink its commitment to laissez-faire economics.[70] As a result, the influence of the at-will doctrine diminished thanks

---

Wood's "scholarly disingenuity was extraordinary," as Wood's descriptions of the origin of and the current state of American employment contracts were riddled with errors and inaccuracies; (3) Wood failed to provide any policy justifications for his rule. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976). However, Professor Morriss defends Wood's rule, noting that seven states had adopted the at-will rule prior to the publication of Wood's treatise in 1877. Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994). Morriss further discounts the influence that Wood's rule had on jurisdictions that adopted the rule later, noting that "only a third of the common law adopters [of employment at-will] between 1880 and 1900 cited Wood." *Id.* at 697. Additionally, Morriss points to the general lack of controversy and the low number of dissenting opinions in other jurisdiction's adoption of the rule as "a powerful indicator that the rule was seen as relatively unimportant and/or obvious." *Id.* at 698.

66. *See* Kurt H. Decker, *At-Will Employment: A Proposal for its Statutory Regulation*, 1 HOFSTRA LAB. & EMP. L.J. 187, 191 (1983) (theorizing that the rule was adopted to foster industrial development). From a libertarian perspective, Wood's rule appeared to be fair to employer and employee alike. *Id.*

67. *See* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 346 (1974) (writing that the at-will doctrine achieved universal acceptance with American courts, despite its alleged analytical shortcomings); *see also* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994) (covering each state's adoption of employment-at-will).

68. 10 S.W. 99 (Tex. 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." East Line & Red River R.R. Co. v. Scott, 10 S.W. 99, 102 (Tex. 1888).

69. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 668 (1984). *Compare* Adair v. United States, 208 U.S. 161, 180 (1908) (concluding that a federal law barring employers from discharging their employees based on their membership in a union was unconstitutional), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (finding that Congress was authorized under the Commerce Clause to combat employer discrimination and retaliation against employees based on their union membership, thus marking an end to the Court's adherence to the idea that employment-at-will was worthy of constitutional protection).

70. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 119 (2001). Incidentally, President Roosevelt's landslide victory in the election of 1936 and his proposal in March of 1937 to

to a renewed judicial focus on the rights of workers.[71] Today, pure application of at-will employment has essentially vanished, due in part to the influence of labor unions and the promulgation of civil service regulations that protect a significant number of workers from arbitrary dismissal.[72] Furthermore, both the federal and state governments have passed legislation to soften the impact of the at-will doctrine on employees.[73] Courts in a number of jurisdictions have recognized certain limitations on the at-will doctrine as well.[74] Still, Texas has been loath to alter the basic tenets of employment-at-will.[75] Recently, the Texas Supreme Court reconsidered the doctrine in a drug testing case, ultimately holding the sanctity of the at-will doctrine as more important than the rights of an employee who was discharged under questionable circumstances.[76]

### B. *The* Mission *Case: When Adherence to Employment-At-Will Performs an Injustice*

In *Mission Petroleum Carriers, Inc. v. Solomon*, the Texas Supreme Court grappled with the question of whether an employer owes his employee a duty of reasonable care in administering a compulsory drug test resulting in the employee's dismissal.[77] The court refused to impose a

---

pack the Court with additional Justices also had an indisputable impact on adjustments to the Supreme Court's economic and political philosophies. *Id.*

71. *Id.; see also* United States v. Darby, 312 U.S. 100, 125 (1941) (upholding the constitutionality of the Fair Labor Standards Act, which prevented the sale of products in the interstate stream of commerce that failed to comply with minimum acceptable production standards and labor conditions); *Jones & Laughlin Steel Corp.*, 301 U.S. at 29 (endorsing the constitutionality of the National Labor Relations Act, which protected workers by "placing under the compulsory supervision of the federal government all industrial labor relations within the nation").

72. Claudia Everett Decker, Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 668 (1984).

73. *Id.*

74. *See id.* (citing two comprehensive legal studies of thirty-two states' efforts to place contractual and tort limitations on the at-will doctrine).

75. *Id.* at 671; *see also* Urdiales v. Concord Tech. Del., Inc., 120 S.W.3d 400, 408 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (refusing to sustain a cause of action by a dismissed at-will employee outside of the Texas Labor Code exceptions, which include employer discrimination based on color, race, religion, disability, age, sex, or national origin); Tex. Dep't of Health v. Rocha, 102 S.W.3d 348, 354 (Tex. App.—Corpus Christi 2003, no pet. h.) (declaring that Texas holds at-will employment as an important and time honored doctrine). *But see* Tex. State Employees Union v. Tex. Workforce Comm'n, 16 S.W.3d 61, 66 (Tex. App.—Austin 2000, no pet.) (allowing public employees to defeat the at-will presumption when written policies clearly and explicitly limit the employer's ability to terminate the employment relationship, thus creating an expectation of continued employment).

76. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 716 (Tex. 2003).

77. *Id.*

duty, fearing that any obligation placed on employers would undermine Texas's commitment to at-will employment.[78] The court concluded that it was unnecessary to impose an additional duty on the employer since the DOT regulations comprehensively govern testing procedures and provide avenues for employees to challenge questionable results.[79] Still, the facts of the case suggest that the employee suffered an injustice with no satisfactory legal recourse.[80]

The DOT regulations required Mission Petroleum Carriers to submit their truck drivers to random drug tests.[81] Interestingly, Mission opted to use its own employees to administer the tests and collect the samples, even though a number of companies in the Beaumont, Texas, area were available to conduct these tests.[82] On April 3, 1997, Roy B. Solomon was randomly chosen to provide a urine sample for testing.[83] His immediate supervisor, Ed Hillebrandt, gave Solomon an unsealed collection receptacle that had been sitting exposed in the office of the terminal dis-

---

78. *See id.* (warning that the exception advocated by the plaintiff "could quickly swallow the rule").

79. *See id.* at 715 (citing both the DOT's broad regulatory framework and the authority granted to the Medical Review Officer (MRO) as sufficient to protect employee interests). The court was correct that the DOT regulations provided employees with options to contest objectionable results, but nothing within the regulations deals with employee recourse for noncompliance with testing requirements. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 C.F.R. § 40 (2002). The court concedes this point, but notes that the "regulations serve both as an incentive for employers to carefully abide by those protocols and as a safe harbor for employees whose test results are tainted by unacceptable breaches of collection procedures." *Mission Petroleum Carriers*, 106 S.W.3d at 715. However, the failure of the employer in this case to comply with mandated testing procedures presumably weakens the court's reasoning. *Id.*

80. *See* Mary Alice Robbins, *Employers Don't Have a Duty to Exercise Reasonable Care When Drug Testing*, TEX. LAW., May 26, 2003, at 1 (questioning the circumstances surrounding the administration of Mr. Solmon's urine analysis). One of Mr. Solomon's attorneys described the Texas Supreme Court's ruling as "a serious step backwards for the protection of individuals." *Id.* Additionally, another attorney noted that the federal regulations relied on by the Supreme Court impart no cause of action for individuals. *Id.*

81. Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.305 (2002); *see also Mission Petroleum Carriers*, 106 S.W.3d at 706-07 (listing the various regulations that compelled Mission to test their drivers); Mission Petroleum Carriers, Inc. v. Solomon, 37 S.W.3d 482, 484 (Tex. App.—Beaumont 2001), *rev'd*, 106 S.W.3d 705 (Tex. 2003) (noting that employees were required to give urine specimens on demand).

82. *Mission Petroleum Carriers*, 106 S.W.3d at 707. Mission's director of safety provided the reasoning for this decision, noting that using an outside company would double the costs of administering the tests. *Mission Petroleum Carriers*, 37 S.W.3d at 487. However, at least one employment law expert asserts that an independent, certified actor with no affiliation to the employer should administer any drug test, in order to safeguard the integrity of the process. KURT H. DECKER, EMPLOYMENT PRIVACY LAW AND PRACTICE 290 (1987).

83. *Mission Petroleum Carriers*, 106 S.W.3d at 707.

patcher.[84] Solomon took the collection container to the lavatory, provided a specimen, and returned the container to the dispatcher's office.[85] He left the container in the office and returned to the restroom to wash his hands.[86] Solomon later testified that Hillebrandt never instructed him to wash his hands before the test was conducted.[87] Moreover, Solomon noted that he had no knowledge of who may have exercised control over the unsealed container before he collected the specimen and while he was washing his hands afterwards.[88] When Solomon returned from washing his hands, Hillebrandt separated the specimen in two different containers. Solomon then sealed both, initialed the tamper-proof seals affixed to the top of each container, and placed them in a plastic bag.[89] He then signed an informed consent form that acknowledged "the identity and integrity of [the] sample throughout the collection and testing process."[90] Mission sent one specimen to a laboratory in Wisconsin for analysis, setting the other aside in the event that additional testing was needed.[91] The laboratory analyzed the specimen, determining that it contained THC metabolite, a chemical normally produced in the human body following marijuana use.[92]

A representative of the laboratory notified Solomon that he had tested positive for marijuana use.[93] Solomon protested the result's accuracy, claiming that he had never used marijuana and had not used any medication prior to the test that might have resulted in the discovery of THC metabolite in his specimen.[94] At the time, he did not mention that Mission's faulty administration of the test may have impacted the results of the test.[95] Solomon requested a retest from Mission. They sent the other sample to a different laboratory, which also discovered THC metabolite

---

84. *Id.*

85. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 707 (Tex. 2003).

86. *Id.*

87. *Mission Petroleum Carriers*, 37 S.W.3d at 485.

88. *Id.* at 484.

89. *Mission Petroleum Carriers*, 106 S.W.3d at 707.

90. *Id.*

91. *Id.*

92. *Id.*; *see also* Dean S. Landis, Comment, *Drug Testing of Private Employees*, 16 U. BALT. L. REV. 552, 557 (1987) (discussing how urine tests detect THC metabolite as a byproduct of marijuana use).

93. *Mission Petroleum Carriers*, 106 S.W.3d at 707.

94. *Id.* at 707. Additionally, two of Solomon's co-workers testified that they had no knowledge of Solomon ever using drugs. Mission Petroleum Carriers, Inc. v. Solomon, 37 S.W.3d 482, 485 (Tex. App.—Beaumont 2001), *rev'd*, 106 S.W.3d 705 (Tex. 2003). Additionally, a psychiatrist and a therapist, both of whom had treated Solomon for depression, testified that he possessed none of the ordinary traits associated with drug abusers. *Id.*

95. *Mission Petroleum Carriers*, 106 S.W.3d at 707.

in Solomon's specimen.[96] After receiving the results of Solomon's retest, Mission terminated his employment.[97]

These test results left Solomon unemployable as a truck driver.[98] The day after his dismissal, Solomon applied for positions with two other trucking companies.[99] Prospective employers are required by DOT regulations to examine drug test results from an applicant's previous employers taken within two years before the date of application.[100] After Solomon signed the requisite consent forms, the two companies received his test results from Mission.[101] Neither company offered Solomon employment.[102]

Solomon continued to insist he never used marijuana.[103] At trial, two of his former co-workers declared that Solomon did not have a reputation for drug abuse.[104] Additionally, a psychiatrist and a therapist, who Solomon was seeing for depression, both testified that he exhibited none of the characteristics experts normally associate with drug abuse.[105] After his dismissal, Solomon submitted to, and passed, a hair-follicle test conducted by an independent laboratory.[106] Hair-follicle tests are used by a number of law enforcement agencies, including the FBI, and the results are generally considered admissible in both federal and state courts.[107] The results of this test, however, are more helpful in establishing evidence of long-term marijuana use, not isolated occurrences.[108] Consequently,

---

96. *Id.*

97. *Id.*

98. *Mission Petroleum Carriers*, 37 S.W.3d at 485.

99. *See Mission Petroleum Carriers*, 106 S.W.3d at 707 (noting that Solomon sought employment with both Coastal Transport and MCX Trucking).

100. *See* Controlled Substances and Alcohol Use and Testing, 49 C.F.R. § 382.405(f) (2002) (mandating that disclosure of testing records is permitted only when authorized by the driver); *see also* Employer Responsibilities, 49 C.F.R. § 40.25(b) (2002) (ordering prospective employers to request information regarding "verified positive drug tests" from previous DOT-regulated employers who have employed the applicant during the two years before the date of the employment application).

101. *Mission Petroleum Carriers*, 106 S.W.3d at 707.

102. *Id.* at 707-08.

103. *Mission Petroleum Carriers*, 37 S.W.3d at 485.

104. *Id.*

105. *Id.*

106. *Mission Petroleum Carriers*, 106 S.W.3d at 708. Solomon's attorney arranged the hair-follicle test. *Mission Petroleum Carriers*, 37 S.W.3d at 486.

107. *See Mission Petroleum Carriers*, 37 S.W.3d at 486 (citing Dr. Gary Wimbish's testimony on the general acceptance of hair-follicle tests).

108. *See* Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 708 (Tex. 2003) (noting that even Solomon admitted that hair-follicle testing is more appropriate for determining long-term marijuana use). *But see Mission Petroleum Carriers*, 37 S.W.3d at 486 (noting Dr. Wimbish's analysis that if Solomon was a regular marijuana user when Mission conducted his test, it would have been apparent from Solomon's hair sample).

the Texas Supreme Court discounted these results as irrelevant to refute Mission's tests.[109]

Solomon filed suit against Mission, alleging defamation, business disparagement, and negligence.[110] Mission moved for summary judgment on all of Solomon's claims.[111] The trial court granted the motion on the defamation and business disparagement claims, leaving the negligence claim to be decided at trial.[112] At trial, Solomon argued that Mission violated a number of the DOT's drug-testing regulations when it conducted Solomon's test, including: improperly allowing the immediate supervisor of the employee to collect the employee's urine sample,[113] opening a sealed collection kit outside of the presence of the employee,[114] failing to instruct the employee to wash his or her hands before offering the sample,[115] failing to restrict access to the site where the specimen is collected,[116] and failing to keep the receptacle in full view of the collector and the employee from the time the employee has provided the specimen to the moment that the receptacle is sealed.[117]

The testimony of Mission's employees at the trial raised even more questions about the company's adherence to the DOT regulations. Ed

---

109. *Mission Petroleum Carriers*, 106 S.W.3d at 709.

110. *Id.* at 708.

111. *Id.*

112. *Id.*; *see also Mission Petroleum Carriers*, 37 S.W.3d at 484 (dismissing Mission's assertion that the summary judgment disposed of all issues on appeal).

113. *Mission Petroleum Carriers*, 106 S.W.3d 705, 708; *see also* 49 C.F.R. § 40.31(c) (2002) (noting that an employee's immediate supervisor is prohibited from collecting the urine specimens "unless no other collector is available and [the supervisors] are permitted to do so under DOT agency drug and alcohol regulations"); KURT H. DECKER, EMPLOYEE PRIVACY LAW AND PRACTICE 293 (1987) (observing that employers should choose a credible laboratory or clinic to administer the tests to ensure there are no disputes over methods or accuracy).

114. *Mission Petroleum Carriers*, 106 S.W.3d at 708; *see also* 49 C.F.R. § 40.63(c) (2002) (mandating that the both the collector and the employee must be present when the seal of the receptacle is broken).

115. *Mission Petroleum Carriers*, 106 S.W.3d at 708; *see also* 49 C.F.R. § 40.63(b) (2002) (ordering the collector to "[i]nstruct the employee to wash and dry his or her hands" before the specimen container is unsealed). Additionally, the collector must make sure that the employee does not wash his or her hands again until after they have delivered the specimen. *Id.* The regulations note that the employee should not have any "access to water or other materials that could be used to adulterate or dilute a specimen." *Id.*

116. *Mission Petroleum Carriers*, 106 S.W.3d at 708; *see also* 49 C.F.R. § 40.43(e) (2002) (directing employers to "implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored").

117. *Mission Petroleum Carriers*, 106 S.W.3d at 708; *see also* 49 C.F.R. § 40.73(a) (2002) (instructing employers that all collection steps taken before the specimen is sealed must be completed in the employee's presence).

Hillebrandt, Solomon's immediate supervisor and the administrator of the drug test, denied much of Solomon's testimony.[118] His credibility was tarnished, however, by the discovery that he had received deferred adjudication for an unnamed offense, and as part of his probation, was also subject to random drug testing.[119] Merle Esprit, a former Mission employee, confirmed Solomon's testimony.[120] Esprit, who had also collected urine samples for Mission, testified that his training for the job was inadequate, and that he was unaware of several of the DOT-mandated requirements, including employee hand washing, keeping the container sealed before the test was administered, and keeping the collected specimen in the employee's full view until completion of the procedure.[121] Also, Esprit confirmed that it was common for collectors to open the test kit prior to the employee's arrival, in order to start filling out paperwork that was included in the kit.[122] Esprit also backed up Solomon's assertions that the dispatcher's office and the adjacent restroom were not secure locations as required by DOT regulations.[123] Former employee Gregg Brown, who had also collected samples for Mission, testified at trial.[124] His description of the inadequacies of Mission's testing procedures corroborated the testimony of Solomon and Esprit.[125]

The testimony of several other witnesses showed how important it was to ensure the integrity of the collection procedures. Joe Clark, the owner of a local urine specimen collection company, testified on the importance of following the regulatory protocols, noting in particular that a drug test could be wholly invalidated by a break in the chain of custody.[126] Dr. Gary Wimbish, a forensic toxicologist, vouched for the integrity of Solo-

---

118. Mission Petroleum Carriers, Inc. v. Solomon, 37 S.W.3d 482, 485 (Tex. App.—Beaumont 2001), *rev'd*, 106 S.W.3d 705 (Tex. 2003).

119. *Mission Petroleum Carriers*, 37 S.W.3d at 485; *see also* Mary Alice Robbins, *Employers Don't Have a Duty to Exercise Reasonable Care When Drug Testing*, TEX. LAW., May 26, 2003, at 3 (noting that this development had a significant impact on the jury's decision).

120. *Mission Petroleum Carriers*, 37 S.W.3d at 485.

121. *Id.*

122. *Id.*

123. *Id.* Esprit testified that the office was constantly flooded with "people going in and out." *Id.* Additionally, he noted that the restroom where the urine specimens were collected was accessible to all employees and was cleaned only twice weekly. *Id.*

124. *Id.*

125. *Mission Petroleum Carriers,* 37 S.W.3d at 485. Brown testified that he was trained to "basically take the specimen, get him to sign the paper and, you know, and package it up." *Id.* He also acknowledged on the stand that a number of the specimens he sent to the laboratory were improperly collected. *Id.*

126. *Id.* at 486. Clark also noted that there were over a dozen specimen collection businesses available to Mission in Beaumont. *Id.*

mon's hair follicle test results.[127] Dr. Wimbish also discussed how the DOT protocols should be observed, noting that the test results should be considered invalid when regulations were not properly followed.[128] According to the DOT regulations, the collector bears responsibility for ensuring the integrity and authenticity of the urine sample.[129] As trainer of the medical review officer (MRO)[130] in charge of Solomon's test, Dr. Wimbish confidently asserted that the MRO would have invalidated the results of Solomon's test if he was aware of Mission's noncompliance with DOT regulations.[131] Dr. Wimbish further emphasized that due to the availability of other local specimen collection companies, direct supervisor Hillebrandt's collection of Solomon's specimen violated DOT regulations.[132] Furthermore, Mission created a contamination risk when they presented an unwrapped collection container to Solomon before his test.[133] By allowing Solomon to wash his hands after he obtained the specimen but before the container had been sealed, Dr. Wimbish asserted that this cast further doubt on the authenticity of the specimen.[134]

The trial court agreed with Solomon's assertion that Mission was negligent, assessing more than $900,000 in damages for Solomon's medical expenses, lost wages and mental anguish.[135] Included in this amount was $100,000 in exemplary damages imposed by the court, due to Mission's malice.[136]

Mission raised six issues on appeal to the Ninth District Court of Appeals: (1) the final judgment disposing of the case voided the judgment on negligence;[137] (2) Mission had not breached a duty owed to the employee;[138] (3) Solomon had failed to prove probable cause;[139] (4) Solo-

---

127. *Id.*

128. *Id.* The witness testified that the regulatory requirements should be considered safeguards. *Id.*

129. 49 C.F.R. § 40.121-.123 (2002).

130. *Id.* A medical review officer is a licensed physician knowledgeable in substance abuse and drug testing procedures who acts "as an independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process." *Id.*

131. *Mission Petroleum Carriers*, 37 S.W.3d at 487. Furthermore, Mission's noncompliance with DOT regulations "removed the certainty that the specimen sent to the lab was Solomon's." *Id.*

132. *Id.* Dr. Wimbish argued further that it was generally inappropriate for Hillebrandt, who was also subject to random drug testing, to administer any drug tests. *Id.*

133. *Id.*

134. *Id.*

135. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 708 (Tex. 2003).

136. *Id.*

137. *Mission Petroleum Carriers*, 37 S.W.3d at 484.

138. *Id.*

139. *Id.*

mon could not recover damages for mental anguish;[140] (5) Mission's lawful firing of the plaintiff made damages for medical expenses and mental anguish inappropriate;[141] and (6) there was no factual evidence of malice.[142] Surprisingly, Mission did not dispute that the evidence considered by the jury pointed to carelessness in their collection of Solomon's specimen.[143] The Court of Appeals rejected all of the issues raised by Mission and affirmed the trial court's judgment.[144]

The Texas Supreme Court however, relying on the same DOT regulations that Mission had failed to comply with, reversed the judgment of the Ninth District Court of Appeals.[145] It noted that these regulations, coupled with the advocacy of MROs, balance the competing interests of efficient testing for employers and employee expectations of integrity and fairness.[146] The court agreed that these regulations fall short of providing a private cause of action for employees, but did assert that employees "are entitled to compel compliance by invoking the regulations already in place."[147] The court asserted that DOT protocols encourage employers to follow regulatory procedures to the letter, while sheltering employees affected by tainted test results.[148] But, these protocols appear to have failed to protect Solomon from harm in this case.[149]

The Texas Supreme Court's true concern was the status of at-will employment in Texas. The court feared that applying a duty of care to Mission would weaken the doctrine by requiring a reasonableness investigation.[150] Thus, the negligent testing theory espoused by Solomon posed too much danger to the doctrine.[151] The court preferred to maintain the pure interpretation of at-will employment, giving employees and employers the flexibility to terminate their working relationship at any time.[152]

---

140. *Id.*

141. *Id.*

142. *Mission Petroleum Carriers*, 37 S.W.3d at 484 (Tex. App.—Beaumont 2001), *rev'd*, 106 S.W.3d 705 (Tex. 2003).

143. *Id.*

144. *Id.*

145. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 715-16 (Tex. 2003).

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Mary Alice Robbins, *Employers Don't Have a Duty to Exercise Reasonable Care When Drug Testing*, TEX. LAW., May 26, 2003, at 1 (noting Solomon's attorney's comment that the regulatory process provided by the DOT is powerless to restore Solomon's former employment).

150. *Mission Petroleum Carriers*, 106 S.W.3d at 716.

151. *Id.*

152. *Id.*

Concurrences offered by other judges showed some sympathy on the bench for the injustice perpetrated on Solomon. Justice Enoch's concurrence concedes that Solomon's injury, if caused by Mission's negligence, is serious.[153] But Justice Enoch believed that the regulatory scheme enacted by the federal government should take precedence over any common law liability the Texas Supreme Court could impose.[154] Justice Schneider agreed with Justice Enoch's contention that the at-will doctrine is not implicated in this case, but he believes that the application of a common law duty would have no adverse effect on the congressional intent surrounding the DOT regulations.[155] Still, Justice Schneider conceded that Solomon failed to establish causation to show Mission's negligence was the proximate cause of his specimen testing positive for THC metabolite.[156] These Justices appear to recognize the danger of injustice when no duty to exercise reasonable care is imposed on an employer administering drug tests. But their timidity in facing this problem suggests that the solution may lie beyond judicial means.

## III. ANALYSIS

### A. *Employment-At-Will: Employer's Friend, Employee's Enemy?*

In a 1913 speech underscoring his commitment to liberty for all Americans, President Woodrow Wilson declared, "A nation of employees cannot be free any more than a nation of employers can be."[157] For better or worse, America has become a nation of the employed,[158] dependent on

---

153. *Id.* at 717 (Enoch, J., concurring). Justice Enoch notes that protecting the purity of the at-will doctrine offers cold comfort to a person who is unable to find work in his chosen career, due to the negligent actions of his former employer. *Id.*

154. *Id.*

155. *Mission Petroleum Carriers*, 106 S.W.3d at 717 (Schneider, J., concurring).

156. *Id.* Justice Schneider notes that Solomon's failure to present any proximate causation evidence impaired his case. *Id.* Schneider also brings up the possibility that Solomon could have created the necessary causal link through *res ipsa loquitor*, but Solomon's failure to raise this issue made the question moot. *Id.* at 718.

157. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE (Suzy Platt ed., 1989), *available at* http://www.bartleby.com/73/1081.html.

158. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 377 (2002) (estimating that less than 10 million of the 135 million employed in the civilian workforce are self-employed); Gregory L. Crow, Case Note, Sterling Drug, Inc. v. Oxford: *Arkansas Adopts the Public Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 187 (1989) (noting that roughly ninety percent of the civilian workforce are employed by someone other than themselves). As one commentator has stated:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon

others for their livelihood.[159] As a result of this phenomenon, the loss of a job is potentially catastrophic to many employees, as it threatens the loss of almost every valuable resource available to them.[160] To many experts, this development poses a significant threat to individual freedom, as big business and industry exercise their clout over relatively powerless workers.[161] The efforts of labor unions to reduce the inequality between employer and employee have met with only limited success.[162] As economic power concentrates itself into a small number of large corporations,[163] employees need legal protection now more than ever before.[164]

Ironically, proponents of the at-will doctrine praise it for the freedoms it grants to both employer and employee. Professor Richard A. Epstein, one of the most distinguished advocates of employment-at-will, argues that the doctrine protects one of the most important cornerstones of individual liberty: the freedom to contract.[165] According to Epstein, the freedom to make one's own employment choices stands on equal footing with the freedom of religion and "is doubtless more pervasive than the desire to participate in political activity."[166] Epstein also argues that opponents of employment-at-will generally adopt an unwarranted paternalistic attitude, assuming that competent adults are not sophisticated

---

wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security.

FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

159. *See* FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (discussing the gradual shift brought about at the beginning of the Industrial Revolution, in which employee independence gave way to almost total dependence on others for survival). "Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*" *Id.*

160. *Id.* The Industrial Revolution adversely impacted the autonomy of the individual worker, who eventually "had no recognizable place that he could call his own, no society to which he 'naturally' belonged, and no values by which he was expected to live." *Id.* at 8.

161. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967).

162. *Id.* at 1405.

163. *See The Global Giants: Amid Market Pain, U.S. Companies Hold Greater Sway*, WALL ST. J., Oct. 14, 2002, at R10 (exploring recent mergers and the continuing dominance of American companies in the global marketplace): *see also* Elliot Spagat & Ann Zimmerman, *Merger Fuels Gas-Station Consolidation: Phillips-Conoco Tie Means Fewer Operators to Fill Tanks for U.S. Drivers*, WALL ST. J., Nov. 20, 2001, at A2 (discussing consumer and employee concerns about the impact of the Phillips-Conoco merger).

164. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967).

165. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984).

166. *Id.* Professor Epstein additionally notes that the freedom to contract cuts to the heart of people's desire for the health and comfort of themselves and their families. *Id.* at 953-54.

enough to protect themselves in ordinary business dealings.[167] Furthermore, Epstein believes any attempt to curtail the at-will doctrine is ill-advised, as it denies employees the freedom they innately possess to pursue their interests and ambitions aggressively.[168] In essence, as long as an "employer is the full owner of his capital and the employee is the full owner of his labor," both parties are free to barter over details of the employment relationship.[169] Mistakes and inequities in this arrangement are possible, but unlikely, as both parties are unlikely to make the same mistake a second time.[170]

Proponents of employment-at-will also hail its utilitarian approach in promoting equitable bilateral rights.[171] Professor Epstein contends that critics of the at-will doctrine misguidedly justify placing limits on the doctrine as a way to curb employer abuse when the more important issue is ensuring that both parties maximize the benefits resulting from their arrangement.[172] He points out that critics oversimplify the relationship between employer and employee, failing to attach proper weight to the cooperative nature of the arrangement between the parties.[173] Professor Epstein cites five different areas in which employment-at-will ably and equitably serves both employer and employee: (1) in ensuring fair and

---

167. *Id.* at 954. Professor Epstein writes that

> [w]ith employment contracts we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache. Instead we are dealing with the routine stuff of ordinary life; people who are competent enough to marry, vote, and pray are not unable to protect themselves in their day-to-day business transactions.

*Id.*

168. *See id.* at 953-54 (declaring the freedom to contract within the employment relationship as equally fundamental to other individual liberties, including freedoms of speech, religion, and selection of marital partners). "The desire to make one's own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity." *Id.* at 953.

169. *Id.* at 955.

170. Richard A. Epstein, *In Defense of the Contract at Will,* 51 U. CHI. L. REV. 947, 955 (1984). "More to the point, employers and employees are unlikely to make the same mistake once." *Id.*

171. *See id.* at 957 (explaining that the at-will doctrine allows employees to "use the contract as a means to control the firm, just as the firm uses it to control the worker").

172. *See id.* (arguing that the focus of negotiations between employer and employee should revolve around making the most of the benefits of the relationship, not protecting one party from the other's abuses).

173. *Id.* at 958-59. Epstein believes that at-will contracts should be considered a partnership between employee and employer. *Id.* at 958. As with most business partnerships, the division of proceeds is an important consideration, and the at-will doctrine allows parties to properly focus on personal and mutual benefit. *Id.* Treating the contract-at-will as a partnership allows both parties to distribute labor, expenses, and risk more equitably, resulting in a fairer partnership for both sides. *Id.* at 958-59.

measured monitoring and response to employee misbehavior;[174] (2) in limiting arbitrary behavior on the part of employers by forcing them to consider damaging reputational losses;[175] (3) in allowing both employer and worker to assess risk diversification and informational uncertainty as circumstances warrant;[176] (4) in keeping the administrative costs down for both parties;[177] and (5) in requiring the employer to confront the uncertainty of the labor market before making the decision to fire an employee.[178]

Critics of employment-at-will argue, however, that the "comparative immobility" most workers encounter renders the virtues of the doctrine a fallacy.[179] Furthermore, critics assert that it is unrealistic to believe em-

---

174. *See id.* at 963-67 (noting the steep external transactional costs normally associated with combating internal abuse of employer resources, and arguing that at-will employment affords employers the flexibility to maintain internal discipline by monitoring employees and compensating their good and bad behavior accordingly). Furthermore, this encourages employers to exercise self-restraint in disciplining wayward employees, keeping the sanctions for infractions of company policy proportional. *Id.* at 965. On the employee's side, Epstein notes that the worker has the option to terminate the relationship when the "net value of the employment contract turns negative." *Id.* at 966. The threat to quit is most persuasive to employers when the employee has the least to lose from terminating the relationship. *Id.* at 966-67.

175. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967-68 (1984). "The law may tolerate arbitrary behavior, but private pressures effectively limit its scope." *Id.* at 968.

176. *Id.* at 968-69. "The employee is not locked into an unfortunate contract if he finds better opportunities elsewhere or if he detects some weakness in the internal structure of the firm." *Id.* at 969. At-will employment permits both parties "to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information." *Id.*

177. *Id.* at 970-73 (noting that one of the most attractive features of employment-at-will is its low transactional costs). Applying any regulatory scheme to the at-will doctrine would carry a dual burden of substantially increasing litigation and administrative expenses, while placing "costly and inconvenient restraints upon contractual freedom." *Id.* at 973.

178. *Id.* at 974. "The right to fire is exercised only infrequently because the threat of firing is effective." *Id.*

179. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); *see also* Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 3 (1979) (noting that non-unionized employees additionally lack the organization that their employers have in promoting meaningful political change); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 338-39 (1974) (recognizing a steady decline in employees' mobility to change jobs, due in part to company initiatives, such as seniority, used to limit employee movement). Employees who are unaffiliated with any labor organizations tend to be "unorganized and therefore lacking in the unity of purpose and effort that produces a successful lobby." *Id.* Ironically, the interests of unionized employees are not necessarily advocated effectively by labor unions, as they are unlikely to promote legislation that limits the organizational

ployers and employees stand on an equal playing field, since employees pay more attention to real-world concerns, such as a low unemployment rate, than to esoteric economic and contractual concepts.[180] As the specialization of the American workforce continues, few employees truly have the necessary skills to be free operators in the employment marketplace.[181] The growing perception is that at-will employment places the well being of workers at the mercy of their employers.[182] This belief has negative implications for employees and the American economy as a whole.[183] Several concerns justify placing certain restraints on the freedom of employers to discharge employees on an at-will basis, including: the narrow scope of most exclusions to the at-will doctrine;[184] increasing employee expectations of job security in a corporate environment that rewards seniority, but shortchanges security in employment;[185] and the psychological importance that experts place on employees' continuing employment.[186] These concerns, when put together, underscore the eco-

---

power held by employers. *Id.* "The assumption that [unions] stand as the universal protectors of all employees . . . would be an obvious and gross exaggeration." Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410 (1967).

180. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 470 (1980); *see also* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 338 (1974) (noting that while employer power has expanded in recent years, the comparative bargaining power of employees has declined considerably). Additionally, union membership has steadily declined, further harming employees in an at-will marketplace. *Id.*

181. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); *see also* FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 7-8 (1951) (characterizing the shift "from a simple society to a complex industrial and urban economy" as the "great moral tragedy of the industrial system," robbing individuals of their moral character and occupational security).

182. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); *see also* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 337 (1974) (arguing that, outside of legislative limitations and occasional judicial intervention, "employees have little job security").

183. J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 337 (1974).

184. *Id.* at 337-38. The writers note that typical white-collar employees enjoy few of the benefits and safeguards bestowed on unionized and public-sector employees. *Id.* at 337.

185. *Id.* at 338-39.

186. *See id.* at 339 (suggesting that job security impacts the self-esteem of employees just as much as it affects economic security). "Work serves not only a useful economic purpose but plays a crucial role in the individual's psychological identity and sense of order." *Id.*

nomic and social importance of mitigating some of the harmful effects that at-will employment can impose on employees.

B. *Methods of Mitigating the Harms Created by Employment-At-Will*

1. Judicial Exceptions

a. Tort Theories

Critics of the at-will doctrine have come up with a number of theories to combat the injustices that occur within an at-will employment regime. Some commentators have explored the idea of nurturing an action in tort for employees who are wrongfully dismissed, but barred from legal recourse due to the inflexibility of at-will employment.[187] Professor Lawrence E. Blades, in a provocative and influential article, argued in favor of instituting the new tort of "abusive discharge" to satisfy employees' need for protection from unjust termination.[188] Blades argues that this tort gives employees some assurance that they will not have to bear all of the expenses of finding new employment when they are wrongfully fired.[189] Additionally, the threat of a lawsuit accusing employers of abusive discharge will deter them from terminating an employee arbitrarily or capriciously.[190]

Other tort theories have been brought forward to combat wrongful termination of employees with mixed results. Some plaintiffs have filed suit against their former employers based on the tort of intentional infliction of emotional distress.[191] Texas courts, however, have narrowly construed the tort of intentional infliction of emotional distress in an employment

187. *See* Daniel A. Mathews, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1464 (1975) (recommending that the tort action allowed in *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), should be broadened to allow employees to sue for "bad faith, malicious, or retaliatory discharge").

188. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967). "An appropriate legal response would be to confer on the afflicted employee a personal remedy for any damage he suffers when discharged as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment." *Id.*

189. *Id.* at 1414. Blades also argues that legal protection for a worker who suffered an abusive discharge will compel employers to recognize and respect employee individuality. *Id.*

190. *Id.* "[T]he fear of lawsuits would have the salutary effect of discouraging improper attempts to interfere with the employee's freedom or integrity." *Id.* Beyond that, Blades insists that providing employees with this legal security would foster in employers an appreciation for the uniqueness of each of their employees. *Id.*

191. *See* Kathleen T. McCormick, *Wrongful Discharge of Private Employees in Texas: Status Quo or Statute?*, 19 T. MARSHALL L. REV. 45, 64 (1993) (listing the four elements of a claim for emotional distress as: (1) the defendant's acts were intentional or reckless, (2)

setting, fearing that it will alter the balance of the at-will doctrine.[192] Other plaintiffs have attempted to apply the torts of defamation[193] and fraud[194] to a wrongful termination suit, but Texas courts have been reluctant to construe these torts broadly in the employment context.[195] Additionally, all of these torts are applicable only in a limited number of circumstances, thus making Professor Blades' broad tort of abusive discharge more attractive to those seeking to ameliorate the rigidity of the at-will doctrine.[196] However, relying on the abusive discharge tort to prove the defendant's malicious ulterior motive is considered too unclear for consistent and effective application in court.[197]

b. Contract Theories

Other commentators have argued in favor of an action in contract to limit employers' ability to arbitrarily discharge employees.[198] This approach is enticing because it seeks to uphold the interests of both parties: a productive employee is assured the ability to protect his employment interest, while the employer retains the ability to review (and terminate,

---

extreme and outrageous conduct, (3) the defendant's acts caused the plaintiff's emotional distress, and (4) the plaintiff's emotional distress was severe).

192. *See id.* at 65 (concluding that it is improbable that Texas courts will apply the tort of negligent infliction of emotional distress in an employment context); *see also* Fiorenza v. First City Bank-Cent., 710 F. Supp. 1104, 1105 (E.D. Tex. 1989) (declining to sustain the plaintiff-employee's claim of negligent infliction of emotional distress that arose from his dismissal).

193. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd) (finding that the plaintiff, a discharged bank president, had a legitimate cause of action for defamation based on the bank's false claims to its insurer about the president's dishonest behavior).

194. *See* Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986) (ruling that the employer's false promise to establish a bonus plan was actionable fraud, because it was made with the intention to mislead and with no intention of fulfilling the promise).

195. *See* Kathleen T. McCormick, *Wrongful Discharge of Private Employees in Texas: Status Quo or Statute?*, 19 T. MARSHALL L. REV. 45, 67-71 (1993) (exploring the difficulties confronted by employees seeking to bring a wrongful termination suit against their employees based on defamation and fraud).

196. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1414 (1967) (arguing that the employee should be armed "with a damage action where his discharge is caused by a refusal to submit to the employer's improper or overreaching demands").

197. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 473 (1980).

198. *See* J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 367-68 (1974) (asserting that an implied covenant of good faith and fair dealing should be applied to at-will employment, protecting employees from wrongful discharge and ensuring that employers still have the option to dismiss underperforming employees).

if necessary) the employment of workers who are unproductive or too costly to retain.[199]

Several jurisdictions have found contractual causes of action in two different areas. First, some courts have ruled that the duty of good faith and fair dealing implicit in all contracts bars employers from discharging employees without cause.[200] Second, other courts have found another contract right inherent in an employer's handbooks, statements of policy, and conduct.[201] Still, these judicial limitations on the doctrine have gained only limited acceptance nationwide, and a number of jurisdictions, including Texas, consistently decline to impose contractual restraints on at-will employment.

Other critics fear that maintaining the action within the contractual realm gives employers an unfair advantage in the courtroom,[202] since the contract law is credited as a significant reason for the establishment and survival of employment-at-will.[203] Indeed, scores of cases attempting to apply contractual components to employment have been defeated due to the lack of consideration between the two parties.[204]

2. Statutory Exceptions

On both federal and state levels, legislators have attempted to relieve some of the burden that at-will employment places on workers. These attempts have been limited in scope, with one notable exception in the West. Montana passed the Wrongful Discharge from Employment Act[205] in 1987 to soften the impact of the at-will doctrine on private workers in

---

199. *Id.*

200. *See* Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (ruling that the employer's interests must be properly balanced against the employee's and the public's interest in maintaining fair employment opportunities); *see also* Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977) (citing the court's decision in *Monge* in applying an implied covenant of good faith in at-will employment contracts).

201. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 890 (Mich. 1980) (putting forth the concept that when an employer establishes uniform procedures and policies upon which employees rely, a contractual obligation is created that limits application of the at-will doctrine).

202. *See* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967) (acknowledging that under "the contractual principle of mutuality of obligation . . . if the employee can quit his job at will, then so, too, must the employer have the right to terminate the relationship for any or no reason").

203. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (citing the at-will doctrine as a victory for principles of freedom of contract).

204. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967).

205. MONT. CODE ANN. § 39-2-901 (2003).

the state. The statute allows an employee to seek damages for wrongful discharge in three instances: (1) when the dismissal "was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy";[206] (2) the dismissal "was not for good cause" after the worker's tenure had exceeded any initial probationary period;[207] and (3) if the employer failed to comply with its own express provisions of the personnel policy.[208] Despite the revolutionary nature of the act, it has failed to inspire any imitators in other jurisdictions.

Pure at-will employment has been weakened somewhat by the statutory exceptions drafted by both federal and state legislators. The two statutes that most significantly affected the at-will doctrine on a national level are the National Labor Relations Act of 1935[209] and Title VII of the Civil Rights Act of 1964.[210] The National Labor Relations Act is notable because it created the framework for collective bargaining that unionized workers rely on to this day.[211] The Civil Rights Act is lauded for the broad protection it offers "to all individuals against discrimination on the basis of race, sex, religion, or national origin."[212] Those two landmarks gave rise to a revolution in federal law affecting the at-will doctrine. Now, federal laws are in place barring employers from discharging employees on the basis of their age,[213] jury duty,[214] the vesting of retirement benefits,[215] disabilities,[216] and military service.[217]

---

206. Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-904(1)(a) (2003).

207. *Id.*

208. *Id.*

209. *See* National Labor Relations Act, 29 U.S.C. § 158(a)(3) (2001) (defining employer discrimination in hiring and retention of employees based on their involvement with labor organizations as an unfair labor practice); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937) (upholding the National Labor Relations Act under the rationale that Congress's action to regulate labor negotiations affected interstate commerce, thus ensuring that the legislation fell properly within the bounds of the Commerce Clause).

210. *See* Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2(a) (2001) (making it unlawful for an employer to discriminate on the basis of "race, color, religion, sex, or national origin").

211. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 947 (1984).

212. *Id.* Professor Epstein notes that the influence and ubiquitousness of the National Labor Relations Act and Title VII have obscured the fact that the rights of a large number of workers today are still governed only by the doctrine of at-will employment. *Id.*

213. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2001).

214. Judiciary and Judicial Procedure Act, 28 U.S.C. § 1875 (2001).

215. Employee Retirement Income Security Act, 29 U.S.C. § 1140 (2001).

216. Americans with Disabilities Act, 42 U.S.C. § 12112 (2001).

217. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (2001) (barring employers from denying "initial employment, reemployment, reten-

The Texas Legislature has followed suit with a number of statutory exceptions to the at-will doctrine. Texas employees are protected from termination on the basis of "race, color, disability, religion, sex, national origin, or age."[218] Texas employers are also barred from dismissing an employee for filing a worker's compensation claim,[219] testing positive for HIV,[220] union involvement,[221] jury duty,[222] military duty,[223] or political affiliation.[224] Moreover, Texas has enacted legislation protecting public employees who report their employer's illegal activity.[225] However, Texas courts continually decline to extend whistleblower protection to private employees.[226] Still, these statutory exceptions are extremely narrow in their focus, leaving a great number of employees out in the cold when they are wrongfully terminated in a context not covered by statute.

---

tion in employment, promotion, or any benefit of employment by an employer" based on military service).

218. TEX. LAB. CODE ANN. § 21.051 (Vernon 1996). This legislation follows Title VII closely, adding only the criteria of disability and age, which are addressed in other federal statutes. Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2(a) (2001).

219. *See* TEX. LAB. CODE ANN. § 451.001 (Vernon 1996) (barring employers from discharging employees for the filing of a claim or retaining a lawyer to handle a claim).

220. *See* TEX. HEALTH & SAFETY CODE ANN. § 85.012 (Vernon 2001) (citing Model Workplace Guidelines governing accommodations to be made to HIV-positive employees in the workplace and policies barring employer discrimination).

221. *See* TEX. REV. CIV. STAT. ANN. art. 5196 (Vernon 1987) (barring employer discrimination based on an employee's participation in a strike).

222. TEX. CIV. PRAC. & REM. CODE ANN. § 122.001(a) (Vernon 1997); *see also* Wright v. Faggan, 773 S.W.2d 352, 353-54 (Tex. App.—Dallas 1989, writ denied) (ruling that the statute's underlying purpose and public policy require the court to apply a statutory exemption to at-will employment to cover jury service).

223. *See* TEX. GOV'T CODE ANN. § 431.006(a) (Vernon 1998) (barring private employers from discharging an employee who is part of the state military forces when he or she is ordered to training or called to duty).

224. *See* TEX. ELEC. CODE ANN. § 161.007 (Vernon 2003) (stating that the employer is guilty of a Class C misdemeanor if he or she knowingly refuses to allow a delegate to miss work to go to a county, district, or state convention, or threatens to penalize or actually penalizes a delegate for their participation in a political convention).

225. TEX. GOV'T CODE ANN. § 554.002 (Vernon 1994); *see also* Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768, 770-71 (Tex. App.—Corpus Christi 1989, writ denied) (applying the narrow public policy exception to the at-will doctrine, carved out by *Sabine Pilot*, in the case of a woman discharged for soliciting legal advice regarding the deceptive labeling of firearms packages).

226. *See* Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 724-25 (Tex. 1990) (declining to apply the Texas whistleblower statute to a private employee of a newspaper after the newspaper dismissed the employee for reporting the unlawful behavior of coworkers to his superiors); *see also* Austin v. HealthTrust, Inc., 967 S.W.2d 400, 403 (Tex. 1998) (rejecting the application of the whistleblower exception to the dismissed nurse of a private hospital who reported the wrongdoing of one of her contemporaries).

3. Public Policy Limitations

Some courts have also recognized and applied public policy exceptions to the doctrine. These exceptions are divided into four categories: (1) where an employee is dismissed for exercising a right protected by statute;[227] (2) where an employee is dismissed for complying with a public duty;[228] (3) where an employee is dismissed for blowing the whistle on his employer's illegal acts;[229] and (4) where an employee is dismissed for declining to engage in unlawful conduct.[230] In finding a public policy exception to the at-will doctrine, courts generally hold that malice is not enough to support the application of the exception.[231] The plaintiff must

227. TEX. LAB. CODE ANN. § 451.001 (Vernon 1996); *see also* Cont'l Coffee Prod. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996) (explaining that an employee only needs to show a causal connection between the filing of the worker's compensation claim and their subsequent discharge).

228. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 122.001(a) (Vernon 1997) (stating that an employee cannot be fired because the employee served as a juror); *see also* Fuchs v. Lifetime Doors, Inc., 717 F. Supp. 465, 467 (W.D. Tex. 1989) (holding that the statutory exception to at-will employment that protects employees who serve on a jury from wrongful termination trumps the common law rule and will be strictly construed by the courts).

229. *See* McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 607 (Miss. 1993) (recognizing a limited exception to employment-at-will when an employee reports "illegal acts of his employer to the employer or anyone else"). *But see* Runge v. Raytheon E-Systems, Inc., 57 S.W.3d 562, 566 (Tex. App.—Waco 2001, no pet.) (stating that "[t]here is no common-law cause of action, however, for a private employee who was discharged for reporting illegal activities at the workplace"); Thompson v. El Centro Del Barrio, 905 S.W.2d 356, 359 (Tex. App.—San Antonio 1995, no writ) (refusing to extend the Texas whistleblower exception beyond the current statute, which protects only public employees from wrongful discharge for reporting illegal activities).

230. *See McArn*, 626 So. 2d at 607 (recognizing an additional exception to the at-will doctrine when an employee is dismissed for his or her refusal to commit an illegal act at his employee's insistence); Sabine Pilot Svc., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (acknowledging a narrow public policy exception to the doctrine covering "only the discharge of an employee for the sole reason that the employee refused to perform an illegal act"). *See generally* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf (describing the public policy exception, as well as implied contract and covenant of good faith exceptions to the at-will doctrine).

231. *See* Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974) (failing to find the requisite specific intent to injure and noting that malice alone would not support the plaintiff's pleading for the application of the public policy exception); John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 474 (1980) (suggesting that a general malice allegation is not enough to support an abusive discharge claim).

prove specific intent to injure,[232] and must show that the employer's termination frustrated an important public policy recognized by the court.[233]

Furthermore, courts have drawn a distinction between public and private policy interests.[234] In order to have a fighting chance, employees must show that their termination had a detrimental effect on a legitimate public interest – a private interest alone is clearly insufficient.[235] This notion seems to suggest that Solomon might have had a more persuasive cause of action if he could show that Mission's failure to administer his drug test to DOT specifications frustrated a compelling public policy interest. Solomon could have set forth a convincing case that a trucking company's adherence to specific federal regulatory guidelines when conducting drug tests on its drivers serves an important public policy interest in improving safety on our nation's highway system. This strategy would require Solomon to also demonstrate that Mission's performance of the drug test was done with a specific intent to injure him, which would have been difficult to prove.

Unfortunately for Solomon, Texas courts have accepted a public policy exception to employment-at-will in only one situation: where the employee, against the employer's wishes, refuses to commit an unlawful deed.[236] Texas first recognized this exception in *Sabine Pilot Service, Inc. v. Hauck*.[237] In *Sabine*, the plaintiff employee was discharged for his refusal to pump the bilges of a boat in a manner that he knew was unlawful.[238] The court created an extremely limited exception to the doctrine, allowing employees a cause of action to collect pecuniary damages when they are fired for refusing to commit an illegal act.[239] Beyond this narrow

---

232. *See* John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 474 (1980) (citing the *Geary* court's refusal to apply the exception in the absence of a specific injury to the plaintiff).

233. *Id.*; Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 4, *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

234. *See* Campbell v. Ford Indus., Inc., 546 P.2d 141, 148 (Or. 1976) (declining to substitute stockholder interests cited by the plaintiff for the requisite public interest required for a proper claim); John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 479 (1980) (citing the distinction between the public interest and stockholder interests in *Campbell v. Ford Industries, Inc.*).

235. Campbell v. Ford Indus., Inc., 546 P.2d 141, 145 (Or. 1976).

236. Kathleen T. McCormick, *Wrongful Discharge of Private Employees in Texas: Status Quo or Statute?*, 19 T. MARSHALL L. REV. 45, 51 (1993).

237. 687 S.W.2d 733 (Tex. 1985).

238. Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734 (Tex. 1985).

239. *Id.*

exception, Texas courts have shown little interest in loosening the doctrine of employment-at-will.[240]

## IV. PROPOSAL

Instead of pursuing impossibly broad or narrow exceptions to the at-will doctrine, Texas legislators should consider an exception that acknowledges the competing interests of employers, employees, and the public interest at large. In this case, an exception should be imposed allowing an at-will employee legal recourse when the terminating employer fails to adhere to state or federal regulations. However, before employees can take legal action, they must establish that their employer's failure to properly observe the regulations frustrates a recognized and significant public policy interest. This policy interest can be gleaned from a number of sources, including interests enumerated in the published regulations or found in any available legislative history.

This option is beneficial because it recognizes the interests of employers, their employees, and the general public. Employers are not unduly burdened by this exception because employees are still required to prove that the employer's noncompliance was contrary to a legitimate and important public interest. If the employee cannot show that this type of interest was implicated, the exception will not apply. Employees obviously benefit from this exception because it allows them a way to surpass the impenetrable barriers of employment-at-will by showing that a noteworthy public interest is related to their employment. Finally, the public is well served by this exception, as its primary focus is based on an employer's compliance with acknowledged social goals.

In Mr. Solomon's case, this legislative exception would be applicable and would offer him relief from Mission's missteps in administering his DOT-mandated drug test. There is no doubt that Mission failed to adhere to several notable DOT regulations in managing his test.[241] Additionally, over-arching public interests are implicated by Mission's negligence. Undeniably important public interests are at stake in improving safety on our nation's highways and in ensuring that truck drivers operating within the interstate stream of commerce are sober and up to

240. *See* Gregory L. Crow, Case Note, Sterling Drug, Inc. v. Oxford: *Arkansas Adopts the Public Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 207 (1989) (noting Texas's refusal to apply public policy considerations beyond their narrowly established exception).

241. *See* Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705, 708 (Tex. 2003) (discussing Mission's numerous violations in conducting Solomon's test).

the job.[242] Mission's failure to properly administer Solomon's test frustrates these efforts. It creates confusion as to Solomon's fitness for the job, and creates an issue as to whether other Mission truck drivers were properly qualified under DOT regulations to perform their duties on state and national highways.[243] Furthermore, news of these testing irregularities could easily undermine public confidence in the trucking industry's commitment to highway safety.

It is not clear whether Mr. Solomon had used marijuana prior to the mandatory drug test that Mission conducted on April 3, 1997. It is clear, however, that Mission's failures to follow federally mandated procedures created confusion and raised questions about the appropriateness of Solomon's subsequent termination. If an exception to the at-will doctrine is to be applied in this case, it should recognize the employee's interest in his continued employment, as well as the employer's interest in flexibility. Moreover, public interests must be acknowledged. In order to protect Texas's thriving economic environment, the time has come to recognize an exception to the at-will doctrine allowing employees a cause of action when their employer's failure to follow regulatory guidelines runs contrary to public policy interests.

## V. CONCLUSION

### A. *Employment-At-Will Today: A Timid Judiciary*

It is unlikely that Texas will sever its relationship with the at-will doctrine anytime soon.[244] Both the legislature and the courts have made it clear that the benefits of the doctrine outweigh the occasional injustice that results from the doctrine. Moreover, few commentators argue that only an outright abolition of the doctrine will give employees a fair shake in the workplace. Begrudgingly, commentators acknowledge the economic benefits society recognizes and enjoys thanks to the at-will regime.[245] Expecting Texas to abandon this system after its long history with employment-at-will is unrealistic and inadvisable. After all, employ-

---

242. *Senate Unit Backs Drug Tests for Transportation Workers*, N.Y. TIMES, Mar. 11, 1987, at B8.

243. *See* Mission Petroleum Carriers, Inc. v. Solomon, 37 S.W.3d 482, 487 (Tex. App.—Beaumont 2001), *rev'd*, 106 S.W.3d 705 (Tex. 2003) (recalling Dr. Wimbish's testimony that Mission's mistakes in conducting the test raised issues about the integrity of the testing process).

244. *See* Tex. Dep't of Health v. Rocha, 102 S.W.3d 348, 354 (Tex. App.—Corpus Christi 2003, no pet.) (declaring that "[a]t-will employment is an important and longstanding doctrine in Texas").

245. *See* Harry Hutchison, *Subordinate or Independent, Status or Contract, Clarity or Circularity: British Employment Law, American Implications*, 28 GA. J. INT'L & COMP. L. 55, 80 (1999) (acknowledging that the arguments brought forward by proponents of the

ers and employees in this state have come to rely on the flexibility and freedom it offers when making personnel decisions.[246] It can be credibly argued that at-will employment has been a contributing factor in the ongoing economic strength enjoyed by Texans. But employees in our state, including Mr. Solomon, still deserve some protection from the harshness that the doctrine can impose on them.

Texas courts have proved timid when faced with the proposition of weakening the doctrine of employment-at-will. A number of commentators and jurists have argued that it would be inappropriate for courts to legislate from the bench.[247] They argue that allowing courts to break free of their judicial moorings weakens legislative powers while illegitimately expanding judicial powers.[248] Furthermore, these judges reason that the legislature is better equipped to make changes to the doctrine based on

---

abolition of at-will employment regarding economic subordination or duress willfully ignore the sophistication of modern professionals).

246. *See* Wells v. Sierra & Assoc., Inc., No. 07-97-0378-CV, 1998 WL 244578, at *4 (Tex. App.—Amarillo May 13, 1998, no pet.) (recognizing the reciprocal freedom that employees and employers have under the at-will doctrine); Collins v. Allied Pharmacy Mgmt., Inc., 871 S.W.2d 929, 938 (Tex. App.—Houston [14th Dist.] 1994, no writ) (arguing that the employee's ability to terminate the employment relationship at any time "is [the] freedom that is the basis of our at-will employment rule").

247. *See* Murphy v. Am. Home Products Corp., 448 N.E.2d 86, 89 (N.Y. 1983) (refusing the plaintiff's request to recognize the tort of wrongful discharge absent a legislative mandate); Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114, 1117 (Ohio 1986) (finding no adequate basis for establishing a public policy exception to the at-will doctrine due to the Ohio Constitution's express grant of responsibility for employee welfare to the legislature); Maus v. Nat'l Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (declining to establish an exception to at-will employment for nursing home employees, in the interests of judicial restraint and respecting legislative authority); *see also* Kurt H. Decker, *Refining Pennsylvania's Standard for Invalidating a Non-Competition Restrictive Covenant When an Employee's Termination Is Unrelated to the Employer's Protectible Business Interest*, 104 DICK. L. REV. 619, 620 n.7 (2000) (noting the concerns of some courts that, unlike legislatures, "they are not institutionally capable of formulating or implementing a workable policy to address the needs of employees and employers involved in at-will employment terminations"); Gregory L. Crow, Case Note, Sterling Drug, Inc. v. Oxford: *Arkansas Adopts the Public Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 207 (1989) (explaining that some jurisdictions, including Texas, find that courts step outside their judicial boundaries in recognizing public policy exceptions that have no legislative or constitutional basis).

248. *See* Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1188 (1st Cir. 1996) (declaring that any protection against wrongful discharge should originate in the legislature, not the courts); Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985) (arguing that any applicable public policy for the courts to consider is established by statute, which "preempts the field of its application"); Pacheco v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993) (stating that "[i]t is not the role of the courts to create rights for persons whom the Legislature has not chosen to protect").

democratic principles and the will of their constituents.[249] This reigning judicial philosophy ensures that few exceptions to the at-will doctrine will pass the scrutiny of Texas courts. It follows that our courts will be unreceptive to attempts to expand the current exceptions through tort or contractual principles.

### B. *A Legislative Compromise: Finding the Right Balance*

The burden falls on the legislature to ameliorate the relationship between employers and employees within the at-will context. Again, it is unrealistic and undesirable to expect the Texas Legislature to completely sever its ties with the doctrine of at-will employment.[250] The real question is how broad or narrow the applicable legislative exception that would protect workers such as Roy Solomon should be.

The narrowest exception available to Solomon would apply wrongful termination principles when an employer negligently mishandles an employee's drug test. The limited nature of this exception makes it attractive to parties reluctant to alter the at-will doctrine any more than is necessary, but its scope may be so limited that it would be difficult to generate the necessary support from legislators. Moreover, the narrowness of this exception would lock out a great number of workers whose employment was terminated due to their company's negligence.

A broad exception would impose wrongful termination principles whenever an employer failed to properly follow federal or state regulations applicable to the employment relationship. However, the sweeping range of this exception would work as a double-edged sword, as it grants employees an open exception to the at-will rule any time their termination results from the employer's failure to adhere to regulations. Additionally, the far-reaching applicability of the exception would inevitably become unduly burdensome on both employers and the judicial sys-

---

249. *See Phung*, 491 N.E.2d at 1117 (arguing that "[t]here can be no better expression of the public policy of a state than duties specifically imposed by statute"); City of Midland v. O'Bryant, 18 S.W.3d 209, 215-16 (Tex. 2000) (acknowledging the Texas Legislature's efforts and expertise in establishing and maintaining a whistleblower statute as a major reason for not applying a common-law whistleblower exception to at-will employment); HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.2, at 4 (2d ed. 1987) (expanding on the New York Court of Appeals' analysis in Murphy v. Am. Home Products Corp., 448 N.E.2d 86 (N.Y. 1983)). "[T]he legislature is better equipped than the courts to consider the competing policy positions of various groups in the society and to determine the exact circumstances in which liability is appropriate." *Id.*

250. *See generally* Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003) (expressing the court's reluctance to stray from the general tenets of the doctrine).

tem.[251] Employers conceivably would have to follow every regulation to the letter, while still preparing for legal attacks from ex-employees who base their cause of action on a little-known regulation that the employer violated innocently and unknowingly. Courts would also be overburdened with lawsuits filed by employees based on this exception. The effect of a broad-based statutory exception such as this could paralyze any state's economy and legal system.[252]

The fairest possible exception would respect the interests and concerns of workers and employers, and it would recognize a third, equally important component: the public interest to be protected. The threefold legislative exception to the at-will doctrine proposed here would effectively reconcile the competing interests of employers and employees, while ensuring that important public concerns are adequately considered in the inquiry. Employment-at-will has been a valuable policy for promoting economic development in this state, but it should not be allowed to trump the legitimate interests of workers in their employment or long-acknowledged social interests. This proposal would prove invaluable to workers, including Mr. Solomon, whose dismissal not only occurred under questionable circumstances, but also frustrated important policy objectives. Adoption of this proposal would promote greater employer accountability, while maintaining the benefits associated with the at-will doctrine. The legislature should adopt this proposal as a way to counterbalance the interests of workers, employers and the public in the ongoing economic development of Texas.

---

251. *See generally* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (discussing the inevitable increase in transactional costs that arise whenever limits are placed on employment-at-will).

252. *See id.* at 973 (predicting the consequences of recognizing such an exception).