

June 1981

Job Security for the at Will Employee: Contractual Right of Discharge for Cause

Janice E. Linn

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Janice E. Linn, *Job Security for the at Will Employee: Contractual Right of Discharge for Cause*, 57 Chi.-Kent L. Rev. 697 (1981).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol57/iss3/6>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

JOB SECURITY FOR THE AT WILL EMPLOYEE:
CONTRACTUAL RIGHT OF DISCHARGE
FOR CAUSE

Toussaint v. Blue Cross & Blue Shield of Michigan
408 Mich. 579, 292 N.W.2d 880 (1980)

The right to earn a living is one of the most valuable rights enjoyed by citizens in a free society. Nonetheless, for more than a century the American rule of employment has been that, absent an explicit contract to the contrary, an employment relationship of indefinite duration is terminable at the will of either the employee or the employer.¹ The employee may quit at any time without notice or reason and the employer may lawfully discharge the employee "for good cause, for no cause, or even for cause morally wrong."² In contrast, an employment contract of definite duration may be terminated only if there is sufficient cause.³ However, an employer's right to discharge, where the term of employment is indefinite, is not absolute. An employee may be shielded from unjust discharge by the terms of a collective bargaining agreement⁴ or by Title VII of the Civil Rights Act of 1964⁵ where a

1. See 3A CORBIN ON CONTRACTS § 684 (1963); WILLISTON ON CONTRACTS § 1017 (3rd ed. 1957). Under this view of terminability, such an agreement is not a contract at all but "an expression in which the promises are illusory, since refusal to perform is not a breach, being merely an exercise of a reserved power to terminate." 1 CORBIN ON CONTRACTS § 96 (1963). Nonetheless, most cases in which the rule is cited refer to the employment relationship as one of "contract," irrespective of whether that "contract" was held to be enforceable.

2. *Payne v. Western & A.R.R.*, 81 Tenn. 507, 520-21 (1884), *overruled on other grounds sub nom.*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915); See 53 AM. JUR. 2d *Master and Servant* § 43, at 117-18 (1970), where it is said that "[w]hen the employment is not for a definite term and there is no contractual or statutory restriction upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without liability."

Although the at will employee has no protection from arbitrary discharge, he is protected from third party interference with his employment contract. See, e.g., *Porcelli v. Joseph Schlitz Brewing Co.*, 397 F. Supp. 889 (E.D. Wis. 1975); *Hill Grocery Co. v. Carroll*, 136 So. 789 (Ala. 1931) (cases where employees recovered for tortious interference with employment leading to their discharges).

3. The maxim generally followed where the term of employment is stated is that the employment may not be cancelled without a "cause sufficient in law which would justify an employer in discharging an employee." *Vogel v. Pathe Exch., Inc.*, 234 App. Div. 313, 318, 254 N.Y.S. 881, 886 (2d Dep't 1932); see also *Ward v. Consol. Foods Corp.*, 480 S.W.2d 483 (Tex. Civ. App. 1972); *Blumrosen, Employer Discipline: United States Report*, 18 RUTGERS L. REV. 428, 435-37 (1964).

4. The right to bargain collectively is secured in § 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1970 & Supp. IV 1974) [hereinafter referred to as the NLRA]. Seventy-nine percent of the collective bargaining agreements surveyed provided that employees could not be discharged without "cause" or "just cause." [1979] 2 COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS (BNA) 40:1. Where dismissal for just cause only is not provided for by agreement,

discharge is racially or sexually discriminatory or by statute or judicial decision⁶ where a discharge is contrary to public policy. Nonetheless, most⁷ American workers remain subject to the risk of arbitrary or malicious discharge.⁸ A recent Michigan Supreme Court decision, *Toussaint v. Blue Cross & Blue Shield of Michigan*,⁹ may afford increased job protection to a significant number of Michigan's at will workers whose discharges are not otherwise protected by statute or judicial decision.

The issue in *Toussaint*¹⁰ was whether an employer's promise to discharge an employee only for good cause was legally enforceable if the promise was made orally at the hiring¹¹ or was expressed as a com-

arbitrators invariably read such a term into the agreement. Summers, *Individual Protections Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 499-500 (1976) [hereinafter referred to as Summers].

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-15 (1976) [hereinafter referred to as Title VII].

6. Examples of discharges which have been held to be contrary to public policy are: *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (refusing to commit perjury); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979) (filing workmen's compensation claim); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (reporting for jury duty); *Harless v. First Nat'l*, 246 S.E.2d 270 (W. Va. 1978) (attempting to force employer to comply with state and federal consumer credit and protection laws). *But see* *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977), and *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977) (where courts refused to recognize a public policy exception to the at will rule absent legislation); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), and *Campbell v. Ford Indust., Inc.*, 266 Or. 479, 513 P.2d 1153 (1973) (courts claimed to recognize the exception but refused to allow it unless the violation of public policy was substantial).

7. There is no accurate accounting of the number of American workers without express contracts of definite duration. The population at risk of arbitrary discharge is estimated to be between 60-65% of the non-agricultural workforce. *Peck, Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-9 (1979) [hereinafter referred to as *Peck*]. The percentage of workers subject to summary discharge is derived from the following statistics: 96,900,000 persons were employed in the United States in 1976. U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 387, Table 625 (98th ed. 1977). Of that number, approximately 80,000,000 are non-agricultural workers. *Id.* at 400, Table 654; 28% of non-agricultural workers are protected by collective bargaining agreements. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS: GRIEVANCE PROCEDURE (1965). 79% of collective bargaining agreements provided protection from discharge without cause. *See* note 4 *supra*. Approximately 2½ million federal civil employees and 6 million state and local government employees have some type of civil service protection.

8. In contrast, the laws in France, Germany, Italy, Japan, Sweden and the United Kingdom provide workers with varying degrees of protection from arbitrary, unwarranted or poor cause discharge. *See, e.g., Peck, supra* note 7, at 10-13; *Summers, supra* note 4, at 508-19.

9. 408 Mich. 579, 292 N.W.2d 880 (1980).

10. Two cases, *Toussaint v. Blue Cross & Blue Shield of Michigan*, 79 Mich. App. 429, 262 N.W.2d 848 (1978), and *Ebling v. Masco Corp.*, 79 Mich. App. 531, 261 N.W.2d 74 (1977), were consolidated for appeal.

11. *Walter Ebling and Charles Toussaint* claimed that they were promised they would not be discharged except for cause on the occasion of their respective hirings. 408 Mich. at 597 n.5, 292 N.W.2d at 884 n.5.

pany policy in its personnel manual.¹² The Michigan Supreme Court held that such a promise could become part of the employment contract even though there had been no mutual intention to create contractual rights in the employee¹³ and even though the employee did not learn of the policy until after the employment had commenced.¹⁴

This comment will review the history and recent erosion of the employment at will doctrine and discuss the limits of legislatively and judicially secured job protection prior to *Toussaint*. Next, good cause as a standard for termination will be discussed. Then, the comment will present and analyze the opinion in *Toussaint*, focusing on the court's contention that it was forging no new path but was merely clarifying the law which had long been misinterpreted.¹⁵ Finally, this comment will consider the possible legal and logistical effects of *Toussaint* on the future of job protection for at will employees.

HISTORY OF THE AT WILL DOCTRINE

A number of early American cases¹⁶ followed the English rule that, unless otherwise specified, a hiring was presumed to be for one year.¹⁷ But in 1877, H.G. Wood announced the American rule in his treatise on master-servant relationships:¹⁸

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 . . . but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. . . .¹⁹

Although Wood neither justified this rule nor correctly interpreted the

12. *Toussaint* claimed that representations made in his employer's personnel manual formed a part of his employment contract. *Id.*

13. *Id.* at 613-15, 292 N.W.2d at 892.

14. *Id.*

15. *Id.* at 600, 292 N.W.2d at 885.

16. *See, e.g.*, *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891); *Davis v. Gorton*, 16 N.Y. 255 (1857); *Bascom v. Shillito*, 37 Ohio St. 431 (1882).

17. The English common law rule evolved from the Statute of Labourers which provided that apprentices could be discharged only "on reasonable cause." 1 W. BLACKSTONE, COMMENTARIES 426 (1879). Laborers who did not reside with the master or who were hired by the day or week were not similarly protected. *Id.* at 426-27. Beginning in the 19th century, the English rule was that "unless otherwise specifically agreed, employment could be terminated only after a notice period fixed by the custom of the trade, or a reasonable time if there were no custom, unless there was cause for a summary dismissal." Peck, *supra* note 7, at 11. In 1971 employees in the United Kingdom won statutory protection against unfair dismissal unless based upon an employee's capability, qualification, conduct, redundancy or other substantial reason. Industrial Relations Act, 1971, §§ 22, 24, 41 Hal. Stat. §§ 2062, 2088, 2090, 2091 (1971 Cont. Vol.).

18. H. WOOD, MASTER AND SERVANT § 136 (2d ed. 1886).

19. *Id.* at 283 n.5.

four American cases that he cited,²⁰ the doctrine was accepted quickly, often without question.²¹

One reason for the swift adoption of the terminable at will rule was that it purportedly enhanced America's economic and industrial development.²² Moreover, against the reigning philosophy of *laissez faire*, the rule was considered equitable: The employer's right to control his workforce by retaining discharge discretion was balanced against the worker's right to terminate the employment arrangement if employment conditions became unfavorable to him.²³

As the rule evolved, numerous contracts for permanent employ-

20. The cases cited by Wood are *Wilder v. United States (Wilder's Case)*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); *DeBriar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871).

The *Tatterson* and *Franklin* cases contradict Wood's rule and evidence recoveries by employees for wrongful discharge, despite indefinite term employment contracts. In *Tatterson*, the plaintiff continued to work after a contract of definite term had expired and the jury found that a contract of similar term could be implied. In *Franklin*, four months pay was awarded to a mining captain who had been promised stable employment but was fired after eight months. The jury found evidence sufficient to indicate a one year hiring.

Although an employer and his former employee were adverse parties in *DeBriar*, the cause of action was for wrongful eviction and not for improper discharge. The *DeBriar* court held that the employer could evict a former employee from the employer's lodging after the employment contract expired so long as no force was used. Finally, *Wilder's Case* is not even tangentially related to discharge issues because it involved a dispute over a commercial contract. In *Wilder*, a private merchant contracted to transport goods to the United States Army. When the contract was ended, the merchant, aware that the quartermaster could find no other delivery source, insisted on an increased transporting fee. The Court of Claims held that the Army's silence in response to the proposed increase constituted acceptance of the new term. The Supreme Court reversed, holding that the statute of limitations on the claim had run.

21. *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895), is credited as being the first case in which Wood's rule is cited. Note, *Implied Contract Rights to Job Security*, 26 STANFORD L. REV. 335, 341-42 (1974) [hereinafter referred to as Stanford]; *Harrod v. Wineman*, 146 Iowa 718, 718, 125 N.W. 812, 813 (1910), where the court adopted the rule and indicated that it relied for its authority on cases too numerous to mention.

22. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 468-69 (1980) [hereinafter referred to as Blackburn]; Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) [hereinafter referred to as Blades].

23. The United States Supreme Court elevated an employer's privilege of discharge to an absolute constitutional right. *Adair v. United States*, 208 U.S. 161 (1908). In *Adair*, a statute prohibiting the discharge of a railroad employee because of his union membership was declared unconstitutional. The Court reasoned that the freedom of contract allowed an employer to dispense with the services of an employee for union membership, just as the employee was at liberty to quit the employ of an employer who would not hire union men. Such refusal of business relations might rest upon "reason, or [as] the result of whim, caprice, prejudice or malice." *Id.* at 173. The Court held that legislation to the contrary was an arbitrary interference with the freedom of contract as well as a violation of the fifth amendment's guarantee of the right not to be deprived of property without due process. *Id.* at 175-76. *Accord*, *Coppage v. Kansas*, 236 U.S. 1 (1914).

The employer's privilege of discharge, however, has long since been discredited as a constitutional right. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the NLRA was upheld. *Accord*, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941), where the Court noted that the course of its decisions since *Adair* had completely sapped that case of its authority.

ment were held to be indefinite in term and, therefore, were considered terminable at will.²⁴ The courts' rationalization of how "permanent" employment could be so tenuous was the explanation that the term "permanent" described the type of work offered rather than its duration.²⁵ Permanent or lifetime employment thus was distinguished from temporary or transient work which could be for a specific but short term. For example, in *Arentz v. Morse Dry Dock & Repair Co.*,²⁶ the New York Court of Appeals said that permanent employment could imply nothing but indefinite term employment. The *Arentz* court refused to believe that an employer would bind himself for a lifetime to a worker whom he had not known prior to the hiring.²⁷

Despite the finding that "permanent" employment was not to continue forever, early cases that followed Wood's rule did not contemplate that a discharge could be made summarily or without cause.²⁸ The leading cases standing for this enlarged rule are *Perry v. Wheeler*²⁹ and *Lord v. Goldberg*.³⁰ In *Perry*, a minister was promised permanent employment and the lifetime use of the rectory. When the purpose of the contract was thwarted because of serious disagreements between the minister and his congregation, the congregation sought to remove the minister from his pulpit.³¹ The *Perry* court held that permanent employment meant employment only until one or another of the contracting parties had reason to end the relationship. The court further held that dissolution of the pastoral relationship was proper only if the dissatisfied party gave reasonable notice to the minister and only "upon fair and equitable terms."³²

In *Lord*, the employee had a written contract for permanent employment as a solicitor for a grocery store, but only for so long as the employee used his best efforts on behalf of the proprietor. Apparently,

24. See, e.g., *Alabama Mills v. Smith, Inc.*, 237 Ala. 296, 186 So. 699 (1939); *Perry v. Wheeler*, 75 Ky. 541 (1876); *Carnig v. Carr*, 167 Mass. 544, 46 N.E. 117 (1877); *Roxanna Petroleum Co. v. Rice*, 107 Okla. 161, 235 P. 502 (1924); *Forer v. Sears, Roebuck & Co.*, 36 Wis. 2d. 388, 153 N.W.2d 587 (1967); see generally 53 AM. JUR. 2d., *Master and Servant* § 32 (1970); Annot., 60 A.L.R.3d. 226 (1974).

25. 53 AM. JUR. 2d, *Master and Servant* § 32 (1970); Annot. 60 A.L.R.3d 226 (1974).

26. 249 N.Y. 436, 164 N.E. 342 (1928).

27. *Id.* at 442, 164 N.E. at 343.

28. See, e.g., *Perry v. Wheeler*, 75 Ky. 541 (1877); *Lord v. Goldberg*, 81 Cal. 596, 22 P. 1126 (1889).

29. 75 Ky. 541 (1877).

30. 81 Cal. 596, 22 P. 1126 (1889).

31. The rift between the minister and his congregation was considerable. Despite the recommendation for dissolution of the relationship by an ecclesiastical review board, the minister stubbornly clung to the rectory and refused to be ousted. 75 Ky. at 547.

32. *Id.* at 549.

the employee had misrepresented his qualifications and could not perform as expected. Relying on *Perry*, the *Lord* court held that the employment was indefinite and, therefore, severable, but only "for some good reason."³³ The court found that misrepresentation of one's capabilities was good cause for dismissal.

The merger of Wood's rule that an indefinite hiring is terminable at will³⁴ with the *Lord* and *Perry* corollary that a firing must be effected only for good cause was short-lived. Subsequent courts dismissed the requirement that good cause be a condition precedent to the firing of a permanent employee and, in effect, ignored the reasonable expectations of a generation of employees.³⁵ By the early twentieth century, the prevalent formula was: "permanent employment equals indefinite employment equals employment at will."³⁶

Despite its broad acceptance, the "inflexible" terminable at will rule has not always been followed mechanically. For example, a few courts have considered the contractual stipulation of an employee's compensation to be indicative of the duration of the hiring. In such cases, the courts often find that the stipulation of pay in terms of a stated weekly, monthly, annual or other time period constitutes some basis for an inference that the employment is for a definite term which is equal in length to the same time period for which an employee is paid.³⁷

A second approach used by courts is to analyze the circumstances surrounding the employment to ascertain the true intentions of the parties.³⁸ The usual rule applied is that unless the intentions are so vague as to be indecipherable, an indefinite term contract will not be pre-

33. 81 Cal. at 602, 22 P. at 1128.

34. See text accompanying notes 18-20 *supra*.

35. See, e.g., *Sullivan v. Detroit, Y. & A.A. Ry.*, 135 Mich. 661, 98 N.W. 956 (1904).

36. See *Stanford*, *supra* note 21, at 345.

37. See, e.g., *Sandt v. Mason*, 208 Ga. 561, 67 S.E.2d 767 (1951) (weekly pay indicates definite employment for one week); *Putnam v. Producers' Livestock Marketing Ass'n*, 256 Ky. 196, 75 S.W.2d 1075 (1934) (annual salary indicates a one year contract); *Alkire v. Alkire Orchard Co.*, 79 W.Va. 526, 91 S.E. 384 (1917) (employment for a stipulated monthly salary is employment for one month's time); *Lowenstein v. President & Fellows of Harvard College*, 319 F. Supp. 1096 (D.C. Mass. 1970) (applying Massachusetts law) (annual pay is some evidence supporting finding of definite term employment); *but cf.* *Atwood v. Cutiss Candy Co.*, 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959), and *Justice v. Stanley Aviation Corp.*, 35 Colo. App. 1, 530 P.2d 984 (1974) (cases where the period for which compensation is to be earned does not, standing alone, create a presumption that the parties intended the hiring to be for other than an indefinite period).

38. *Littel v. Evening Star Newspaper Co.*, 120 F.2d 36 (D.C. Cir. 1941), is the leading case. The court said that even absent special consideration, where the parties clearly intend to make a contract for permanent employment, such a contract is enforceable and not terminable at will. See text accompanying notes 44-49 *infra*. See also *Drzewiecki v. H.&R. Block, Inc.*, 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972); *McCall Co. v. Wright*, 133 App. Div. 62, 68, 117 N.Y.S. 775, 779 (1909) (although a specific term was not expressed by precise words, the surrounding circum-

sumed to be at will.³⁹

Those courts which look to the intentions of the parties describe two exceptions to the at will rule. One exception states that contracts for permanent employment are at will unless the employment contract is marked by distinguishing features, provisions or consideration over and above the services to be rendered.⁴⁰ For example, an employee's longevity of service⁴¹ or an employer's promises capable of inducing reasonable reliance of job security⁴² have been found to distinguish in-

stances determined that the whole contract was "instinct with . . . obligation"); *see also* 3A CORBIN ON CONTRACTS § 684 (1963).

39. *Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co., Inc.*, 232 N.Y. 112, 133 N.E. 370 (1921); *Wiener v. Pictorial Paper Packaging Corp.*, 303 Mass. 123, 20 N.E. 458 (1897). *But cf.* *Stevenson v. ITT Harper, Inc.*, 51 Ill. App. 3d 568, 366 N.E.2d 561 (1977) (where there is no ambiguity, a court will not add covenants to a contract simply to reach a more equitable result).

40. *See, e.g.*, *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.C.N.H. 1974), and *Prussing v. General Motors Corp.*, 403 Mich. 366, 269 N.W.2d 181 (1978) (cases where the longevity of an employee's service distinguished a contract otherwise terminable at will); *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 291 P.2d 91 (1955) (after employer induced employee not to resign by offering fringe benefits, arbitrary discharge was improper); *Wiener v. Pictorial Paper Package Corp.*, 303 Mass. 123, 20 N.E.2d 458 (1939) (where employee took charge of stock, received a stipulated percentage of sales and after six months was to draw his own contract, arbitrary discharge was improper); *Werner v. Biederman*, 64 Ohio App. 423, 28 N.E.2d 957 (1940) (contract to employ an attorney for a very special task so long as employer is in business is enforceable); *But cf.* *Buyan v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970) (applying Illinois law) (where employee was fired one month after arriving in Saudi Arabia to begin a job which, according to employer's tax records, was for 18 months, no features were found to distinguish the contract from an otherwise at will relationship); *Odom v. Bush*, 125 Ga. 184, 53 S.E. 1013 (1906) (where plaintiff resigned his position of 25 years, sold his home and stock in the company and moved to a new town to help another begin a business, contributed part of his salary and the profits from the sale of his house and stock to start-up capital for the new venture and was fired when the venture prospered, the court found no evidence of other than an at will contract); *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937) (resigning a current job and selling a house are merely activities to enable an employee to accept new employment).

41. *See, e.g.*, *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.C.N.H. 1974); *Prussing v. General Motors Corp.*, 403 Mich. 366, 269 N.W.2d 181 (1978). *But see* *Hernden v. Consumers Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419 (1976) (despite 28 years of service, indefinite term employment is at will and an employee may be fired for an arbitrary reason).

42. *See, e.g.*, *Hardin v. Eska Co.*, 256 Iowa 371, 127 N.W.2d 595 (1964) (discharge was improper where plaintiff incurred costs by promoting employer's product and hiring new salesman subsequent to employer's promise of an exclusive sales territory); *accord*, *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. 1959). The theory upon which recovery is based in cases of detrimental reliance is promissory estoppel. The widely accepted statement of the theory is found in § 90 of the RESTATEMENT (SECOND) OF CONTRACTS (Tentative Draft No. 7 1972):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee of a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

In its classic form, promissory estoppel is a device for validating promises separate from consideration. According to the Restatement, the doctrine is not formulated either as a species of consideration or as an element in the bargain-type of contract. Rather, promissory estoppel is applicable where the bargained for element of consideration is missing but a promise has induced detrimental reliance. J. MURRAY, MURRAY ON CONTRACTS § 92, at 201 (2d ed. 1974). An example is the gratuitous promise. Increasingly, however, courts are treating the unbargained for reliance as a species of consideration and hold that an informal contract is formed. *See, e.g.*, *Porter v. Com-*

definite term employment contracts otherwise terminable at will.

The second exception allows the harshness of the at will rule to be avoided only where the employee pays consideration in addition to his services.⁴³ The rationale underlying the extra consideration exception is that the employee is said to have purchased his employment by conferring a benefit upon his employer greater than the value of his services and thereby has suffered a detriment.⁴⁴ An example is where an employee gives up the right to sue his employer for a work-related injury in exchange for the employer's promise of lifetime employment.⁴⁵

The courts which recognize the payment of extra consideration as the only exception to the at will rule generally hold that without extra consideration the employment contract must fail for lack of mutuality.⁴⁶ The doctrine of mutuality of obligation requires that each party to a contract be bound or neither is bound.⁴⁷ The doctrine typically applies to bilateral contracts⁴⁸ where each party makes one or more

missioner, 60 F.2d 673, 675 (2d. Cir. 1932); *Miller v. Lawlor*, 245 Iowa 1144, 1152, 66 N.W.2d 267, 272 (1954). See also Note, *Protection of Aesthetic Interest*, 41 IOWA L. REV. 296, 300 (1956).

43. See, e.g., *Foster Wheeler Corp. v. Zell*, 250 Ala. 146, 33 So. 2d 255 (1947); *Gerald B. Lambert Co. v. Flemming*, 169 Ark. 532, 275 S.W. 912 (1925); *Lord v. Goldberg*, 81 Cal. 596, 22 P. 1126 (1889); Annot., 60 A.L.R.3d 226, §§ 4-6 (1974) and the cases collected therein.

44. See, e.g., *Alabama Mills, Inc. v. Smith*, 237 Ala. 296, 186 So. 699 (1939) (employee relinquished claim against employer for work-related injury in exchange for promise of lifetime employment); *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305 (Iowa 1971) (plaintiffs were induced to sell their businesses to defendant as an incident to employment). But some cases have denied recovery because no economic or financial benefit accrued to the employer despite a detriment to the employee. See, e.g., *Rape v. Mobile & O. R.R.*, 136 Miss. 38, 100 So. 585 (1924) (substantial moving expenses incurred by employee do not benefit the employer); *Forer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967) (an employee who had resigned for ill health and was induced to sell his farm and livestock at a loss to return to manage his former employer's concern cannot claim a benefit to the employer).

45. See, e.g., *F.S. Royster Guano Co. v. Hall*, 68 F.2d 533 (4th Cir. 1934) (applying North Carolina law); *Alabama Mills, Inc. v. Smith*, 237 Ala. 296, 186 So. 699 (1939); *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 485, 111 S.E. 857 (1922).

46. See, e.g., *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975), a case factually similar to *Toussaint* in that the employee claimed that he was discharged in violation of terms expressed in his employer's handbook. In *Shaw*, the appellate court said that:

Even assuming, *arguendo*, that the handbook . . . [was] part of the contract, in the absence of a promise on the part of the employer that the employment should continue . . . for a period of time that is either definite or capable of determining, the employment relationship . . . is terminable at the will of the employer . . . There being no binding promise on the part of the employee that he would continue in the employment, . . . [the employment] is terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforceable. . . .

Id. at 779. See also Annot., 60 A.L.R.3d 226 (pt. II 1974) and the cases collected therein.

47. See, e.g., *Storm v. United States*, 94 U.S. 76 (1876); *Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (2d Cir. 1908) (applying New York law); *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937).

48. See, e.g., *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213 (1962). When the act is wholly or partially performed "[s]uch performance ordinarily indicates acceptance as well as furnishing the consideration." *Id.* at 531-32, 117 N.W.2d at 221. See also *Chinn v. China*

promises to the other. An employment contract, however, is generally unilateral because the employer is seeking only an act or performance rather than a return promise. Consequently, in those jurisdictions requiring mutuality of obligation to support a contract, the employment contract is generally held to be unenforceable because the employee has not made a return promise or suffered a detriment in return for the employer's promise of permanent employment or his promise not to discharge except for cause. Where extra consideration is paid by the employee, however, some courts will enforce the employer's promise because the employee has suffered a detriment similar to the detriment suffered by the employee who makes a return promise in a bilateral contract.

The modern view, however, is that consideration and not mutuality of obligation is necessary to support a contract.⁴⁹ Section 75 of the Second Restatement of Contracts defines consideration as either a bargained for performance or a return promise.⁵⁰ Therefore, both the uni-

Nat'l Aviation Corp., 131 Cal. App. 2d 98, 291 P.2d 91 (1955); Delaware Trust Co. v. Delaware Trust Co., 43 Del. Ch. 186, 222 A.2d 320 (1966); 1A CORBIN ON CONTRACTS § 152, at 3 (1963).

49. See, e.g., Ryan v. Upchurch, 474 F. Supp. 211, 217 (S.D. Ind. 1979); Toussaint v. Blue Cross, 408 Mich. 579, 600, 292 N.W.2d 880, 885 (1980); Stauter v. Walnut Grove Prods, 188 N.W.2d 305, 311 (Iowa 1971); Standard Oil Co. v. Veland, 207 Iowa 1340, 1343, 224 N.W. 467, 469 (1929); RESTATEMENT (SECOND) OF CONTRACTS § 81, at 64 (Tentative Draft No. 7 1972); 1A CORBIN ON CONTRACTS § 152, at 2-6 (1963); 1 WILLISTON ON CONTRACTS § 105A, at 422 (1957); Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 525 (1914). See also [1980] LAB. L. REP. (CCH) (1 State Laws) ¶ 47,000 (state laws abolishing the requirement of mutuality of contract).

Despite some courts' steadfast insistence on mutuality of obligation as a requirement to enforceability of the indefinite term employment contract, courts in other contexts uniformly hold otherwise. For example, "a promise that is voidable because of infancy, or insanity, or because of fraud, duress, or illegality, can be, nevertheless, consideration to make a counter-promise binding and enforceable." J. MURRAY, MURRAY ON CONTRACTS § 90, at 192 (2d ed. 1974).

Where mutuality of obligation has been abolished, there is imposed on the employee the duty to perform his services in a skillful and workmanlike manner. Failure to perform services accordingly may be cause for discharge, where cause is required. See, e.g., Ingram v. Dallas County Water Control and Improvement Dist., 425 S.W.2d 366 (Tex. Civ. App. 1968). See also Nash v. Sears, Roebuck & Co., 383 Mich. 136, 174 N.W.2d 818 (1970) (employer may be entitled to damages as a result of unworkmanlike performance by employee); 9 WILLISTON ON CONTRACTS § 1012C (3d ed. 1967).

50. Section 75 of the RESTATEMENT (SECOND) OF CONTRACTS (Tentative Draft No. 7 1972) sets forth that:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance of return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or
 - (b) a forbearance, or
 - (c) the creation, modification or destruction of a legal relationship.

The phrase "bargained for" is explained in Comment b:

[I]t is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. But it is

lateral contract where a performance such as work is sought and the bilateral contract where mutual promises are exchanged are enforceable. Mutuality of obligation is but one indication of valid consideration. Where any other consideration is found, mutuality of obligation is unnecessary.⁵¹

Moreover, the law of contracts does not prohibit a promisor from obligating himself to do two or more things while exacting in return only a single promise or performance.⁵² Accordingly, an employer could promise to pay wages and not to discharge an employee without cause as well as to confer a number of other benefits on the indefinite term employee in exchange for the employee's services. Once the employee has partially performed in accordance with the employee's specifications, the employer is bound to retain the employee unless there is good cause to discharge him. At least with respect to employment contracts, however, this view of contracts is seldom acknowledged because many courts steadfastly cling to the notion that mutuality of obligation is needed in order to enforce a contract.

EROSION OF THE TERMINABLE AT WILL RULE

Early in the twentieth century the economy was stable and American business was transformed from the small shop into the giant industrial complex. The power of the employer over the at will employee became awesome.⁵³ An employee had scant chance of winning increased wages or working conditions in the large, impersonal setting. Theoretically, an at will worker was still free to quit when he chose. Realistically, however, he knew that jobs in the cities were scarce and that thousands of unskilled and undemanding immigrant workers waited anxiously to replace him. Thus, it was only the employer who was sheltered by the terminable at will rule.⁵⁴

The widespread insecurity of industrial workers largely fueled the

not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present or there is no bargain.

RESTATEMENT (SECOND) OF CONTRACTS § 75 (Tentative Draft No. 7 1972).

51. 1A CORBIN ON CONTRACTS § 152, at 6 n.5 (1963).

52. 1 CORBIN ON CONTRACTS § 125, at 535 (1963); J. CALMARI & J. PERILLO, CONTRACTS § 75, at 146 (1970).

53. See Blades, *supra* note 22; Blackburn, *supra* note 22.

54. No doubt the employer sometimes is a "loser" under the at will rule. For example, where an employee was trained in a specialized or developing technology, the employee, free by the at will rule to sell his skills at a premium in a scarce market, can leave his employer without an equivalently trained replacement.

union movement and swelled its ranks.⁵⁵ Organized labor's power was recognized with the passage of the NLRA⁵⁶ in 1935. Although the NLRA does not provide that an employee shall be discharged only for cause, the majority of the unionized workforce subsequently became protected from unjust discharge by the terms of a collective bargaining agreement.⁵⁷ Other employees are now protected by federal law from discharge due to their race, color, religion, sex or national origin⁵⁸ or age.⁵⁹ An employee is also protected from arbitrary dismissal if he is a returning veteran,⁶⁰ or civil servant⁶¹ or if his wages have been garnished for any one indebtedness.⁶² A number of states have enacted similar statutes.⁶³

Thus, statutory protection from arbitrary or unjust discharge exists, but only for select workers. Between sixty and sixty-five percent of the nonagricultural workforce is still subject to the risk of unjust dismissal.⁶⁴ This schism between protected and unprotected workers has

55. See generally A. BLUM, A HISTORY OF THE AMERICAN LABOR MOVEMENT (1972); G. HILDEBRAND, AMERICAN UNIONISM: AN HISTORICAL AND ANALYTICAL SURVEY (1979).

56. National Labor Relations Act of 1935, Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-168 (1970 & Supp. IV 1974)).

57. Sections 8(a)(1) and 8(a)(3) respectively prohibit the discharge of employees for exercise of their right to organize and bargain collectively and discrimination in employment due to union membership or discouraging union membership. See [1980] LAB. L. REP. (CCH) (1 State Laws) ¶ 47,000 (statutory texts of comparable state laws). The right to bargain collectively is secured in § 7 of the NLRA. Seventy-nine percent of the collective bargaining agreements surveyed provided that employees could not be discharged without just cause. [1979] 2 COLLECTIVE BARGAINING: NEGOTIATIONS & CONTRACTS (BNA) 40:1. Where dismissal for just cause is not provided for by agreement, arbitrators invariably read a good cause term into the agreement. See Summers, *supra* note 4, at 499-500.

Federal law does prohibit the discharge of public employees covered by civil service law or regulation except "for such cause as will promote the efficiency of the service." 5 U.S.C., § 7501(a) (1976). State and local employees have varying degrees of job protection. See, e.g., J. WEISBERGER, JOB SECURITY AND PUBLIC EMPLOYEES (1973); Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297 (1974).

58. Title VII, 42 U.S.C. §§ 2000e through 2000e-15 (1976), prohibits employment discrimination on the basis of race, creed, nationality and sex. Title VII also has been held to prohibit discharges due to height, weight and marital status. See, e.g., *Dothard v. Rawlinson*, 430 U.S. 321 (1977) (height and weight are improper standards for excluding applicants for positions as prison guards); *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (marital status); cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (where plaintiff meets the *prima facie* burden of proving racial discrimination, employer may overcome by showing legitimate reasons for the discharge and that such reasons are not mere pretext).

59. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 631-34 (1976).

60. Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. § 2012(A) (Supp. IV 1974).

61. Civil Service Reform Act of 1969, 5 U.S.C. § 7501 (Supp. II 1978).

62. Consumer Credit Protection Act of 1969, 15 U.S.C. § 1674(a) (1976).

63. See, e.g., Michigan Fair Employment Practices Act, Mich. Comp. Laws §§ 423-310 (1978); Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. §§ 951-954 (1964).

64. See note 7 *supra*.

led to a number of scholarly articles advocating change.⁶⁵ Professor Lawrence Blades spearheaded the reform movement, calling upon the courts to recognize a new tort: abusive discharge.⁶⁶ Blades argued that contract law, primarily because of the confusion over consideration and mutuality concepts,⁶⁷ provides little relief from unjust dismissal. Tort law, he felt, was "a more elastic principle," pervaded by emphasis on wrongful or ulterior motive.⁶⁸

A number of courts responded to Blades' challenge by recognizing the tort of abusive or retaliatory discharge. The tort, however, has been limited to situations where the dismissal contravenes public policy.⁶⁹ Using this tort concept, courts have found that at will employees have been wrongfully discharged when the basis for the discharge has been for serving on juries,⁷⁰ for refusing to commit perjury,⁷¹ for filing workmen's compensation claims,⁷² or for "whistle-blowing" on fellow em-

65. See, e.g., Blackburn, *supra* note 22; Blades, *supra* note 22; Peck, *supra* note 7; Summers, *supra* note 4; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1979) [hereinafter referred to as Harvard]; Note, *A Remedy for Malicious Discharge of the At-Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758 (1975) [hereinafter referred to as Connecticut]; STANFORD, *supra* note 21; Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1974) [hereinafter referred to as Buffalo]; and Comment, *New Hampshire Supreme Court Recognizes Cause of Action for Malicious Discharge—Monge v. Beebe Rubber Co.*, 8 CREIGHTON L. REV. 700 (1975).

66. Blades, *supra* note 22, at 1413, 1421-35. Blades analogizes this remedy to the protection provided to automobile dealers whose franchises are wrongfully terminated. See Federal Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-25 (1970).

67. See text accompanying notes 47-52 *supra*.

68. Blades, *supra* note 22, at 1422, 1435.

69. A number of states have enacted statutes which codify recent court decisions that protect workers from dismissal for reasons that contravene public policy. See, e.g., [1980] LAB. L. REP. (CCH) (1 State Laws) ¶ 43,055 (state laws prohibiting discharge for failure to take a lie detector test); [1980] LAB. L. REP. (CCH) (1 State Laws) ¶ 43,045 (state law prohibiting discharge for failure to exert political influence). But see *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law) (despite law forbidding employer from requiring a polygraph as a condition of employment, the anti-public policy presumption may be overridden by a demonstration that the employer had a separate, plausible and legitimate reason for the discharge).

70. See, e.g., *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). But cf. *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (discharge upheld although officer of corporation advised employee that it was her duty to serve on jury but supervisor fired her for reporting for jury duty).

71. *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), is the first modern case to announce a public policy exception to the terminable at will rule.

72. *Framptom v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), was the first case to recognize that an employee's dismissal for filing a workmen's compensation claim was in violation of public policy. Prior to such decisions, an employee's only remedy was in tort, although 80% of such cases were unsuccessful. *Id.* at 250 n.2, 297 N.E.2d at 427 n.2. The *Framptom* court said that where the workmen, compensation law provided no remedy for reprisal, the statute must be liberally construed so that the employee can exercise his rights. See also *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Sventko v. Kroger*, 69 Mich. App. 644, 245 N.W.2d 151 (1976). But cf. *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), where employee was fired for filing a

ployees.⁷³

The public policy exception to the at will rule, however, has not been universally accepted. Some courts have been reluctant to embrace the new tort for fear of the "floodgate effect."⁷⁴ Enthusiasm for change through judicial revolution also has been tempered precisely because the new tort rests upon public policy. For example, in *Hinricks v. Tranquilaire Hospital*,⁷⁵ where an employee was fired for refusing to falsify patients' medical records, the court held that public policy "is too vague a concept to justify the creation of a new tort. Such creations are best left to the legislature."

Other courts have refused to allow recovery for tortious discharge absent a substantial violation of public policy.⁷⁶ In *Geary v. United States Steel Corp.*,⁷⁷ an employee was fired because he notified his employer that an unsafe product was being marketed. Although the product was withdrawn from circulation, the court would not be "beckon[ed] . . . into uncharted territory."⁷⁸ It found that "no clear

claim, the court held that he was compensated for his injury and whatever implied contractual duty the employer owed him was satisfied.

The judicial finding that there is a remedy in tort for retaliatory discharge parallels recent developments in landlord-tenant law where courts allow recovery for retaliatory eviction based on tenants reporting housing code violations. See, e.g., *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), the landmark case in which retaliatory eviction was recognized as an affirmative defense; *Aweeka v. Bonds*, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971) (retaliatory eviction is an affirmative cause of action).

73. *Palmateer v. International Harvester Co.*, No. 53780 (Ill. April 17, 1981), where the plaintiff was fired because he blew the whistle on a co-employee for selling stolen goods. The Illinois Supreme Court found the benefit to society derived from encouraging responsible citizen crime fighting and cooperation with law enforcement authorities outweighed an employer's common law right to discharge indefinite term employees at will.

74. Fear of "floodgating" refers to an argument sometimes raised by the judiciary that permitting one particular claim or finding a new cause of action would invite a flood of similar claims. An inference usually accompanies the "floodgate" argument that many of the subsequent claims would lack merit and, therefore, the court's scarce resources would be wasted. See, e.g., *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 70 (1968) (negligent infliction of emotional trauma and physical injury). See also *Slocum v. Food Fair Stores*, 100 So.2d 396 (Fla. 1958); *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 A. 1022 (1905). Note, *Educational Malfeasance: A New Cause of Action for Failure to Educate?*, 14 TULSA L.J. 383, 395 n.75 (1978). The "floodgate" argument has been criticized, however, on the ground that a primary responsibility of the courts is to award damages based on an analysis of the merits of each individual case. This duty should not be abrogated in exchange for administrative convenience. *Dillon v. Legg*, 68 Cal. 2d at 730, 441 P.2d at 924, 69 Cal. Rptr. at 71.

75. 352 So.2d 1130, 1131-32 (Ala. 1977).

76. *Id.* (employee's refusal to falsify medical records is not a sufficient violation of public policy to justify recognizing a new tort); *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (public policy is not sufficiently affronted where a physician is fired for refusing to test a controversial new drug); *Campbell v. Ford Indus., Inc.* 266 Or. 479, 513 P.2d 1153 (1973) (where an employee who also was a stockholder was fired for asking to inspect the corporate records, as provided for by law, the court held that there was no general concern to the public).

77. 456 Pa. 171, 319 A.2d 174 (1974).

78. *Id.* at 174, 319 A.2d at 175.

mandate of public policy [was] violated."⁷⁹ The court balanced the magnitude of the affront to public policy caused by the discharge against the probable impact of the tort on employer interests. The *Geary* court concluded that the constant threat of suit for abusive discharge would inhibit an employer from critically evaluating his workforce.⁸⁰

Consequently, the tort of abusive discharge has fallen short of Professor Blades' expectations⁸¹ of providing relief to at will workers who are discharged in violation of public policy. Moreover, even if the tort were widely accepted, an arbitrary discharge of an at will employee, neither maliciously motivated nor in violation of public policy, would still not be actionable. For example, an employee who can allege only that his dismissal stemmed from a single tardy arrival to work on a morning when his supervisor was in a bad mood could not sustain a cause of action in tort for abusive discharge. Such a discharge might be unjust, but it would not be considered malicious and arguably it would not violate the generally-accepted notion of public policy.

Cognizant of tort law's shortcomings, a number of commentators⁸² have recently suggested alternative solutions to the problem of job protection for the at will employee. Some have proposed the need for a statute which would provide for arbitration of unjust discharge claims;⁸³ others have suggested causes of action founded upon due pro-

79. *Id.* at 185, 319 A.2d at 180.

80. *Id.* at 181-82, 319 A.2d at 179.

81. See Blades, *supra* note 22.

82. Tort law is superior to contract law, however, where non-pecuniary damages result from the discharge. For example, an employee may sometimes recover punitive damages and for emotional harm, damages which are unavailable in contract law. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (punitive damages); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (emotional harm). The majority view is that unemployed insurance benefits collected by a discharged employee need not be deducted from a contractual recovery. See, e.g., *Billetter v. Posell*, 94 Cal. App. 2d 858, 211 P.2d 621 (1949); *Sporn v. Celebrity, Inc.*, 129 N.J. Super. 449, 324 A.2d 71 (1974). The minority view is that a set-off is required to avoid unjust enrichment. See, e.g., *Denhart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 124 N.W.2d 664 (1963).

A California appellate court recently ruled that an at will employee who is discharged without cause has a cause of action both in tort for wrongful dismissal and in contract for breach of an implied duty of good faith and fair dealing. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

83. See generally Summers, *supra* note 4. Although early in this century a Texas law requiring that a corporation could not discharge employees without cause was declared an unconstitutional violation of freedom of contract and equal protection in *St. Louis Southwestern Ry. v. Griffin*, 106 Tex. 477, 171 S.W. 703 (1914), federal and state laws which protect some workers from unjust discharge subsequently were passed. See notes 61-67 *supra*. Other commentators discount the likelihood that a national law will be passed to protect the job security of all workers. Peck, *supra* note 7, at 3, and Blackburn, *supra* note 22, at 492, argue that the at will worker is unorganized and, therefore, without a lobby. This is in contrast to organized labor's successful campaign to win freedom from discharge due to union activity. Moreover, employer associations are strong and may be counted on to oppose any congressional action that would curtail employer

cess and equal protection⁸⁴ or on property rights in employment principles.⁸⁵ Still others have advocated that contract law, notwithstanding the stumbling blocks it has presented thus far to at will employees, could be the most effective theory on which to base unjust dismissal claims.⁸⁶

CONTRACTS TO DISCHARGE IN GOOD FAITH OR WITH JUST CAUSE

Good Faith: An Employer's Subjective State of Mind

There are two contractual standards by which an at will employee might be sheltered from wrongful discharge: good faith and just cause. A number of courts hold that every contract contains an implied obli-

discharge discretion. Furthermore, organized labor has no incentive to organize for a statute which would neutralize its argument in support of unionization, i.e., to protect workers from unjust discharge. Peck, *supra* note 7, at 3; Blackburn, *supra* note 22, at 492.

84. See generally Peck, *supra* note 7, for a discussion of possible protections from unjust discharge predicated on constitutional law. The theory developed by Peck is that the fourteenth amendment could be applied to employees working for a private corporation which hold a state charter or who have government contracts, thus giving rise to the inference that the discharge amounted to state action. An example of a successful recovery for unjust discharge based upon state action is *Holodnak v. Arco Corp.*, 514 F.2d 285, 289 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). The *Holodnak* court said that where most of the buildings, land, machinery and equipment at the employer's plant were federally owned, nearly all of the work done at the plant was defense related and the Department of Defense kept a large force at the plant to oversee operations, the nexus between the employer and the federal government established a symbiotic relationship such as to make the employer's action in firing an employee because she published an article critical of the employer state action within the purview of the 14th amendment.

85. See Buffalo, *supra* note 69, at 212-13. There is some historical support for the argument that there is a property right in employment. In *Dorrington v. Manning*, 135 Pa. Super. 194, 201, 4 A.2d 886, 890 (1939), the court held that "[t]he right to work, . . . in a general sense, constitutes a property right, the continued interference with which equity will enjoin where the legal remedy is inadequate."

The notion that there may be a current property right in employment is best tested against four recent United States Supreme Court decisions relating to public employees. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court refused to recognize plaintiff schoolteacher's claim that he was denied a rehiring without due process of law. In dicta, however, the Court said that a property right in public employment might derive from a legitimate expectation of continued employment grounded in federal or state law or in a school's rule or policy. In *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), the Supreme Court found that a college's policy was sufficient to create a *de facto* entitlement to rehire where no system of tenure was in place. In *Arnett v. Kennedy*, 416 U.S. 134, 155-56 (1974), the Supreme Court held that federal law had created a property interest in government employment, but that that interest was governed by statutory conditions. The plaintiff in *Arnett* was removed from his job in accordance with the statutory conditions and his discharge, therefore, was proper. Finally, in *Bishop v. Wood*, 426 U.S. 341, 344 (1976), the Supreme Court narrowed the grounds upon which a property right in public employment might rest: such right must be established by reference to state (and presumably federal) law. Thus, the promise of *Roth* and *Sindermann*, that a property right in public employment might be based upon reasonable reliance on an employer's policies and work rules, is unrealized. It is even less probable that a property right in private employment, absent expressed statutory creation, will be recognized.

86. See, e.g., Blackburn, *supra* note 22; Harvard, *supra* note 69; Stanford, *supra* note 21.

gation to deal fairly and in good faith.⁸⁷ Good faith, however, is a subjective concept without precise meaning. It encompasses, among other things, "an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage."⁸⁸

If a duty to execute a contract in good faith is imposed, the employer's ability to discharge is circumscribed in accordance with that duty. An employer will be held liable for lost wages due to a discharge made in bad faith. In effect, where a duty of good faith is implied, the employment contract is converted into a satisfaction contract⁸⁹ in which the parties agree that successful performance is measured by the employer's subjective satisfaction. In a suit for breach, the employer need only establish that he was dissatisfied with the employee's performance as the predicate to discharge; he need not show that his judgment was reasonable. The jury's role is to determine whether the dissatisfaction was sincere and not claimed in bad faith as a pretext for another reason.⁹⁰

The leading case in which a duty to discharge an indefinite term employee in good faith was implied is *Monge v. Beebe Rubber Co.*⁹¹ In *Monge*, an employee in an unionized plant⁹² was allegedly discharged for refusing to date her foreman. The New Hampshire Supreme Court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and

87. See, e.g., *Moore v. Home Ins. Co.*, 601 F.2d 1072 (9th Cir. 1979); *Fortune v. National Cash Register Co.*, 377 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Beers v. Atlas Assurance Co.*, 215 Wis. 165, 253 N.E. 584 (1934). See also *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980), where the court held that an indefinite term employee who is discharged without cause has a cause of action for breach of an implied duty of good faith, as well as an action in tort for wrongful discharge; U.C.C. § 1-203 (1978), which requires that all contracts to buy and sell goods be executed in good faith; RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tentative draft No. 7 1972).

88. BLACK'S LAW DICTIONARY 623 (5th ed. 1979).

89. 3A CORBIN ON CONTRACTS § 684, at 229 (1960).

90. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 623, 292 N.W.2d 880, 895 (1980); *Lake Shore & Western Ry. v. Tierney*, 8 Ohio C.C. (m.s.) 521, 29 Ohio C.C. 83, *aff'd*, 75 Ohio St. 565, 80 N.E. 1128 (1905). See also J. MURRAY, MURRAY ON CONTRACTS § 152 (2d ed. 1974).

91. 114 N.H. 130, 316 A.2d 549 (1974).

92. It is unclear why the grievance procedure agreed to in the collective bargaining agreement was bypassed in *Monge*. Arguably, *Vaca v. Sipes*, 386 U.S. 171 (1967), required that summary judgment be granted to the employer. In *Sipes*, the United States Supreme Court said that a private cause of action did not arise until the employee had exhausted the grievance procedure. But the *Sipes* Court also stated that an employee might sue directly in court upon a showing that the grievance procedure would be totally useless or that the employer had repudiated the collective bargaining agreement. *Id.* at 184-85. Neither exception is apparent in *Monge*. See also Connecticut, *supra* note 69, at 768-69.

constitutes a breach of the employment contract."⁹³

Although *Monge* extends job protection to at will employees, it is more deferential to employers than is the discharge requirement of a standard satisfaction contract. Under *Monge*, an employer need not claim to be dissatisfied with his employee's work so long as the underlying reason for the dismissal is not colored by bad faith, malice or retaliation.⁹⁴

In addition to providing some security for the at will employee, the duty to discharge in good faith is said to be fair to both parties.⁹⁵ It is fair to the employee because the court merely provides a missing term which the contracting parties would have included in a written contract if the parties had been of equal bargaining power. This view recognizes the prohibitive cost of negotiating individual employment contracts⁹⁶ and the inability of the average, nonunion employee to coerce his employer into providing favorable discharge terms.⁹⁷ It is also purportedly fair to the employer because he is not required to retain an unsatisfactory worker nor to suffer economically by the requirement. Thus, an employer who dismisses or lays off an employee because of accumulating inventory during a business slump is not acting in bad faith.

However, because the good faith standard only requires a subjective dissatisfaction on the employer's part before discharging an employee,⁹⁸ it affords less protection to the at will employee than the good

93. 114 N.H. at 133, 316 A.2d at 551.

94. *Id.*

95. *See, e.g., Monge v. Beebe*, 114 N.H. at 136, 316 A.2d at 551; Harvard, *supra* note 63, at 1831-33. *But see Jones v. Keogh*, 409 A.2d 581 (Vt. 1979) (duty of good faith in *Monge* should only be implied where there is a clear and compelling violation of public policy).

96. *See* Harvard, *supra* note 69, at 1831-32.

97. This is in contrast to a union employee who has at his disposal the lawful tools of striking, picketing, boycotts and handbilling with which to coerce the employer into granting favorable terms.

98. *See* text accompanying note 118 *infra*. This is, perhaps, a simplistic analysis of the good faith approach. In practice, applying the good faith standard may result in an effect similar to the good cause standard for termination. In *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), a California Court of Appeal described the good faith standard relative to dismissals as one which varies according to the circumstances of employment. For example, the *Cleary* court said that an employer's honest dissatisfaction with a long-term employee's performance would not be a sufficient reason for a termination under the good faith test. *Id.* at 449, 168 Cal. Rptr. at 729-30. A proper reason would be one that approaches the good cause test. *See* text accompanying notes 107-17 *infra*. Realistically, therefore, the good faith standard is multivariate, depending for its definition on such factors as the employee's term of service, the difficulty, dangerousness or cost of the performance sought and the employee's status in the organizational hierarchy. *See, e.g., Harvard, supra* note 69, at 1840-41.

Another example of a situation in which the good faith and good cause standards for termination are minimally different as applied is where an employee argues under the good faith standard, that an employer's averred dissatisfaction is a pretext for another, unlawful reason. If the

cause standard.

Just Cause: An Objective Standard

"Just or good cause" is some substantial misbehavior on the part of the employee which is recognized both at law and by sound public opinion as good grounds for dismissal.⁹⁹ Examples of behavior which might justify a just cause dismissal are dishonesty, disloyalty, absenteeism, insubordination, intoxication, misconduct and violation of company or safety rules.¹⁰⁰ Although purportedly objective, the standards for judging such behavior are inexact.¹⁰¹ Not every act of insubordination or misconduct would give rise to just cause for discharge¹⁰² but repeated acts, not alone sufficient cause for dismissal, may accumulate so as to provide just cause.¹⁰³ Moreover, just cause will be found only where an employee knows that the challenged behavior is prohibited. An exception may arise, however, where a rule has not been uniformly enforced such that some employees who have violated the rule have not been discharged or have been given lesser penalties than others with comparable work and disciplinary records who have violated the same rule. In these situations, a just cause discharge for the latter employees will generally not be sustained.¹⁰⁴

Under traditional contract theory, just cause would be measured by whether the objectionable act amounted to a material breach of contract.¹⁰⁵ Materiality is as imprecise a term as is just cause, however,

employer merely rests his defense upon the strength of his subjective dissatisfaction with the employee's performance, without an objective standard for measuring that performance, the employer's credibility in a factual determination will be diminished. If, however, the employer can give a reason for the dismissal which approaches good cause, it will be harder for the employee to sustain a charge that the employer acted in bad faith.

99. See, e.g., *In re Gage*, 383 A.2d 204 (Vt. 1979); *In re Brooks*, 382 A.2d 297 (Vt. 1977); RESTATEMENT OF CONTRACTS § 275, at 403 (1932); See also *Keserich v. Carnegie-Ill. Steel Corp.*, 163 F.2d 889 (7th Cir. 1947) (just cause need not be legal cause but such cause as a fair minded person might act upon, and not in an arbitrary fashion).

100. See *Summers*, *supra* note 4, at 499 n.104; *TWA v. Beaty*, 402 F. Supp. 652 (S.D.N.Y. 1975) (failure to successfully complete training course is cause); *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968) (immorality); *Berry v. Goodyear Tire and Rubber Co.*, 242 S.E.2d 551 (S. Car. 1978) (disloyalty).

101. Despite the elusive quality of "just cause," arbitrators have built a body of both substantive and procedural law governing the union shop on those bare words in a collective bargaining agreement. *Summers*, *supra* note 4, at 500; see generally, F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* (3rd ed. 1973).

102. See, e.g., *Resilient Floor & Decorating Covering Workers, Local 1179 v. Welco Mfg. Co.*, 542 F.2d 1029 (8th Cir. 1976) (if just cause means every act of insubordination by an employee who has served faithfully for years, then no employee will benefit from a just cause claim in his contract).

103. See, e.g., *In re Brooks*, 382 A.2d 204 (Vt. 1977).

104. *Summers*, *supra* note 4, at 500-08.

105. 4 CORBIN ON CONTRACTS § 946 (1951); cf. RESTATEMENT (SECOND) AGENCY 2d § 409(1)

and its meaning varies according to the status of the employee and the type of performance sought. Consequently, whether an employee's act was material enough to constitute a breach of duty would depend upon whether it was done wilfully, negligently or innocently.¹⁰⁶

Theoretically, then, the good cause standard provides more protection from unjust discharge than does the good faith standard because the good cause standard is more difficult to satisfy. Under the good faith standard, an employer need only demonstrate his subjective belief that an employee is performing badly to substantiate his discharge of that employee. Under a good cause standard, however, the employer must show that the employee failed to measure up to objective performance criteria which have been previously set out by the employer or which are common in the industry.

Consequently, unlike the good faith standard where the employer could rely on his own reasonable, but subjective evaluations for dismissal, an employee's discharge under a good cause standard could only be justified where the employer could prove that the employee breached some objective, clearly-established standards of performance. In *Toussaint v. Blue Cross & Blue Shield of Michigan*,¹⁰⁷ the Michigan Supreme Court further explored the indefinite term employee's contractual right not to be discharged except for cause.

TOUSSAINT V. BLUE CROSS & BLUE SHIELD OF MICHIGAN
408 Mich. 598, 292 N.W.2d 880 (1980)

Statement of the Case

Toussaint v. Blue Cross & Blue Shield of Michigan is a consolidation for appeal of two cases: *Toussaint v. Blue Cross & Blue Shield of Michigan*¹⁰⁸ and *Ebling v. Masco Corp.*¹⁰⁹ In *Toussaint*, Charles Toussaint was hired as an administrative assistant to the treasurer of Blue Cross & Blue Shield of Michigan. When he was hired, Toussaint asked about job security and he was told that "as long as [he] did [his] job [he] would be with the company until mandatory retirement *at age*

and 259 Comment (b) (1957) (a serious violation of the duty of loyalty or of obedience by the employee may constitute a breach of the contract although the resulting harm is quite small).

106. See, e.g., *Thomas v. Bourdette*, 45 Or. App. 195, 608 P.2d 178 (1980) (acts which are material violations and, therefore, cause for dismissal of a manager are quantitatively and qualitatively distinct from those required to terminate an employee possessing lesser responsibility and discretion); see also RESTATEMENT OF CONTRACTS § 275, at 403 (1932).

107. 408 Mich. 579, 292 N.W.2d 880 (1980).

108. 79 Mich. App. 429, 262 N.W.2d 848 (1977).

109. 79 Mich. App. 531, 261 N.W.2d 74 (1977).

65.’”¹¹⁰ Toussaint was handed a Supervisory Manual which provided that all non-probationary employees would only be dismissed for just cause and in accordance with specified procedures and policies applicable to all areas, divisions and departments.¹¹¹ Five years later, Toussaint was fired. He alleged that his discharge was without cause and in violation of his employment contract, certain terms of which were set forth in the manual. Blue Cross claimed that no employment contract existed because the manual was simply intended as a management guide for supervisors¹¹² and it did not contain the elements of a contract. Moreover, Blue Cross argued that, although an at will employee could be discharged for any reason, Toussaint was fired for good cause.¹¹³ At trial, a jury verdict for \$72,835.52 was rendered for Toussaint.

The court of appeal reversed that judgment, holding that the plaintiff could not recover under either a definite or indefinite term contract theory.¹¹⁴ The court said that if the contract was to last until

110. 408 Mich. at 597 n.5, 292 N.W.2d at 884 n.5 (emphasis added). Whether age “65” expressly was mentioned at the hiring as opposed to “until retirement age” was an issue at the trial and appellate levels, but not certified for appeal to the Michigan Supreme Court. At best, the record is confusing. In his summation to the jury, Toussaint’s lawyer denied that any term was specified and, therefore, that the contract was for an indefinite duration. 408 Mich. at 639-40 n.2, 292 N.W.2d at 904 n.2. In effect, Toussaint was on the horns of a dilemma. If the hiring was indefinite, the traditional view of employment contracts was that the contract was terminable at will, and that he could be discharged without good cause. If, however, the hiring was for a definite term—until Toussaint reached 65—Toussaint could be fired only for cause. See text accompanying note 1 *supra*. But, an oral contract for a definite duration in excess of one year could not be enforced because it would run afoul of the statute of frauds. An indefinite term oral contract is not barred by the statute of frauds because it can be performed within one year. See, e.g., *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305 (Iowa 1971); *Roxanna Petroleum Co. v. Rice*, 107 Okla. 161, 235 P. 502 (1924); *But see Rubenstein v. Klevan*, 261 F.2d 921 (1st Cir. 1958) (applying New York law) (contract for “lifetime employment” in contrast to one for “permanent employment” is within the provision of the statute of frauds). Presumably, Toussaint chose to challenge the prevailing law by asserting that his contract was for an indefinite term and that, based upon his employer’s promises and policies, he could not be dismissed without good cause.

111. Except for cases of serious misbehavior which might warrant summary dismissal, the disciplinary procedure included, in sequence, a verbal warning, written warning, probation and termination. 408 Mich. at 651-62, 292 N.W. at 909-15.

112. *Id.* at 644, 292 N.W.2d at 906. There was testimony to the effect that Toussaint had never been responsible for supervising employees and, therefore, that the manual could not have been given to him for supervisory purposes. Blue Cross contended that Toussaint was not given the manual until after his hiring and that he was given the manual because one of his duties was to keep it current by adding and deleting pages.

113. It was alleged that Toussaint was fired, after he was asked to resign, because he could not get along with his co-employees and had mismanaged the company motor pool. 408 Mich. at 637, 292 N.W.2d at 902-03. A perusal of Blue Cross’ brief indicates that Toussaint might have been implicated in a fraudulent scheme involving tampering with odometers in the company cars. It is unexplained, therefore, why Blue Cross did not more aggressively assert the defense of good cause. A possible explanation, if in fact the odometer readings were changed, is that Blue Cross did not want to call attention to the irregularities.

114. 79 Mich. App. at 438, 262 N.W.2d at 852.

Toussaint was 65, it was definite in duration. Accordingly, it would be barred by the statute of frauds which provides that an oral contract which by its terms cannot be performed within one year is unenforceable. The appellate court also reasoned that if the contract was for an indefinite term, then the employment relationship was one at will. The court further said that the employment contract could not be modified to provide that a discharge be for cause unless the employee paid some consideration beyond his bargained for service.¹¹⁵

In *Ebling*, Walter Ebling was hired as a Director of Marketing of Masco Corporation. After negotiations, Ebling agreed to accept the position and leave his then-current job upon assurances that the Masco hiring officer would personally review his performance. Ebling was told that "he would not be discharged if he was doing his job."¹¹⁶ Among the benefits promised to Ebling was an option to purchase Masco stock, which was to vest after three years of employment. Ebling was fired after two years and two months. In an action for breach of contract, he claimed that he had been discharged without cause in violation of the agreement to prevent him from exercising the stock option which had become quite valuable.¹¹⁷ A jury verdict for \$300,000 was rendered for Ebling. On appeal, Masco contended that employment for an indefinite term is at will and cannot be made otherwise unless the employee furnishes special consideration to the employer. In a *per curiam* opinion, the appellate court affirmed the verdict in favor of Ebling. The court said that the correct statement of the exceptions to the at will rule is that distinguishing features, promises, or consideration in addition to services remove a case from the general rule.¹¹⁸ The court found that the distinguishing feature of Ebling's contract was the negotiated promise of a discharge only for cause. Therefore, the jury should have rendered judgment in his favor.

Reasoning of the Majority Opinion

On further appeal, the Supreme Court of Michigan found that Toussaint and Ebling—employees with oral contracts of indefinite term—could not be discharged without good cause.¹¹⁹ Accordingly, the judgment of the court of appeal was reversed in *Toussaint* and af-

115. *Id.* at 435, 262 N.W.2d at 851.

116. 408 Mich. at 597 n.5, 292 N.W.2d at 884 n.5.

117. *Id.* at 634, 292 N.W.2d at 901.

118. 79 Mich. App. at 533, 261 N.W.2d at 74.

119. 408 Mich. at 598, 292 N.W.2d at 885. Justice Levin wrote the majority opinion, joined by Justices Kavanagh, Williams and Moody.

firmed in *Ebling*. The *Toussaint* court held that a promise to discharge only for cause may be incorporated into the employment contract either by express oral or written agreement or based upon an employee's legitimate expectations grounded in the employer's policy.¹²⁰ The court further held that such a promise is enforceable even though no mutual intention to create contract rights in the employee existed, neither party had signed the statement, the policy could be amended unilaterally by the employer any time subsequent to the hiring, and the employee had not learned of the policy until after the hiring.¹²¹ The court, however, did not prohibit the making of contracts expressly terminable at will.¹²² Neither did it require good cause for dismissal absent some evidence of the parties' intent.

The majority's reasoning is in three parts. First, the court determined that the rule that an indefinite term employment contract is terminable in the discretion of either party was a rule of construction and not of substantive law. It is not *per se* illegal to provide contractually that an indefinite term employee may be discharged only for good cause. Rather, if the term of employment is indefinite, a presumption is raised that either party may end the relationship in his discretion, absent evidence of contrary intentions. Second, the court considered whether an employer's statement of policy alone might give rise to enforceable rights in the employee. Third, the court discussed the proper role for the jury where the plaintiff alleges that he was discharged without cause in violation of his contract.

Terminable At Will: A Rule of Construction

The Michigan Supreme Court denied that *Toussaint* was a departure from settled law or that it was legislating by judicial fiat.¹²³ The court said that those courts which have mechanically applied the at will rule "have misapplied language and principles found in earlier cases where the courts merely were attempting to discover and implement the intentions of the parties."¹²⁴ To support this proposition, the *Toussaint* court examined Wood's rule¹²⁵ and subsequent leading cases.¹²⁶

120. *Id.*

121. *Id.* at 613, 292 N.W.2d at 892.

122. *Id.* at 610, 292 N.W.2d at 890.

123. *Id.* at 600, 292 N.W.2d at 885.

124. *Id.*

125. See text accompanying notes 18-20 *supra*.

126. *Perry v. Wheeler*, 75 Ky. 541 (1877); *Lord v. Goldberg*, 81 Cal. 596, 22 P. 1126 (1889); *Louisville & N.R. v. Offutt*, 99 Ky. 427, 36 S.W. 181 (1896); *Sullivan v. Detroit, Y. & A.A. Ry.*,

Included in the *Toussaint* court's review were *Perry v. Wheeler*¹²⁷ and *Lord v. Goldberg*,¹²⁸ early cases which modified the at will rule to require that a discharge from an indefinite term employment be made fairly and for cause.¹²⁹ According to the Michigan Supreme Court, subsequent decisions, ostensibly based upon *Perry* and *Lord*, ignored the caveat that terminations must be effected "upon equitable terms" or "for some good reason."¹³⁰

The court pointed to *Adolph v. Cookware Co.*¹³¹ to underscore another way in which the at will rule was subverted. According to the *Toussaint* court, the Michigan Supreme Court in *Adolph* had erroneously cited *Lynas v. Maxwell Farms*, another Michigan case,¹³² for the proposition that unless the employee pays consideration in addition to his proffered services, permanent employment is terminable at will.¹³³ But the *Lynas* rule is that there are three exceptions which will defeat the rule that an indefinite term contract is at will: distinguishing features, provisions or extra consideration.¹³⁴

So stated, the rule of indefinite contracts only raises a presumption of terminability which an employee may rebut. According to the *Toussaint* court, it is a rule of construction rather than a principle of substantive law.¹³⁵ A rule of construction, in this context, signals a court to construe the contract by looking beyond its face to the parties' true intentions.¹³⁶ It does not prevent the court from finding that the parties sought to limit the employer's discharge discretion despite the indefinite term of the contract.

Accordingly, the Michigan Supreme Court found the oral assurances of job security made to *Toussaint* and *Ebling* to be features which distinguished their employment contracts from other indefinite term contracts. Unquestionably, the court said, had those promises been memorialized in writing, the terms would have been enforceable.¹³⁷ Similarly, oral promises such as those expressed in *Toussaint*

135 Mich. 661, 98 N.W. 756 (1904); *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937); and *Adolph v. Cookware Co.*, 283 Mich. 561, 278 N.W. 687 (1938).

127. 75 Ky. 541 (1877). See text accompanying notes 31-32 *supra*.

128. 81 Cal. 596, 22 P. 1126 (1889). See note 31 *supra* and accompanying text.

129. See text accompanying notes 28-36 *supra*.

130. 408 Mich. at 604, 292 N.W.2d at 888. See text accompanying notes 32-33 *supra*.

131. 283 Mich. 561, 278 N.W. 687 (1938).

132. 279 Mich. 684, 273 N.W. 315 (1937).

133. 283 Mich. at 568, 278 N.W. at 688.

134. 279 Mich. at 687, 273 N.W. at 316-17.

135. 408 Mich. at 599-600, 292 N.W.2d at 885. Substantive law creates duties, rights and obligations. BLACK'S LAW DICTIONARY 1281 (5th ed. 1979).

136. See, e.g., *Dutton v. Pugh*, 45 N.J. Ch. 426, 18 A. 207 (1889).

137. 408 Mich. at 611, 292 N.W.2d at 890.

may be sufficient to overcome the presumption that an indefinite term contract is at will.

An Employer's Statements of Policy May Be Enforceable

The *Toussaint* court concluded that the terms of the manual were incorporated into Toussaint's employment contract and that the manual's provisions were independently actionable.¹³⁸ The court rejected as irrelevant Blue Cross' claim that Toussaint could not have relied upon their discharge policy since he was not given the manual until after the actual hiring.¹³⁹ Rather, the court said, an employee may be eligible for his employer's benefits even though he has not bargained for them and neither party has signed the statement of policy. Moreover, the employee need not learn of the specific policy until he seeks to invoke it in his behalf.¹⁴⁰ In the court's view, the employee is justified in relying on a general image of fair treatment which the employer has intentionally created through his general policies. Convincing employees that they will be treated fairly is precisely why the employer publishes policies relating to discharge procedures and other terms and conditions of employment.¹⁴¹ It enables the employer to attract an orderly and cooperative work force. Consequently, where an employer has created an atmosphere which is "instinct with obligation," he may not treat his promises as illusory.¹⁴²

In holding that an employee could legitimately rely on his employer's policy statements regarding job security, however, the *Toussaint* court did not limit the employer's right to change a policy. Nor did it require an employer to give notice of an impending change. The court said that an employer could publicize his reserved right to alter or suspend a policy in his discretion. In such a case, employees are put on notice that they cannot rely forever upon any one policy. But, the *Toussaint* court said, while a policy is in force, it must be uniformly applied.¹⁴³

138. *Id.* at 612-15, 292 N.W.2d at 891-92.

139. *Id.*

140. 408 Mich. at 613, 292 N.W.2d at 892. Although the parties disagreed about whether Toussaint received the manual before or after the moment of the hiring, Blue Cross did not claim that Toussaint learned of the discharge policy only after he was fired. The Michigan Supreme Court's holding that an employee need not learn of the policy until he seeks to invoke it in his behalf, therefore, is an alternative holding. Moreover, it may be supported only by a strained usage of the promissory estoppel doctrine. See notes 179-80 *infra* and accompanying text.

141. *Id.* at 613, 292 N.W.2d at 892.

142. *Id.*

143. *Id.* at 619, 292 N.W.2d at 894-95.

The Jury's Role in Determining Good Cause

The *Toussaint* court considered two possible roles for the jury in its review of discharge for cause: to determine whether the dismissal was reasonable under the circumstances or to determine whether the cause was the kind that indicates that the employee no longer was doing the job. The court rejected the alternative that a jury could find a breach only if the employer's decision was unreasonable.¹⁴⁴ It reasoned that under a contract terminable only for cause the employee has secured more than the employer's promise to act reasonably or in good faith. He has received a promise that he will not be discharged except for cause. The Michigan Supreme Court endorsed the second jury role described above in order to give effect to that promise.

The *Toussaint* court indicated that an employer can minimize the jury's role by establishing and uniformly applying work rules. Where his rules and standards for performance are clear, the jury decides only whether the employee broke the rule.¹⁴⁵ If he did, the employer's own rule is the standard by which good cause is measured. The court said, however, that where rules are not articulated or are vague or selectively enforced, the jury is assigned the task of determining whether the objectionable behavior amounted to good cause for the dismissal.¹⁴⁶

The Dissenting Opinion

The same three judges¹⁴⁷ who concurred¹⁴⁸ in *Ebling* dissented to the favorable judgment in *Toussaint*. First, the dissent found that the oral promise of job security made to *Toussaint* was not the result of bargaining between *Toussaint* and Blue Cross. According to the dissent, this distinguished *Toussaint's* case from *Ebling's*. In *Toussaint*, the employee merely asked about security on the day of the hiring and was told that he would not be fired if he did his job. In contrast, *Ebling* was described by the dissent as having engaged in prolonged negotia-

144. *Id.* at 622-23, 292 N.W.2d at 896.

145. *Id.* at 623-24, 292 N.W.2d at 897.

146. *Id.*

147. Justice Ryan wrote the concurring opinion and was joined by Chief Justice Coleman and Justice Fitzgerald.

148. The differences between the concurring and majority opinions are slight. First, the concurrence disagreed with the majority's assertion that mutuality of obligation was unnecessary in a contract as long as valid consideration was present. According to the concurrence, mutuality of obligation is not required for unilateral contracts such as employment contracts. For bilateral contracts, however, mutuality of obligation is still necessary to enforce the contract. 408 Mich. at 600, 292 N.W.2d at 885. Second, the concurrence felt that *Ebling's* contract was enforceable because it was marked by "distinguishing features" which, according to Michigan law, made it not at will. *Id.* at 633-34, 292 N.W.2d at 901.

tions concerning job security.¹⁴⁹ The bargain struck by Ebling and Masco during a number of pre-employment meetings was that if Ebling's work was unsatisfactory, his immediate supervisor personally would review Ebling's performance and would give Ebling a chance to correct his performance. Ebling also was assured that he would not be fired without good cause.¹⁵⁰

Second, the dissent found neither direct nor circumstantial evidence from which a jury could have concluded that Blue Cross' discharge policy was integrated into Toussaint's employment contract.¹⁵¹ The dissent agreed with the majority that a policy statement sometimes may become part of an employment contract where an employee justifiably relies upon the employer's statement. However, that reasonable reliance must be predicated on the employee's awareness of the promise. A promise may not become a contractual term by inadvertence since each party must manifest assent to the term.¹⁵² Thus, the dissent disputed the majority's alternative holding that an employer's statement of policy may give rise to contractual rights in an employee even where the employee is unaware of the policy.¹⁵³

According to the dissent, the majority's holding that an employee may enforce a policy of which he was unaware is based upon inapposite precedent. The cases which the majority cited¹⁵⁴ as support do not deal with termination of at will employees but with employees' entitlement to accrued benefits such as severance and vacation pay. The dissent said that in the cited cases the employee had paid consideration by performing the requested services. Hence, the employer was obligated to pay what was owed to the employee. The dissent contrasted the earned benefits in these cases with the promise to discharge only for cause in *Toussaint* because the promise to discharge for cause is not earned as a result of a specific period of service. In the dissent's view, a promise to pay accrued benefits also differs from a promise to discharge for cause because "an employer should reasonably expect that a promise of deferred compensation would induce reliance while a promise of

149. 408 Mich. at 641 n.4, 292 N.W.2d at 904 n.4.

150. *Id.* at 633-34, 292 N.W.2d at 901.

151. *Id.* at 645, 292 N.W.2d at 907.

152. *Id.* at 646-47, 292 N.W.2d at 907.

153. See note 180 *infra* and accompanying text.

154. The cases are: *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 78 N.W.2d 296 (1956); *Psutka v. Michigan Alkali Co.*, 274 Mich. 318, 264 N.W. 385 (1936); *Gaydos v. White Motor Corp.*, 54 Mich. App. 143, 220 N.W.2d 697 (1974); *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 211 N.W.2d 101 (1973); and *Couch v. Administrative Comm. of the Difco Labs, Inc.*, 44 Mich. App. 44, 205 N.W.2d 24 (1972).

job security would not.”¹⁵⁵

Analysis of the Majority Holding

The common law rule that an indefinite term employment contract is terminable at the will of either party has subjected many employees to arbitrary and capricious discharge. In *Toussaint v. Blue Cross & Blue Shield of Michigan*, the Michigan Supreme Court may have afforded job protection to a significant number of Michigan's at will workers whose discharges would not otherwise be protected by statute or judicial decision. Alternatively, the gain in employment security may prove to be fleeting because *Toussaint* may signal employers to make indefinite term employment contracts expressly terminable at will.

The significance of *Toussaint* is three-fold: an employer's express oral or written promise not to discharge an indefinite term employee except for cause is enforceable; provisions of a personnel manual or other statements of employer policy independently can give rise to enforceable rights in the employee; and an employer's statement of policy can create contractual rights even though the employee is unaware of the specific policy.

The first part of the court's holding—an employer will be bound by his express promise to discharge for cause—is not a radical departure from settled law and, in fact, is grounded in Michigan employment law.¹⁵⁶ The Michigan Supreme Court became convinced by an analysis of past decisions that an indefinite term employment contract is not per se terminable at will. The court said that such employment raises a presumption that either party may sever it at his discretion, which prevails unless the parties can show that they intended otherwise. Therefore, the *Toussaint* court correctly concluded that evidence could support jury findings that the parties intended that *Toussaint's* and *Ebling's* employment would not be at will. The court cited evidence of promises of job security made to *Ebling* and *Toussaint*, both at their respective hirings and in a personnel manual, as features which distinguished their contracts sufficiently to rebut the at will presumptions.

The Michigan Supreme Court also reviewed, but thereafter ignored, the holdings in *Perry v. Wheeler*¹⁵⁷ and *Lord v. Goldberg*,¹⁵⁸ leading cases which explained the nature of permanent employment as

155. 408 Mich. at 598, 648-49, 292 N.W.2d at 884, 908.

156. See *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937).

157. 75 Ky. 541 (1877).

158. 81 Cal. 596, 22 P. 1126 (1889).

promised to an employee of indefinite term. The *Toussaint* court cited *Perry* and *Lord* for the proposition that indefinite term employment may be ended at the will of either party—but only for good cause.¹⁵⁹ Based on its review of *Perry* and *Lord*, the *Toussaint* court could have announced that the correct statement of the rule of indefinite term employment is that such employment is presumed to be *not terminable without cause* absent intent to the contrary. The Michigan Supreme Court, however, opted for a conservative position, by merely holding that a court must give effect to the intentions of the parties in an indefinite term employment contract. Only where the parties indicate an express intent to limit discharges to those made only for cause will the presumption that an indefinite term employment contract is at will be overruled.

This holding also squares with the doctrine of partial performance as applied to unilateral contracts.¹⁶⁰ In a unilateral employment contract, the employer seeks the performance of the employee. The employer may not revoke the offer of employment once the employee has partially performed some of the requested service.¹⁶¹ In such situations, the employee cannot be terminated without cause even though he has made no return promise to work for a specific period and has not relinquished the power to quit at his discretion.¹⁶² Even where the employee exercises his right to suspend performance, the employee is not in breach because a unilateral contract is not formed until the employee has completed the performance sought. Thus, in *Toussaint v. Blue Cross & Blue Shield of Michigan*, the Michigan Supreme Court merely introduced into the employment relationship the standard principles of unilateral contracts which had long been applied in commercial contexts.

The second part of the holding in *Toussaint*—that an employer's statement of policy independently can create contractual rights in the employee—also comports with principles of contract law. The Michigan Supreme Court found that *Toussaint* could enforce the discharge policies set forth in *Blue Cross*'s personnel manual, regardless of whether he had been promised job security after or prior to his hiring. Although the court did not specify the precise theoretical basis upon which the holding rests, this portion of the opinion is closer to promis-

159. See notes 28-36 *supra* and accompanying text.

160. 1A CORBIN ON CONTRACTS § 152, at 13-15 (1963).

161. RESTATEMENT (SECOND) OF CONTRACTS § 45, at 53 (Tentative Draft No. 7 1972).

162. An offer also might become irrevocable where the employee gives consideration or relies on the offer. *Id.* § 89B (2).

sory estoppel analysis than it is to partial performance theory. The doctrine of promissory estoppel is applicable where no bargained for consideration can be found to support a contract, but where a party reasonably has relied upon a promise to his detriment.¹⁶³ Moreover, the promise must be of the sort that the promisor reasonably would believe to be capable of inducing reliance in the promisee.

Thus, the *Toussaint* court emphasized that the employer had made promises of job security and discharge procedures in the personnel manual which were directed toward the entire workforce. In the court's view, these promises not only were capable of inducing reasonable reliance in the employee, but the employer's very purpose for creating the policies was to convince the employees that they could rely upon the employer to deal fairly with them. Arguably, the employee forebore from seeking employment elsewhere because of his reliance on his employer's policies. Consequently, if the employer refuses to follow through on these policies, the employee is unjustly deprived of the promised benefits and the employer has breached his implied promise to provide these benefits.

The third, and possibly most significant, result of *Toussaint* is that an employee may be unaware of the employer's policy but nonetheless entitled to enforce it.¹⁶⁴ Without explicitly saying so, the court once again seemed to be relying on the doctrine of promissory estoppel to justify its holding. Under promissory estoppel, it is necessary to find at least one promise of which the employee was aware and upon which he relied in order to find an implied contract. Apparently the Michigan Supreme Court found such a promise in the image of fair treatment which the totality of the employer's policies was designed to create. In the court's view, the employer's decision to seek the good will of his workforce gave rise to his implied promise that the employee would be treated in accordance with the image that the employer had projected. According to *Toussaint*, the employer has no obligation to create any policies for the employee's benefit. But where he has done so and the policies are in force, justice would demand that the employer be held accountable for his promises to the employee regardless of whether the employee is unaware of any specific policy relating to fair treatment. This interpretation stretches the principle of promissory estoppel beyond its usual measure by implying constructive reliance on a particu-

163. *Id.* § 90. See also note 43 *supra*.

164. This is an alternative holding, however, because *Toussaint* himself became aware of Blue Cross' discharge policies in the personnel manual moments after his hiring. 408 Mich. at 597, 292 N.W.2d at 884.

lar policy because there has been some reliance on a more general policy. In a case where the employee is unaware of the specific policy, presumably there would have to be proof that the employee had relied upon the general policy as a predicate to allowing him to enforce the specific policy.

Promissory estoppel analysis also would accommodate the *Toussaint* court's holding that the enforceability of the employer's statement of policy is unaffected by the employer's right to unilaterally alter the policy. If the employer changes the policy and the employee continues to work, the employee is entitled to enforce the new policy in order to avoid injustice where there is either actual or constructive knowledge of and reliance on a new policy. Similarly the employee could not assert a right to the former policy since there can be no reliance upon a non-existent policy.

Critique of the Dissenting Opinion

The dissent attacks the majority decision on four fronts: there was no bargaining by Toussaint for the assurance that he would be dismissed only for cause; there was neither direct nor circumstantial evidence from which a jury could have concluded that Blue Cross' discharge policy was integrated into Toussaint's employment contract; there cannot be reliance upon a policy unless an employee is acquainted with that policy; and there is no basis for an employer to anticipate that an employee would rely upon the employer's promise of job security. Each criticism is without persuasive force.

First, the dissent takes a narrow and unwarranted view of "bargaining." According to the dissent, Ebling could enforce his employer's promises to evaluate his job performance and to discharge him only for cause because those promises were concessions resulting from a period of negotiations.¹⁶⁵ Toussaint, on the other hand, merely inquired about job security on the day of the hiring. In response to that inquiry, he was told that he would not be fired absent good cause. Therefore, because Toussaint was passive in that he did not haggle over assurances of job security, the dissent concluded that he was entitled to none.

Followed to its extreme conclusion, the dissent implies that a prospective employee who merely asks what salary he will be paid would not necessarily be entitled to the quoted rate because the specified salary would be an "unbargained" for term. Bargaining, however, describes a broad process, where a number of terms and conditions might

165. *Id.* at 641 n.4, 292 N.W.2d at 904 n.4.

be considered.¹⁶⁶ Each term need not be haggled over. The bargaining in Toussaint's case presumably involved discussion of certain specific duties of the job. Among the *quid pro quo* for Toussaint's acceptance of the job offer was Blue Cross' promise of benefits including discharge only for cause.

Second, the dissent disagreed with the majority that a jury could have found that the manual's provisions were incorporated into Toussaint's contract. Contrary to the dissent's belief, however, there was enough evidence upon which a jury could have ruled as the majority claimed. Toussaint testified that he believed that he had an employment contract, although he could not offer a signed document.¹⁶⁷ He further believed that the contract included provisions from the manual. A literal reading of the manual, despite its caption "Supervisory Manual," was that its terms applied to all nonprobationary employees, "in all Blue Cross areas, divisions and departments."¹⁶⁸ Blue Cross, however, insisted that the manual did not apply to supervisors but that it was intended to guide their management of employees; it was undisputed that Toussaint did not supervise any employee. In sum, it seems clear that there was enough evidence upon which a jury could have decided that the manual's terms were incorporated into Toussaint's employment contract.

Third, the dissent disagreed with the majority's assertion that an employee cannot rely upon his employer's policy if he did not learn of it until after the hiring. The dissent's criticism here is faulty because an employee would not have to show that he was aware of the specific policy in question at the time of the hiring for it to be actionable. Where the employee merely wants to show that the specific policy became a term of the employment contract at some point, he need only prove that he learned of the policy sometime between when he was hired and when he was fired. Consequently, so long as Toussaint learned of the policy sometime after the hiring but before he was fired, his employment contract would be modified to incorporate all subsequent terms, including the right to be discharged only for cause.

Finally, the dissent's belief that an employer justifiably may expect that a promise of deferred compensation would induce reliance by the employee, but that a promise of job security would not, is indefensible.

166. See generally R. SMITH, ET. AL., COLLECTIVE BARGAINING AND ARBITRATION: MATERIALS ON THE NEGOTIATION, ENFORCEMENT AND CONTENT OF LABOR AGREEMENTS, Part I ch. 3 (1970).

167. 408 Mich. at 597 n.5, 641, 292 N.W.2d at 884 n.5, 905.

168. *Id.* at 651, 292 N.W.2d at 909.

This view can be challenged by considering the similarities between a promise of severance pay and a promise to discharge for cause only. Severance pay purportedly is offered for the purpose of improving the employer-employee relationship.¹⁶⁹ Not only does the employer seek better relations with current employees through a policy of severance pay, but the employer also seeks to improve its image in the community. This, in turn, may ensure that competent workers will be attracted in the future. In *Toussaint*, there was no evidence that Blue Cross had set out fair discharge procedures for any reason but to secure a cooperative workforce. Thus, it is fair to conclude that Blue Cross' reputation as a just employer would enhance its image in the community and aid in the employment of personnel in the future.

A promise of severance pay also may protect an employee from arbitrary discharge.¹⁷⁰ If a company must grant severance pay, fiscal responsibility dictates that discharge decisions must be carefully evaluated so as to avoid making unwarranted dismissals. Similarly, if an employer promises to discharge only for cause, an employee might reasonably believe that his employer is unlikely to discharge without cause rather than to risk being sued for breach of contract.

Moreover, the right to be discharged only for cause as promised is analogous to a deferred benefit, the right to which is earned after a period of service. Where the employee has completed a task according to his employer's standards, he has earned the right not to be discharged. But where the employee has performed poorly, he has not accrued protection from discharge. He has given the employer good cause for his dismissal.

Impact of Toussaint: A Gain or a Loss for Employees?

A possible consequence of *Toussaint*, raised by the defendants and amici,¹⁷¹ is that it will cause the courts to be flooded with claims of unjust discharge. In response to this fear, the Michigan Supreme Court suggested that the contesting parties might agree prospectively to an alternative method of dispute resolution such as binding arbitration. The court's recommendation for arbitration is consistent with a common provision in collective bargaining agreements between employers and unions.¹⁷² The recommendation also is consistent with a national policy to alleviate congestion of court calendars and to encourage

169. See, e.g., *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 78 N.W.2d 296 (1956).

170. *Id.*

171. Chrysler Corporation filed briefs in *Toussaint* as *amicus curiae*.

172. See note 4 *supra*.

speedy problem solving through the increased use of arbitration.¹⁷³ In any event, fear of flooding the courts with litigation is unwarranted. A court should not shrink from making a proper decision because the effect of that decision might be to encourage litigants to vindicate their rights.¹⁷⁴

The amici also warned that if discharge for good cause were required, productivity and competency of the workforce would suffer.¹⁷⁵ Apparently, the amici were suggesting that if an employer would not be able to discharge an employee except for cause, the employer would legally be unable to dismiss an employee because of shoddy work. The *Toussaint* court, however, did not make discharge for cause a mandatory requirement of indefinite term employment contracts. Moreover, good cause for discharge does not imply lower performance standards. The Michigan Supreme Court explained that where an employer articulates standards of performance, those standards compose his policy. Like a promise to discharge with cause, expressed performance standards are integrated into an employee's contract¹⁷⁶ and he may be held to those standards.

Where a discharge is founded on an employee's failure to meet an employer's expressed and consistently applied standards and rules, the discharge is for cause. Another effect of *Toussaint*, therefore, might be to encourage employers to establish and announce minimum required standards of production as well as work and safety rules. Only where there are no clearly articulated rules or where enforcement is selective will a jury be asked to determine whether the employee's behavior amounted to good cause for the discharge.¹⁷⁷

Since many medium to large sized companies distribute personnel manuals, the potential number of indefinite term employees protected by *Toussaint* is large. The Michigan Supreme Court held that even where a worker fails to bargain for assurances of job security, but his employer has instituted a policy of discharge for cause, that policy is enforceable. Additionally, all Michigan employees—at will or otherwise—may benefit from *Toussaint*. Presumably, *Toussaint* provides

173. Dispute Resolution Act of 1979, Pub. L. No. 96-190, §§ 1-10, 94 Stat. 17 (1980). The Act reflects a congressional finding that for many, appropriate dispute mechanisms "are largely unavailable, inaccessible, ineffective, expensive or unfair." Note, *Dispute Resolution Act Passed*, 35 ARB. J. 18,19 (June 1980). The principal purpose of the Act is to make grants available through state and local government and non-profit groups to establish new or design improved mechanisms for the resolution of minor disputes.

174. See note 74 *supra*.

175. 408 Mich. at 623, 292 N.W.2d at 896.

176. *Id.* at 624, 292 N.W.2d at 897.

177. *Id.*

that employees are entitled to benefit from any of their employer's policies which are in force. Policy statements which could be enforceable might be the kind which are posted on the company bulletin boards, announced at office meetings or published in a personnel manual. Because of such policy statements, an employee might be justified in demanding that his employer's announcement of an extra day's vacation at Christmas or his promise of a progressive disciplinary policy be strictly enforced.¹⁷⁸

Despite its promise of job protection and other rights derived from company policy, the final effect of *Toussaint* may be that indefinite term employees in Michigan will remain at the risk of arbitrary discharge. It is important to note that the Michigan Supreme Court did not abrogate an employer's right to make a contract expressly terminable at will. After *Toussaint*, an employer can establish a policy of requiring prospective employees to acknowledge that they serve at the will or at the pleasure of the company.¹⁷⁹ Prior to *Toussaint*, it was unlikely that many employers would have executed such a contract, because they believed that the terminable at will rule already gave them broad discharge powers. Now a Michigan employer who wishes to retain unfettered discretion over termination decisions may well make such an agreement.

Accordingly, *Toussaint* may give rise to the widespread use of disclaimers of discharge for cause.¹⁸⁰ An example of an employer's suc-

178. One amicus curiae argued that:

[L]arge organizations regularly distribute memoranda, bulletins and manuals reflecting established conditions and periodic changes in policy. These documents are drafted "for clarity and accuracy and to properly advise those subject to the policy memo of its Contents." If such memoranda are held by this Court to form part of the employment contract, large employers will be severely hampered by the resultant inability to issue policy statements.

Id. at 619, 292 N.W.2d at 894. In response, the Michigan Supreme Court said that "[a]n employer who establishes no personnel policies instills no reasonable expectations of performance." *Id.*

179. *Id.* at 596 n.5, 614 n.27, 640-41, 292 N.W.2d at 884 n.5, 892 n.27, 904-06.

180. It is unlikely that a written disclaimer of job security would be stricken from an employment contract as an unconscionable term. A term is unconscionable if, for example, it appears in small print, is in a document wherein rights and duties would not be expected to be set forth or where there is a vast inequality of bargaining power between the parties. *See, e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); U.C.C. § 2-302 (1978); 1 CORBIN ON CONTRACTS § 128 (1963). An example of an atypical format case is *Weisz v. Parke-Bennet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (1971) (catalog of paintings to be auctioned was an inappropriate form in which to disclaim auctioneer's liability of authenticity). An employment contract, however, is expected to recite the rights and duties of the parties. Although an employee generally is in a bargaining position inferior to an employer, most prospective employees have a choice of some other employment. In *Henningen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), a waiver of liability of injury was held to be an unconscionable term in a contract for purchase of a new automobile, in part because such a term was standard in the automobile industry, leaving the consumer no choice but to waive liability. If all employers, or per-

cessful use of a disclaimer to avoid liability for discharge is found in *Novosel v. Sears, Roebuck & Co.*¹⁸¹ In *Novosel*, decided in reliance on *Toussaint*, the United States District Court for the Eastern District of Michigan validated a disclaimer of job security that for many years had been included on the employer's job application form.¹⁸² The *Novosel* opinion is silent regarding why the employee believed that he could be dismissed only for cause. The court said, however, that the signed disclaimer destroyed the possibility that the employee could have relied on any policy that provided that there would be no discharge except for cause.

Certainly other employers who do not wish to provide for discharge only for cause might seek a similar disclaimer and at the same time make no statements which could lead to inadvertent, but enforceable rights in indefinite term employees. If large numbers of employees refused to sign a disclaimer as a condition of employment, the employer might have to delete the disclaimer from the application form. The employer, however, would not have to make any affirmative promises of job protection.

The decision in *Toussaint* encourages employers to insulate themselves from litigation by requiring that a prospective employee disclaim the right to be discharged except for cause. The *Toussaint* court, however, did not indicate how it would rule in light of contradictory evidence of the parties intentions such as where both a disclaimer and a plantwide policy to discharge only for cause existed. The *Novosel* decision is not instructive because in that case the source of the employee's belief that he was entitled to be discharged only for cause was not identified.

If a policy of discharge for cause were promulgated subsequent to the execution of the disclaimer, a court might find that the original contract was modified and that the employee was protected by the new policy.¹⁸³ The more difficult question arises when an employee signs a

haps all those in one industry, required that all prospective employees disclaim job protection, then such a disclaimer might be stricken from the contract as an unconscionable term.

181. No. 79-73926 (E.D. Mich. Sept. 5, 1980) (applying Michigan law).

182. The application form, in pertinent part, provided that:

In consideration of my employment, I agree to conform to the rules of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice president . . . has authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

Id. at 5.

183. *See, e.g., Carter v. Kaskaskia Comm. Action Agency*, 24 Ill. App. 3d 1056, 322 N.E.2d

disclaimer of job protection where his employer has a contemporaneous policy to discharge only for cause. This situation may arise because few employers would take the chance of deleting existing and advertised discharge procedures when to do so might cause a serious threat to employee morale or a loss of personnel. To resolve the contradiction of whether the disclaimer is superior or subordinate to the discharge policy, a court might consider whether the employee knew of the policy but signed the disclaimer in spite of it. A court might well conclude that such a disclaimer evidenced the parties' true intentions not to be bound. This would comply with the presumption that an indefinite term employment contract is at will unless there is evidence to the contrary.¹⁸⁴ A court also might consider whether the employee really understood the implication of the disclaimer or if the employee believed that the disclaimer was a mere formality, which in practice was not enforced. An analysis of whether the disclaimer was an unconscionable term also might be appropriate.¹⁸⁵

Where an employee claims that if he had known that a policy to discharge only for cause was in force he would not have signed the disclaimer, some court, influenced by the spirit of *Toussaint*, might struggle to find a basis upon which to void the disclaimer. In light of the Michigan Supreme Court's disapproval of employers who promulgate policies to garner employee good will and then avoid the policies' provisions, a refusal to enforce a disclaimer might be justified in light of a contemporaneous policy to discharge only for cause.

Accordingly, any expansion of the discharge protection afforded to indefinite term employees by *Toussaint* is speculative. If employers are prompted to make explicit that an employee serves at the pleasure of the company or otherwise fail to proffer statements of job security pol-

574 (1974). In *Carter*, an employer discussed proposed policies, including discharge standards, with a committee of employees before the terms were integrated into a new employment manual. The *Carter* court held that the published manual constituted a modification of the employee's indefinite term employment contract and that the employee could not be fired in violation of the discharge policy published therein; *accord*, *Gishen v. Dura Corp.*, 362 Mass. 177, 285 N.E.2d 117 (1972); *Williams v. Action for Better Comm., Inc.*, 51 App. Div. 2d 876, 380 N.Y.S.2d 138, *leave to appeal denied*, 39 N.Y.2d 708, 351 N.E.2d 439 (1977). *But see Sargent v. IIT*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979), where an employee was denied recovery for dismissal contrary to the procedure set forth in the personnel manual. The *Sargent* court distinguished *Sargent* from *Carter* because in the *Carter* case the manual was in force when the employee was hired whereas in *Sargent* the manual was drafted subsequent to the hiring. *See also Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213 (1962) (cases which hold that the terms in an employment manual are not enforceable because they are not bargained for).

184. *See* notes 133-35 *supra* and accompanying text.

185. *See* note 180 *supra*.

icy, an employee will have no grounds upon which to persuade an arbitrator or a court that he was hired or worked with the understanding that he would not be discharged except for good cause. The common law presumption, that an employee of indefinite term is terminable at will, would prevail.

Conclusion

In *Toussaint v. Blue Cross & Blue Shield of Michigan*, the Michigan Supreme Court held that, where an employer induces a reasonable expectation in an employee that he will not be discharged except for cause, the employee may not be discharged arbitrarily. The court further held that it is irrelevant whether the reasonable expectation is the result of an employer's express written or oral promise or of some statement of policy in a personnel manual. The decision may be a mixed blessing for at will workers seeking job protection from arbitrary discharge. On one hand, a significant number of Michigan workers, especially those who work for companies which include discharge rights and procedures in a personnel manual, will enjoy increased job protection. On the other hand, as a result of *Toussaint*, employers may be encouraged to eliminate statements of policy that might give rise to discharge rights and require that prospective employees disclaim such rights. The *Toussaint* court held that where there are no policies, there can be no reasonable reliance. The long term effect of *Toussaint*, therefore, may be to diminish rather than to enhance the protection from arbitrary discharge that might be afforded to indefinite term employees.

Perhaps the only meaningful protection for employees will result from national legislation. Although many commentators believe that enactment of a law prohibiting the discharge of an employee without good cause is improbable, their pessimism may be unwarranted. Of course, neither employer associations nor unions would have an incentive to support such legislation. But, it is possible that a majority of indefinite term workers could capture congressional attention. It may be that to win job protection at will workers will have to organize and collectively assert their will.

JANICE E. LINN

