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The Public Policy Exception: The Need to Reform Florida's At-Will Employment Doctrine After *Jarvinen v. HCA Allied Clinical Laboratories* and *Bellamy v. Holcomb*

Stephen G. De Nigris*

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Abstract

"Silence," the King of the Turtles barked back, "I'm king, and you're only a turtle named Mack."

KEYWORDS: reform, employment, clinical

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I. INTRODUCTION

“Silence,” the King of the Turtles barked back, “I’m king, and you’re only a turtle named Mack.”¹

The authority an employer exercises over an employee’s continued job security is substantial. As a result, this relationship implicitly recognizes “that not every act of insubordination or misconduct ethically justifies an employer in firing [an] employee”² When discharge

* LL.M., Georgetown University, 1991; J.D., Nova University Law Center, 1989.

1. *Davis v. Williams*, 598 F.2d 916, 917 (5th Cir. 1979) (quoting SUESS, YERTLE THE TURTLE AND OTHER STORIES (1950)).

2. *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 616 (Pa. Super. Ct. 1980) (quoting *Resilient Floor & Decorative Covering Workers, Local Union 1179 v. Welco Mfg. Co.*, 542 F.2d 1029, 1033 n.4 (8th Cir. 1976)); Note, *Protecting Employees At Will*

does occur it is recognized to be an extreme industrial penalty since the employee's job, benefits and reputation are at stake.³ To some commentators, discharge is the equivalent of industrial capital punishment.⁴

Yet, employees in the United States encounter dramatically disparate levels of protection against the risk of wrongful discharge. On one hand, those covered by a collective bargaining agreement and those employed by the federal, state and local governments enjoy substantial protection and can only be discharged for "just cause."⁵ On the other hand, those working for an indefinite or unspecified term of employment are considered to be employees at-will. Under this doctrine, either party may terminate the employment relationship at any time or for any reason.⁶ The resulting inequity becomes readily apparent since the rule permits an employer to discharge a long-term employee without regard to the years of satisfactory performance or the substantial opportunities the employee may have foregone to remain in the employer's service.⁷ Thus, the common law "at-will" doctrine allows any employee under no specific term of employment or statutory protection to be discharged by his employer for good cause, bad cause, or for no cause at all without concern for legal liability. Despite marked im-

Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931 (1983). The condition of the modern employee has been described as follows:

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

Thomas G. Lemley, Note, *Employment At Will: Missouri Recognizes the Public Policy Exception*, 52 MO. L. REV. 677 (1987) (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)) (emphasis in original).

3. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 616 (4th ed. 1985).

4. *Id.*

5. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980). In the federal sector, the employer agency must demonstrate some nexus between the conduct warranting discharge and the efficiency of the service. 5 U.S.C. § 7513(a) (1988).

6. *Smith v. Piezo Tech. and Prof. Admin.*, 427 So. 2d 182, 184 (Fla. 1983); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1328 (Fla. 3d Dist. Ct. App. 1985).

7. *See supra*, note 5.

provements in federal legislation protecting employee rights,⁸ workers in Florida not covered by a collective bargaining agreement or individual employment contract enjoy only limited protections.⁹ Furthermore, the Florida courts have significantly compounded the problem by consistently refusing to extend additional protection for workers in the ab-

8. *E.g.*, Civil Service Reform Act of 1978, 5 U.S.C. § 7116 (1988) (protecting federal employees from discharge for exercising rights under the title); Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000-e-2a (1988) (protecting employees from discriminatory discharges); National Labor Relations Act of 1935, § 8(a), 29 U.S.C. § 158(a) (1988) (protecting employees while engaged in protected activity); Age Discrimination Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1988) (prohibiting dismissal of persons within the protected class); Occupational Health and Safety Act of 1970, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1988) (prohibiting discharge or discrimination against any employee for filing a complaint under this chapter); Railway Labor Act of 1926, § 2 Fourth, 45 U.S.C. § 152 Fourth (1988) (prohibiting interference by employers for protected activity).

9. FLA. STAT. § 40.271 (1991) (prohibiting discharge because of service on a jury); FLA. STAT. § 61.1301(2)(j)1 (1991) (prohibiting discharge against an employee because of an income deduction order); FLA. STAT. § 104.081 (1991) (prohibiting discharge for voting or not voting in any election); FLA. STAT. § 110.105(2) (1991) (prohibiting discrimination in state employment based upon sex, age, race, religion, national origin, political affiliation, marital status or handicap); FLA. STAT. § 112.042(1) (1991) (prohibiting discharge or discrimination by county or municipal employers on the basis of race, color, national origin, sex, handicap, religious creed); The Drug Free Workplace Act, FLA. STAT. § 112.0455(8)(p)-(t) (1991) (prohibiting employee discharge on the basis of prior medical history or who is voluntarily seeking drug rehabilitative treatment); FLA. STAT. § 112.044(3)(a)1 (1991) (prohibiting discrimination in employment because of age); The Whistle-blower's Act of 1986, FLA. STAT. § 112.3187(4)(a) (1991) (prohibiting discharge of an agency or independent contractor for disclosing information pursuant to this section); The Police Officer's Bill of Rights, FLA. STAT. § 112.532(5) (1991) (prohibiting discharge of a law enforcement officer for exercising rights guaranteed under the statute); The Firefighter's Bill of Rights, FLA. STAT. § 112.82(9) (1991) (prohibiting discharge of firefighter for exercise of rights guaranteed under the statute); FLA. STAT. § 250.481 (1991) (prohibiting discharge because of armed forces reserve obligations); FLA. STAT. § 440.205 (1991) (creating a statutory cause of action for wrongful discharge for employee's pursuit of a workers' compensation claim); FLA. STAT. § 447.17(1) (1991) (action for discrimination based on membership in a labor union); FLA. STAT. § 447.501(1)(b) (1991) (prohibiting certain employer unfair labor practices for public employees); FLA. STAT. § 448.07(2) (1991) (action for wage discrimination on the basis of sex); FLA. STAT. § 448.075 (1991) (prohibiting discharge or discrimination solely because individual has sickle-cell trait); The Human Rights Act of 1977, FLA. STAT. § 760.10(1)(a) (1991) (prohibiting discharge or discrimination in private employment on the race, color, religion, sex, national origin, age, handicap or marital status); FLA. STAT. § 760.50 (1991) (prohibiting discharge or discrimination on the basis of or belief that the individual has taken an HIV test or is infected with the HIV virus).

sence of specific legislative enactments, even when the employer's action can only be described as unconscionable.¹⁰ As justification for this lack of intervention, the Florida courts assert that to overrule long-standing Florida law would create uncertainty in present employer-employee relationships and would be contrary to one of the basic functions of the law which is "to foster certainty in business relationships."¹¹ Yet:

[I]n a civilized state where reciprocal legal rights and duties around the words "at will" can never mean "without limit or qualification" . . . for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and not there for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counterbalancing rights and obligations that holds such societies together [T]here can be no right to terminate such [an employment] contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is

10. *Bellamy v. Holcomb*, 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991) (employee discharged after subpoena of employer's wage and hour records); *Scott v. Estalella*, 563 So. 2d 701 (Fla. 3d Dist. Ct. App. 1990) (Florida statute protecting employees from discharge for jury service "in this state" did not apply to jury service in federal courts in Florida); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989) (subpoenaed employee terminated for testifying truthfully against employer); *Ochab v. Morrison, Inc.*, 517 So. 2d 763 (Fla. 2d Dist. Ct. App. 1987) (no cause of action for fired employee who refused to serve intoxicated patron, even though state statute prohibits serving habitual drunkards); *Ponton v. Scarfone*, 468 So. 2d 1009 (Fla. 2d Dist. Ct. App.), *petition for rev. denied*, 478 So. 2d 54 (1985) (no common law cause of action based upon public policy under state or federal sex discrimination laws when female's rejection of sexual advances is motivation underlying her termination from employment). *Contra* *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991) (arbitrator's award properly vacated as violative of explicit, well-defined and dominant public policy against sexual harassment). *Accord* *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980) (no wrongful discharge action for employee who was terminated for failure to withdraw daughter's injury suit); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985) (no cause of action against employer for employee refusing to violate federal and state environmental statutes and regulations); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

11. *Hartley*, 476 So. 2d at 1329; *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. 2d Dist. Ct. App. 1983). The court's statement ignores the fact that the courts can narrowly circumscribe a public policy exception to avoid uncertainty.

designed to discourage and prevent.¹²

By refusing to modify an outmoded nineteenth century principle in addressing twentieth century problems, the Florida judiciary perpetuates the uncertainty that it seeks to avoid. This article examines the underpinnings and development of the employment at-will doctrine as it expanded in the United States and in Florida, and focuses on the cases of *Jarvinen v. HCA Allied Clinical Laboratories*,¹³ and *Bellamy v. Holcomb*.¹⁴ This article concludes that the Florida Supreme Court should now recognize a narrow public policy exception to the at-will employment doctrine in light of the inequity of the *Jarvinen* and *Bellamy* decisions and further examines how other courts approach this issue, along with the theoretical basis for adopting such a policy. Finally, this article proposes specific statutory reforms for adoption by the Florida Legislature.

II. EMPLOYMENT AT-WILL IN THE UNITED STATES

Commentators agree that the growth of the at-will doctrine can be traced to several developments during the late nineteenth century. The first factor involved the decline of the American courts in following the traditional English rule of employment.¹⁵ While previously, the master bore the customary responsibility for the servant's health and well-be-

12. J. Michael McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 CAMPBELL L. REV. 217 (1988) (quoting *Sides v. Duke Hosp.*, 328 S.E.2d 818, 826 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985)).

13. 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989).

14. 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991).

15. Amy D. Ronner, Comment, *Brockmeyer v. Dun & Bradstreet: The Narrow Public Policy Exception to the Terminable-At-Will Rule*, 38 U. MIAMI L. REV. 565 (1984). The employment at will doctrine supplanted English employment law. The Statute of Labourers provided that

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

Id. at 566-67 (citations omitted); see 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1425 (1783). Consequently, the rule made it difficult for an employer to dismiss an employee without breaching the contract and incurring liability.

ing, the new employment theory supposed that by entering into a wage bargain, workers assumed the risk of on-the-job injuries.¹⁶ The second factor entailed the willingness of the courts to recast the traditional employment relationship in terms of the emerging theory of contracts.¹⁷ Third, with the advent of the industrial revolution, the courts favored a laissez-faire attitude concerning the employment relationship in order to further economic growth.¹⁸ Fourth, the emergence of Horace Wood's

16. Note, *supra* note 5, at 1824-25.

As the nineteenth century progressed and society became more commercial, the relationship between master and servant changed. The "law of master and servant," being originally premised on a personal, often familial relationship under the category of domestic relations, was no longer suitable for employment that was commercial and involved large number of employees. With these changes in society, the application of the "settled" [English rule] no longer produced judicious results.

See David P. Weiss, Note, *Public Policy Limitations to the Employment At-Will Doctrine Since Geary v. United States Steel Corporation*, 44 U. PITT. L. REV. 1115, 1117 (1983) (citations omitted). Hence, the courts were no longer capable of dealing with the new commercial employer-employee relationship. Consequently, the courts utilized the new emerging theory of contracts to define the employment relationship.

17. Note, *supra* note 5, at 1824-25.

The principal consequence of this conceptual change was a drastic limitation in the employer's duties to the employee According to this formalistic approach, if the parties had intended the employment relationship to last for one year, they would have made that an express term of the contract.

Id. This approach relies upon two predominant theories in the late nineteenth century. First, "that manifestations of assent must be evidenced by definite, express terms if promises are to be enforceable. Thus, an employer's absolute discretion to terminate had to be presumed unless some definite duration was specified in the employment contract." *Id.* at 1825. Secondly, there must be mutuality of contract. "Mutuality of contract requires that both parties are bound or neither is bound to the contract. Symmetry is the crux of this definition of mutuality. Accordingly, terminable at-will employment contracts are valid because neither party is bound to the agreement." David Peck, *The Public Policy Exception to the Employment At-Will Rule: Illinois Creates and Amorphous Tort*, 59 CHI.-KENT L. REV. 247, 248 n.5 (1982). But several courts and commentators have pointed out that the symmetry and logical appeal of the contractual principle of mutuality of obligation has little or no legitimate economic justification to at-will employment because it is based upon the false premise of relatively equal bargaining power between employers and at-will employees. See Andre D. Bouffard, Comment, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception To The Employment At-Will Doctrine In Maine*, 38 ME. L. REV. 67, 70 n.7 (1986).

18. See Ronner, *supra* note 15, at 567.

The laissez-faire concept was based on the assumption that the individual

1877 *Treatise on the Law of Master and Servant*,¹⁹ provided the already receptive courts with an additional basis to adopt the at-will doctrine.²⁰ Recognized as a prolific treatise writer of his time, Wood's theory stated that:

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. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite

should have complete social freedom to contract not only in his personal affairs, but also in his business relationships. The new rule was ushered in by the industrial revolution and its companion notions of social freedom and freedom of contract. Under this contractual approach to employment, the parties were bound only by obligations clearly intended; the parties set their own terms and any implied obligations became secondary to the employees' basic freedoms.

George R. Arrants, Jr., Note, *Labor Law-Employment At Will-Public Policy Exceptions to the Employment At Will Doctrine*, 53 TENN. L. REV. 199, 203 n.22 (1985).

19. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). One author writes that Wood himself was an enigma. He apparently was a practicing attorney in Albany, New York, but was not a member of the New York State Bar Association. In addition to his master and servant treatise, he edited or authored treatises on nuisances, torts and evidence, among others. See Jay M. Feinman, *The Development of The Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 n.68 (1976). The Albany Law Journal said:

Mr. Wood obtained an excellent reputation as a learned, accurate and original author

. . . . To bring order, simplicity and symmetry out of [the conflicting decisions on master and servant] was the work of a man of genius, and this we have before us.

15 ALB. L.J. 378-79, May 12, 1877; Feinman, *supra* note 68.

20. See Ronner, *supra* note 15, at 568.

The employment relationship in the late nineteenth century was considered to be strictly contractual in nature and the absence of expressed terms or a written contract created the at will arrangement. [Thus, the] contract based theory was a repudiation of the English rule which required just cause for termination of at will employment.

Arrants, *supra* note 18, at 203 n.23.

hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.²¹

Wood's rule has been widely criticized as a misreading and distortion of the law existing at the time.²² A review of the authority relied upon by Wood reveals four flaws with his "inflexible rule." First, it is argued that Wood's treatment on the duration of service contracts lacked comprehensiveness and concern for detail.²³ Second, the four American cases cited as authority for the at-will theory were in fact far off the mark.²⁴ In actuality, two of the cases cited by Wood found job

21. WOOD, *supra* note 19, at 272 (citations omitted).

22. Feinman, *The Development of The Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Joseph De Giuseppe, Jr., *The Recognition of Public Policy Exceptions To Employment-At-Will Rule: A Legislative Function?*, 11 FORDHAM URB. L.J. 721, 724 n.6 (1983); Rodney A. Max, *A New Tort in Alabama: Wrongful Employment Termination in Violation of Public Policy*, 12 AM. J. TRIAL ADVOC. 39, 40 n.6 (1988); Laurie Schober Carnahan, Note, *Bushko v. Miller Brewing Co.: An Analysis of the Wisconsin Public Policy Exception to the Employment At Will Rule and a Call For Legislative Action*, 1987 WIS. L. REV. 689, 691 n.17 (1987); accord Gregory L. Grow, Note, *Sterling Drug, Inc. v. Oxford: Arkansas Adopts the Public Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 190 n.26 (1989); Lemley, *supra* note 2, at 678 n.10; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974); Weiss, *supra* note 16, at 1118 n.23.

23. Feinman, *supra* note 22, at 126.

24. *Id.*; see Shapiro & Tune, *supra* note 22, at 341. The first case, *DeBriar v. Minturn*, 1 Cal. 450 (1851), involved

the right of a discharged bartender to occupy a room in the tavern after he had been notified to leave by the end of the month. Essentially an action for unlawful ejection, the case touched only tangentially on the employment relationship. [The court] held only that the innkeeper had a right to eject a person living in his house after proper notification.

Shapiro & Tune, *supra* note 22, at 342 n.54.

Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870), also contradicts Wood's assertion. The court found that there was no error in allowing the jury to determine the nature of the contract from written and oral communications, usages of the trade, the situation of the parties, the types of employment and all other circumstances.

Shapiro & Tune, *supra* note 22, at 342 n.54.

In *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871), the court found that indefinite duration by itself did not give the employer unfettered discretion to dismiss an employee. A mining captain discharged at the end of eight months was allowed to recover four additional months of pay because he had been assured that employment would be stable. The

security rights in the absence of explicit provisions on the length of employment.²⁵ Third, Wood's rule revolved around his incorrect assertion that no American court had approved the English rule in recent years. He continued that the employment at-will rule was inflexibly applied in the United States and that the English rule was only a yearly hiring, making no mention of notice.²⁶ Lastly, even though unsupported by legal precedent, Wood failed to offer any policy grounds for the adoption of this theory.²⁷ Feinman argues that it is possible to attribute too much influence to Wood himself.²⁸ However, he acknowledges that treatises were an important tool to the bar and bench in this period.²⁹ Therefore, a modern, comprehensive treatise stating a clear rule of practical application would inevitably attract a wide following and be cited as authority.³⁰ While Wood's treatise could not have alone caused the change to employment at-will, the rule would not have developed as quickly and uniformly as it did without it.³¹ Despite the lack of analysis and authority, by the beginning of the twentieth century Wood's rule

jury thought that hiring for a year could be reasonably inferred from the facts.

Shapiro & Tune, *supra* note 22, at 342 n.54.

Finally, *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871), concerned a business contract between the Army and private entrepreneurs for the transportation of goods; it had nothing to do with general hirings as such. A business had an outdated contract with an army quartermaster to transport goods across Minnesota and, at a time when the quartermaster could obtain no other transportation, the company insisted on a new arrangement at a higher price. The Supreme Court reversed a Court of Claims decision upholding the company's right to collect the additional price on grounds that the statute of limitations on the claim had run.

Shapiro & Tune, *supra* note 22, at 342 n.54.

25. Feinman, *supra* note 22, at 126. Judge Meyer, in his dissenting opinion in *Murphy v. American Home Prod. Corp.*, 448 N.E.2d 86, 95 (N.Y. 1983) (Meyer, J., dissenting), characterizes the New York court's adoption of Wood's rule in *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895), as bizarre in light of Wood's concession of a yearly hiring in England; the Court of Appeals adoption of the English Rule and the fact that Wood's rule was not supported by any of the cases cited by him.

26. Feinman, *supra* note 22, at 126.

27. *Id.*

28. *Id.* at 127.

29. *Id.*

30. *Id.*

31. *Id.*

became the primary doctrine governing employment duration.³² Those courts adopting Wood's rule did so by simply citing to Wood's treatise or the cases cited by him directly.³³

32. Shapiro & Tune, *supra* note 22, at 342.

33. *Id.* One commentator writes:

Although courts today often feel obliged to pay lip service to the legitimacy of the at will rule, legal scholars are increasingly likely to view the rule as an anachronism. This conclusion follows from three sets of interrelated arguments, each suggesting that certain social, economic and institutional conditions have change since 1877. First, economic power has become increasingly concentrated in the hands of large, impersonal employers. This not only endangers individual freedom by creating the potential for employers to exploit employee vulnerability but also undermines the traditional assumption that employees can negotiate the terms of their employment contract using bargaining power equal to that of their employers. This does not conform to modern realities. At the time a job is extended and accepted, little bargaining actually takes place, only the rare employee can insist on negotiating terms of employment and the rest must accept the terms and conditions of employment prevailing in the workplace at the time of hire.

Second, the work force is no longer predominantly self employed and as a result today's wage earner is often completely dependent on employment related income. This reveals the inadequacy of the contract principles of freedom of choice and mutuality of rights. In this context, the employer's right to discharge employees at will becomes a right to impose significant social, psychological and economic costs on employees without providing justification. For the economically dependent employee who does not feel free to quit, the right to withdraw from the employment contract becomes a hollow right.

Third, employee expectations regarding employee rights generally and job security specifically have changed during the course of this century. Evidence of increasing employee dissatisfaction with the employment relationship and rising expectations regarding fair, nonarbitrary treatment is revealed by opinion polls, surveys and a growing number of lawsuits. Employees now expect management to provide job related reasons when decisions are made that affect their employment status. Evidence that norms of workplace justice are changing is also reflected in arbitration decisions. Arbitrators are increasingly insistent that procedural rules be observed and increasingly reluctant to uphold employee discharges except as an option of last resort. As a result it can no longer be suggested that employees, in accepting a job offer, agree as part of the employment bargain that they can be fired at will.

Fourth, contract principles are unsuited to modern institutional realities. Life in large scale organizations is characterized by a high degree of interdependence. This requires cooperation among all of the organization's members and a strong sense of commitment to the enterprise as well as

An even more dramatic pronouncement of the at-will doctrine occurred with the Supreme Court's decisions in *Adair v. United States*³⁴ and *Coppage v. Kansas*.³⁵ Both cases gave the at-will doctrine constitutional legitimacy. In those cases, the Supreme Court held that regulation of the employment relationship violated the parties' freedom to contract. These opinions represent the high water mark of the Court's insistence on laissez-faire principles in the labor area, despite a growing concern that freedom of contract was a cruel illusion because of the extreme differences in bargaining power between employers and employees.³⁶

each other. Contract principles, premised on freedom of choice and limited commitment, are ill suited for establishing the kind of employment relationship required by modern enterprises. Achieving harmony between legal principles and institutional realities requires alternative principles of association premised on mutual obligation and increased commitment.

Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMP. REL. L.J. 387 (1988) (citations omitted).

34. 208 U.S. 161 (1908). In this case, the Supreme Court invalidated a federal statute making it a criminal offense for an interstate carrier to discharge an employee simply because of the employee's membership in a labor organization. The high court concluded that the statute invaded the parties personal liberty and interfered with the right to contract. The Court wrote:

In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

Id. at 175.

Adair was overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941); see Richard D. Humberger, Comment, *Unjust Discharge: Why Nonunion Employees Need a Just Cause Statute*, 25 WILLAMETTE L. REV. 135 (1989).

35. 236 U.S. 1 (1915). In *Coppage*, the Supreme Court invalidated a Kansas statute that provided for a fine and imprisonment if an employer required an employee to agree not to become or remain a member of any labor organization during the term of employment. The Court then concluded that the employer's right to hire and fire at-will was a property right protected by the Constitution.

Today, so called "yellow dog" contracts are specifically illegal under several statutes. See, e.g., The Railway Labor Act, 45 U.S.C. § 151 (1988).

36. Arrants, *supra* note 18, at 204; Humberger, *supra* note 34; Ronner, *supra* note 15; see Note, *Protecting Employees*, *supra* note 2, at 1933; see also Note, *Protecting At Will Employees*, *supra* note 5, at 1982.

From a historical perspective, the Supreme Court's laissez-faire intervention and its attempts at restraining Congressional power to regulate the economy eventually culminated in a showdown between President Franklin D. Roosevelt and the High

III. THE RULE DEVELOPS IN FLORIDA

The Florida courts were slow to expressly adopt Wood's rule after its first pronouncement in 1877. Yet, early Florida cases suggest that the doctrine was evolving.

In *Chipley v. Atkinson*,³⁷ the plaintiff sued the defendant in an action for tortious interference with a business relationship. Kehoe and Walker employed Chipley as a superintendent at a brick manufacturing business.³⁸ His employment agreement included a provision that he would be employed for a long period of time and that he had a "prospect and promise of obtaining an interest in the business."³⁹ The company dismissed Chipley after Atkinson convinced Kehoe and Walker that Chipley was a thief.⁴⁰ Chipley then commenced an action against Atkinson.⁴¹ At trial, the court charged the jury as to terminable at-will employment as part of the proof Chipley needed to show in order to prevail against Atkinson.⁴² The jury found for Chipley and awarded

Court. Ravaged by the throes of an economic depression, the Roosevelt New Deal program was shattered by a series of judicial defeats. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933); see *Railroad Retirement Bd. v. Alton Ry.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1934); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act of 1933).

In February, 1937, President Roosevelt wrote Congress calling for a reorganization of the judicial branch or what has become known as the Roosevelt "Court Packing" plan. The plan proposed that for the appointment of additional judges to the federal bench for each judge over the age of seventy years who did not choose to retire. At that time, six Justices on the Supreme Court had passed the voluntary retirement age. The plan was rejected. However, within four years Roosevelt was able to replace all six justices as a result of retirement. The new Court took essentially a hands off approach on economic policy.

37. 1 So. 934 (Fla. 1887).

38. *Id.* at 935.

39. *Id.*

40. *Id.* Chipley never sued his former employers and named only Atkinson in the action. The case makes no mention as to why Chipley chose not to sue the partners.

41. *Id.*

42. *Chipley*, 1 So. at 935. The court charged the jury that: "If you find that the contract was not for a definite term, and there are no payments or other circumstances to show that the hiring was from period to period, then it would be a hiring from day to day, and terminable at the will of either party." *Id.* This instruction was not excepted to by either party to the lawsuit. Nor is there any supporting authority found in the case supporting this statement of the law.

damages. The defendant filed exceptions to several of the jury charges. On appeal, the Florida Supreme Court granted a new trial. The court reasoned that the term "long period of time" created a jury question as to the actual term of employment which suggested that Chipley could not be discharged except for cause.⁴³ Consequently, the jury would have to determine the actual length of employment since this factor controlled whether Chipley could maintain his action against Atkinson.⁴⁴

Shortly after the turn of the century, the supreme court again addressed the issue of at-will employment in *Savannah, F. & W. Railway Co. v. Willett*.⁴⁵ In that case, Willett made an application for employment to the defendant after being solicited to apply for a conductor's position.⁴⁶ The defendant informed Willett that he would be employed if he reported for duty at once.⁴⁷ Willett resigned from his job and reported to a Savannah, F. & W. station at the company's direction.⁴⁸ After receiving his route assignment, Willett left the company's Sanford station and travelled to Kissimmee.⁴⁹ Upon arrival at the Kissimmee station, Willett was instructed to return to Sanford. The

43. *Id.* at 941. The court wrote:

An agreement between the plaintiff and Kehoe & Walker for the continuance of the employment for a long period of time cannot be ignored as a feature of the case. This allegation means that the agreement entered into by them entitled the plaintiff, either expressly or by implication, to employment not only for a period of time, but for a long period. It means that a period of time was agreed upon by them; and whatever the period thus agreed on was, whether limited by months or years or otherwise, is to be proved. The language implies that there was at least some point of time in the future, ascertainable from the terms of the agreement, up to which the employment was to extend.

Id.

44. The term of employment was critical since Chipley alleged that he was discharged during his term of employment. This could only be done for just cause. If Chipley was an at-will employee with no definite term, then he could be discharged at any time for any reason. Accordingly, his claim for malicious interference with a business relationship could not be maintained against Atkinson if he could be discharged for no reason at all.

45. 31 So. 246 (1901).

46. *Id.* Willett had been employed as a conductor for nineteen years and sought a better paying job with the Savannah, F. & W. Railway.

47. *Id.* The facts indicate that Willett took the Savannah position in order to improve himself.

48. *Id.* Upon responding, Willett was examined and then assigned to a route.

49. *Id.* Willett travelled aboard one of the Savannah's trains to the new station.

company subsequently informed Willett on his return that he would not be employed unless he obtained a release or recommendation from his previous employer. When he could not obtain the recommendation, Willett was fired.⁵⁰ Willett sued the railroad. The case went to trial resulting in a verdict for Willett and Savannah appealed.⁵¹

The supreme court reversed the verdict and judgment. The court held that since Willett alleged no facts as to the duration of employment, the employment was at-will and terminable by either party. In its analysis, the court cited several cases and Wood's rule.⁵² Each of the cases cited by the court were reminiscent of Wood's misapplication of the actual holdings and lack of analysis.⁵³

50. *Savannah*, 31 So. at 246. The railway had not previously asked for this release or recommendation at the time it solicited Willett to work for them. Furthermore, the company was aware that Willett was working for another railroad and that he took the Savannah position in order to improve himself and for an increase in salary. The evidence before the court showed that Willett had faithfully and diligently performed his duties in the nineteen years that he had been a conductor. As a result of Savannah's actions, Willett was unable to obtain employment for twelve months.

51. *Id.* at 247. Willett claimed \$1500.00 in damages. The jury awarded \$744.83. *Id.* at 246-47.

52. *Id.* at 247.

53. *Id.* The court first cited to *Blaisdell v. Lewis*, 32 Me. 515 (1851). In that case, Blaisdell sued alleging that Lewis failed to hire him as promised. There was no time stipulated as to the duration of the service. Subsequently, Lewis never hired Blaisdell and was sued for the amount of money that Blaisdell would have made had he been hired. A jury returned a verdict for the plaintiff. The Maine Supreme Court reversed the verdict holding that because there was no fixed period of time of when Blaisdell's employment was to begin, there was no contract. The court then wrote in dicta that had Blaisdell gone to work, there was nothing to prevent Lewis from discharging him on that day. The Maine Supreme Court never cited any other precedent in its holding.

Today, the efficacy of the *Blaisdell* holding is dwindling with the Maine Supreme Court's recent pronouncement in *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984). In that case, the court indicated that it would not rule out the possible recognition of a public policy cause of action when the discharge contravenes some strong public policy. See, Andre D. Bouffard, Comment, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception To The Employment At-Will Doctrine In Maine*, 38 ME. L. REV. 67 (1986).

De Briar v. Minturn, 1 Cal. 450 (1851), the second case relied upon by the Florida Supreme Court, and previously rejected as a misstatement, was blindly cited by the court. The court then cited directly to Wood's treatise.

Commissioners v. Brown, 32 N.J.L. 504 (N.J. 1866), the third case cited by the court, involved a suit of a contractor against the water commissioners of Jersey City, New Jersey. Brown alleged that the commission refused to perform under a contract hiring Brown to lay submerged pipe across the Hackensack river. The enabling state

The court's next pronouncement of the employer-employee relationship occurred in *Florida Fire & Casualty Insurance Co. v. Hart*.⁵⁴ Hart alleged that he was elected secretary of the insurance company for a definite period of time and had been fired.⁵⁵ To support his allegations, Hart testified at trial that no information was given him that the position was temporary.⁵⁶ Hart proffered no evidence to support his allegations that he was elected secretary at a salary of \$200.00 per month until the next annual meeting. The court had little trouble concluding that Hart's lack of evidence was fatal to his claim.⁵⁷

In 1934, the supreme court decided the case of *Knudsen v. Green*.⁵⁸ Knudsen alleged that he had an oral agreement with the de-

statute authorized the water commission to enter into contracts for the pipe project. The statute set forth specific criteria concerning the particular manner in which contracts were to be advertised for and made. The statute further mandated that the contracts be in writing and that three copies were to be deposited with the controller of Jersey City and one retained by the commissioners. The commissioners subsequently passed a resolution authorizing that a contract be drawn up to utilize Brown as a pipe laying contractor. However, prior to the actual contract being drawn, the commissioners rescinded the resolution. At trial a jury found for Brown and awarded damages. On appeal, the New Jersey Supreme Court reversed. The court reasoned that the resolution was not a binding contract but only an authorization to begin negotiations for a contract. Furthermore, the court held that until there was an actual offer and acceptance, then either party was at liberty to withdraw from the negotiations. Thus, the court viewed the resolution only as a direction to the commission's engineer and attorney to prepare a contract for the pipe work and to submit the agreement to the commission for its approval before being executed. Finally, the court concluded that the commission's failure to pass a resolution approving the agreement signified that they did not consent to the agreement.

Shaw v. Woodbury Glass Works, 18 A. 696 (N.J. 1889), the final case cited by the court, involved the hiring of a workman for a definite period of time. The court concluded that the plaintiff failed to prove the agreement because neither the rate of wages nor the location of work had been agreed upon. The court reasoned that no agreement existed and that this was merely negotiations in contemplation of an agreement.

54. 75 So. 528 (Fla. 1917).

55. *Id.* at 529.

56. *Id.* at 532. This suggested that if Hart was not temporary, then he had a definite term of employment.

57. *Id.* The court noted that Hart's failed to proffer any evidence through the testimony of witnesses, the minutes of the board of directors or the charter or by-laws of the company. The court was quick to note that if Hart had come forward with this evidence, it would have supported his claim for wrongful discharge. *Id.* It seems clear that this case stands not so much as an expansion of the employment at-will doctrine as it does on how to prove a wrongful discharge case.

58. 156 So. 240 (Fla. 1934).

fendant for employment as captain and master of a house boat.⁵⁹ The duration of the alleged agreement was unspecified.⁶⁰ After Knudsen resigned from his current employment, Green refused to employ him and hired another person to serve as captain.⁶¹ The trial court found that Green's actions entitled Knudsen to recover only \$300.00 for the first month's employment.⁶² The court reasoned that because the amount in dispute was only \$300.00, it lacked subject matter jurisdiction and dismissed the case.⁶³

The supreme court reversed the circuit court and held that the court did have jurisdiction. The court went on to resolve the dispute and found that a contract existed but that it did not bind the parties after the first month since the duration was indefinite. Accordingly, the court held the relationship to be terminable at-will despite the fact that the authority relied upon by the supreme court strongly militated against a finding of at-will employment.⁶⁴ In short, one case indicated that no specific term of employment needed to be agreed upon in order to establish a definite term if the custom of the trade implied a term of employment.⁶⁵ The second case held that a jury could infer a yearly

59. *Id.* at 241. Knudsen was employed as a mate on a vessel of the Standard Oil Company at the time of the hiring. He had a definite annual salary and benefits in the form of a retirement and other bonuses.

60. *Id.*

61. *Id.* Green assured Knudsen that Knudsen would not regret leaving Standard Oil. Moreover, Green offered Knudsen a monthly salary of \$300.00. Knudsen, relocated to Miami based upon those representations in October, 1930, and remained there until April, 1931 when Green repudiated the agreement. Thereafter, Knudsen attempted to obtain his former position at Standard Oil but was refused reemployment.

62. *Id.* Knudson alleged that his damages were \$15,000.00. Knudsen based this amount on the monies he lost as a result of terminating his employment with Standard. Once the trial court found that the damages were only \$300.00, it dismissed the case without further action.

63. *Knudsen*, 156 So. at 242.

64. *Id.* Interestingly, the court never cited to any of its earlier decisions in *Chipley* or *Savannah, F & W Ry.*, as support for this proposition. Rather, the court relied upon another series of cases from other jurisdictions as precedent. Most of the interpretations given by the supreme court were in fact strained and ignored other pertinent discussions in the cases.

65. In *Odom v. Bush*, 53 S.E. 1013 (Ga. 1906), the court interpreted a Georgia statute that provided that a hiring of indefinite duration could be terminated at the will of either party. Yet, the court wrote that: "Where a contract of hiring is made with reference to a general custom or business usage, which enters into and becomes a part of the agreement, the contract is not, of course, indefinite as to its duration the custom and usage fixes the term of the engagement." *Id.* at 1016.

hiring even if there was no specific evidence to support that inference.⁶⁶ The third case involved an employee who remained willing and able to perform his service contract and who was entitled to recover that portion of his unpaid salary.⁶⁷ The last case pertained to an expressed provision of an employment contract which evidenced a definite term of employment.⁶⁸ However, the contract could be terminated so long as a

The court's statement certainly suggests a definite term of employment need not be explicitly agreed upon by the parties if the plaintiff can show by evidence that the custom or trade implies a certain term of employment which would become part of the employment contract. Even more significant, is the fact that the Georgia court acknowledged that wages payable for a stipulated period raised a presumption that the hiring was for that period. As a result, even if no term of employment was stated a definite term employment could still exist. On the other hand, if the proof indicates that the contract was for a longer term, the mere reservation of wages for a lesser period would not control. In other words, a plaintiff could be paid on a monthly basis but still have a contract for a year if the evidence supported this conclusion. The Florida Supreme Court seemed to ignore this portion of the opinion in reaching its conclusion. Under this analysis, if Knudsen proved that the industry standard of \$300.00 per month implied a longer term of employment, he would have been successful in his claim. At the very minimum, if the Florida Supreme Court followed through with the *Odom* rationale, the remand should have also allowed Knudsen to plead and prove the claim, if possible.

66. *Clark v. Ryan*, 11 So. 22 (Ala. 1892). Similarly, the court's reliance on *Clark* is misplaced. In that case, the Alabama Supreme Court relied upon Wood's treatise to state the employment at-will doctrine. See *supra* note 19. The court, however, approved the trial court's jury instruction that read if the jury did not believe that Ryan's employment was for a month, then a reasonable construction was that it was for a year. It seems clear that this holding is contrary to a finding of at-will employment. Recently, the Alabama Supreme Court recognized a limited exception to the at-will doctrine. For a discussion of the employment at-will doctrine in Alabama, see James W. Lampkin II, Comment, *Employment At Will: The Time has Come For Alabama To Embrace Public Policy As An Exception To The Rule Of Employment At Will*, 19 CUMB. L. REV. 372 (1989).

67. *Cleveland v. Towle*, 106 So. 60 (Ala. 1925). In *Cleveland*, the plaintiff sued after being fired. A jury found for the plaintiff and the Alabama Court of Appeals reversed the verdict. The Alabama Supreme Court reversed the court of appeals and held that where an employee has a contract for services to be performed and was discharged without fault on his part, he is entitled to recover his salary if he remains ready to perform.

68. *Derry v. Board of Educ.*, 61 N.W. 61 (Mich. 1894). In *Derry*, the plaintiff signed an agreement with the school board to teach for the following school year. The contract provided an express clause that allowed the school board to discharge the plaintiff upon one weeks written notice. When the board exercised that option, plaintiff sued. In a brief opinion, the Michigan Supreme Court upheld the dismissal based upon the clear express contractual language of the agreement. Accordingly, this holding did

week's notice was given.⁶⁹

Twenty one years later, the supreme court firmly cemented the at-will doctrine in Florida jurisprudence in *Wynne v. Ludman Corp.*⁷⁰ Wynne's complaint alleged a definite term employment contract. It further alleged that Wynne's employment had been held over for an additional year under the prior terms. At trial, Wynne candidly testified that his employment was not for a definite time and that he could be terminated at any time.⁷¹ Thus, his testimony did not support the allegations of his complaint and in fact proved the appellee's allegations.⁷² The court, relying on its decisions in *Savannah, F. & W. Railway Co.*⁷³ and *Knudsen*,⁷⁴ reiterated its holdings in order to uphold the termination.⁷⁵

IV. THE GROWTH OF THE PUBLIC POLICY EXCEPTION

Faced with a growing number of unconscionable discharges, several courts began to create exceptions to the employment at-will doctrine. One of the recognized exceptions is the discharge in violation of public policy. Under this doctrine, the courts allow recovery in tort for employees who are fired for refusing to violate a clear mandate of public policy.⁷⁶ The problem with this precept lies in the fact that its development has been erratic and not always without contradictions.⁷⁷ Even those who support the doctrine agree that the "Achilles Heel" of exception is in determining what constitutes public policy.⁷⁸ Still, several

not deal with an at-will situation but the interpretation of clear and unambiguous contractual language.

69. *Id.*

70. 79 So. 2d 690 (Fla. 1955).

71. *Id.* at 691.

72. *Id.*

73. 31 So. 246 (Fla. 1901).

74. 156 So. 240 (Fla. 1934).

75. The result in *Wynne* is not as troubling as the court's other holdings because Wynne's complaint and testimony were completely contradictory.

76. See Giuseppe, *supra* note 22, at 754. Before applying the public policy exception most courts require that the plaintiff show more than a mere personal interest in retaining their employment. The employer's actions must harm not only the plaintiff but also society as a whole by circumventing a specific statutory pronouncement. Peck, *supra* note 17, at 263.

77. See Weiss, *supra* note 22, at 1121.

78. See Giuseppe, *supra* note 22; McGuinness, *supra* note 12, at 232 (the threshold question to be addressed in a wrongful discharge case premised upon public policy

courts have been able to formulate a workable definition of public policy. Some courts hold that public policy may be found in legislation, administrative rules, regulations or judicial decisions.⁷⁹ Other courts find public policy within a professional code of ethics.⁸⁰ Certainly, it is beyond dispute that once a legislature enacts a statute prohibiting certain conduct, that conduct is against public policy.⁸¹

exception is whether or not a sufficient expression of public policy is alleged); Peck, *supra* note 17, at 255 (many courts recognize rather ethereal public policies not to be readily found in legislation, constitutions, or judicial opinions); Bouffard, *supra* note 53; Debra Greenberg, Note, *Employment At Will: A Proposal To Adopt The Public Policy Exception In Florida*, 34 U. FLA. L. REV. 614, 629 (1982) (court have long recognized that public policy of one generation might not be the public policy of another); Robert B. Gidding, Comment, *Pierce v. Ortho Pharmaceutical Corp.: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L. REV. 1187, 1193 (1981) ("not all sources express a clear mandate of public policy . . . absent legislation, other sources claimed to be a source of public policy would be subject to case by case judicial determinations"); Grow, *supra* note 22, at 201 (supreme court neglected to determine the proper scope of Arkansas's public policy exception); David J. Monz, Comment, *Wrongful Discharge Law In Connecticut: Time For A Workers' Bill Of Rights Through Enumerated Prohibitions Legislation*, 21 CONN. L. REV. 467, 477 (1989) (the degree to which public policy overrides at-will employment rights generally varies depending on the policies implicated); Comment, *Employment At Will*, *supra* note 63, at 380 (the concept of public policy is vague and subject to dispute when applied).

Some courts encounter little problem in defining the scope of public policy. *See, e.g.* *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) (public policy must be well defined and dominant and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) (discharge motivated by bad faith or malice or based upon retaliation is not in the best interest of the economic system or the public good); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (public policy may be found in legislation; administrative rules, regulations or decisions and judicial decisions and in certain instances a professional code of ethics).

Public policy is also described as:

community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like; it is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation.

BLACKS LAW DICTIONARY 1231 (6th ed. 1990).

79. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

80. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980).

81. *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985). The *Wagenseller* court also noted that a majority of states have either recognized some

While the full parameters of the doctrine are unclear, three definitive types of cases have evolved. First, are those cases where the firings were precipitated by the employee's refusal to obey directions of the employer to commit a crime or act contrary to public policy, or where the employee refused to give false testimony at a trial or administrative hearing.⁸² The second area pertains to those cases involving whistleblowers or employees refusing to violate a code of ethics.⁸³ The last

form of public policy exception or expressed a willingness to consider it under appropriate circumstances. The court concluded that while the interests of the economic system will be served by allowing employers to terminate employees for good cause or no cause, the interests of society will be served if employers are prevented from terminating employees for a cause that is morally wrong. *Id.* at 1031. Administrative rules and regulations can also be said to reflect public policy since all have their genesis in the statute's enabling statute absent any excess of delegated legislative authority.

82. *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1991) (discharged for reporting FAA safety violations); *Jarvinen v. HCA Allied Clinical Lab., Inc.*, 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327 (Fla. 3d Dist. Ct. App. 1985); *Ochab v. Morrison, Inc.*, 517 So. 2d 763 (Fla. 2d Dist. Ct. App. 1987) (refusal to serve intoxicated patron in violation of state dram law); *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (refusal to "pack loans" in violation of federal truth in lending law and state small loan regulation law); *Sides v. Duke Hosp.*, 325 S.E.2d 818, (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985) (refusal to commit perjury); *DeRose v. Putnam Mgt. Co.*, 496 N.E.2d 428 (Mass. 1986) (refusing to testify falsely against fellow employee at employer's demand); *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (1987) (refusing to violate Clean Air Act); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984) (en banc) (fired for instituting accounting practices to insure compliance with federal corrupt practices anti-bribery statute); *Troy v. Interfinancial, Inc.*, 320 S.E.2d 872 (Wash. 1984) (false testimony in deposition in lawsuit of another against employer); *Melchi v. Burns Int'l Sec. Serv., Inc.*, 597 F. Supp. 575 (E.D. Mich. 1984) (discharge for reporting violations to Nuclear Regulatory Commission); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1982) (employee discharged to prevent testimony before grand jury or any subsequent criminal trial); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (refusal to violate anti-trust laws and consent decree); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 265 N.W.2d 385 (Mich. Ct. App. 1978) (employee discharged for refusing to alter results of tests on pollution control reports); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Was. 1977) (en banc) (refusal to commit perjury); *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959) (refusal to commit perjury before state legislature).

83. *City of Miami v. Coll*, 546 So. 2d 775 (Fla. 3d Dist. Ct. App. 1989) (discharge for reporting malfeasance, misfeasance and neglect of duty); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (filing complaint with FDA where employer violated lens testing regulations); *Maus v. National Living Ctrs., Inc.*, 633 S.W.2d 674 (Tex. Ct. App. 1982) (reporting inadequate patient care and neglect

area entails the employee's exercise of a statutory right.⁸⁴ In all cases in which plaintiffs prevailed, the courts recognized that the public's collective good outweighed the employer's right to fire. For example, the North Carolina courts recognized this premise when creating an exception to the at-will doctrine.

In *Sides v. Duke Hospital*,⁸⁵ the plaintiff was employed as a nurse anesthetist for more than eleven years prior to her dismissal.⁸⁶ While on duty, Sides refused to follow a doctor's order to administer anesthetics to a patient because she thought the drug would harm the patient.⁸⁷ The doctor administered the drug and the patient suffered permanent brain damage.⁸⁸ The patient's estate filed suit alleging medical malpractice.⁸⁹ Sides was deposed in the malpractice case but before she gave her deposition, several doctors at Duke and Duke's attorneys told her not to testify about all she observed. Some of the doctors warned her that she would be "in trouble" if she did so.⁹⁰ Despite these warn-

of patients); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (relying on general criminal statutes for proposition that public policy favors citizen crime fighters); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Penn. 1974) (employee complaint over defective casings).

84. *Scott v. Otis Elevator*, 572 So. 2d 902 (Fla. 1991) (discharged for filing workers' compensation claim); *Hummer v. Unemployment Appeals Comm'n*, 573 So. 2d 135 (Fla. 5th Dist. Ct. App. 1991) (discharged for HIV treatment); *Aszkenas v. J.B. Robinson Jewelers, Inc.*, 560 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1990) (fired for serving on federal jury); *Neidhart v. Pioneer Fed. Sav. & Loan Ass'n*, 498 So. 2d 594 (Fla. 2d Dist. Ct. App. 1986) (responding to jury summons); *Blangy v. State*, 481 So. 2d 940 (Fla. 4th Dist. Ct. App.), *rev. denied*, 492 So. 2d 1330 (1986) (discharge because of length of jury duty); *Kilpatrick v. Delaware County Soc'y for Prevention of Cruelty to Animals*, 632 F. Supp. 542 (E.D. Pa. 1986) (OSHA prohibits discharge of employees in reprisal for exercising rights under the Act); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (dismissal in violation of first amendment guarantee); *Mobley v. Southern Plasma Corp.*, 366 So. 2d 480 (Fla. 1st Dist. Ct. App. 1979) (discharge for collective bargaining activities); *Montalvo v. Zamora*, 86 Cal. Rptr. 401 (5th Dist Ct. App. 1970) (implied action under minimum wage statute).

85. 328 S.E.2d 818 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985).

86. *Id.* at 820.

87. *Id.* at 821.

88. *Id.*

89. *Id.*

90. *Sides*, 328 S.E.2d at 821. Such a recommendation by counsel in Florida would certainly violate the rules of professional conduct. See RULES REGULATING THE FLORIDA BAR 4-3.4(a), which states that a lawyer shall not "[u]nlawfully obstruct another party's access to evidence; or . . . counsel or assist another person to do any such act."

ings, Sides testified "fully and truthfully" at the depositions and again at trial.⁹¹ The trial resulted in an award of \$1,750,000 for the patient.⁹² Concerned that her testimony in the case might cause her difficulties in her work with some of the doctors at Duke, Sides asked her supervisor to inform her of any complaints about her work so that she could address them.⁹³ Thereafter, several doctors displayed hostility towards Sides and refused to work with her.⁹⁴ Within a short period of time, Sides' supervisor informed Sides of her inadequate job performance, but refused to give her any specific examples. Sides was told that her performance would be monitored closely for the next three months.⁹⁵ Less than three weeks later, Sides was discharged.⁹⁶ Sides brought an action for wrongful discharge and for wrongful interference with her employment contract.⁹⁷ The trial court dismissed the suit.

In a unanimous decision, the court of appeals reversed the dismissal of the claims and held that Sides stated an action for relief under both contract and tort theories.⁹⁸ The court noted that there was a strong public interest in preventing the obstruction of justice.⁹⁹ As a

91. *Sides*, 328 S.E.2d at 821.

92. *Id.* The defendant doctor viewed Sides as the person who caused them to lose the case.

93. *Id.* The chief nurse refused to do this.

94. *Id.*

95. *Id.*

96. *Sides*, 328 S.E.2d at 821-22.

97. *Id.* at 822.

98. *Id.* at 825-28.

99. *Id.* at 823-24. Speaking for a unanimous court, Judge Phillips wrote:

These offenses are an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given. Indeed, as every citizen of ordinary intelligence must surely know, under our law before any witness can testify in any civil or criminal case he must solemnly affirm or swear that the evidence given by him "shall be the truth, the whole truth, and nothing but the truth." [W]e . . . believe that to deny that an enforceable claim has been stated in this instance would be a grave disservice to the public and the system of law that we are sworn to administer, no principle of which requires that civil immunity be given to those who would defile or corrupt it.

Id. (citations omitted). Section 90.605, Florida Statutes, requires that before testifying a witness must take an oath or affirmation that he will testify truthfully. FLA. STAT. § 90.605 (1991). If a witness refuses to either swear or affirm that he will tell the truth, he will not be allowed to testify. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 605.1

result, the court concluded that no employer could deprive an at-will employee of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case. The court opined: "If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward them for lawlessness at the unjust expense of their victims."¹⁰⁰

Of equal importance was the action of the Texas Supreme Court in *Sabine Pilot Service, Inc. v. Hauck*.¹⁰¹ Hauck was discharged by his employer for refusing to pump the bilges of the employer's boat into the water which would be a violation of federal law.¹⁰² He subsequently sued his employer alleging wrongful discharge. The trial court granted summary judgment for the employer and the court of appeals reversed the judgment. The Texas Supreme Court affirmed.¹⁰³ The supreme court opined that in the intervening ninety seven years since the court first recognized the at-will doctrine in Texas, the employer-employee relationship and changes in American society required that public policy, as expressed in the laws of Texas and the United States, required a very narrow exception to the doctrine.¹⁰⁴ The court was sure to note that the narrow exception covers only the discharge of an employee for the sole reason that an employee refused to perform an illegal act.¹⁰⁵ The concurring justices applauded the decision, characterizing the at-will doctrine as a "relic of industrial times, conjuring up visions of sweat shops described by Charles Dickens," and concluded that the doctrine "belongs in a museum, not in our law."¹⁰⁶

(2d ed. 1984).

100. *Sides*, 328 S.E.2d at 826.

101. 687 S.W.2d 733 (Tex. 1985).

102. *Id.* at 734-35. Hauck saw a sign stating that this practice was illegal. He called the Coast Guard to confirm the illegality of the procedure. After receiving confirmation that the act was illegal, he refused to do what the employer ordered. He was then fired. *Id.*; see Comment, *Labor Law-Texas Employment At-Will-A State Position On Public Policy Comes Into Sharper Focus. Vasquez v. Bannworths*, 707 S.W.2d 886 (1986), 12 T. MARSHALL L. REV. 241 (1986).

103. *Sabine Pilot*, 687 S.W.2d at 734-35.

104. *Id.*

105. *Id.* at 736.

106. *Id.*; Comment, *supra* note 102, at 249. Justice Kilgarlin then observed:

Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws

Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and

V. OF CONTRACT OR TORT

Perhaps the most difficult problem facing the Florida Supreme Court in dealing with an exception to the at-will employment doctrine is whether to treat the exception as a breach of contract or as a tort. Florida courts take a strict doctrinal approach to employer-employee relations and couch their concern in terms of a reluctance to interfere with the inherent right of the employer and employee to contract.¹⁰⁷ This strict doctrinal approach and the courts' refusal to allow an action under tort theory suggests that the Florida courts are more comfortable in defining the employment relationship under traditional contract theory. This may be the result of the courts' perception that contract theory provides a bright line basis for defining the relationship. Thus, the court simply looks to see if the relationship includes an exchange of mutual promises, consideration and mutuality.¹⁰⁸ If any one element is missing, there is no relationship.¹⁰⁹

legal institutions of our society The court admittedly carves out but one exception to employment-at-will, . . . but our decision today in no way precludes us from broadening the exception when warranted in a proper case.

Id.

107. *Hartley*, 476 So. 2d at 1329. One commentator astutely observes: "It is as though the turn of the century values concerning formalism, laissez-faire economics, stare decisis and deference to legislatures . . . still predominate in the South." Susan K. Datesman, Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-At-Will Rule*, 64 N.C. L. REV. 840, 841 (1986).

108. For a good review of the doctrinal basis under contract theory and the necessity of change, see Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980). One commentator suggests that contract theory could be properly applied to the public policy at-will exception the same as if the employer attempted to enforce an illegal condition in a term employment contract. If the court would find void as against public policy a condition allowing abusive conduct in a contract term, that court should not condone the abusive conduct simply because an at will contract is for an indefinite period of time. Illegal conduct is illegal conduct. J. Wilson Parker, *North Carolina Employment Law After Coman: Reaffirming Basic Rights In The Workplace*, 24 WAKE FOREST L. REV. 905, 931 (1989).

109. I believe that the true reasons for this strict doctrinal approach are set forth in Justice Ryan's dissent in *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (1981) (Ryan, J., dissenting).

The deteriorating business climate in this State is a topic of substantial interest. A general discussion of that subject is not appropriate to this dissent. It must be acknowledged, however, that Illinois is not attracting a great amount of new industry and business and that industries are leaving

Tort theory, on the other hand, attempts to reconcile the potentially conflicting sets of interests present in an at-will relationship.¹¹⁰ Courts analyzing the at-will doctrine as a tort, balance the employer's interest in the ability to evaluate its workforce with a sufficient degree of flexibility to discharge an unproductive employee against the employee's interest in freedom from discharge for exercising legal rights or refusing to violate the law.¹¹¹ Once the courts are committed to protecting the employee's interest in the balance, the logical result is to utilize a third interest, the public interest, in the promotion of state public policy.¹¹² In the traditional form of contract based at-will employment, the Florida Supreme Court recognizes only one of these interests, that of the employer's, by granting the employer the absolute right to discharge an employee at-will for good cause, no cause or even morally bad cause.¹¹³

In contrast to Florida's strict doctrinal approach, contract based exceptions to the employment at-will doctrine have evolved from the obligations of the parties arising out of their relationship.¹¹⁴ While

the State at a troublesome rate. I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy which will permit an employer to discharge an unwanted employee, one who could be completely disruptive of labor-management relations through his police spying and citizen crime-fighting activities, only at the risk of being sued in tort not only for compensatory damages, but also for punitive damages.

Id. at 885.

110. See Bouffard, *supra* note 53, at 78-79. The three interest are the employer's interest, the employee's interest, and the public interest.

111. *Id.*

112. *Id.* The courts, therefore, use the public interest to resolve the conflict between the employer and the employee. The overall objective is to balance all three interests without favoring one set of interests over another. *Id.*

113. *Id.*; accord *Smith v. Piezo Tech. and Prof. Adminis.*, 427 So. 2d 182 (Fla. 1983); *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (1980).

114. See Bouffard, *supra* note 53, at 80. In an insightful fashion, Gilmore argues that over the past forty years, we have seen the effective dismantling of the formal system of classical contract theory.

Speaking descriptively, we might say that what is happening is that contract is being reabsorbed into the mainstream of tort. Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. It should be pointed out that the theory of tort into which contract is being reabsorbed is itself a much more

Florida courts assess liability for breach of an expressed contract,¹¹⁵ they refuse to find liability for breach of a policy manual¹¹⁶ or through the implied duty of good faith and fair dealing.¹¹⁷

expansive theory of liability than was the theory of tort from which contract was artificially separated a hundred years ago.

GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

115. *Vienneau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856 (Fla. 4th Dist. Ct. App. 1989); *Maines v. Davis*, 491 So. 2d 1233 (Fla. 1st Dist. Ct. App. 1986); *Grapone v. City of Miami Beach*, 495 So. 2d 838 (Fla. 3d Dist. Ct. App. 1986).

116. *Lurton v. Muldon Mtr. Co.*, 523 So. 2d 706 (Fla. 1st Dist. Ct. App. 1988) (policy manual expressing dismissal only for just cause not enforceable). *Contra Staggs v. Blue Cross of Md., Inc.*, 486 A.2d 798 (Md. Ct. Spec. App.), *cert. denied*, 303 493 A.2d 349 (1985) (provisions in a policy manual which limit the employer's discretion to terminate an indefinite employment or that set forth a required procedure for termination may if properly expressed and communicated to the employee become a contractual undertaking by the employer that are enforceable by the employee). *Accord Woolley v. Hoffmann-LaRoche*, 491 A.2d 1257, *modified*, 499 A.2d 515 (N.J. 1985); *Toussaint v. Blue Cross and Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980), where the court held:

that [an] employer statements of policy such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee

Id. at 892. Thus, where an employer establishes a company policy to discharge for just cause only, pursuant to certain procedures, makes the policy known to the employee and committed itself to abide by its policy, the relationship is not terminable at will.

117. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987); *Cook v. Alexander & Alexander of Conn., Inc.*, 488 A.2d 1295 (Conn. Super. Ct. 1985); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

Although not all courts recognize exceptions or limitations to the employment at will doctrine, courts in thirty-two states have adopted public policy exceptions, eleven states have applied the covenant of good faith and fair dealing, and twenty-nine states have used employee handbooks to find contractual limitations on terminations. A total of thirty-nine states now employ one or more theories to qualify the employment at will doctrine.

Bullock v. Automobile Club of Mich., 444 N.W.2d 114, 119 (Mich. 1989), *cert. denied*, 493 U.S. 1072 (1990) (quoting Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 13-14 (1988)).

The Florida Courts reject the implied duty of good faith and fair dealing as it pertains to at-will employment contracts. *See, e.g. Kelly v. Gill*, 544 So. 2d 1162 (Fla. 5th Dist. Ct. App.), *rev. denied*, 553 So. 2d 1165 (1989), *cert. denied*, 494 U.S. 1029 (1990); *Muller v. Stromberg, Carlson Corp.*, 427 So. 2d 266 (Fla. 2d Dist. Ct. App. 1982). Conversely, the courts are quick to imply a duty of good faith and fair dealing in its commercial contracts. *See Coira v. Florida Medical Ass'n*, 429 So. 2d 23 (Fla. 3d Dist. Ct. App. 1983), and cases cited therein. *See also* FLA. STAT. § 671.203 (1989)

VI. THE TREND CONTINUES

A. *Jarvinen v. HCA Allied Clinical Laboratories, Inc.*¹¹⁸

Sandra Jarvinen was employed by HCA Allied Laboratories. HCA terminated Jarvinen after she responded to a subpoena and testified truthfully against HCA at trial.¹¹⁹ As a result, Jarvinen sued HCA and two other defendants in a three count complaint. Count I, pertaining only to HCA, alleged that HCA terminated Jarvinen in retaliation for her testimony.¹²⁰ She further alleged that her dismissal violated public policy for witnesses to testify truthfully, without coercion, intimidation or threat of adverse consequences.¹²¹ Subsequently, the trial

(every contract or duty within the code imposes an obligation of good faith in its performance).

The Restatement (Second) of Contracts states that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). It is clear that nothing in the Restatement (Second) of Contracts suggests that it should not apply to employment contracts. See Parker, *supra* note 108.

118. 552 So. 2d 241 (Fla. 4th Dist. Ct. App. 1989).

119. *Jarvinen*, 552 So. 2d at 242. Jarvinen was subpoenaed to testify in the trial of Dr. Raul Romaguera, a physician who was suing HCA. The allegations in Jarvinen’s complaint alleged that the testimony was truthful and that HCA viewed Jarvinen’s testimony as detrimental to its defense of the Romaguera lawsuit.

FLA. R. CIV. P. 1.410(e) provides that the “[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.”

120. *Id.*

121. *Id.*

Section 837.012 states:

(1) Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding, in regard to any material matter shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the defendant’s mistaken belief that his statement was not material is not a defense.

Nessmith v. State, 472 So. 2d 1248, 1252 n.6 (Fla. 1st Dist. Ct. App. 1985), *rev. denied*, 484 So. 2d 10 (1986).

“Official proceeding” means a proceeding heard, or which may be or is required to be heard, before any legislative, judicial, administrative, or the other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, or other person taking testimony or a deposition in connec-

court dismissed the suit and entered judgment for HCA.¹²² The Fourth District Court of Appeal affirmed the trial court's decision. The court held that Jarvinen could not state a cause of action since she was an employee at-will.¹²³ Nonetheless, Judge Glickstein, in a specially concurring opinion, urged the Florida Supreme Court to address the issue

tion with any such proceeding.

Id. at 1252 (quoting FLA. STAT. § 837.011(1) (1985)).

FLA. STAT. § 837.021 (1991) states:

(1) Whoever in one or more official proceedings, willfully makes two or more material statements under oath when in fact two or more of the statements contradict each other is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 914.13 (1991) states:

When a court of record has reason to believe that a witness or party who has been legally sworn and examined or has made an affidavit in a proceeding has committed perjury, the court may immediately commit the person or take a recognizance with sureties for his appearance to answer the charge of perjury. Witnesses who are present may be recognized to the proper court, and the state attorney shall be given notice of the proceedings.

FLA. STAT. § 914.14 (1991) states:

(1) It is unlawful for any person who is a witness in a proceeding instituted by a duly constituted prosecuting authority of this state to solicit, request, accept, or agree to accept any money or anything of value as an inducement to:

- (a) Testify or inform falsely; or
- (b) Withhold any testimony, information, document, or thing.

(2) Any person violating any provision of this section shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 914.22 (1991) states:

(1) A person who knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, or offers pecuniary benefit or gain to another person, with intent to cause or induce any person to:

(a) Withhold testimony, or withhold a record, document, or other object, from an official investigation or official proceeding;

(c) Evade legal process summoning that person to appear as a witness, or to produce a record, document or other object, in an official investigation or an official proceeding;

(d) Be absent from an official proceeding to which such person has been summoned by legal process; or

122. *Jarvinen*, 552 So. 2d at 242.

123. *Id.*

presented by Jarvinen.¹²⁴ Judge Glickstein viewed the actual issue as one which concerned whether a cause of action should exist for retaliatory discharge for failure to give false testimony.¹²⁵ His discussion spoke to those jurisdictions which recognize a narrow public policy exception for discharged employees who have chosen to testify truthfully and have consequently lost their jobs.¹²⁶

124. *Id.* at 243. Obviously concerned by the inequity presented in the case, yet bound by precedent of the supreme court, Judge Glickstein wrote: "I . . . write in the hope that the Florida Supreme Court will speak to the issue, given the court's concern for the administration of justice." *Id.*

At common law perjury, subornation of perjury and intimidation of witnesses were offenses. The Florida Legislature broadened the perjury prohibition through legislation. *See supra*, note 121. Other courts have manifested similar attitudes toward perjury offenses. *See Sides*, 328 S.E.2d at 823 ("[t]hese offenses . . . are an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly and a violation of all litigants in this state to have their cases tried upon honest evidence fully given.").

125. *Jarvinen*, 552 So.2d at 243.

126. *Id.* Judge Glickstein referred to several cases cited by Jarvinen in her brief, quoting their rationale but taking no further position on the issue except to indicate that several other courts created exceptions under these circumstances. *See, e.g.*, *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959); *Sides v. Duke Hosp.*, 328 S.E.2d 818, 826 (N.C. Ct. App.), *rev. denied*, 335 S.E.2d 13 (1985); *Roberts v. Atlantic Richfield Co.*, 568 P.2d 764 (Wash. 1977). Judge Glickstein's opinion clearly reflects that he was disturbed by the inequity of the results in this instance and the necessity to encourage persons to testify truthfully. Unfortunately, the court passed up the opportunity to expand upon its discussion, or to utilize other procedural alternatives available to it in order to avoid upholding the trial court's dismissal of the complaint. In that regard, the court might have chosen to certify the question presented in the case to the Florida Supreme Court as one of great public importance. Article Five of the Florida Constitution provides:

(b) Jurisdiction - The supreme court:

. . . .
(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

FLA. CONST., art V, § 3; *see Smith v. Department of Ins.*, 507 So. 2d 1080 (Fla. 1987); *accord FLA. R. APP. P. 9.030(a)(2)(B)(i)-(ii)* (1991).

Under certification jurisdiction, review by the Florida Supreme Court is discretion-

B. *Bellamy v. Holcomb*

More recently, another court proceeding set the stage for the termination of an at-will employee in *Bellamy v. Holcomb*.¹²⁷ Karin Bellamy worked as a bookkeeper for Auto Intelligence Devices.¹²⁸ Bellamy brought an auto negligence action which was unrelated to her employment.¹²⁹ The defense attorney in that case issued a subpoena duces tecum for Holcomb's wage and hour records relating to Bellamy.¹³⁰ Holcomb refused to comply with the subpoena. The defense attorney then subpoenaed the company's bookkeeper. The bookkeeper testified that Holcomb instructed her not to bring or produce Bellamy's person-

ary. Furthermore, since the court of appeal cannot intentionally render a decision which is in conflict with supreme court precedent, certification would have been the only viable alternative in order to redress the inequity perpetrated in *Jarvinen*. The supreme court notes its preference to this method of review. Speaking to the issue in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), the supreme court noted:

This is not to say that the District Court of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.

Id. at 434.

In the same vein, the case must present some indication of a need for immediate resolution in addition to a substantive basis for review. Certainly, dismissal from one's livelihood in lieu of committing perjury satisfies the immediacy requirement. For a thorough review of the "immediate resolution" standard, see *Department of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 737 (Fla. 1981) (England, J., dissenting). Finally, a simple majority of the merits panel at the district court of appeal is all that is needed to certify a question to the supreme court.

Jarvinen subsequently moved the district court of appeal for certification of the question to the supreme court. The court denied certification on November 21, 1989.

127. 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991). The reported case provides no facts. Thus, the facts portrayed in this comment are taken from the brief of the appellant filed before the court of appeal.

128. Appellant's Initial Brief at 1, *Bellamy v. Holcomb*, 577 So. 2d 609 (Fla. 4th Dist. Ct. App. 1991) [hereinafter Appellant's Initial Brief]. Auto Intelligence Devices is the alter ego of appellee Holcomb.

129. *Bellamy*, 577 So. 2d at 610; Appellant's Initial Brief, *supra* note 128, at 5.

130. Appellant's Initial Brief, *supra* note 128, at 5; see FLA. R. CIV. P. 1.410(b) (providing "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein . . .").

The defense attorney made service of the subpoena duces tecum upon the company's records custodian on April 14, 1987. No records were produced in response to it. Appellant's Initial Brief, *supra* note 128, at 5.

nel records.¹³¹ The defense attorney issued and served Holcomb's firm another subpoena duces tecum for a records custodian deposition to be held at Holcomb's office. On the day of the deposition, the attorney was informed upon arrival at the office that the records custodian was out of town.¹³² In response, the trial court in the auto negligence case issued an order to show cause why Holcomb's company should not be held in contempt of court.¹³³ The order further directed that a company representative appear before the court on April 11, 1988.¹³⁴ Holcomb advised Bellamy after learning that he would be subpoenaed, "They'll have to find me first to serve me and I'm not easily found."¹³⁵ To his surprise, Holcomb was found and the trial judge held him in contempt for not producing the subpoenaed documents.¹³⁶ The day following the court hearing, Holcomb discharged Bellamy.¹³⁷ Bellamy instituted an action against Holcomb alleging several different theories of recovery.¹³⁸ Holcomb moved to dismiss the suit with prejudice. The trial court granted Holcomb's motion and Bellamy appealed.¹³⁹

In a per curiam decision, the Fourth District Court of Appeal affirmed the dismissal of the lawsuit without further discussion.¹⁴⁰ Judge Polen, in his specially concurring opinion, believed that this question should be certified to the Florida Supreme Court as one of great public

131. Appellant's Initial Brief, *supra* note 128, at 5. The bookkeeper testified on November 17, 1987. *Id.*

132. *Id.* The subpoena was returnable on March 29, 1988.

133. *Id.*

134. *Id.*

135. Appellant's Initial Brief, *supra* note 128, at 6. Bellamy further alleged that when Holcomb was ordered to show cause, he stated that "I have every intention of firing you." *Id.*

136. *Id.*

137. *Id.* Bellamy's brief reflects the following account:

On April 12, 1988, the day after Holcomb appeared in court, Holcomb's personnel manager approached Bellamy laughing. The following exchange then took place:

Personnel Manager: You know it's coming.

Bellamy: Yes.

Personnel Manager: I have to fire you. I don't know why. I always have to do the dirty work.

Id. Bellamy's brief indicates that she was a conscientious employee who abided by the work rules set out in her employee's handbook.

138. Appellant's Initial Brief, *supra* note 128, at 6; Count I involved Breach of Unilateral Employment Contract; Count II Promissory Estoppel; and Count III Tortious Wrongful Discharge in Violation of Public Policy. *Id.*

139. *Id.*

140. *Bellamy*, 577 So. 2d at 609.

importance.¹⁴¹

VII. THE NEED TO REFORM

Workers' rights continue to suffer in Florida. Relying on the courts' failure to modify the archaic notion that the legislature makes public policy,¹⁴² employers enjoy a premium on continued lawlessness.¹⁴³ Moreover, the rationale for continuing the at-will doctrine is inconsistent in several aspects. First, the employment at-will doctrine is a creation of the Florida Supreme Court and not the legislature or common law.¹⁴⁴ Accordingly, the court is free to modify the doctrine without legislative action.¹⁴⁵ Second, the doctrine of stare decisis is of

141. *Id.*; Judge Polen's proposed certified question reads as follows:

Should a cause of action be recognized for tortious wrongful discharge (from employment otherwise terminable at will), in violation of public policy where an employee is fired because of her participation in a lawsuit which requires that the employee's earning records be produced by the employer pursuant to a subpoena?

Id. Conversely, Judge Stone opined in his specially concurring opinion that the certified question is properly one for legislative determination. *Id.*

142. *See, e.g.,* Shands Teaching Hosp. & Clinics, Inc. v. Smith, 497 So. 2d 644, 646 (Fla. 1986) ("of the three branches of government, the judiciary is the least capable of receiving public input and resolving policy questions based on a societal consensus"); Greenleaf & Crosby Co. v. Coleman., 158 So. 421, 429 (Fla. 1934) ("acts of the legislature practically determine the policy of the state"); State *ex rel.* Church v. Yeats, 77 So. 262, 264 (Fla. 1917) (legislature establishes the public policy of the state unless restrained by some constitutional authority).

143. Applied to the *Jarvinen* holding, the court's holding creates a substantial dilemma: commit the crime of perjury and go to jail, or refuse to commit perjury and be fired. Alternatively, Jarvinen could refuse to testify and be held in contempt and sent to jail. Each alternative, is totally unacceptable given the courts' duty to insure the fair and impartial administration of justice.

The *Bellamy* holding is equally disturbing because the process utilized by the defense attorney was the civil rules of procedure as established by the supreme court. Thus, the results in this case now penalize an employee for using, or in *Bellamy's* case not using, the rules of civil procedure that were promulgated to secure the just, speedy and inexpensive determination in every action. *See* FLA. R. CIV. P. 1.010 (rules shall be construed to secure the just, speedy and inexpensive determination of every action).

144. *See* Chipley v. Atkinson, 1 So. 934 (Fla. 1887); Savannah, F. & W. Ry. v. Willett, 31 So. 246 (Fla. 1901); Florida Fire & Cas. Ins. Co. v. Hart, 75 So. 528 (Fla. 1917); Knudsen v. Green, 156 So. 240 (Fla. 1934); Wynne v. Ludman Corp., 79 So. 2d 690 (Fla. 1955).

145. In *County Sanitation Dist. v. Los Angeles County Employees Ass'n, Local 660*, 699 P.2d 835 (Cal.), *cert. denied*, 474 U.S. 995, (1985), the California Supreme Court wrote:

little import because the cases in which the supreme court premised its original adoption of at-will employment were not based on terminations for refusal to violate the law.¹⁴⁶ Accordingly, the supreme court's con-

Plaintiff's argument that only the legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

Id. at 848.

Section 2.01, Florida Statutes, provides:

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

FLA. STAT. § 2.01 (1989). Since the employment at-will doctrine was not part of the English common law then in effect at that time, the supreme court is free to fashion a modification. *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952), supports this proposition. In that case, the court wrote:

When the rules of common law are in doubt, or when a factual situation is presented which is not within the established precedents, we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion. *It is only proper that in such cases we take into account the changes in our social and economic customs and present day conceptions of right and justice.*

When the common law is clear we have no power to change it.

Id. at 423 (emphasis added). Even more compelling, is the fact that the Florida Supreme Court has not hesitated in other respects to reject anachronistic common law concepts. *See, e.g., Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (abrogating the municipal immunity doctrine); *Morgenthaler v. First Atlantic Nat'l Bank*, 80 So. 2d 446 (Fla. 1955) (adopting American testator intent rule and rejecting English rule); *accord Holland v. State*, 302 So. 2d 806 (Fla. 2d Dist. Ct. App. 1974).

In *State v. Dwyer*, 332 So. 2d 333 (Fla. 1976), Justice Boyd writing for the court stated:

Stare decisis is a fundamental principle of Florida Law. It played an important part in the development of English common law and its importance has not diminished today. Where an issue has been decided by the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court.

Id. at 335 (citations omitted).

146. The doctrine of stare decisis is ordinarily a wise rule of action which should be faithfully adhered to by the court so as to preserve the integrity of the judicial

tinued adherence to the at-will doctrine and reluctance to create a limited exception is an enigma in light of its own declarations. For example, in *Gilliam v. Stewart*,¹⁴⁷ the court stated: "We recognize that in this fast changing world the general welfare requires from time to time reconsideration of old concepts. When the district courts decide that ancient precedents should be overruled, we welcome their views and such should be unhesitatingly rendered"¹⁴⁸ Given those words and its own precedent, the court's reluctance to administer justice in the employment relationship is inconsistent and unsupportable.¹⁴⁹ In the

administration of law. Nevertheless, the courts have the power to disregard the force of judicial precedent in a proper case. 13 FLA. JUR. 2D, *Courts and Judges* §156. Stare decisis is not a universal, inexorable command. *Id.* There are nevertheless occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law and to remedy a continued injustice. *Id.* at § 157. It will not be applied to factual situations when to do so would defeat justice. In that regard, both the Florida Supreme Court and the United States Supreme Court have departed from it to overrule an earlier decision. *Id.*

Changes in social and economic conditions may compel the extension of legal formulas and the approval of new precedents in order to achieve the administration of justice. In other words, when the reason for the rule changes, the rule itself should no longer stand and a new rule in harmony with changed conditions should be recognized. *Id.* at § 158.

While it is the function of courts to interpret rather than make law, it must nevertheless be borne in mind that the common law is not a collection of archaic, abstract legal principles as the briefs of the defendants imply—it is a living system of law that, like the skin of a child, grows and develops customs, practices and necessities of the people it was adopted for change. The common law had its genesis in customs and practices of the people, and its genius, as many of the country's greatest jurists and legal scholars have pointed out, is not only its age and continuity, but its vitality and adaptability.

Sides, 328 S.E.2d at 827.

147. 291 So. 2d 593 (Fla. 1974).

148. *Id.* at 594.

149. There are numerous examples where the supreme court and the district courts of appeal have created judicial remedies or judicially modified common law doctrines without any direction from the legislature. *See, e.g.*, *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla.), *cert. denied*, 464 U.S. 816 (1983) (refusal to submit to polygraph not grounds to dismiss public employee); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (adopting RESTATEMENT (SECOND) OF TORTS § 402(a)); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (rejecting contributory negligence and adopting comparative negligence); *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971) (establishing right of wife to recover for loss of husband's consortium), receding from, *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952); *Randolph v. Randolph*, 1 So. 2d 480 (Fla. 1941) (modifying common law doctrine that gave father superior right to custody of a child);

same vein, the supreme court's rationale in *Hoffman v. Jones*,¹⁵⁰ amply supports the reasons to place the at-will doctrine with the relics of the past. In that case, the supreme court abolished the doctrine of contributory negligence and adopted a comparative negligence system. The court's rationale spoke to the fact that the supreme court judicially adopted the doctrine of contributory negligence in 1886.¹⁵¹ The court noted that it exercises broad discretion in changing or modifying a rule taking into account the changes in our social and economic customs and the present day conceptions of right and justice.¹⁵² The court's own words are instructive:

Be that as it may, our own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated. . . . It may be argued that any change in this rule

Banfield v. Addington, 140 So. 893 (Fla. 1932) (removing common law exemption of a married woman from causes of action based on contract or mixed contracts in tort); *Waller v. First Sav. & Trust Co.*, 138 So. 780 (Fla. 1931) (rejecting common law principle that action for personal injuries abated upon death of tortfeasor); *Continental Ins. Co. v. Herman*, 576 So. 2d 313 (Fla. 3d Dist. Ct. App. 1990) (recognizing new tort of negligent spoliation or destruction of evidence for prospective civil suit).

In *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. 3d Dist. Ct. App. 1984), *rev. denied*, 484 So. 2d 7 (1986), the district court addressed the issue of whether to recognize a cause of action for negligent retention of hospital records. While not a previously recognized tort in Florida, the court wrote:

To be sure, the tort alleged is not a familiar one. That fact, however, hardly prevents it being recognized by us. As we are reminded by Professor Prosser:

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has been recognized before The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Id. at 1312 (quoting WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* § 1, at 3-4 (4th ed. 1971)); *see also* *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla. 1st Dist. Ct. App. 1981) (adopting Greco inference); *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3rd Cir. 1969).

150. 280 So. 2d 431 (Fla. 1973).

151. *Louisville & Nashville R.R. v. Yniestra*, 21 Fla. 700 (1886).

152. *Hoffman*, 280 So. 2d at 434-35.

should come from the Legislature. No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.¹⁵³

The court found that the demise of the doctrine of contributory negligence has been urged by many scholars. Furthermore, the court's own research indicated that at least sixteen states, as well as several industrial countries, have adopted some form of comparative negligence in addition to several industrial countries.¹⁵⁴ In short, the court concluded:

[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community [t]he disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.¹⁵⁵

Unfortunately, these words have little meaning when applied to the at-will relationship. Indeed, to place an at-will employee in a situation where she must choose between obstructing justice, committing a criminal act or loss of employment, engenders that very disrespect that the court speaks disdainfully of in *Hoffman*, and is tantamount to an unconscionable miscarriage, and the destruction of, the administration of justice.

Fourth, the criminal code of Florida is a legislative pronouncement of public policy and can be easily and narrowly applied in the employment at-will context.¹⁵⁶ Fifth, the Florida Legislature's enactments in-

153. *Id.* at 435 (citations omitted).

154. *Id.* at 436. Historically, the doctrine of contributory negligence was adopted by the courts to protect the essential growth of industries, particularly transportation. *Id.* The court also found that the courts created ancillary several doctrines to deal with the harshness of the doctrine.

155. *Id.* (citations omitted).

156. *See* FLA. STAT. § 775.012 (1991). This section reads in pertinent part:
The general purposes of the provisions of the code are:

dicates that it is not inimical to modifying the employment at-will doctrine.¹⁵⁷ For example, in *Segal v. Arrow Industries Corp.*,¹⁵⁸ the employee filed a complaint against his employer seeking damages on the ground that he was wrongfully discharged because he filed a workers' compensation claim.¹⁵⁹ The trial court dismissed the action and Segal appealed. The Third District Court of Appeal affirmed the discharge concluding that no action existed, because Segal was an at-will employee. In response to this decision, the legislature statutorily overruled *Segal* the following year.¹⁶⁰ Lastly, entertaining actions based on a violation of public policy for refusing to commit a criminal act presents no evidentiary impediments as to proof.¹⁶¹ Thus, a judicial

(1) To proscribe conduct that improperly causes or threatens substantial harm or individual or public interest.

(6) To insure the public safety by deterring the commission of offenses

Id. Under the current state of the law in Florida, an employer could direct an at will employee to commit murder at the risk of losing his job. While the employer could certainly be charged with solicitation under section 777.04(2), Florida Statutes (1989), the employee's discharge from employment nonetheless would be upheld. The thought, however, at using the criminal statutes as a basis for civil suit in an at will employment is a question left for another day. Yet, before a criminal statute could be used to imply a cause of action for civil liability, the plaintiff would have to meet the test set forth in *Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc). In that case, the court adopted the United States Supreme Court's analysis in *Cort v. Ash*, 422 U.S. 66 (1975), for determining whether a criminal statute implies a private cause of action. The test as set out by the Court involves a determination by the courts as to:

- (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted;
- (2) whether there is any indication, either explicit or implicit, of a legislative intent to create or deny such a remedy;
- (3) whether judicial implication is consistent with the underlying purposes of the legislative scheme; and
- (4) whether the cause of action is one traditionally relegated to state law and of concern to the states, such that a cause of action ought not to be inferred based solely upon federal law.

Cort, 422 U.S. at 78.

157. See, e.g., *supra* note 9.

158. 364 So. 2d 89 (Fla. 3d Dist. Ct. App. 1978).

159. *Id.*

160. FLA. STAT. § 440.205 (1991).

161. Even if the court were not inclined to create a broad public policy exception to at-will employment, it could easily create a narrow exception to pertain only to those claims which involve an employer requiring an illegal act, or retaliation for using the

modification of the at-will doctrine will pose no great impact on the court system or business relationships.¹⁶²

VIII. A PROPOSED STATUTE FOR WRONGFUL DISCHARGE

Soon after the Florida Supreme Court modifies the at-will doctrine, the Florida Legislature should enact legislation to codify the court's action. The statute should define what offenses will create a

procedures set forth by the supreme court in litigating a dispute. Accordingly, claims could be disposed of quickly since a plaintiff would have to specifically show the criminal statute that an employer ordered the employee to violate. The standard burden for allowing a cause of action under this narrow exception would be the test similarly used to litigate cases under 42 U.S.C. § 1983. In that instance, the plaintiff's burden of establishing a prima facie case would be met if:

- (1) the plaintiff was employed by the employer;
- (2) the employer ordered the plaintiff to violate a specific criminal statute;
- (3) the employee refused to violate the statute, and;
- (4) the employee suffered an adverse employment action by the employer.

If the plaintiff meets this initial showing that the protected conduct was a substantial or motivating reason for discharge, the burden would then shift to the defendant to show that it would have taken the same adverse employment action in the absence of the protected conduct. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); *accord* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987).

Moreover, proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made. An employer may not, in other words, prevail in a mixed-motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present and indeed the case.

Price Waterhouse, 490 U.S. at 252 (citations omitted).

If the employer meets this burden, then the employee would have to show that the reason given was pretextual. If the plaintiff fails to meet this burden, then the suit is dismissed.

162. There has been a concern by some courts that a change in the at-will doctrine will create confusion and uncertainty in business relationships. *See* Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d Dist. Ct. App. 1985); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 270 (Fla. 2d Dist. Ct. App. 1983). Courts so disposed to this theory imply that existing businesses, or the influx of new businesses to Florida, will be harmed. To the contrary, since 1980, one year after the enactment of section 440.205, Florida Statutes, creating a wrongful discharge cause of action for filing a workers' compensation claim, only twenty six cases have been reported.

cause of action, remedies and a statute of limitations. The proposed statute should state the following:

CHAPTER 91-_____

House Bill No. _____

An act relating to wrongful discharge from employment; creating s. _____, F.S., providing for certain definitions, rights and remedies with respect to wrongful and retaliatory discharge from employment; providing for an effective date.

Be It Enacted by the Legislature of the State of Florida;

Section 1: **SHORT TITLE:** This act may be cited as the "Florida Wrongful Discharge From Employment Act".

Section 2: **PURPOSE:** The Legislature finds that the stability of its workforce is indispensable to the state's continued economic growth and to the vitality of its workers. As a result, the necessity in maintaining full employment and the interests of the employer to make legitimate business decisions are best served if the discharge of an employee is regulated under certain circumstances. Accordingly, the Legislature finds that the discharge of an employee for refusing to commit a criminal act or for exercising a statutory right specifically granted by law is against the public policy of this state. In this respect, the Legislature declares that the purpose of this act is to establish certain rights and remedies with respect to wrongful discharge. Except as limited in this act, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party.¹⁶³

Section 3: **DEFINITIONS:** The following definitions apply to this act:

(a) "Constructive Discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative.¹⁶⁴

(b) "Discharge" includes a constructive discharge as defined in subsection (a), any other termination of employment including voluntary res-

163. This section allows for a structured balance to meet the needs of employers to effectively manage and operate a business and in making legitimate business decisions. Furthermore, the Act allows an employer to discharge an unproductive or disruptive with no civil liability at all since the Act protects only those employees for those enumerated causes of action as set forth in section 4 of the Act. *See* MONT. CODE ANN. § 39-2-902 (1991).

164. MONT. CODE ANN. § 39-2-903(1) (1991); *STEELE V. OFFSHORE SHIPBUILDING, INC.*, 867 F.2d 1311 (11th Cir. 1989).

ignation under duress or undue influence,¹⁶⁵ elimination of the job, lay-off for lack of work, failure to recall or rehire, and any other cutback in the number of employees for other than a legitimate business reason.

(c) "Person" includes an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, or unincorporated organization; any other legal or commercial entity; the state; or any governmental entity or agency.¹⁶⁶

(d) "Employee" means a person who works for another for hire but does not include:

- (i) an independent contractor
- (ii) an elected public official or an appointee of an elected public official;
- (iii) a state, county, municipal or civil service public employee already statutorily protected against unjust discharge;
- (iv) a person elected to his employment by:
 - (a) shareholders, a board of governors or an executive committee;
 - (v) a member of top level management;
 - (vi) a person under a fixed term of employment for two or more years who has agreed in writing to waive his or her rights under the Act;
 - (vii) a volunteer serving without any form of compensation;
 - (viii) an individual working for his or her parents, legal guardian or spouse;
 - (ix) an employee on probation, except when such status is used as

165. MONT. CODE ANN. § 39-2-903(2) (1991).

A voluntary act is an act proceeding from one's own choice or full consent unimpelled by another's influence. However, an action cannot be voluntary if it is performed as a result of duress. Duress involves a step beyond mere illegality and implies that a person has been unlawfully constrained or compelled by another to perform an act under circumstances which prevent the exercise of free will. In order to show duress, a plaintiff must show (1) that one side involuntarily accepted the terms of another, (2) that circumstances permitted no other alternative, and (3) that said circumstances were the result of coercive acts of the opposite party. The plaintiff bears the burden of creating a fact issue with respect to a claim of duress. However, duress is not measured by a plaintiff's subjective evaluation of a situation; rather, a plaintiff must tender objective evidence that the retirement or resignation was the product of duress.

McLaughlin v. Department of Nat'l Resources, 526 So. 2d 934, 936 (Fla. 1st Dist. Ct. App. 1988) (citations omitted).

166. FLA. STAT. § 760.02(5) (1991).

a pretext for the exercise of rights enumerated in section 4 of this Act.

(x) domestic servants;

(xi) an individual protected against wrongful discharge under a collective bargaining agreement.¹⁶⁷

(e) "Employer" includes any person employing 15 or more employees, for each working day in each of 20 or more calendar weeks in the cur-

167. Richard D. Himberger, Comment, *Unjust Discharge: Why Nonunion Employees Need A Just Cause Statute*, 25 WILLAMETTE L. REV. 135, 154 (1989).

Particular occupations are not covered by the Act. Elected officials and their appointees (e.g. city managers) are excluded because of the political nature of their appointment. Business officials are excluded for similar reasons.

[In the same vein,] [u]nder state public employee statutes, state and municipal employees may only be dismissed for just cause. These employees can be excluded from the Act's coverage.

Id. Similarly, employees covered by collective bargaining agreements are excluded from coverage since the majority of collective bargaining agreements specifically impose a "just cause" standard for disciplinary action or dismissal. *Id.*

High level managerial employees are excluded for several reasons. First, they are in a substantially better bargaining position and are economically compensated for the risks they bear. Second, they are party to the most sensitive type of strategic business planning and participate in considerable policy making activity. *Id.* at 154-55.

The Act generally excludes independent contractors as non-employees. It also excludes employees working under fixed-term employment contracts of two years or more who have waived their statutory rights against unjust dismissal in writing. Two justifications emerge. First, these individuals have voluntarily contracted away their statutory rights and should have to accept responsibility for their contractual decisions. Second, if such employees are discharged in violation of their contracts, they can sue for breach. In addition, the Act's fixed-term requirement assures that employers cannot coerce their employees into signing short-term waivers of just cause statutory rights.

Volunteer employees, individuals working for their parents, guardians, or spouses, and domestic servants have been excluded Volunteer workers do not receive financial compensation or barter in lieu of such compensation. Therefore, the available remedies of reinstatement with back pay or compensatory damages are inappropriate. Family members and domestic employees are excluded because of the "close personal relationships" that exist.

Because employers often require a probationary period to determine a worker's qualifications, this statute excludes all employees who have completed less than six months of service with their employer The burden is on the [probationary employee] to show that the employer used the six month period to mask willful acts of unjust discharge.

Id. at 155-56 (citations omitted).

rent or preceding calendar year and agent of such a person.¹⁶⁸

(f) "Fringe benefits" means the value of any employer paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.¹⁶⁹

(g) "Good cause" means reasonable, job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.¹⁷⁰

(h) "Lost wages" means the gross amount of wages that would have been reported to the Internal Revenue Service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.¹⁷¹

(i) "Public policy" means the policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, administrative rule or pronouncements of the supreme court;¹⁷²

(j) "Probationary Period" means the initial training period following hiring not to exceed six months;

(k) "Disciplinary Action" includes demotion, loss of pay, suspension, reduction in seniority, transfer, denial of promotion, reassignment or otherwise discriminated against, in regard to his employment with regards to the actions enumerated in section 4 of this Act;¹⁷³

Section 4: ELEMENTS OF WRONGFUL DISCHARGE. A disciplinary action, discharge or constructive discharge is wrongful if it was in retaliation for:

(a) the employee's refusal to commit an unlawful act or violate a regulatory statute or administrative rule or regulation;

(b) the employee's performance of a public obligation;

(c) the employee's exercise of a statutory right;

(d) the employee's testimony before any criminal or civil proceeding, any administrative proceeding, or any arbitration, whether or not compelled by subpoena;

168. The definition of employer is taken from section 760.02(6), Florida Statutes (1989). By affixing the lower limit of employer, the Act will not become unduly burdensome on small employers and will not omit those employees who require the statute's protection the most.

169. MONT. CODE ANN. § 39-2-903(3) (1991).

170. *Id.* at § 39-2-903(5).

171. *Id.* at § 39-2-903(6).

172. *Id.* at § 39-2-903(7); *see supra*, notes 78-84.

173. FLA. STAT. § 112.532(4) (1991).

(e) the employee's report of any suspected violation of federal, state or local law made to any federal agency, state officer, department, board, commission or council of the executive branch or judicial branch of state or federal government, so long as the report was reasonably made and in good faith;

(f) reporting of any criminal or any safety violation of the Federal Aviation Act, 49 U.S.C. § 1301, et.seq., as long as the report was reasonably made and in good faith;¹⁷⁴

(g) the initiation of any civil proceeding seeking recovery for personal injuries; or

(h) where the employer violated the express provisions of its own written personnel policy in discharging an employee for the exercise of subdivisions (a) - (g); or

(i) the discharge was not for good cause and the employee had completed the employer's probationary period of employment.

Section 5: REMEDIES

The remedy for any adverse employment action as described in section 4 of this Act is limited to the following:

(a) Reinstatement with back pay with interest from the date of disciplinary action or discharge;

(b) compensatory damages and/or punitive damages;

(c) removal of any record of the adverse employment action from the employee's personnel record, file, or any other medium used by the employer to maintain records of employees;

(e) injunctive relief;

(d) attorney's fees and costs.¹⁷⁵

174. A provision was specifically included to cover employees who report violations of the Federal Aviation Act. Its purpose is to cover situations where the courts have found that no cause of action under that statute existed for employees discharge for reporting flagrant safety violations of defective aircraft. It allows coverage for employees not protected by section 112.3187(4)(a), Florida Statutes (1989), and furthers the policy of this state to protect its citizens while flying. *Accord* Tritle v. Crown Airways, Inc., 928 F.2d 81 (4th Cir. 1991) (discharged for reporting FAA safety violations).

175. Section 5 provides for several traditional make whole remedies. One remedy included is a provision for reinstatement. It could be argued that in a wrongful discharge proceeding which the Act covers, the employee would not desire reinstatement because the employer-employee relationship will have deteriorated as a result of bad feelings engendered from the dismissal. On the other hand, this provision is entirely consistent with remedies available under the National Labor Relations Act, Title VII, and enumerable other statutes and arbitration awards. The Act will similarly prevent employer misconduct in making such wrongful dismissals since it provides for the

Section 6: LIMITATION OF ACTION

(a) An action may only be maintained under this chapter within 90 days after the date of the adverse employment action or when the aggrieved employee reasonably should have known of the adverse employment action.¹⁷⁶

IX. CONCLUSION

The efficacy of the at-will employment doctrine is in serious doubt. Created by misapplied authority and distortion, the doctrine is treated as a treasured artifact from the nineteenth century by the Florida courts. While many courts have taken the forefront in the eradication or modification of the at-will doctrine, the Florida Supreme Court's unyielding loyalty to the doctrine places a premium on unlawful employer conduct. Consequently, employers have utilized the doctrine as leverage to violate federal and state laws with impunity. Such a result is both illogical and intolerable in light of the supreme court's other pronouncements, and the changes in society. Thus, the supreme court should no longer sanction the discharge by an employer of an employee who refuses to commit an unlawful act. Furthermore, the district courts of appeal should recognize the need for change and utilize the certification procedure to encourage the modification of the rule. Only

award of punitive damages.

Removal of the adverse employment action requires that all evidence of the dismissal will be removed from a personnel record since these records will generally follow an employee from job to job. In addition, where the employee was wrongfully discharged, it is inequitable for the employer to maintain a permanent record indicating that the employee was a "bad employee." This section does not limit any other remedies in tort where the employer slanders or libels a former employee with a prospective employer. If anything, it encourages a "blind" recommendation.

Injunctive relief is provided for in order to allow a court to regulate the conduct of an employer who engages in persistent egregious conduct with respect to its employees. It is an extraordinary remedy and should only be granted in those cases where the employer's conduct is truly outrageous.

Attorney's fees and costs should be provided since it encourages plaintiffs to bring actions against an employer in order to enforce the statute, and encourages members of the bar to take on cases in order to protect workers' rights.

176. An employer should not have to have a potential cause of action lingering for several years, as is allowed under a general personal injury statute of limitations. Thus, section 6 forces a discharged employee to expeditiously bring its claim. This allows for an expedited resolution of the dispute and limits damages. Of course, an employee would be required to mitigate his damages under generally accepted principles of contract.

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in this fashion, will the rule of law prevail over the rule of the market, and force the King of the Turtles to speak instead of shout.