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The Recognition of Public Policy Exceptions to the Employment-at-Will Rule: A Legislative Function?

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THE RECOGNITION OF PUBLIC POLICY EXCEPTIONS TO THE EMPLOYMENT-AT-WILL RULE: A LEGISLATIVE FUNCTION?

*Joseph DeGiuseppe, Jr. **

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I. Introduction

Recent developments concerning the application of the employment-at-will rule¹ demonstrate that courts are reluctant to recognize exceptions to the rule based on considerations of public policy in the absence of a legislative mandate. This point is readily confirmed by the decision of the New York Court of Appeals in *Murphy v. American Home Products Corp.*² where the court declared that the recognition of a cause of action in tort for abusive discharge should be a function of the state legislature. Other jurisdictions have also declined to implement public policy exceptions to the at-will rule without legislative action.³ Indeed, courts have been unwilling to imply private causes of action to protect the rights of employees under federal and state law.

Proposed "whistle-blower" and unjust dismissal legislation has been introduced in a number of jurisdictions, but has had limited success.⁴

1. For further discussion on the employment-at-will rule, see DeGiuseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981).

2. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); see notes 305-14 *infra* and accompanying text for a discussion of this case.

3. See cases cited in note 292 *infra*.

4. A number of commentaries have considered the adoption through statute or case law of unjust dismissal protection for at-will employees. See generally Estreicher, *At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response*, 54 N.Y.S.B.J. 146 (1982); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979); Mennemeier, *Protections from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 418 (1976); Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1973); Comment, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); *At-Will Employment and the Problem of Unjust Dismissal*, 36

Only Connecticut and Michigan have enacted comprehensive "whistle-blower" protection for employees furthering a public interest to the detriment of their employers. As with the common law exception to the at-will rule, there may be difficulties in defining the parameters of public policy under these statutes. Moreover, the extent to which states can protect the rights of employees to receive fringe benefits has also been questioned in recent decisions on the grounds of federal preemption.

Courts, however, could become more willing to recognize implied-in-fact contract rights to job security based on the "totality" of the parties' employment relationship. Under this approach, protection for employees from wrongful terminations may be derived from long-standing common law principles of contract interpretation and obligations without the need for legislative action. Similarly, private causes of action under statutes may be implied based on the inadequacy of statutory relief or to further legislative intent in protecting the rights of employees afforded by these laws.

This Article examines recent developments concerning the effect of the employment-at-will rule on employee rights to job security and fringe benefits. Federal and state legislation regulating the terms and conditions of employment relationships is also examined. Finally, this Article analyzes whether the recognition of public policy exceptions to the at-will rule should be an exclusive function of the legislature.

II. Employment-at-Will Rule

A. Development of the At-Will Rule

The common law rule regarding employment relationships of an indefinite duration emerged in the late nineteenth century as a direct result of H.G. Wood's treatise on master-servant relationships.⁵

N.Y.C.B.A. REP. 170 (Apr. 1981); Feerick, *Continued Erosion of Employment-at-Will*, N.Y.L.J., Feb. 4, 1983, at 1, col. 1; Feerick, *Employment-at-Will Rule and Unjust Dismissal*, N.Y.L.J., Aug. 6, 1982, at 1, col. 1; Harmon & Kolko, *Developments in the Law Covering Abusive Discharges*, N.Y.L.J., Aug. 26, 1982, at 1, col. 3; Travis, *Abusive-Discharge Cases to Test Common-Law Rule*, N.Y.L.J., Sept. 24, 1982, at 1, col. 2; Weiss, *State by State: Chipping Away at Employment-at-Will*, Nat'l L.J., Jan. 18, 1982, at 26, col. 1.

5. H.G. WOOD, *MASTER AND SERVANT* (2d ed. 1886). Prior to the nineteenth century, the law regarding employment relationships of an indefinite duration was based on the feudal doctrine of master and servant, which considered the master-servant relationship as one primarily based on status rather than contract. Although the enactment in 1562 of the English Statute of Laborers, 5 Eliz., ch. 4 (1562), reinforced this doctrine by requiring certain classes of individuals to accept employ-

Wood's rule "that a general or indefinite hiring is *prima facie* a hiring at will" was stated without further analysis based upon authority of questionable value.⁶ The rule was incorporated into the American common law in *Martin v. New York Life Insurance Co.*⁷ and, by the beginning of the twentieth century, became the primary authority with respect to the termination of employment relationships for an indefinite term.⁸

ment, it also introduced the concepts of termination by notice and "on reasonable cause." 1 W. BLACKSTONE, COMMENTARIES 131 (1878). The rule emerged under the English common law that a general hiring for an unspecified duration was presumed to be a hiring for a one-year period, terminable only for "just cause" prior to the expiration of the implied one-year term. As the rule eventually evolved, employment relationships, unless otherwise specified, could be terminated only by notice. Summary dismissals for cause were excepted from the notice requirements. See generally DeGiuseppe, *supra* note 1, at 3-5; Summers, *supra* note 4, at 485.

6. See DeGiuseppe, *supra* note 1, at 6-7. In his treatise, Wood stated the following rule:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic or other servants.

H.G. Wood, *supra* note 5, § 136.

None of the cases cited by Wood in support of his rule squarely support the general proposition that an indefinite hiring is terminable at-will. See *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd*, 80 U.S. 254 (1872) (statute of limitations barred creditor's claim against debtor for payment of a larger sum than agreed upon by debtor); *De Briar v. Minturn*, 1 Cal. 450 (1851) (new trial granted on issue of whether defendant-innkeeper had right to eject forcefully plaintiff-barkeeper after notifying him of his discharge); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870) (court held that whether an oral employment contract was for a year or for a quarter of a year was a question of fact for the jury and that the statute of frauds did not bar an action by the employee for payment of wages during the second year of employment); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871) (court affirmed jury verdict for plaintiff-employee where jury found that parties intended hiring to be for a definite period of one year and plaintiff was fired after only eight months).

7. 148 N.Y. 117, 42 N.E. 416 (1895). The court established that a hiring at an annual salary does not make the employment for a year; rather, an employee hired at such a salary was an employee-at-will and the employer was at liberty to terminate him at any time. In adopting Wood's rule, the *Martin* court stated:

The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood and it has been adopted in a number of states. . . .

It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.

Id. at 121, 42 N.E. at 417 (citation omitted).

8. *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 628 (Hawaii 1982); see generally DeGiuseppe, *supra* note 1, at 7; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342 (1974).

Reflecting a concern for economic growth and entrepreneurship, the United States Supreme Court in *Adair v. United States*⁹ affirmed the at-will rule based on the principles of freedom of contract and freedom of enterprise.¹⁰ The Court in *Adair* held that the right to discharge employees at will cannot be limited by federal legislation, because such legislation would be repugnant to the fifth amendment guarantees of personal liberty and liberty of contract.¹¹ The Court in *Coppage v. Kansas*¹² subsequently declared unconstitutional under the fourteenth amendment state legislation similar to the federal statute in *Adair*.¹³

Support for the employment-at-will rule was also based on the contractual doctrine of mutuality of obligation.¹⁴ In applying this doctrine to employment relationships, courts reasoned "that if the employee can end his employment at any time under any condition, then the employer should have the same right."¹⁵ The contractual doctrines of mutuality of remedy and consideration were similarly raised as sufficient justification for the at-will rule.¹⁶

9. 208 U.S. 161 (1908). In *Adair* the Supreme Court declared unconstitutional § 10 of the Erdman Act of June 1, 1898, ch. 370, 30 Stat. 424, a statute which imposed criminal penalties for the discharge or threatened discharge of interstate railroad employees because of union membership.

10. Concerning the principles of freedom of contract and freedom of enterprise, the Court in *Adair* stated:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . .

208 U.S. at 174-75.

11. *Id.* In this regard, the Court stated: "In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Id.* at 175.

12. 236 U.S. 1 (1915).

13. In *Coppage* the state statute provided that it was a misdemeanor, punishable by fine or imprisonment, for an employer to require any of its employees to agree not to become or remain a member of any labor organization during the course of his employment. *Id.* at 6-7.

14. See generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419-21 (1967) (discusses mutuality doctrine); Summers, *supra* note 4, at 484-85.

15. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 128, 421 N.E.2d 876, 878 (1981) (citing Summers, *supra* note 4, at 484-85).

16. Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 336 (1982). The following policy consideration for the at-will rule was stated in *Pitcher v. United Oil & Gas Syndicate Inc.*, 174 La. 66, 67, 139 So. 760, 761 (1932):

B. Application of the At-Will Rule

Most jurisdictions continue to recognize the rule that a hiring for an indefinite term amounts to an employment-at-will which may be terminated at any time by either party with or without cause or notice.¹⁷ Even those jurisdictions which have recognized exceptions to the at-will rule based on considerations of public policy have confirmed their adherence to the rule in recent decisions.¹⁸ In this regard, one court has declared that its acceptance of the public policy exception was not intended "to be the death knell of the employment-at-will doctrine."¹⁹

Recent cases demonstrate that dismissals of employees under the at-will rule continue to be sustained on numerous grounds. Pursuant to the at-will rule, employees have been lawfully terminated for filing workers' compensation claims,²⁰ refusing to submit to the sexual ad-

An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself

.....

Id.

17. See DeGiuseppe, *supra* note 1, at 25 n.25 and cases cited therein. The following jurisdictions have recently affirmed their adherence to the at-will rule by declining to recognize the public policy exception: Alabama: Meredith v. C.E. Walther, Inc., 422 So. 2d 761 (Ala. 1982); District of Columbia: Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. Ct. App. 1981); Georgia: Taylor v. Foremost-McKesson, Inc., 656 F.2d 1029 (5th Cir. 1981); Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.E.2d 51 (1981); Mississippi: Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); New Mexico: Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (1981); New York: Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); Ohio: Dadas v. Prescott, Ball & Turben, 529 F. Supp. 203 (N.D. Ohio 1981); Texas: Maus v. National Living Centers, Inc., 633 S.W.2d 674 (Tex. Ct. App. 1982). See also Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (North Carolina and Virginia law); Forde v. Royal's Inc., 537 F. Supp. 1173 (S.D. Fla. 1982) (Florida law).

18. See, e.g., Colorado: Rawson v. Sears Roebuck & Co., 530 F. Supp. 776, 781-82 (D. Colo. 1982); Connecticut: Kilbride v. Dushkin Pub. Group, Inc., 186 Conn. 718, 443 A.2d 922 (1982); Massachusetts: Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982); Michigan: Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982); Pennsylvania: Callahan v. Scott Paper Co., 541 F. Supp. 550, 561-63 (E.D. Pa. 1982); Borensen v. Rohm & Haas, Inc., 526 F. Supp. 1230, 1235 (E.D. Pa. 1981); Wisconsin: Brockmeyer v. Dun & Bradstreet, 109 Wis. 2d 44, 325 N.W.2d 70 (Ct. App. 1982) (petition for review pending); see also Serafin v. City of Lexington, 547 F. Supp. 1118 (D. Neb. 1982); Wood v. MARTA, No. C81-1204A (N.D. Ga. Oct. 25, 1982), reprinted in DAILY LAB. REP. (BNA) No. 233, at D-1 (Dec. 3, 1982) (employment-at-will rule affirmed in public employment cases).

19. Brockmeyer v. Dun & Bradstreet, 109 Wis. 2d 44, 325 N.W.2d 70 (Ct. App. 1982) (petition for review pending).

20. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (1981); see also Sloane v. Southern

vances of their supervisors,²¹ complaining about the quality of their employers' services,²² testifying truthfully against the interests of their employers,²³ disclosing allegedly unlawful accounting practices,²⁴ refusing to provide accurate information to questions on their employer's questionnaires,²⁵ criticizing company policies,²⁶ and, among other things, smoking marijuana on the job.²⁷ The at-will rule has also been applied to employment contracts alleged to be for a permanent or definite term where such contracts were not supported by sufficient consideration or did not reflect a mutual understanding of the parties regarding a specific term of employment.

1. *Permanent Employment Contracts*

Contracts for permanent or lifetime employment continue to be enforced with marked reluctance by the courts and only in cases where the commitment had been "clearly, specifically and definitely expressed."²⁸ These contracts are generally considered to be agree-

Bell Tel. & Tel. Co., 505 F. Supp. 1085 (S.D. Fla. 1981) (reduction of disability benefits in retaliation for filing workers' compensation claim was not unlawful).

21. Forde v. Royal's, Inc., 537 F. Supp. 1173 (S.D. Fla. 1982).

22. Keneally v. Orgain, 606 P.2d 127 (Mont. 1980) (complaints concerning customer service and maintenance); Maus v. National Living Centers, Inc., 633 S.W.2d 674 (Tex. Ct. App. 1982) (complaints concerning poor patient care and neglect).

23. Meredith v. C.E. Walther, Inc., 422 So. 2d 761 (Ala. 1982); Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. Ct. App. 1981).

24. Taylor v. Foremost-McKesson, Inc., 656 F.2d 1029 (5th Cir. 1981); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

25. Cort v. Bristol-Meyers Co., 385 Mass. 300, 431 N.E.2d 908 (1982).

26. Borensen v. Rohm & Haas, Inc., 526 F. Supp. 1230 (E.D. Pa. 1981).

27. Brockmeyer v. Dun & Bradstreet, 109 Wis. 2d 44, 325 N.W.2d 70 (Ct. App. 1982) (petition for review pending) (other factors for the employee's dismissal included his having an affair with a secretary, lack of attention to his job, and low morale among his employees).

28. Borbely v. Nationwide Mut. Ins. Co., 547 F. Supp. 959, 970 (D.N.J. 1981) (citing Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 601, 89 A.2d 237, 241 (1952)). It should be noted that managerial personnel may need extraordinary hiring authority to bind companies to contracts for permanent employment. Boleman v. Congdon & Carpenter Co., 638 F.2d 2 (1st Cir.), *cert. denied*, 454 U.S. 824 (1981).

In *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903, 906 (Ala. 1982), the following definition of "permanent employment" was stated:

In *Alabama Mills, Inc. v. Smith*, 237 Ala. 296, 186 So. 699 (1939), this Court defined "permanent employment" as follows:

"It was said that what they meant by a permanent employment was so long as defendant was engaged in the same nature of business and needed the service of such an employee, and plaintiff was able and willing to do it satisfactorily and gave no cause for his discharge.

ments for an indefinite duration terminable at the will of either party with or without cause or notice.²⁹ Courts have recognized, however, that binding agreements for permanent employment may be created where sufficient consideration other than services rendered has been given by employees in a bargained-for exchange.³⁰ Mutuality of obli-

‘ “[P]ermanent” employment will be held to contemplate a continuous engagement to endure as long as the employer shall be engaged in business and have work for the employee to do and the latter shall perform the service satisfactorily. . . . ’ ” (237 Ala. at 299, 186 So. 699.)

Thus, according to the above definition, an implicit term of the employment contract was that the employee would remain employed only if the employer had need of the employee’s services.

Contracts for broad, unspecified terms, however, are generally considered to be terminable at will. *See, e.g.*, *Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002 (8th Cir. 1982) (employment contract for “so long as it is mutually satisfactory to both parties” was at-will agreement); *Fleming v. Mack Trucks, Inc.*, 508 F. Supp. 917 (E.D. Pa. 1981) (promise to retain employee “as long as you perform satisfactorily” not sufficient to create a contract); *Geib v. Alan Wood Steel Co.*, 419 F. Supp. 1205 (E.D. Pa. 1976) (vague promise of employment “until retirement” did not create binding obligation); *Lightcap v. Keaggy*, 128 Pa. Super. 348, 194 A. 347 (1937) (employment for “so long as you live” did not give rise to an enforceable contract); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977) (no exception to at-will rule based solely on employee’s subjective understanding that he would be employed for “as long as he did his job in a satisfactory manner”). *But see Forman v. BRI Corp.*, 532 F. Supp. 49 (E.D. Pa. 1982) (alleged oral contract for “reasonable time” stated cause of action).

29. *See, e.g.*, *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982) (under Arkansas or Wisconsin law, employee hired as “ ‘a permanent member of the staff’ ” was hired for an indefinite term of employment), *cert. denied*, 103 S.Ct. 1194 (1983); *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982) (under Maryland law, no promise for lifetime employment based on statements of company vice president and plaintiff’s relinquishment of job position and benefits); *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959 (D.N.J. 1981) (friendly assurances of continued employment did not create contract for lifetime employment); *Rogers v. IBM Corp.*, 500 F. Supp. 867 (W.D. Pa. 1980) (under Pennsylvania law, no contract for “permanent” employment based on employer’s “promote from within” policy and statements in company manual); *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982) (no agreement for permanent employment even though employee relinquished prior job for alleged contract); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983) (no agreement for permanent employment based on six-month probationary period and annual reviews under merit plan); *Pinsof v. Pinsof*, 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1982) (death benefit plan and stock purchase agreement did not constitute contract for lifetime employment); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (1982) (employee’s personal understanding of clause providing for “regular employment” upon completion of six-month probationary clause did not create contract for permanent employment).

30. *See, e.g.*, *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982) (relinquishment of prior employment based on promise of permanent employment); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982) (relinquishment of job offer in exchange for promise of permanent employment stated cause of action); *Pullman Co. v. Ray*, 201 Md. 268, 94 A.2d 266 (1953) (relinquishment of personal injury claim);

gation is not essential to the creation of binding obligations for lifetime employment.³¹

Courts have closely scrutinized the sufficiency of the additional consideration given by employees as well as the understanding of both parties as to the duration of employment in determining whether an agreement for permanent employment has in fact been made. It is generally agreed that such an agreement may not be established solely by the subjective understandings and expectations of employees concerning the duration of their employment.³² Accordingly, courts have been reluctant to infer lifetime employment agreements from probationary clauses in company personnel manuals,³³ the terms and conditions of company benefit plans,³⁴ or gratuitous statements made by

contra Ryan v. J.C. Penney Co., 627 F.2d 836 (7th Cir. 1980) (continued services of employee did not support contract for permanent or otherwise definite term of employment). See *generally* Annot., 60 A.L.R.3d 226, 264-65 (1974) (discusses relinquishment of prior job).

In Heuvelman v. Triplett Elec. Instrument Co., 23 Ill. App. 2d 231, 235, 161 N.E.2d 875, 877 (1959), the court stated the following general rule for upholding agreements for permanent employment:

Oral contracts for "permanent employment" (meaning that as long as defendant was engaged in the prescribed work and as long as plaintiff was able to do his work satisfactorily, defendant would employ him) have been sustained, provided such contracts are supported by a consideration other than the obligation of services to be performed on the one hand and wages to be paid on the other.

31. Page v. Carolina Coach Co., 667 F.2d 1156 (4th Cir. 1982) (employee need not promise to work for life for employer); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982) (promises of parties need not be of same type to constitute consideration); see *generally* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981). *But see* Hamlen v. Fairchild Indus., 413 So. 2d 800 (Fla. Dist. Ct. App. 1982) (mutuality of obligation required to support agreement for permanent employment). It should be noted, however, that independent consideration is not needed to support an employment contract for permanent employment based upon mutual promises. See Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487 (W.D. Ark. 1982); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982).

32. Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Roy Jorgensen Assocs. v. Deschenes, 409 So. 2d 1188 (Fla. Dist. Ct. App. 1982); Lasser v. Grunbaum Bros. Furniture Co., 46 Wash. 2d 408, 281 P.2d 832 (1955); Parker v. United Airlines, Inc., 32 Wash. App. 722, 649 P.2d 181 (1982). See *also* Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) (despite employee's understanding of medical examination requirement, no contract for permanent employment existed where medical report disclosed serious medical conditions).

33. Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Parker v. United Airlines, Inc., 32 Wash. App. 722, 649 P.2d 181 (1982). *Accord* Gunn v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779 (1982) (one-year probationary clause in pilot's contract for indefinite term did not limit employer's right to discharge at-will).

34. Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983) (annual merit pay plan); Pinsof v. Pinsof, 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1982) (death benefit plan and stock purchase agreement).

company representatives.³⁵ Even assurances of "steady" employment may not suffice to establish a permanent employment contract terminable only for "just cause."³⁶

Instead, courts have looked "at the alleged 'understanding,' the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case to ascertain the terms of the claimed agreement."³⁷ Oral agreements for permanent employment, however, may not be enforceable under the statute of frauds.³⁸ Moreover, the doctrines of promissory and equitable estoppel cannot be used to create primary contractual liability where none would have otherwise existed.³⁹

Recent cases demonstrate that the mere relinquishment of a job, business, or profession by one who decides to accept a contract for alleged permanent employment may not be sufficient consideration to support an agreement for such employment.⁴⁰ In *Page v. Carolina*

35. *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Borbely v. Nationwide Mut. Ins. Co.*, 547 F. Supp. 959 (D.N.J. 1981).

36. *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 725, 649 P.2d 181, 183 (1982) (citing *Gensman v. West Coast Power Co.*, 3 Wash. 2d 404, 101 P.2d 316 (1940)).

37. *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 725, 649 P.2d 181, 183 (1982) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)). See also *Hodge v. Evans Fin. Corp.*, No. 81-02726 (D.C. Cir. May 27, 1983).

38. *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982).

In most jurisdictions, oral contracts not capable of being performed within one year are unenforceable under the applicable statute of frauds. "The test is simply whether the contract by its terms is capable of full performance within a year, not whether such occurrence is likely." *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 604, 440 N.E.2d 998, 1004 (1982) (citing *Stein v. Malden Mills, Inc.*, 9 Ill. App. 3d 266, 292 N.E.2d 52 (1972)). Oral contracts for permanent or lifetime employment are generally not considered to be barred by the statute of frauds. See Annot., 60 A.L.R.3d 226 (1974).

Nevertheless, the mere possibility that an employee could be terminated within a year does not necessarily remove the alleged contract from the statute of frauds prohibition. *Sinclair v. Sullivan Chevrolet Co.*, 45 Ill. App. 2d 10, 14-15, 195 N.E.2d 250, 252, *aff'd*, 31 Ill. 2d 507, 202 N.E.2d 516 (1964). Nor does the possibility that an employee may die or resign within the first year necessarily remove the oral agreement from the prohibitions of the statute of frauds. *Gilliland v. Allstate Ins. Co.*, 69 Ill. App. 3d 630, 633, 388 N.E.2d 68, 70 (1979). "Whether the possibility of an employee's death or termination takes the employment agreement from the bar of the Statute in a specific case depends in large part on the underlying purpose and specific terms of the agreement itself." *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84, 87 (N.D. Ill. 1982); see *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (employment contract with no fixed term was not an agreement which "by its terms" could not be performed within one year).

39. See *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903, 905 (Ala. 1982), and cases cited therein.

40. *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982); see also *C & P Tel. Co. v. Murray*, 198 Md. 526, 84 A.2d 870 (1951). *Contra Grouse v. Group Health Plan*,

*Coach Co.*⁴¹ the Fourth Circuit, applying Maryland law, held that an employee who merely relinquished his job and benefits as a union bus driver to assume a non-union position did not provide sufficient consideration to support his alleged lifetime employment contract. The court also held that a statement by the defendant's vice president of operations to plaintiff that he had made " 'a wise move' " "could not reasonably be interpreted as a promise of lifetime employment, but rather only as words of encouragement."⁴²

Adequate consideration to support a lifetime employment contract may be found, however, where an employee agrees to forego a more lucrative job offer in exchange for a promise of job security made by an employer who desires to retain the services of a valuable employee.⁴³ Nevertheless, courts have recognized that not every relinquishment of a job offer or position will be sufficient consideration to support an alleged agreement for permanent employment.⁴⁴ In this regard, "[c]ourts have realized that a person necessarily must give up or terminate a prior job in order to accept a new one and, absent other circumstances, the relinquishment of the prior job does not render the new employment offer as anything more than a hiring for indefinite duration."⁴⁵

2. *Contracts for a Definite Term*

Employment contracts for a definite term are exempt from the application of the employment-at-will rule. Whether an employment relationship constitutes a hiring for a specific duration depends on the facts and circumstances of each case.⁴⁶ In most jurisdictions, the speci-

Inc., 306 N.W.2d 114 (Minn. 1981) (employer liable on theory of promissory estoppel for withdrawing job offer to employee who left prior job in reliance on the employer's promise of employment).

41. 667 F.2d 1156 (4th Cir. 1982).

42. *Id.* at 1157-58.

43. *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 65 Ill. Dec. 143, 440 N.E.2d 998 (1982). *See also* *Sea-Land Serv., Inc. v. O'Neal*, No. 800856 (Va. Sup. Ct. Dec. 3, 1982) (employee who resigned from prior position based on employer's promise of new job supplied sufficient consideration for new position).

44. *Adler v. American Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982); *Heuvelman v. Triplett Elec. Instrument Co.*, 23 Ill. App. 2d 231, 161 N.E.2d 875 (1959).

45. *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 603 n.1, 440 N.E.2d 998, 1004 n.1 (1982) (citing Annot., 60 A.L.R.3d 226 (1974), and cases cited therein).

46. *Gollberg v. Bramson Publishing Co.*, 685 F.2d 224 (7th Cir. 1982); *Dadas v. Prescott, Ball & Turben*, 529 F. Supp. 203 (N.D. Ohio 1981); *Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976). In *Gollberg* the court

fication of an employee's salary for a specific period does not create a contract for the period named.⁴⁷ Independent consideration is not required, however, to support an agreement for a definite term employment relationship provided that the agreement is based upon the mutual promises of the parties.⁴⁸ Where an employment contract is for a specified period, "just cause" is generally required for termination prior to the expiration date of the agreement.⁴⁹ Under the appro-

made the following statement concerning the existence of a contract for a definite term:

Absent an expressed intent, and where, as here, there were no negotiations respecting terminability, a court should look within the four corners of the contract, and to the facts and circumstances surrounding the making, performing, and terminating of the contract, including actions of the parties and the prevailing practice, if any, in the industry. *Henry v. J.B. Publishing Co.*, 54 Mich. App. 409, 221 N.W.2d 174 (1974); *Michigan Crown Fender Co. v. Welch*, 211 Mich. 148, 178 N.W. 684 (1920).

685 F.2d at 226-27. *See also Paice v. Maryland Racing Comm'n*, 539 F. Supp. 458 (D. Md. 1982) (longevity of employment alone cannot form basis for continued employment).

47. *See Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 251, 344 N.E.2d 118, 119 (1976), where the court stated:

[I]n the absence of facts and circumstances which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party.

Accord Myers v. Coradian Corp., 92 A.D.2d 643, 459 N.Y.S.2d 929 (3d Dep't 1983); *but see Weaver v. Shopsmith, Inc.*, 556 F. Supp. 348 (S.D. Ohio 1982) (Connecticut law) (*Henkel* distinguished on grounds that employee's allegations of one-year employment contract based on payment of bonuses and reimbursement of relocation expenses stated cause of action).

In certain jurisdictions, however, "a hiring at a stated sum per week, month or year, is a definite employment for the period named." *DuSesoi v. United Ref. Co.*, 549 F. Supp. 1289, 1297-98 (W.D. Pa. 1982) (applying Texas law) (citing *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557 (Tex. Civ. App. 1947)); *accord Chas. S. Stiff Co. v. Florsheim*, 203 Ark. 1043, 159 S.W.2d 748 (1942); *Putnam v. Producers' Live Stock Mktg. Ass'n*, 256 Ky. 196, 75 S.W.2d 1075 (1934); *Delzell v. Pope*, 200 Tenn. 641, 294 S.W.2d 690 (1956); *but see Garrison v. Lannom Mfg. Co.*, 55 Tenn. App. 419, 402 S.W.2d 462 (1965) (hiring at particular sum per specific period does not raise presumption of employment for that period); *War-Pak, Inc. v. Rice*, 604 S.W.2d 498 (Tex. Civ. App. 1980) (no contract for a definite term where only evidence was employee's salary).

48. *Scholtes v. Signal Delivery Serv. Inc.*, 548 F. Supp. 487, 492 (W.D. Ark. 1982).

49. *Alpern v. Hurwitz*, 644 F.2d 943 (2d Cir. 1981); *Ghalam v. Tesson Ferry, Inc.*, 560 F. Supp. 631 (E.D. Mo. 1983); *Chapin v. Klein*, 128 Ariz. 94, 623 P.2d 1250 (Ct. App. 1981); *Rosecrans v. Intermountain Soap & Chem. Co.*, 100 Idaho 785, 605 P.2d 963 (Idaho 1980); *Crane v. Perfect Film & Chem. Corp.*, 38 A.D.2d 288, 329 N.Y.S.2d 32 (1st Dep't 1972); *Lone Star Steel Co. v. Wahl*, 636 S.W.2d 217 (Tex. Ct. App. 1982). *But see Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (Or. 1982) (employer's definition of "just cause" will control unless other-

priate circumstances, a contract may be renewed automatically for another full term where the employee works beyond the period fixed in the agreement.⁵⁰

The types of agreements which will be deemed to create employment contracts for a definite term have been the subject of recent judicial scrutiny.⁵¹ In *Gollberg v. Bramson Publishing Co.*⁵² plaintiff-employee claimed that his written employment agreement guaranteed him employment with the defendant for one year. Paragraph 2 of the agreement stated:

The terms of this agreement shall be from January 3, 1978, for a period of one year, and shall continue from year to year, thereafter, unless terminated pursuant to paragraph 8, *infra*.⁵³

The provisions of paragraph 8 of the plaintiff's employment agreement provided for the immediate termination of the agreement upon notice or plaintiff's death.⁵⁴ Plaintiff, who was summarily discharged on June 16, 1978, sued for breach of contract alleging that the "unless terminated" language of paragraph 2 did not affect his guaranteed right to one year of employment from January 3, 1978.

Relying on prior case law and industry practice, the *Gollberg* court rejected plaintiff's contentions that the termination provision of his employment agreement only applied to the renewal periods rather

wise agreed). See also *Shoucair v. Read*, 88 A.D.2d 718, 451 N.Y.S.2d 281 (3d Dep't 1982) (termination of employment contract terminable upon notice for failing to obtain permanent medical license was valid).

50. *Foster v. Springfield Clinic*, 88 Ill. App. 3d 459, 410 N.E.2d 604 (1980) (express one-year contract was extended for an additional term by implication where doctor worked three weeks beyond expiration date). The court in *Foster* stated that following rule in support of its decision:

It has been repeatedly held that, where one party enters the employment of another under a special contract fixing the time and price to be paid, and continues in such employment after the term has elapsed, it will be presumed that the hiring and service were under the original contract.

Id. at 463, 410 N.E.2d at 607 (quoting *Crane Bros. Mfg. Co. v. Adams*, 142 Ill. 125, 130, 30 N.E. 1030, 1032 (1892)).

51. *Gollberg v. Bramson Publishing Co.*, 685 F.2d 224 (7th Cir. 1982); *Weaver v. Shopsmith, Inc.*, 556 F. Supp. 348 (S.D. Ohio 1982) (Connecticut law); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

52. 685 F.2d 224 (7th Cir. 1982).

53. *Id.* at 225.

54. Paragraph 8 of the agreement stated:

This agreement shall be terminable immediately upon the date of mailing of written notice by either party to the other, addressed by registered mail, return receipt requested, to the last known business address of the respective parties, or upon the death of Sales Representative.

Id.

than the initial period of his employment.⁵⁵ In reaching its decision, the court rejected any arguments based on the plaintiff's expectation of employment for a one-year period.⁵⁶ Accordingly, the court held that the plaintiff's contract of employment was terminable at-will.

Courts have similarly rejected arguments that annual performance reviews create contracts for one-year periods.⁵⁷ In *Muller v. Stromberg Carlson Corp.*⁵⁸ plaintiff-employee claimed that annual performance reviews under a company merit pay plan created a series of one-year employment contracts with specified salary increases, subject only to his satisfactory performance.⁵⁹ The court upheld the plaintiff's discharge on the grounds that the provisions of the merit pay arrangement did not establish "that the parties ever intended a definite term of employment or specific salary increases."⁶⁰ Because the plaintiff

55. *Id.* at 227. The *Gollberg* court relied on *Brekken v. Reader's Digest Special Prods., Inc.*, 353 F.2d 505, 506 (7th Cir. 1965), where an employment contract containing the following clause was found to be terminable at-will:

This agreement shall be effective from the date of execution and shall remain in effect for a period of twelve months and will be automatically renewed for twelve-month terms unless sooner terminated.

This agreement may be terminated by either party upon written notice or by Manager's death.

Plaintiffs in *Brekken* argued that the phrase "unless sooner terminated" only applied to the renewal periods after the expiration of the initial period of employment. The *Brekken* court rejected this contention as being the mere expectations of the plaintiffs unsupported by "any tenable legal foundation." *Id.*

56. 685 F.2d at 229-30 (citing *Brekken v. Reader's Digest Special Prods., Inc.*, 353 F.2d 505, 506 (7th Cir. 1965)), where the court stated:

It cannot be doubted as plaintiffs assert that they expected their employment to continue for at least one year, but that was merely an expectation and not a right guaranteed by the contracts which they signed. The courts cannot rewrite the contracts which they made.

57. *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); *Garcia v. Aetna Fin. Co.*, No. 80-A-1002 (D. Colo. Feb. 5, 1981); *Mann v. Ben Tire Distribs., Ltd.*, 89 Ill. App. 3d 695, 411 N.E.2d 1235 (1980).

58. 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

59. Plaintiff alleged that he was told by defendant "that he would become a 'permanent' employee after a six-month probationary period and would remain employed as long as evaluations of his performance were satisfactory." *Id.* at 268. Plaintiff also claimed that the defendant had breached his employment contract by not giving the full salary increases to which he was entitled under the merit pay plan for the years 1979-1981.

The defendant's merit pay plan required employees and their supervisors to formulate and carry out yearly objectives. Employees were evaluated annually to determine how well they fulfilled their objectives. The supervisors then made salary increase recommendations which were reviewed and subject to the approval of higher managerial personnel. *Id.*

60. *Id.* at 268. The court also rejected plaintiff's argument that the defendant was required to give him specific annual salary increases.

failed to produce any other evidence establishing that the parties had intended to create a definite term of employment, the court declined to recognize his subjective expectations regarding the tenure of his employment.⁶¹

III. Statutory Limitations on the Employment-at-Will Rule

Current federal and state legislation regulating the terms and conditions of employment relationships is directly attributable to the decisions of the United States Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*⁶² and *NLRB v. Jones & Laughlin Steel Corp.*⁶³ In these decisions, the Court recognized the congressional power under the Commerce Clause to give employees the right to organize and bargain collectively through representatives of their own selection without the threat of discharge or other punitive action. The Court thus rejected the holdings of *Adair v. United States*⁶⁴ and *Coppage v. Kansas*⁶⁵ that legislation cannot constitutionally limit the principle of freedom of contract.

A. Federal Legislation

Federal legislation protecting the rights of employees is extensive. The National Labor Relations Act (NLRA)⁶⁶ provides employees in

61. *Id.* (citing *Roy Jorgensen Assocs. v. Deschenes*, 409 So. 2d 1188 (Fla. Dist. Ct. App. 1982)). The *Muller* court, in reaching its decision, distinguished *American Agronomics Corp. v. Ross*, 309 So. 2d 582 (Fla. Dist. Ct. App.), *cert. denied*, 321 So. 2d 558 (Fla. 1975), in which an employee was found to have an enforceable contract for a definite term based on a letter confirming his employment and specifying several dates over a one-year period on which his performance would be reviewed. In distinguishing this case, the *Muller* court stated that *Ross* involved a document supported by testimony purporting to set out the terms of the employee's employment whereas the plaintiff merely alleged that company policy gave rise to an enforceable contract. 427 So. 2d at 269.

62. 281 U.S. 548, 570 (1930) (Court upheld constitutionality of the Railway Labor Act); see notes 68-69 *infra* and DeGiuseppe, *supra* note 1, at 16-17, for a discussion of the Railway Labor Act.

63. 301 U.S. 1, 49 (1937) (Court upheld constitutionality of the National Labor Relations Act); see notes 66-67 *infra* and DeGiuseppe, *supra* note 1, at 17-19, for a discussion of the National Labor Relations Act.

64. 208 U.S. 161 (1908); see notes 9-11 *supra* and accompanying text.

65. 236 U.S. 1 (1915); see notes 12-13 *supra* and accompanying text.

66. 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980). The NLRA, or Wagner Act, was significantly amended in 1947 by the Labor-Management Relations Act, Act of June 23, 1947, ch. 120, § 101, 61 Stat. 136-52, and by the Labor-Management Reporting and Disclosure Act of 1959, Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 519. Health Care Amendments to the NLRA were adopted in 1974, Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

industries affecting commerce with the right to organize, bargain collectively and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."⁶⁷ Similarly, the provisions of the Railway Labor Act⁶⁸ are designed to prevent employer interference with the rights of employees in the railroad and airline industries to select bargaining representatives without the threat of termination or coercion.⁶⁹ Federal statutes also prohibit employment discrimination based on race, color, religion, sex or national origin,⁷⁰ age,⁷¹ and physical handicap.⁷²

67. NLRA § 7, 29 U.S.C. § 157 (1976). The "mutual aid or protection" language of § 7 of the NLRA protects employees in both organized and unorganized shops irrespective of whether union activity is involved or collective bargaining is contemplated. *See, e.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-67 (1978) (political activity); *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 127 (6th Cir. 1980) (safety complaints); *Pleasant View Rest Home*, 194 N.L.R.B. 426 (1971) (working conditions). Even supervisory discharges may be unlawful where they interfere with the right of employees to exercise their rights under § 7 of the NLRA. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. No. 58, 110 L.R.R.M. 1289 (1982). *Accord* *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1983).

Under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976), employers are prohibited from discriminating "in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage" union membership. *Id.* The NLRB in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), set forth the following burden of persuasion test for § 8(a)(3) cases:

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

251 N.L.R.B. at 1089. Contrary to the NLRB's holding in *Wright Line*, several circuits had held that the ultimate burden of persuasion should always remain with the General Counsel. *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982); *NLRB v. New York Univ. Medical Center*, 112 L.R.R.M. 2633 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3791 (U.S. Apr. 19, 1983) (No. 82-1705); *Behring Int'l, Inc. v. NLRB*, 675 F.2d 83, 87-91, *opinion modified*, 110 L.R.R.M. 2423 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3199 (U.S. Sept. 13, 1982) (No. 82-438); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 739 (7th Cir. 1982). The United States Supreme Court in *NLRB v. Transportation Management Corp.*, No. 82-168 (U.S. June 15, 1983), held that the NLRB's allocation of the burden of proof was "clearly reasonable" under the NLRA.

68. 45 U.S.C. §§ 151-188 (1976).

69. *See* *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 543 (1937) ("The prohibition against such interference was continued and made more explicit by the amendment of 1934.")

70. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e (1976 & Supp. IV 1980).

71. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980) (prohibits age-based discrimination against persons between the ages of 40 and 70).

72. Vocational Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. IV 1980). The Act provides that where any federal department enters into a contract in

Other federal legislation includes so-called "whistle-blower" statutes⁷³ designed to encourage employees to report without threat of discharge employer violations of the environmental or safety standards set forth in the Energy Reorganization Act of 1974,⁷⁴ the Air Pollution Prevention and Control Act,⁷⁵ the Federal Water Pollution Control Act,⁷⁶ and the Railroad Safety Act.⁷⁷ Employees are similarly protected from discharge under the Occupational Safety and Health Act of 1970 (OSHA)⁷⁸ for filing safety complaints⁷⁹ or for refusing to work under conditions which they reasonably believe to be dangerous to their safety.⁸⁰

A number of other federal statutes have been enacted to protect employees from discharge because of the garnishment of their wages for any single indebtedness,⁸¹ the assertion of their rights under federal wage and overtime laws,⁸² or their status as veterans of the Vietnam

excess of \$2,500 the contract shall require affirmative action to employ qualified handicapped individuals. *Id.* § 793(a). A handicapped person who believes a violation has occurred may file a complaint with the Department of Labor. *Id.* § 793(b).

73. See DeGiuseppe, *supra* note 1, at 20-21 & nn.86-89 for a further discussion of these statutes. In general, these statutes prohibit an employer from discharging or otherwise discriminating against an employee who has commenced or caused to be commenced a proceeding to enforce a statutory requirement, or has testified, participated, or assisted in the proceeding. Reinstatement and back pay may be awarded.

74. 42 U.S.C. § 5851 (Supp. IV 1980); 29 C.F.R. Pt. 24 (1983) (procedures for handling discrimination complaints under federal employment protection statutes).

75. 42 U.S.C. § 7622 (Supp. IV 1980).

76. 33 U.S.C. § 1367 (1976).

77. 45 U.S.C. § 431(a) (1976). Other federal "whistle-blower" statutes include: Toxic Substances Control Act, 15 U.S.C. § 2622 (1976); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1976); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1976).

78. 29 U.S.C. § 660(c) (1976).

79. Chapel Elec. Co., 1980 O.S.H. Dec. (CCH) ¶ 24,157 (S.D. Ohio 1980) (discharge prohibited under 29 U.S.C. § 660(c)(1) where "substantial reason" for the termination is an employee's engagement in protected activity).

80. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) (upheld 29 C.F.R. § 1977.12(b)(2) which permits an employee to refuse to work under hazardous conditions provided the refusal is reasonable and in good faith).

81. Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1977).

82. Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b)(1976). The federal wage laws become applicable to most firms which enter federal contracts. Under the Davis-Bacon Act, 40 U.S.C. § 276a (1976), a government contract in excess of \$2,000 for construction or maintenance of a public building or public works shall provide that hired laborers and mechanics will be paid the federal minimum wage rate. *Id.* § 276(a).

Similarly, under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976 & Supp. IV 1980), a government contract for materials or equipment which exceeds \$10,000 shall provide that all persons employed by the contractor will be paid not less than the federal minimum wage.

War.⁸³ Under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA),⁸⁴ employers may not discharge employees in order to prevent them from attaining vested rights to pension or welfare benefits.⁸⁵ Federal civil service employees are also statutorily protected from unfair discharges.⁸⁶

B. State Legislation

Over twenty-five jurisdictions adopted legislation in 1982 affecting employer-employee relations.⁸⁷ Although few significant labor relations laws were enacted by the state legislatures, statutory measures were implemented protecting employees against unjust discharge, discrimination and discipline.⁸⁸ Proposed legislation has been introduced in certain jurisdictions concerning so-called "whistle-blower" and other unjust dismissal protection for employees.⁸⁹

83. Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021(b)(1), 2024(c) (1976 & Supp. IV 1980) (returning veterans cannot be discharged for six months except for "cause"); *see also* Selective Service Act, 38 U.S.C. § 2021 (a)(2)(A) (1976) (veterans discharged from the armed services may return to their prior jobs).

84. 29 U.S.C. §§ 1140, 1141 (1976).

85. *See* *Kross v. Western Elec. Co.*, 701 F.2d 1238 (7th Cir. 1983); *Calhoun v. Falstaff Brewing Corp.* 478 F. Supp. 357 (E.D. Mo. 1979). *See also* *Petrella v. NL Indus.*, 529 F. Supp. 1357 (D.N.J. 1982) (causes of action sustained under ERISA for alleged deprivation of severance and vacation benefits).

86. Civil Service Reform Act of 1978, 5 U.S.C. §§ 7503, 7513(a) (Supp. V 1981) (discharge of federal civil service employees is permitted only "for such cause as will promote the efficiency of the service"). *See also* Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976).

87. *See generally* DAILY LAB. REP. (BNA) No. 250, at C-1 to C-10 (Dec. 19, 1982).

88. *See* notes 90-96 & 101-03 *infra* and accompanying text.

89. In New York a "whistle-blower" bill was reintroduced in the 1983 session of the State Legislature. *See* Legislative Gazette, Feb. 7, 1983, at 9. S. 1153, N.Y. Leg., 1983-1984 Reg. Sess. (1983). S. 1153 provides in pertinent part:

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because the employee, or a person acting on behalf of the employee, does any of the following:

(a) discloses, or is about to disclose, to a supervisory authority or to a public body an activity, policy, or practice of the employer that the employee reasonably believes to be a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety; or

(b) provides information to, testifies before, or otherwise cooperates with a public body conducting an investigation, hearing, or inquiry; or

(c) objects to, or refuses to participate in, an activity, policy or practice that the employee reasonably believes involves a violation of law or regulation, or that the employee reasonably believes poses a substantial and impending danger to public health or safety; and

(d) if the employee is a public employee, in addition to any of the foregoing, discloses to a supervisory authority or public body an activity, policy, or practice of the employing organization that the public employee

Michigan⁹⁰ and Connecticut⁹¹ have recently enacted "whistle-blower" statutes prohibiting both public and private employers from discharging, threatening or otherwise discriminating against employ-

reasonably believes to be substantial mismanagement, gross waste of funds, or abuse of public authority.

Id. § 2.

In order to be protected under paragraphs 2(a) and (d) of the New York bill, employees may be required to report to and allow their superiors a "reasonable opportunity" to correct the alleged violation. Exceptions to this reporting requirement are made where the supervisor is already aware of the nature of the violation, where the delay would cause "serious and imminent danger" to the physical safety of these employees or where other individuals could be endangered by reporting the violation to the supervisors. *Id.* § 3. Moreover, S. 1153 permits an aggrieved employee to bring a civil action for injunctive relief, reinstatement, lost wages, court costs and attorney's fees, punitive damages as well as a civil fine of up to \$10,000. *Id.* §§ 5-6. An interesting feature of S. 1153 permits an employee to disclose to the news media a situation which presents a serious imminent threat to human health or safety where disclosure has already been made to a government body and the government body failed to take appropriate action within a reasonable time. *See also* note 231 *infra*.

A bill (S. 9566; A. 12451) concerning "whistle-blower" protection had been passed in 1982 by the New York State Assembly, but failed to gain the needed support in the State Senate. Similarly, a "whistle-blower" bill was defeated in the New Jersey Legislature in 1982. *See* Fidell & Marcoux, *The Dept. of Labor Grapples with Growing Number of Whistleblowers*, Nat'l L.J., Apr. 4, 1983, at 25 n.14, col. 4.

A proposed "Unjust Dismissal of Employees Act" providing for the arbitration of such dismissals was also submitted to the labor committees of the New York State Assembly and Senate during the 1983 session. The provisions of this proposed legislation would be applicable only to non-union workers employed by enterprises having 500 or more employees. Other proposed unjust dismissal legislation was introduced in Michigan, Pennsylvania and Wisconsin during either the 1981 or 1982 sessions of the state legislatures. *See The Employment-at-Will Issue*, DAILY LAB. REP. (BNA), at 66-79 (Nov. 19, 1982) for the provisions of these bills.

90. Whistleblowers' Protection Act, MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West 1981). The Michigan act covers both public and private employers, including the State, having one or more employees. *Id.* § 15.361 (1)(b). Employees must bring a civil action within 90 days after the occurrence of an alleged violation of the act. *Id.* § 15.363(1). Employees must show by "clear and convincing evidence" that they were about to report a violation or suspected violation of the law prior to their discharge. *Id.* § 15.363(4). The statute does not impair the rights of employees under any collective bargaining agreement. *Id.* § 15.366.

91. Act of May 28, 1982, Pub. Act No. 82-289, §§ 1-2 (effective Oct. 1, 1982) (reported in 1982 Conn. Legis. Serv. 1056 (West)). The Connecticut act covers all persons engaged in business who have employees, including political subdivisions of the State but excluding the State. *Id.* § 1(a)(2). Employees under the Connecticut law have the right, after exhausting available administrative remedies, to commence a civil action within 90 days after the final administrative determination is rendered or the occurrence of the alleged violation, whichever is later. *Id.* § 1(c). The act does not adversely affect rights granted by collective bargaining agreements. *Id.* § 1(d). Whether the new Connecticut law will be considered the exclusive remedy for whistle-blowing is not clear based on the decision in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), and the lack of specific statutory language to that effect.

ees who report actual or suspected violations of any federal, state, or municipal law or regulation unless the employee knows the report to be false.⁹² These laws also protect employees who are "requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action."⁹³ Employees may be reinstated with full back pay, seniority and fringe benefits, including reasonable attorneys' fees and costs.⁹⁴

Other jurisdictions have also enacted unjust dismissal legislation. Washington, for example, passed a law in 1982 prohibiting public employers from disciplining or taking other retaliatory action against

92. The Connecticut statute provides:

No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. The provisions of this subsection shall not be applicable when the employee knows that such report is false.

Act of May 28, 1982, Pub. Act. No. 82-289, § 1(b) (reported in 1982 Conn. Legis. Serv. 1057).

The Michigan act states:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry by that public body, or a court action.

MICH. COMP. LAWS ANN. § 15.362 (West 1981).

93. Act of May 28, 1982, Pub. Act No. 82-289, § 1(b) (reported in 1982 Conn. Legis. Serv. 1057); MICH. COMP. LAWS ANN. § 15.362 (West 1981).

94. The Connecticut statute provides that an employee may commence an action "for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if such violation had not occurred." Act of May 28, 1982, Pub. Act No. 82-289, § 1(c) (reported in 1982 Conn. Legis. Serv. 1057).

The Michigan act provides for the following relief:

A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

MICH. COMP. LAWS ANN. § 15.364 (West 1981).

employees who report to the state auditor improper governmental actions or the misuse of public funds.⁹⁵ Maryland recently implemented a statute prohibiting employers from discharging or refusing to hire individuals because of expunged criminal charges about which applicants for employment need not answer.⁹⁶ The Commonwealth of Puerto Rico has a "discharge without just cause" law, containing indemnification provisions for wrongfully terminated employees based on an individual's length of service with the company.⁹⁷

95. 1982 Wash. Legis. Serv. 795 (West). Chapter 208, § 5 provides that any employee who makes a good faith report to the auditor and is subjected to reprisal or retaliatory action within a two-year period may seek judicial review and may be entitled to attorneys' fees. *Id.* at 797. The auditor is directed to establish a program to contact the employee periodically during the two years after the disclosure was made. *Id.*

For purposes of this act, "reprisal or retaliatory action" is broadly defined, including: denial of adequate staff, frequent staff changes, refusal to assign meaningful work, frequent and undesirable office changes, as well as demotion, suspension, and dismissal. *Id.*

96. MD. CRIM. LAW CODE ANN. § 740(a) & (c) (1982 & Supp. 1982). The statute, as amended in 1982, provides:

An employer or educational institution may not in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning criminal charges against him that have been expunged. An applicant need not, in answering any question concerning criminal charges that have not resulted in a conviction, or in answering any questions concerning convictions pardoned by the Governor, include a reference to or information concerning charges that have been expunged. An employer may not discharge or refuse to hire a person solely because of his refusal to disclose information concerning criminal charges against him that have been expunged.

Id. § 740(a). A violation of this statute constitutes a misdemeanor punishable by a \$1000 fine, one year in prison or both. *Id.* § 740(d). Furthermore, if the violator is a state employee, the person is subject to dismissal. *Id.* § 740(c).

97. P.R. LAWS ANN. tit. 29, §§ 185a-185i (Supp. 1978). Section 185b of the Puerto Rico statute defines "good cause" as follows:

Good cause for the discharge of an employee of an establishment shall be understood to be:

(a) That the worker indulges in a pattern of improper or disorderly conduct.

(b) The attitude of the employee of not performing his work in an efficient manner or of doing it belatedly and negligently or in violation of the standards of quality of the product produced or handled by the establishment.

(c) Repeated violations by the employee of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been timely furnished to the employee.

(d) Full, temporary or partial closing of the operations of the establishment.

(e) Technological or reorganization changes as well as changes of style, design or nature of the product made or handled by the establishment and in the services rendered to the public.

Existing state equal employment laws prohibit discriminatory discharges or treatment based on race, color, religion, national origin or sex,⁹⁸ age,⁹⁹ and physical handicap.¹⁰⁰ A new California statute prohibits harassment of employees or applicants for employment because of the foregoing factors as well as ancestry, medical condition and marital status.¹⁰¹ Pennsylvania and West Virginia have recently banned employment discrimination based on certain other disabilities.¹⁰² Fair employment legislation was also adopted in 1982 in a number of other jurisdictions.¹⁰³

(f) Reductions in employment made necessary by a reduction in the volume of production, sales or profits, anticipated or prevalent at the time of discharge.

A discharge made by mere whim or fancy of the employer or without cause related to the proper and normal operation of the establishment shall not be considered as a discharge for good cause.

Id. § 185(b). In addition to back wages, employees dismissed without good cause are entitled to one month's salary plus one week's salary for each year of service. *Id.* § 185a. Employees may bring an action within three years from the effective date of the discharge. *Id.* § 185i.

98. See, e.g., ALASKA STAT. § 18.80.220 (Supp. 1982); CAL. GOV'T CODE § 12940(a) (West Supp. 1983); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1982); OHIO REV. CODE ANN. § 4112.02(A) (Page 1980); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1982-1983).

99. MASS. ANN. LAWS ch. 149, § 24A (Michie/Law. Coop. Supp. 1983) (\$500 maximum penalty for discrimination against any person between age 45 and 65); MASS. ANN. LAWS ch. 151B, § 4(1) (Michie/Law. Coop. 1976) (unlawful practice to refuse to hire or to discharge any person because of age); MICH. COMP. LAWS ANN. § 37.2202(a)(1) (Supp. 1982-1983); N.Y. EXEC. LAW § 296 (McKinney 1982); PA. STAT. ANN. tit. 43, § 955(a) (Purdon Supp. 1982-1983); R.I. GEN. LAWS § 28-5-7(A) (Supp. 1982).

100. See, e.g., MASS. ANN. LAWS ch. 149, § 24K (Michie/Law. Coop. 1976); MINN. STAT. ANN. § 363.03(2) (West Supp. 1983); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1982); R.I. GEN. LAWS § 28-5-7(A) (Supp. 1982); WASH. REV. CODE ANN. § 49.60.180 (Supp. 1983-1984).

101. CAL. GOV'T CODE § 12940(i) (West Supp. 1983). To establish harassment, the employee must prove "loss of tangible job benefits." In addition, employers who willfully violate the provisions of the state equal pay act may be subject to fines up to \$10,000 or imprisonment, or both. CAL. LAB. CODE § 6311 (West Supp. 1983).

102. PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1982-1983) (non-job related handicap or disability); W. VA. CODE § 5-11-9(a) (Supp. 1982) (handicap). Cf. N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney Supp. 1982-1983) (subjects any person, firm or corporation which discriminates against or harasses an individual on the basis of disability to a fine).

103. See, e.g., Louisiana: employment discrimination or discharge of persons with sickle cell trait is prohibited, LA. REV. STAT. ANN. § 23:1002(A) & (B) (West Supp. 1983); Wisconsin: employment discrimination based on individual's marital status or arrest or conviction record, WIS. STAT. ANN. §§ 111.32(1) & (12) (definitions); 111.321 (bases of discrimination); 111.322 (prohibition); 111.335 (arrest: exceptions); 111.345 (marital status exceptions) (West Supp. 1982-1983); hiring decisions or promotion procedures conditioned on an individual's sexual orientation, *id.* § 111.36(d)(1) (West Supp. 1982-1983).

Many states have labor-management relations acts similar to the provisions of the NLRA.¹⁰⁴ As with the federal legislation, these statutes guarantee employees the right to organize and bargain collectively through representatives of their own choosing without fear of discharge or other retaliation.¹⁰⁵ In addition, state labor laws, like the NLRA, protect employees against discharges or other discriminatory actions designed to encourage or discourage union membership.¹⁰⁶

Various state laws also prohibit employers from discharging or taking other punitive action against employees to influence or control their votes, political activities or opinions;¹⁰⁷ for refusing to take polygraph¹⁰⁸ or psychological stress evaluation tests¹⁰⁹ as a condition

104. See notes 66-67 *supra* and accompanying text.

105. See N.Y. LAB. LAW § 704(10) (McKinney 1977); MASS. ANN. LAWS ch. 150A, §§ 3-4 (Michie/Law. Coop. 1976).

106. See, e.g., CONN. GEN. STAT. § 31-105(5) (1972); MASS. ANN. LAWS ch. 150A, § 4(3) (Michie/Law. Coop. 1976); MICH. COMP. LAWS § 423.16 (1978); N.Y. LAB. LAW § 704(5) (McKinney 1977); PA. STAT. ANN. tit. 43, § 211.6(1)(c) (Purdon 1964).

107. See, e.g., CAL. LAB. CODE § 1102 (West 1971); COLO. REV. STAT. § 8-2-108 (1973) (misdemeanor and private cause of action); MASS. ANN. LAWS ch. 56, § 33 (Michie/Law. Coop. 1978); NEV. REV. STAT. § 613.040 (1979); N.Y. CIV. SERV. LAW § 107(1) (McKinney 1973).

108. Twenty-one states and the District of Columbia prohibit the use of polygraphs by employers in all or certain circumstances. See, e.g., CAL. LAB. CODE § 432.2 (West 1971 & Supp. 1982) (requires written notice of right to refuse test); CONN. GEN. STAT. ANN. § 31.51g (1981); DEL. CODE ANN. tit. 19, § 704 (1966); D.C. CODE ANN. § 36-802 (1981); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1982-1983); MD. ANN. CODE art. 100, § 95 (1979); MASS. ANN. LAWS ch. 149, § 19B (Michie/Law. Coop. 1978); OR. REV. STAT. §§ 659.225, 659.227 (1981); PA. STAT. ANN. tit. 18, § 7321 (Purdon 1973); W. VA. CODE § 21-5-5 (Supp. 1983); see generally COMMITTEE ON CIVIL RIGHTS, THE USE OF POLYGRAPHS BY EMPLOYERS: A RECOMMENDATION FOR PROHIBITION 486 & nn.27-29 (1981); Flaherty, *Polygraphs: The Big Lie?*, Nat'l L.J., Jan. 24, 1983, at 1, col. 1.

Twenty-three states have adopted licensing requirements for polygraph operators. See, e.g., FLA. STAT. ANN. § 493.40 (1980); ILL. ANN. STAT. ch. 111, § 2401-6 (Smith-Hurd 1978 & Supp. 1982-1983); ME. REV. STAT. ANN. tit. 32, § 7154 (Supp. 1982-1983); MICH. COMP. LAWS § 338.1701-10 (1976); MISS. CODE ANN. §§ 79-29-11 & 79-29-31 (1972 & Supp. 1982); NEB. REV. STAT. § 81-1901-1929 (1981); OR. REV. STAT. § 703.010-100 (1981); TEX. REV. CIV. STAT. ANN. art. 4413 (29cc) (Vernon 1976 & Supp. 1982-1983). The States of Maine, Michigan, Nebraska and Oregon combine licensing requirements with a limited statutory ban to establish the permissible uses of polygraphs. For example, the Michigan statute provides that an examiner may lose his license for failing to inform the examinee that he cannot be discharged from his job because he refuses to take the test or halts the exam. MICH. COMP. LAWS ANN. § 338.1719(1) (1976).

An employee discharged for refusing to take a lie detector test may have a cause of action in tort for abusive discharge. See *Polsky v. Radio Shack*, 666 F.2d 824 (3d Cir. 1981) (tort action permitted where employee signed release prior to polygraph test which was required condition to continued employment); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979).

109. N.Y. LAB. LAW § 735(1) (McKinney Supp. 1982-1983).

of employment; for serving as jurors;¹¹⁰ for appearing as witnesses in criminal actions;¹¹¹ for wage assignments or income executions;¹¹² for filing workers' compensation claims;¹¹³ for asserting their rights under minimum wage laws;¹¹⁴ for refusing to be fingerprinted;¹¹⁵ and for commencing or participating in certain court or public body actions against the employer.¹¹⁶ Occupational safety and health laws were recently passed in Wisconsin¹¹⁷ and Connecticut¹¹⁸ requiring employers to inform employees of the identities and hazardous effects of toxic substances used in the workplace. California enacted a statute in 1982 prohibiting employers from discharging or laying-off employees who refuse to work for companies in violation of state health and safety requirements.¹¹⁹

IV. Exceptions to the Employment-at-Will Rule

Common law exceptions to the employment-at-will rule based on the implied covenant of good faith and fair dealing and on considerations of public policy have been recognized in a number of jurisdictions. Although recovery in tort has been allowed for breaches of the implied "good faith" condition,¹²⁰ certain jurisdictions have specifi-

110. See, e.g., CAL. LAB. CODE § 230 (West Supp. 1982); IDAHO CODE § 2-218 (1979) (violation constitutes criminal contempt and employee may bring civil suit to recover lost wages, attorney fees and to be reinstated); MASS. ANN. LAWS ch. 268, § 14A (Michie/Law. Coop. 1980) (violation constitutes contempt of court); N.Y. JUD. LAW § 519 (McKinney Supp. 1982-1983).

111. N.Y. EXEC. LAW § 296 3-a(c) (McKinney 1982).

112. N.Y. CIV. PRAC. LAW § 5252 (McKinney 1978).

113. N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1982-1983); N.C. GEN. STAT. § 97-6.1 (1979). See also *Dielectric Corp. v. Labor & Indus. Review Comm'n*, 111 Wis. 2d 270, 330 N.W.2d 606 (1983) (Wis. STAT. ANN. § 102.35(3) (West Supp. 1982-1983) requires employers to rehire employees injured in the course of employment who are reemployable).

114. N.Y. LAB. LAW § 662(1) (McKinney 1977).

115. N.Y. LAB. LAW § 201-a (McKinney Supp. 1982-1983).

116. CAL. LAB. CODE § 98.6 (West Supp. 1983); N.Y. LAB. LAW § 215 (McKinney Supp. 1982-1983).

117. WIS. STAT. ANN. § 101.581(1) (West Supp. 1982-1983). See generally *Right-to-Know Laws in Nine States Protect Employees Against Hazardous Workplace Substances, Survey Shows*, DAILY LAB. REP. (BNA), No. 3, at C-1 (Jan. 5, 1983).

118. CONN. GEN. STAT. § 31-40c (1981).

119. CAL. LAB. CODE § 6311 (West Supp. 1983).

120. See, e.g., *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir.), cert. denied, 103 S. Ct. 131 (1982); *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076, 1078 (N.D. Cal. 1982); accord *Kaiser Steel Told to Pay \$4.7 Million in Damages to a Former Foreman*, Wall St. J., Aug. 4, 1982, at 38, col. 4 (punitive damages awarded for breach of "good faith" condition by wrongful discharge); *\$300,000 Award in IBM Sex Suit*, San Francisco Chronicle, Dec. 19, 1981, at 3, col. 1 (punitive damages awarded to female managerial employee who was in effect

cally declined to recognize a tort remedy for "bad faith" terminations of employment.¹²¹ Recovery in tort has been granted for abusive discharges in violation of public policy,¹²² even in the face of specific statutory remedies designed to safeguard the public policies in question.¹²³

A. Breach of the Implied Covenant of Good Faith and Fair Dealing

Certain jurisdictions continue to recognize an implied covenant of good faith and fair dealing in employment-at-will relationships.¹²⁴ Causes of action have been sustained for the breach of the "good faith" condition based on considerations of public policy¹²⁵ and to prevent terminations of employment designed to deprive employees of accrued benefits.¹²⁶ California has recognized that an implied promise on the part of employers not to terminate employees arbitrarily or without cause can exist based on the "totality of the parties' relationship."¹²⁷ Courts have not, however, "equated the absence of good cause for the discharge of an employee with the absence of good faith."¹²⁸

"discharged" as a result of a reassignment for having an affair with an executive from a competing company).

121. *See, e.g.*, *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *see also Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 884, & n.7, 438 N.E.2d 351, 356 & n.7 (1982) (employee should not be entitled to benefits not included in his contract or contemplated by parties).

122. *See* notes 176-231 *infra* and accompanying text.

123. *See* notes 250-59 *infra* and accompanying text.

124. *See, e.g.*, *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, 429 A.2d 492 (1980); *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981). *See also Brockmeyer v. Dun & Bradstreet*, 109 Wis. 2d 44, 325 N.W.2d 70 (Ct. App. 1982) (petition for review pending) (recovery recognized for terminations made in bad faith or with malice).

125. *See, e.g.*, *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); *see also Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982) (claim for breach of "good faith" condition can be maintained on public policy grounds).

126. *See, e.g.*, *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

127. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

128. *Gram v. Liberty Mut. Life Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 2294-95, 429 N.E.2d 21, 26 (1981) (citing *Fortune v. National Cash Register Co.*, 373 Mass. at 104, 364 N.E.2d at 1257).

1. *Monge v. Beebe Rubber Co.*

The New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*¹²⁹ 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 constitutes a breach of the employment contract."¹³⁰ *Monge* involved the discharge of a married employee with three children for refusing to "be nice" to her foreman. The "public good" found to exist in *Monge* was an implied rather than express public policy embodied in federal or state law.¹³¹ *Monge* was subsequently cited by a federal court in *Pstragowski v. Metropolitan Life Insurance Co.*¹³² as standing for the broad proposition under New Hampshire law that "an employee who is discharged by reason of the bad faith, malice, or retaliatory motives of his employer has a right of action for breach of contract, notwithstanding the fact that he was an employee at will."¹³³

Nevertheless, the application of *Monge* was limited by the Supreme Court of New Hampshire in *Howard v. Dorr Woolen Co.*¹³⁴ "to a situation where an employee is discharged because he performed an act that public policy would condemn."¹³⁵ The court held that terminations of employment based on sickness or age did not fall within this "narrow category."¹³⁶ The court cited medical insurance and applica-

129. 114 N.H. 130, 316 A.2d 549 (1974); for a further discussion of *Monge*, see DeGiuseppe, *supra* note 1, at 24-25.

130. 114 N.H. at 133, 316 A.2d at 551-52.

The *Monge* court, in support of this rule, stated:

Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.

Id. at 133, 316 A.2d at 551-52.

131. The public policy to which the *Monge* court addressed itself was a general public interest—the "best interest of the economic system or the public good." *Id.* at 133, 316 A.2d at 551. Based on this public policy, the *Monge* court affirmed the jury's verdict for the plaintiff for 20 weeks of lost wages.

132. 553 F.2d 1, 2 (1st. Cir. 1977). The federal court in *Pstragowski* affirmed a jury's verdict in favor of plaintiff-salesman on the grounds that there was sufficient evidence that his discharge had been motivated by the defendant's malice. *Id.* at 2.

133. *Id.*; accord *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974).

134. 120 N.H. 295, 414 A.2d 1273 (1980). In *Howard* the court considered whether decedent-employee had been discharged in violation of *Monge* based on his age, his illness, and for the purpose of denying him accrued retirement benefits.

135. *Id.* at 297, 414 A.2d at 1274.

136. *Id.* The court also held that the decedent-employee, who was 50 years old at the time of his discharge, had not been discharged for the purpose of denying him

ble equal employment laws as being the "proper" remedies respectively for discharges based on these considerations.¹³⁷

The most recent pronouncement on the application of *Monge* was made by the Supreme Court of New Hampshire in *Cloutier v. Great Atlantic & Pacific Tea Co.*,¹³⁸ where the court stated:

Howard and *Monge* together impose a two-part test which plaintiffs must meet to establish a . . . cause of action. First, the plaintiff must show that the defendant was motivated by bad faith, malice, or retaliation in terminating the plaintiff's employment. . . .

. . . .
Second, the plaintiff must demonstrate that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn.¹³⁹

The *Cloutier* court, in stating this rule, noted that expressions of public policy can be based on nonstatutory sources and that " 'strong and clear public policy' " is not required to sustain a cause of action for wrongful discharge.¹⁴⁰

Although the rule stated in *Cloutier* for claims of "bad faith" discharge appears to be a further limitation on *Monge*, the facts of *Cloutier* demonstrate the continued willingness of the New Hampshire courts to impose the "good faith" condition on at-will relationships. The plaintiff, a store manager for one of the defendant's stores in a dangerous area, was summarily discharged for the failure of an assistant manager on the plaintiff's day-off to make a required bank deposit of store funds which were stolen during a burglary on the same day.¹⁴¹ Under company policy, the defendant held the plaintiff

retirement benefits which would have accrued at age 55. *Id.* On the same day that *Howard* was decided, the New Hampshire Supreme Court in *Tice v. Thomson*, 120 N.H. 313, 414 A.2d 1288 (1980), held that *Monge* was not applicable to public employees.

137. 114 N.H. at 297, 414 A.2d at 1274; *but see* *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 & n.6 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982) (obligation to deal in "good faith" under company personnel policies not dependent on age); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) ("good faith" condition breached by discharge based on age).

138. 121 N.H. 915, 436 A.2d 1140 (1981).

139. *Id.* at 921-22, 436 A.2d at 1143-44 (citations omitted).

140. *Id.* at 922, 436 A.2d at 1144. This view was espoused in the dissenting opinion in *Cloutier* on the grounds that to do otherwise would place the determination of public policy within the province of the jury rather than the legislature. *Id.* at 927, 436 A.2d at 1147 (Bois, J., dissenting). See note 274 *infra* for cases dismissing retaliatory discharge claims on grounds that public policy should be determined by the legislature.

141. 121 N.H. at 921, 436 A.2d at 1143. Company policy required two daily deposits of store funds by two employees. Police protection at a charge of three dollars per trip had been provided by the defendant prior to the implementation of

ultimately responsible "at all times" for store funds and thus summarily fired him for his negligence in failing to handle the funds in the appropriate manner, even though he had been an exemplary employee for thirty-six years.¹⁴²

Based on the reasons for his dismissal and the manner in which he was terminated after thirty-six years of exemplary service, the *Cloutier* court found that the defendant had acted in bad faith and with malice in discharging the plaintiff.¹⁴³ The court also found no less than three independent sources of public policy for sustaining the plaintiff's wrongful discharge claim, the most notable being derived from the provisions of OSHA¹⁴⁴ and the mandate of state law requiring a day of rest for all workers.¹⁴⁵

2. Massachusetts Law

In *Fortune v. National Cash Register Co.*,¹⁴⁶ Massachusetts adopted the rule that an employment-at-will contract may, under the appropriate circumstances, contain "an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a

this policy, but was terminated "to save costs." *Id.* "The plaintiff's supervisors, however, told him that if any employees feared for their lives they could leave the money in the safe overnight and deposit it the next day." *Id.*, 436 A.2d at 1143.

142. *Id.* at 922, 436 A.2d at 1144.

143. *Id.* at 921-22, 436 A.2d at 1144. The plaintiff was suspended after a five minute meeting and subsequently discharged without being informed of the allegations made against him for his "violation of company bookkeeping procedure." *Id.* at 918, 436 A.2d at 1142, 1144. The *Cloutier* court found that these facts constituted bad faith and malice under *Monge. Id.* at 921, 436 A.2d at 1144. The finding of bad faith was also based on the defendant's discharge of the plaintiff for a practice which it condoned. *Id.*, 436 A.2d at 1144.

144. 29 U.S.C. § 654(a)(1976); see notes 78-80 *supra* for a further discussion of OSHA. As noted by the court, the provisions of § 654(a) require an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (1976). The *Cloutier* court found that defendant had breached this directive by requiring the plaintiff to make bank deposits of store funds without police protection. 121 N.H. at 923, 436 A.2d at 1145. The court also stated that, "with or without the existence of OSHA, the facts before us support the conclusion that the plaintiff was discharged for furthering the laudable public policy objective of protecting the employees who worked under him." *Id.*, 436 A.2d at 1145.

145. *Id.* at 923-24, 436 A.2d at 1145. The *Cloutier* court reasoned that by holding the plaintiff responsible "at all times" for store funds, the defendant deprived him of the day of rest mandated by N.H. REV. STAT. ANN. § 275:33 (1977). 121 N.H. at 923-24, 436 A.2d at 1145.

146. 373 Mass. 96, 364 N.E.2d 1251 (1977); see DeGiuseppe, *supra* note 1, at 27-28, for a further discussion of *Fortune*.

breach of the contract.”¹⁴⁷ The *Fortune* court, however, declined to adopt the “broad policy” cited in *Monge* regarding the application of the “good faith” condition to employment relationships or to speculate “whether the good faith requirement is implicit in every contract for employment at will.”¹⁴⁸ The court in *Fortune* did hold that the discharge of the plaintiff, an at-will employee, in order to avoid paying him certain commissions otherwise due to him on a five million dollar sale constituted a breach of the “good faith” obligation.¹⁴⁹

Recent decisions demonstrate that employees may have enforceable claims under Massachusetts law for “bad faith” terminations involving deprivation of benefits¹⁵⁰ as well as violations of public policy.¹⁵¹ The Massachusetts courts “have not decided, however, to impose liability on an employer for breach of a condition of good faith and fair dealing in the discharge of an employee simply because there was no good cause for the employee’s discharge.”¹⁵² For discharges of this nature, an employee may recover under the rule established in *Gram v. Liberty Mutual Insurance Co.*¹⁵³ damages for “identifiable, reason-

147. 373 Mass. at 101, 364 N.E.2d at 1256.

148. *Id.* at 104, 364 N.E.2d at 1257.

149. *Id.* at 101, 364 N.E.2d at 1256. In affirming the jury verdict in favor of the plaintiff, the court citing *Monge* stated:

We believe that the holding in the *Monge* case merely extends to employment contracts the rule that “in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. . . .”

Id. at 104, 364 N.E.2d at 1257 (citations omitted) (quoting *Druker v. Roland Wm. Jutras Assocs.*, 370 Mass. 383, 385, 348 N.E.2d 763, 765 (1976)). The rationale of *Fortune* was subsequently extended to cover discharges based on age, *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980), and discharges designed to prevent the imminent accrual of retirement benefits, *Horrigan v. General Motors Corp.*, No. 77-3302-2 (D. Mass. July 23, 1980). See also Comment, *McKinney v. National Dairy Council: The Employee at Will Relationship in Massachusetts*, 16 NEW ENG. L. REV. 285 (1981).

150. See, e.g., *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Siles v. Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *appeal denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

151. *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982).

152. *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 2295, 429 N.E.2d 21, 26 (“nor have we equated the absence of good cause for the discharge of an employee with the absence of good faith.”); accord *Siles v. Travenol Laboratories, Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103, *appeal denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982). See also *Ward v. American Mut. Liability Ins. Co.*, 15 Mass. App. Ct. 98, 443 N.E.2d 1342 (1983) (finding of “bad faith” not required for breach of employment contract for definite term).

153. 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21. The plaintiff-salesman in *Gram* was discharged for sending personalized, xeroxed notes to customers with whom he had dealt allegedly in violation of company policy. The court affirmed the jury’s

ably anticipated future compensation, based on his past services, that he lost because of his discharge without cause."¹⁵⁴

In *Cort v. Bristol-Myers Co.*¹⁵⁵ plaintiff-salesmen alleged that they were terminated in "bad faith" for refusing to answer certain questions on a company questionnaire which they claimed were "highly personal and offensive," and not for poor job performance as contended by the defendant.¹⁵⁶ In affirming the judgments for the defendant, the court declined, in the absence of some deprivation of benefit as set forth in *Fortune* and *Gram*, to impose liability on the defendant for failing to provide the plaintiffs with job security or the true reasons for their discharge.¹⁵⁷ While noting that the public policy protecting against unlawful invasions of privacy could give rise to a claim for a "bad faith" discharge,¹⁵⁸ the court held that the questions

verdict that the plaintiff had not violated any company policy and, therefore, was terminated without cause. *Id.* at 2298, 429 N.E.2d at 27-28. The court, however, found no basis for concluding that the defendant's discharge of the plaintiff was motivated by a desire to obtain the benefit of his reserved commissions or that the defendant even considered the matter. *Id.*

154. *Id.* at 2287, 429 N.E.2d at 22. The court stated, "[w]e think that the obligation of good faith and fair dealing imposed on an employer requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause." *Id.* at 2300, 429 N.E.2d at 29 (citations omitted). In reaching this decision, the court recognized an objective test for establishing the absence of "good faith" for an alleged wrongful discharge. *Id.* at 2301 & n.10, 429 N.E.2d at 29 & n.10.

155. 385 Mass. 300, 431 N.E.2d 908 (1982).

156. *Id.* at 302, 431 N.E.2d at 909. The court described the questionnaires as follows:

The questionnaire, entitled Biographical Summary, sought information which, it represented, would be held in strict confidence. The subjects covered included business experience, education, family, home ownership, physical data, activities, and aims. In general, each plaintiff furnished answers to the questions concerning his business experience, education, and family. Their answers concerning their medical histories are varied.

None of the plaintiffs answered the questions under the headings "AIMS." These questions concerning "AIMS," which we regard as appropriate to ask of a salesman and not improperly intrusive on his privacy rights, asked each to state his qualifications for his job, his principal strengths, his principal weaknesses, activities in which he preferred not to engage, the income he would need to live the way he would like to live, and his plans for the future.

Id. at 308-09, 431 N.E.2d at 913 (footnotes omitted).

157. *Id.* at 304-05, 431 N.E.2d at 910-11.

158. The court noted that, under the provisions of MASS. GEN. LAWS ch. 214, § 1B (1974 & Supp. 1983), an employer's request for information which constituted "unreasonable, substantial or serious interference with [an employee's] privacy would contravene public policy and warrant the imposition" of a liability for discharges based on failure to comply with such a request. 385 Mass. at 306-07, 431 N.E.2d at 912.

which the plaintiffs refused to answer "were no more intrusive than those asked on an application for life insurance or for a bank loan."¹⁵⁹

A cause of action for a "bad faith" discharge to avoid the payment of earned commissions was sustained in *Maddaloni v. Western Mass. Bus Lines, Inc.*¹⁶⁰ where the plaintiff, pursuant to a written compensation agreement terminable at-will, used his experience and expertise to obtain for the defendant interstate charter rights from the Interstate Commerce Commission. Relying on *Fortune*, the *Maddaloni* court stated that the plaintiff "could reasonably expect that his employment would not be terminated by the defendant in order to deny him commissions."¹⁶¹ A "bad faith" discharge claim for allegedly earned commissions was rejected, however, *Siles v. Travenol Laboratories, Inc.*¹⁶² where the plaintiff was dismissed for having a verbal confrontation with a customer and there was no evidence that the defendant would keep for *itself* commissions which would become due on sales accounts originated by the plaintiff.¹⁶³

3. California Cases

Under California law, an implied covenant of good faith and fair dealing may exist in employment-at-will contracts based on the "totality of the parties' relationship."¹⁶⁴ The California rule was first applied in *Cleary v. American Airlines, Inc.*,¹⁶⁵ a case involving the summary discharge of an employee for alleged theft after eighteen years of "satisfactory" employment without the benefit of a "fair, impartial and objective" hearing as required by express company policy. Based on these facts, the *Cleary* court held "that the longevity

159. 385 Mass. at 310, 431 N.E.2d at 914. ("Most of the unanswered questions were relevant to the plaintiffs' job qualifications and represented no invasion of the plaintiffs' rights of privacy protected by law.")

160. 386 Mass. 877, 438 N.E.2d 351 (1982).

161. *Id.* at 881-82, 438 N.E.2d at 354. The court held that the plaintiff was entitled to the \$61,000 in commissions which he could have "reasonably" been expected to be paid. *Id.* at 883, 438 N.E.2d at 355. A majority of the court agreed, however, that the plaintiff was not entitled to lost wages and fringe benefits unrelated to past services. *Id.* at 884, 438 N.E.2d at 356. In this regard, the court stated: "We need not decide in what circumstances public policy may require additional damages, or a different measure of damages." *Id.* at 884 n.7, 438 N.E.2d at 356 n.7.

162. 13 Mass. App. Ct. 354, 433 N.E.2d 103, *appeal denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982).

163. *Id.* at 358-59, 433 N.E.2d at 106. The court also held the defendant's refusal to give the plaintiff business references was not improper under the circumstances. *Id.* at 359, 433 N.E.2d at 107.

164. See generally DeGiuseppe, *supra* note 1, at 28-30; Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981).

165. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The plaintiff also relied on the implied covenant of good faith and fair dealing to support his claim.

of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee without good cause."¹⁶⁶

The scope of the California rule was clarified in *Pugh v. See's Candies, Inc.*¹⁶⁷ where a company vice president was allegedly terminated after thirty-two years of service for his opposition to the negotiation of a "sweetheart" contract with the union resulting in lower salaries for female employees. Relying on *Cleary*, the *Pugh* court held that the implied "good faith" condition could exist under the facts of the instant case based on "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies."¹⁶⁸

Moreover, federal courts, applying California law, have recently held that a breach of the implied covenant of good faith and fair dealing may entitle wrongfully terminated employees to relief in both contract and tort.¹⁶⁹ In *Crossen v. Foremost-McKesson, Inc.*,¹⁷⁰ for example, a federal district court held that an employee's allegation that he was discharged for refusing to violate Thai law, thereby subjecting himself to the risk of imprisonment, stated a cause of action in contract and tort under the implied covenant of good faith and fair dealing.¹⁷¹ As support for its decision, the *Crossen* court reasoned that

166. *Id.* at 455-56, 168 Cal. Rptr. at 729. The *Cleary* court noted that a cause of action for wrongful termination in breach of the implied covenant of good faith and fair dealing would sound in both contract and tort.

167. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

168. *Id.* at 329, 171 Cal. Rptr. at 927. *See also* *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (based on *Pugh*, plaintiff was allowed to amend his complaint to allege facts supporting an implied "good cause" termination standard).

169. *See, e.g.*, *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982); *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982). *But see* *Crain v. Burroughs Corp.*, 560 F. Supp. 849 (C.D. Cal. 1983) (written contract provision precluded "just cause" determination).

170. 537 F. Supp. 1076 (N.D. Cal. 1982).

171. *Id.* at 1078. The alleged violations cited by the plaintiff were the following:

- (1) Making false statements on factory license applications to the Thai government incidental to seeking approval of expansion of factory facilities;
- (2) Violating certain sanitary laws controlling the manner in which milk and ice cream were transported to various customers;
- (3) Bribing Thai government officials and police to terminate criminal investigations and to obtain special treatment in the processing of certain government licenses;
- (4) Misrepresenting the financial condition and projected income of ice cream parlors to prospective Thai franchisees;
- (5) Violating Thai exchange control regulations;
- (6) Submitting falsified tax returns to the Thai government.

Id.

the citation of *Monge and Fortune* by the California Supreme Court in *Tameny v. Atlantic Richfield Co.*,¹⁷² the decision which established the tort of wrongful discharge in California, "indicates that the covenant encompasses more than the just cause requirement implied into certain at-will employment contracts under *Cleary and Pugh*."¹⁷³ The Court of Appeals for the Ninth Circuit in *Cancellier v. Federated Department Stores*,¹⁷⁴ an action based on age discrimination, held that under California law claims for breaches of the implied covenant of good faith and fair dealing "sound in both contract and tort and may give rise to emotional distress damages and punitive damages."¹⁷⁵

B. The Public Policy Exception

An exception to the employment-at-will rule based on considerations of public policy continues to be recognized in only a limited number of jurisdictions.¹⁷⁶ Under this exception, recovery in tort has

172. 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980). In *Tameny* plaintiff was allegedly discharged for refusing to participate in an illegal gas price-fixing scheme. The court recognized the propriety of a tort remedy for discharges in contravention of public policy. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

173. 537 F. Supp. at 1078. The court also held that the plaintiff did not have a cause of action for wrongful discharge against a vice president of the defendant as an individual, because the vice president had acted within his scope of employment. *Id.* at 1080.

174. 672 F.2d 1312 (9th Cir. 1982). The plaintiff also raised a claim for age discrimination under the Age Discrimination Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a)(1976). The court held that the ADEA did not preempt the award of tort damages on the plaintiff's state law claim for breach of the "good faith" condition. 672 F.2d at 1318.

175. *Id.*

176. The following jurisdictions have recognized public policy exceptions to the employment-at-will rule: California: *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Connecticut: *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); Florida: *Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); Hawaii: *Parnar v. American Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982); Illinois: *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Indiana: *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); Kansas: *Murphy v. City of Topeka-Shawnee County Dep't of Lab. Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Kentucky: *Firestone Textile Co. Div. v. Meadows*, No. 81-2460 (Ky. Ct. App. Nov. 12, 1982); Maryland: *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981), *modified*, 538 F. Supp. 572 (D. Md. 1982); Massachusetts: *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982); Michigan: *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); Montana: *Nye v. Department of Livestock*, 639 P.2d 498 (Mont. 1982); New Hampshire: *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); New Jersey: *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); Oregon: *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); Pennsylvania: *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); West Virginia: *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982); Wisconsin: *Brockmeyer v. Dun & Bradstreet*, 109 Wis. 2d 44, 325 N.W.2d 70 (Wis. Ct. App. 1982) (petition for review pending) (*dicta*).

been allowed for employees discharged in violation of a "clear mandate of public policy."¹⁷⁷ The "Achilles heel" of the exception, however, is in determining what constitutes "public policy."¹⁷⁸ Courts, without reaching an accord on a standard definition of the term, have relied on both statutory¹⁷⁹ and non-statutory¹⁸⁰ sources to determine the public policy limitations on the rights of employers to dismiss employees summarily.¹⁸¹ Nevertheless, certain jurisdictions have de-

177. See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (Super. Ct. App. Div. 1982); but see *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) ("strong and clear public policy" is not required).

In *Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 422 A.2d 611 (1980), *petition for appeal denied*, (1981), a more liberal statement of the law of wrongful discharge was set forth requiring a court to "weigh several factors, balancing against [the employee's] interest in making a living, his employer's interest in running its business, its motive in discharging [the employee] and its manner of effecting the discharge, and any social interests or public policies that may be implicated in the discharge." *Id.* at 577, 422 A.2d at 620. The *Yaindl* balancing test was rejected in *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230, 1236 (E.D. Pa. 1981), as representing the trend of the law in Pennsylvania on wrongful terminations.

178. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981).

179. See, e.g., *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982); *Firestone Textile Co. Div. v. Meadows*, No. 81-2460 (Ky. Ct. App. Nov. 12, 1982); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981).

180. See, e.g., *Nye v. Department of Livestock*, 639 P.2d 498 (Mont. 1982) (administrative personnel policy rules); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (Super. Ct. App. Div. 1982) (code of ethics); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (general public good).

181. In *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980), the Supreme Court of New Jersey stated:

The sources of public policy include legislation; administrative rules, regulations or decisions; or judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient. Absent legislation, the judiciary must define the cause of action in case-by-case determinations.

Id. at 72, 417 A.2d at 512.

Another definition of the phrase "public policy" was set forth by the Supreme Court of Illinois in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), as follows:

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. . . . Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at

clined to apply the public policy exception to retaliatory or abusive discharges covered by "full and adequate" statutory remedies.¹⁸²

1. Retaliatory Discharges

Under the public policy exception, employees may have a cause of action in tort for discharges made in retaliation for exercising a statutory right;¹⁸³ for refusing to violate the law;¹⁸⁴ and for furthering a public interest to the detriment of their employers.¹⁸⁵ Employees discharged on grounds prohibited by statute¹⁸⁶ or condemned by general public policy considerations¹⁸⁷ may also have a claim for abusive discharge. The public policy exception, however, does not cover matters which are personal or sheerly speculative as to the public policies involved.

Recent cases demonstrate that there is a definite trend toward limiting the public policy exception to violations of clear mandates of

the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

Id. at 130, 421 N.E.2d at 878-79 (citation omitted).

182. *Parets v. Eaton Corp.*, 479 F. Supp. 512, 518 (E.D. Mich. 1979); *accord* *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982); *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793 (N.D. Ill. 1982).

183. *See, e.g.*, *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (refusing to take a polygraph test); *Firestone Textile Co. Div. v. Meadows*, No. 81-2460 (Ky. Ct. App. Nov. 12, 1982) (filing workers' compensation claim).

184. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in illegal gas price-fixing scheme); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Super. Ct. Law Div. 1978) (refusal to administer improper medical treatment); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959) (refusal to commit perjury before legislative committee); *see also National Steel Is Told to Pay Fired Worker \$850,000 Plus Interest*, Wall St. J., Mar. 23, 1983, at 58, col. 2 (employee discharged for "refusing to use irregular methods in reporting expenses for American Steel and some of its executives.").

185. *See, e.g.*, *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (protesting hazardous working conditions caused by cigarette smoking); *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (threatening to report alleged embezzlement of corporate funds); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (serving on jury against employer's wishes).

186. *See, e.g.*, *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982) (discharge based on results of polygraph examination); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (discharge based on age); *Horrihan v. General Motors Corp.*, No. 77-3302-Z (D. Mass. July 23, 1980) (discharge to prevent imminent accrual of retirement benefits).

187. *See, e.g.*, *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (public policy favoring citizen crime-fighters); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (protecting the safety of other employees).

public policy.¹⁸⁸ Claims for retaliatory discharge, therefore, have been denied where an employee's dismissal could only be characterized as "unfair";¹⁸⁹ where only "sheer speculation" supported an employee's claim that he was terminated for refusing to lie during an employment discrimination investigation;¹⁹⁰ where an employee did not allege that he was fired for exercising a specific right or duty;¹⁹¹ and where employees had no statutory right or obligation to object to certain alleged illegal price discounts and promotional allowances for favored customers.¹⁹² Similarly, no violation of public policy was found in cases where an employee's complaint concerning internal company accounting practices only involved a corporate management dispute,¹⁹³ and where an employee merely complained about the adequacy of customer service and maintenance of company machines.¹⁹⁴

The scope of the class of employees protected by the public policy exception has also been the subject of recent judicial scrutiny. Several Illinois decisions demonstrate that it is still unclear as to whether employees covered by collective bargaining agreements or other employment contracts can have a cause of action in tort for retaliatory discharges. In *Cook v. Caterpillar Tractor Co.*¹⁹⁵ an Illinois appellate court held that an employee discharged in retaliation for filing a workmen's compensation claim was limited to his contractual remedies under an applicable collective bargaining agreement and could not sue in tort for retaliatory discharge.¹⁹⁶ A similar result was reached

188. See, e.g., *Rozier v. St. Mary's Hosp.*, 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980) (no cause of action for retaliatory discharge where nurse was terminated for leaking alleged patient abuse and other improprieties to newspapers); *Campbell v. Eli Lilly Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980), *petition for transfer denied*, 421 N.E.2d 1099 (Ind. 1981) (no exception to at-will rule for reporting to company counsel certain supervisory misconduct in collecting and reporting drug safety data); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (Hippocratic Oath did not contain clear mandate of public policy preventing doctor from performing research on controversial drug).

189. *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230, 1235-36 (E.D. Pa. 1981).

190. *Brockmeyer v. Dun & Bradstreet*, 109 Wis. 2d 44, 49, 325 N.W.2d 70, 73 (Ct. App. 1982) (petition for review pending).

191. *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776 (D. Colo. 1982).

192. *Callahan v. Scott Paper Co.*, 541 F. Supp. 550 (E.D. Pa. 1982); *accord McNulty v. Borden, Inc.*, 542 F. Supp. 655 (E.D. Pa. 1982) (employee discharged for allegedly refusing to violate antitrust laws did not have standing to challenge violations of these laws).

193. *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).

194. *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980).

195. 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980).

196. The court held that the decision of the Supreme Court of Illinois in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), adopting the public policy

in *Pinsof v. Pinsof*¹⁹⁷ where a claim for retaliatory discharge was dismissed for an employee who did not specifically allege that his employment relationship was in fact terminable at-will.¹⁹⁸

Nevertheless, the holding of *Cook* was directly rejected by another Illinois appellate court in *Wyatt v. Jewel Companies, Inc.*¹⁹⁹ In *Wyatt* it was held that an employee discharged in retaliation for filing a worker's compensation claim could sue in tort for damages, even though his employment was subject to the grievance-resolution mechanisms of a collective bargaining agreement.²⁰⁰ State "whistle-blower" legislation also appears to afford protection from retaliatory discharges for all employees regardless of the availability of contractual remedies.²⁰¹

The issue of whether individual liability for retaliatory discharges can be imposed on the corporate officials responsible for the wrongful termination has been a source of recent debate. In *Harless v. First National Bank*²⁰² the Supreme Court of Appeals of West Virginia held

exception, is not applicable when an employee "has recourse against an employer under a collective bargaining agreement permitting discharge only for just cause and allowing for arbitration to guarantee the parties' rights." 85 Ill. App. 3d at 406, 407 N.E.2d at 98. The *Cook* court also stated that to permit the grievance resolution procedures to be circumvented would be an unnecessary invitation to industrial strife. *Id.*, 407 N.E.2d at 99; *accord* *Bates v. Jim Walther Resources, Inc.*, 418 So. 2d 903 (Ala. 1982); *Embry v. Pacific Stationery & Printing Co.*, 62 Or. App. 113, 659 P.2d 436 (1983). *See also* *Harrison v. Fred S. James, P.A., Inc.*, 558 F. Supp. 438 (E.D. Pa. 1983) (under Pennsylvania law, at-will status required to maintain action for abusive discharge).

197. 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1982).

198. Plaintiff alleged that he had a contract for lifetime employment based on certain death benefit and stock purchase agreements. The court denied his cause of action for breach of this alleged contract and, presumably in the alternative, his cause of action for retaliatory discharge. *Id.* at 1035, 438 N.E.2d at 527.

199. 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982); *but see* *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (retaliatory discharge requires at-will status) (citing *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981)).

200. Contrary to the holding in *Cook*, the *Wyatt* court held that under *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), an employee could seek to recover both contract and tort damages for a retaliatory discharge in violation of the state workers' compensation law. The *Wyatt* court also held that an employee is not required to exhaust his contractual remedies prior to commencing a suit in tort for wrongful termination. 108 Ill. App. 3d at 841, 439 N.E.2d at 1054.

201. *See* notes 90-91 *supra* and accompanying text. These laws also provide that the rights of employees under applicable collective bargaining agreements are not impaired; *see* MICH. COMP. LAWS ANN. § 15.366 (West 1981); 1982 Conn. Legis. Serv. 1056 (West).

202. 289 S.E.2d 692 (W. Va. 1982). Plaintiff-employee was discharged for attempting to have the defendant-employer comply with state and federal consumer credit protection laws. *See* *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

that a supervisor who had been the "principal protagonist" in obtaining the plaintiff's dismissal could be held personally liable in tort for the retaliatory discharge, even though he did not actually fire the plaintiff and was acting within the scope of his authority.²⁰³ A federal court in *Crossen v. Foremost-McKesson, Inc.*,²⁰⁴ applying California law, reached a different conclusion, by holding that a vice president acting within the scope of his employment and not for any individual advantage could not be sued in tort for wrongfully inducing the breach of the plaintiff's at-will employment relationship.²⁰⁵ The federal court distinguished the decisions in the California cases of *Cleary v. American Airlines, Inc.*²⁰⁶ and *Mayes v. Sturdy Northern Sales, Inc.*²⁰⁷ where causes of action for wrongful terminations were sustained against individual defendants not acting within the scope of their employment as agents of the corporation.²⁰⁸

2. Recent Cases

Various sources of public policy have been relied on in recent cases to support a cause of action for retaliatory discharge.²⁰⁹ These cases demonstrate that federal and state statutes continue to provide the main source of public policy for wrongful terminations. Courts have implied private causes of action under statutory measures for employees discharged in retaliation for exercising a legal right or for refusing to violate the law.²¹⁰ In *Parnar v. American Hotels, Inc.*²¹¹ the Supreme Court of Hawaii recently adopted the public policy exception to protect an employee who was summarily discharged to induce her to leave the jurisdiction in order to prevent her from testifying before a grand jury investigating alleged antitrust violations by the defendant. "Whistle-blower" protection has also been provided in some

203. 289 S.E.2d at 698-99. The court noted that "[i]n a retaliatory discharge case the person who does the actual firing may have little to do with the underlying controversy." *Id.* (footnote omitted). See also *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679 (W. Va. 1981) (two-year statute of limitations placed on retaliatory discharge cases in West Virginia).

204. 537 F. Supp. 1076 (N.D. Cal. 1982); see notes 170-73 *supra* for a further discussion of this case.

205. 537 F. Supp. at 1080.

206. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); see notes 165-66 *supra* and accompanying text for a discussion of *Cleary*.

207. 91 Cal. App. 3d 69, 154 Cal. Rptr. 43 (1979); see notes 332-41 *infra* for a discussion of tortious interference with contractual relations.

208. 537 F. Supp. at 1080.

209. See note 181 *supra* for a discussion of public policy sources.

210. See notes 213-17 & 219-25 *infra* and accompanying text.

211. 652 P.2d 625 (Hawaii 1982).

jurisdictions for employees discharged for reporting alleged violations of statutory measures designed to safeguard the health and welfare of the general public.²¹²

Implied causes of action under state workers' compensation acts for retaliatory discharges continue to be recognized under the public policy exception.²¹³ The Court of Appeals of Kentucky in *Firestone Textile Co. Division v. Meadows*²¹⁴ recently adopted the public policy exception in order to protect an employee who alleged that he "had been terminated solely because he had sought and obtained workers' compensation for an injury which he suffered in the course of his employment. . . ."²¹⁵ Like certain other jurisdictions, the Kentucky Workers' Compensation Act²¹⁶ did not contain any "provision specifically restricting an employer from discharging an employee for the latter's exercise of his rights thereunder."²¹⁷ Other courts, however, have declined to adopt or apply the public policy exception to employees statutorily protected from discharge for exercising their rights under applicable state workers' compensation law on the grounds that it was the function of the legislature to establish a remedy for such terminations.²¹⁸

212. See notes 219-25 *infra* and accompanying text.

213. See, e.g., *Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Murphy v. City of Topeka-Shawnee County Dep't of Lab. Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978). See also *Meyer v. Byron Jackson, Inc.*, 120 Cal. App. 3d 59, 174 Cal. Rptr. 428 (1981) (publication of opinion withdrawn) (contrary to other California decisions, court sustained retaliatory discharge cause of action for filing workers' compensation claim).

214. No. 81-2460 (Ky. Ct. App. Nov. 12, 1982).

215. *Id.* at 1.

216. KY. REV. STAT. ch. 342 (1983). The court noted that the Kentucky statute "does plainly exhibit a policy that employees should be free to accept or reject coverage without coercion by their employers, . . . and that they should not be deceived into foregoing lawful claims for benefits or into accepting less than is due them." No. 81-246, slip op. at 4-5 (citations omitted) (citing KY. REV. STAT. §§ 342.395, 342.335 (1983)).

217. No. 81-246, slip op. at 4.

218. See, e.g., *Green v. Amerada-Hess Corp.*, 612 F.2d 212 (5th Cir.) (Mississippi law), *cert. denied*, 449 U.S. 952 (1980); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 215, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). The decision in *Dockery* was subsequently superseded by statute. See N.C. GEN. STAT. § 97-6.1 (1979). See also *Wright v. Fiber Indus.*, 299 S.E.2d 284 (N.C. App. 1983).

“Whistle-blower” protection under the public policy exception has been afforded in recent decisions to employees who merely threatened to report or only reported to company officials alleged violations of federal or state law. In *Adler v. American Standard Corp.*,²¹⁹ for example, a federal district court, applying Maryland law, sustained a cause of action for retaliatory discharge on behalf of an employee who alleged that he was terminated for threatening to disclose certain illegal activities, including “the payment of commercial bribes and the falsification of corporate records and financial statistics.”²²⁰ An Illinois appellate court in *Petrik v. Monarch Printing Corp.*²²¹ similarly sustained a wrongful discharge claim on behalf of an employee who alleged that he was dismissed in retaliation for reporting his suspicions of the embezzlement of corporate funds to company officials.²²² The *Petrik* court rejected the defendant’s contention that the decision of the Supreme Court of Illinois in *Palmateer v. International Harvester Co.*²²³ required the *actual* notification of *public* authorities of alleged violations of the law in order to sustain a cause of action for retaliatory discharge.²²⁴ Similarly, other jurisdictions have also not required the

219. 538 F. Supp. 572 (D. Md. 1982). Prior to rendering its decision, the federal court referred the following questions to the Court of Appeals of Maryland:

(1) Is a cause of action for “abusive discharge” recognized under the substantive law of the State of Maryland?

(2) Do the allegations of the amended complaint, if taken as true, state a cause of action for “abusive discharge” under the substantive law of the State of Maryland?

Id. at 575. The Maryland court in *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981), adopted the public policy exception, but held that the plaintiff’s allegations were “too general, too conclusory, too vague and lacking in specifics. . . .” *Id.* at 44, 432 A.2d at 471. The plaintiff subsequently filed a second amended complaint in federal court enumerating a number of federal and state statutes which formed the basis of his retaliatory discharge action. 538 F. Supp. at 575.

220. 291 Md. at 44, 432 A.2d at 471. The laws relied on by the plaintiff to support his allegations were federal and state antitrust laws, federal and state tax laws, the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, 78dd-2 (Supp. V 1981), and federal law concerning fraudulent acts against the United States Treasury, 26 U.S.C. §§ 7201, 7206 (Supp. V 1981) (fraud against the IRS). *See* 538 F. Supp. at 578.

221. 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982).

222. *Id.* at 508-09, 444 N.E.2d at 592-98. The plaintiff initially discovered a \$130,000 discrepancy in the defendant’s financial books and records and immediately informed the defendant’s president and chief operating officer. Plaintiff, at the request of the defendant’s president, conducted a further investigation of the matter which revealed that certain officers or employees of the defendant “‘might be involved in violation of the criminal laws of Illinois.’” *Id.* at 503, 444 N.E.2d at 589. After reporting these findings, plaintiff alleged that he was discharged by the defendant’s vice president and treasurer. *Id.* at 504, 444 N.E.2d at 589.

223. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

224. 111 Ill. App. 3d at 507-08, 444 N.E.2d at 542.

actual notification of public authorities as a prerequisite to the granting of "whistle-blower" protection.²²⁵

A professional code of ethics was recognized in the New Jersey case of *Kalman v. Grand Union Co.*²²⁶ as a viable source of public policy under the retaliatory discharge doctrine. The plaintiff-pharmacist in *Kalman* was allegedly dismissed for ensuring that a pharmacist was on duty while the defendant's store was open in accordance with the requirements of state law²²⁷ and the provisions of the Code of Ethics of the American Pharmaceutical Association.²²⁸ In sustaining the plaintiff's claim for retaliatory discharge, the court distinguished the decision of the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical Corp.*²²⁹ on the grounds that the pharmaceutical code of ethics, unlike the Hippocratic Oath in *Pierce*, coincided with the public policy.²³⁰ Courts in other jurisdictions, however, have rejected the use of professional codes of ethics as sources of public policy in wrongful discharge cases.²³¹

3. Exclusivity of Remedy

The issue of whether statutory remedies provide the exclusive relief for retaliatory discharges made in violation of applicable federal and

225. See, e.g., *Adler v. American Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982).

226. 183 N.J. Super. 153, 443 A.2d 728 (Super. Ct. App. Div. 1982).

227. Plaintiff relied on N.J. STAT. ANN. § 45:14-30 to 45:14-33 (West 1978), as support for his claims. Under the provisions of this law, "both parties concede[d] that a registered pharmacist had to be on duty whenever the store was open, and the pharmacy area could not be closed while the rest of the premises were open." 183 N.J. Super. at 158, 443 A.2d at 730.

228. The code of ethics provided in pertinent part:

A PHARMACIST has the duty to observe the law, to uphold the dignity and honor of the profession, and to accept its ethical principles. He should not engage in any activity that will bring discredit to the profession and should expose, without fear or favor, illegal or unethical conduct in the profession.

183 N.J. Super. at 158, 443 A.2d at 730 (emphasis in original).

229. 84 N.J. 58, 417 A.2d 505 (1980). In *Pierce* the New Jersey Supreme Court held that a doctor who was discharged for refusing to perform research on a controversial drug did not have a cause of action for retaliatory discharge, because there was no clear mandate in the Hippocratic Oath preventing her from performing her assignment.

230. 183 N.J. Super. at 159, 443 A.2d at 730 ("We have no doubt that plaintiff was required by this code to report defendant's attempt to flout state regulations.").

231. See, e.g., *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); see generally Comment, *Discharge of Professional Employees: Protecting Against Dismissal For Acts Within A Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV 149 (1979-1980). A bill (S. 4937; A. 6610) to amend the New York Labor Law was passed and submitted to the Governor by the New York

state laws continues to be a source of judicial debate. The essential elements in determining the exclusivity of statutory remedies include the preexistence of a common law right, the express language and purpose of that statute, legislative intent, and the completeness of the statutory relief. In the absence of statutory remedies, courts will decide whether an implied private right of action under the statute in question exists.

It is generally agreed that "when a statute creates a new right or imposes a new duty having no counterpart in the common law the remedies provided in the statute for violation are exclusive and not cumulative."²³² Employees, therefore, must exhaust their administrative remedies prior to seeking judicial relief.²³³ Exceptions to the general rule, however, are permitted where the statutory remedies are not intended to be exclusive.²³⁴

Recent cases demonstrate that a cause of action for retaliatory discharge will not exist where applicable statutory remedies are construed to be exclusive based on the absence of preexisting common law rights.²³⁵ In *Ohlsen v. DST Industries*²³⁶ a Michigan appellate court held that the Michigan Occupational Safety and Health Act (MIOSHA)²³⁷ provided the exclusive remedy for an at-will employee alleged to have been terminated for refusing to work in an unsafe environment. The *Ohlsen* court distinguished *Sventko v. Kroger Co.*,²³⁸ where a cause of action for retaliatory discharge was recognized under the Michigan workers' compensation law, on the grounds

Legislature in 1983 to protect certain licensed professional employees against retaliatory discharges or other punitive action for refusing to engage in "professional misconduct" as defined in N.Y. EDUC. LAW. §§ 6506, 6509, 6509-a (McKinney 1972 & Supp. 1982-83).

232. *Ohlsen v. DST Indus.*, 111 Mich. App. 580, 583, 314 N.W.2d 699, 701 (1981) (citing *Pompey v. General Motors Corp.*, 385 Mich. 537, 189 N.W.2d 243 (1971)). *Accord* *Portillo v. G.T. Price Prods., Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982).

233. *See, e.g.*, *Butz v. Hertz Corp.*, 554 F. Supp. 1178 (W.D. Pa. 1983); *Schwartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981).

234. *See, e.g.*, *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

235. *See, e.g.*, *Dadas v. Prescott, Ball & Turben*, 529 F. Supp. 203 (N.D. Ohio 1981); *McCabe v. City of Eureka, Mo.*, 500 F. Supp. 59 (E.D. Mo. 1980), *aff'd*, 664 F.2d 680 (8th Cir. 1981); *Portillo v. G.T. Price Prods., Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982); *Ohlsen v. DST Indus.*, 111 Mich. App. 580, 314 N.W.2d 699 (1981).

236. 111 Mich. App. 580, 314 N.W.2d 699 (1981).

237. MICH. COMP. LAWS ANN. §§ 408.1001 to 408.1069 (Supp. 1982-1983). Plaintiff alleged he was discharged for exercising his rights under MIOSHA to protest an unsafe work place. The plaintiff alleged that the assignment of another truck driver with a suspected alcohol abuse problem to work with him on a routine assignment created the hazard. 111 Mich. App. at 582, 314 N.W.2d at 700.

238. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

that the statute in *Sventko*, unlike MIOSHA, contained no express remedies.²³⁹ The exclusivity of MIOSHA was also confirmed in *Schwartz v. Michigan Sugar Co.*²⁴⁰

The exclusivity of statutory relief for employment discrimination under federal and state law has been recognized in recent decisions.²⁴¹ In *Brudnicki v. General Electric Co.*²⁴² a federal district court, applying Illinois law, stated that "the remedies provided by state and federal law would have no meaning," if an independent common law action for retaliatory discharge could be maintained on public policies protected by these employment discrimination laws.²⁴³ Similarly, in *Carrillo v. Illinois Bell Telephone Co.*,²⁴⁴ a federal district court declined to exercise pendent jurisdiction²⁴⁵ over a retaliatory discharge claim on the ground that "the very completeness of the statutory remedies for employment discrimination that are codified in the [Illinois] Human Rights Act . . . argue against the application of the tort to employment discrimination cases."²⁴⁶ The Court of Appeals for the

239. 111 Mich. App. at 585-86, 314 N.W.2d at 702 ("The *Sventko* decision does not extend to this case where the statute involved prohibits retaliatory discharge and provides an exclusive remedy.").

240. 106 Mich. App. 471, 308 N.W.2d 459 (1981). The plaintiff in *Schwartz* alleged that he was discharged based on his effective performance as a safety director in enforcing MIOSHA regulations. The court dismissed this cause of action, because plaintiff had failed to exhaust his administrative remedies prior to seeking judicial relief. *Id.* at 480, 308 N.W.2d at 463.

241. See, e.g., *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982); *Zywick v. Moxness Prods., Inc.*, 31 EMPL. PRAC. DEC. (CCH) ¶ 33,340 (E.D. Wis. 1983); *Butz v. Hertz Corp.*, 554 F. Supp. 1178 (W.D. Pa. 1983); *Carrillo v. Illinois Bell Tel. Co.*, 538 F. Supp. 793 (N.D. Ill. 1982); *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982); *Dadas v. Prescott, Ball & Turben*, 529 F. Supp. 203 (N.D. Ohio 1981).

242. 535 F. Supp. 84 (N.D. Ill. 1982). Plaintiff claimed he was discharged "in retaliation for his resistance to pressure from G.E. to hire and promote female employees solely on the basis of sex." *Id.* at 88.

243. *Id.* at 89. The court limited the holding of *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), to cases where "there was no other remedy available to vindicate the public policy involved." 535 F. Supp. at 89.

244. 538 F. Supp. 793 (N.D. Ill. 1982). Plaintiff, a Hispanic female, alleged unlawful discrimination based on sex, race and national origin. *Id.* at 795.

245. Federal courts are empowered to hear pendent state claims arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). The discretionary exercise of pendent jurisdiction depends on "considerations of judicial economy, convenience and fairness to litigants." *Id.*

246. 538 F. Supp. at 799. The court declined to resolve the issue of whether the Illinois state courts would apply the tort of retaliatory discharge to the facts of this case. In this regard, the court stated: "Were this court to exercise pendent jurisdiction over [plaintiff's] state claims, it would be necessary to resolve novel and complex issues of state law." *Id.*

Third Circuit in *Bruffett v. Warner Communications, Inc.*²⁴⁷ reached the same conclusion in narrowly construing the provisions of the Pennsylvania Human Rights Act (PHRA)²⁴⁸ which provide that "the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned."²⁴⁹

Other courts have recognized that an implied private cause of action for retaliatory discharge may be available as an alternative source of relief to statutory remedies, even in the absence of a preexisting common law rights.²⁵⁰ In *Lally v. Copygraphics*,²⁵¹ for example, the Supreme Court of New Jersey, without indicating whether preexisting common law rights existed, held that a claim for retaliatory discharge could be maintained to augment available penal and ad-

247. 692 F.2d 910 (3d Cir. 1982). Plaintiff alleged that defendant failed to offer him permanent employment because he was a diabetic. He, therefore, alleged unlawful discrimination claims based on handicap or disability under the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, §§ 951-962(b) (Purdon 1964 & Supp. 1982-1983), and the Federal Vocational Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. IV 1980). 692 F.2d at 912.

248. PA. STAT. ANN. tit. 43, §§ 955, 962(b) (Purdon 1964 & Supp. 1982-1983).

249. *Id.* § 962(b) (Purdon Supp. 1982-1983). The Pennsylvania Supreme Court in *Fye v. Central Transp. Inc.*, 487 Pa. 137, 409 A.2d 2 (1979), held that the remedies of the PHRA are exclusive for those individuals who invoke the provisions of the statute. *Accord* *Butz v. Hertz Corp.*, 554 F. Supp. 1178 (W.D. Pa. 1983) (once employee filed complaint for age discrimination with state agency, PHRA became exclusive remedy); *but see* *Bonham v. Dresser Indus.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (PHRA is exclusive remedy whether or not invoked). Even though the plaintiff in *Bruffett* had not in fact invoked the provisions of the PHRA, the court refused to infer a cause of action for retaliatory discharge under Pennsylvania law for a refusal to hire based on handicap or disability. 692 F.2d at 920-22. *See also* *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (E.D. Pa. 1977) (no breach of contract action under PHRA); *contra* *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975) (breach of contract action upheld under PHRA).

250. *See, e.g.*, *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982) (discharge based on results of polygraph examination); *Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982) (private right of action recognized under Clayton Act); *Berry v. Andrews*, 535 F. Supp. 1317 (M.D. Ala. 1982) (private right of action under Service Contract Act); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (dismissal based on age); *Meyer v. Byron Jackson, Inc.*, 120 Cal. App. 3d 59, 174 Cal. Rptr. 428 (1981) (publication of opinion withdrawn) (contrary to other California decisions, court held that discharge in retaliation for filing workers' compensation claim stated cause of action); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981) (retaliatory discharge for filing workers' compensation claim); *see* cases cited in notes 295-99 *infra* for an interpretation of New York law by federal courts prior to the rejection of the public policy exception in *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

251. 85 N.J. 668, 428 A.2d 1317 (1981).

ministrative remedies under the state workers' compensation law. Declining to address the "adequacy" of the administrative remedies, the *Lally* court still held that "[a] common law action for wrongful discharge in this context will effectuate statutory objectives and complement the legislative and administrative policies which undergrid the workers' compensation laws."²⁵² In *Cancellier v. Federated Department Stores*²⁵³ the Ninth Circuit held that the ADEA did not preempt an award of tort damages on pendent state claims which did not duplicate the federal statutory relief.

Courts have also allowed causes of action for retaliatory discharges based on a preexisting common law right which was not preempted by the passage of applicable statutory relief. In this regard, it has been held that "where a statutory remedy is provided for the enforcement of a preexisting *common-law* right, the newer statutory remedy will be considered only cumulative."²⁵⁴ In *Brown v. Transcon Lines*²⁵⁵ the Supreme Court of Oregon held that a preexisting cause of action for retaliatory discharge was not, in the absence of an express or implied legislative intent to the contrary, abrogated or superseded by the implementation of administrative remedies under the state workers' compensation law.²⁵⁶ A similar result was reached in *Hentzel v. Singer Co.*²⁵⁷ where a California appellate court held that the remedial provisions of the California Occupational Safety and Health Act of 1973²⁵⁸ did not abolish the common law rights of an employee allegedly discharged in retaliation for protesting the "hazardous working conditions" caused by the cigarette smoking of other employees in the workplace.²⁵⁹

In the absence of express statutory remedies, courts have determined whether implied private rights of action can exist under federal and state law. The factors deemed relevant to such an inquiry under

252. *Id.* at 671, 428 A.2d at 1318 ("If the Legislature had wanted to foreclose a judicial cause of action, it would have done so expressly."). *Id.*, 428 A.2d at 319. See also *Bryant v. Dayton Casket Co.*, 69 Ohio St. 2d 367, 433 N.E.2d 142 (1982) (mere expression of intent to pursue workers' compensation benefits prior to discharge did not state cause of action under statutory provision).

253. 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982).

254. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 303, 188 Cal. Rptr. 159, 168 (1982) (emphasis in original); accord *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

255. 284 Or. 597, 588 P.2d 1087 (1978).

256. *Id.* at 610-11, 588 P.2d at 1093-95. The court in *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), had adopted the public policy exception to protect an employee who was discharged for serving on a jury.

257. 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

258. CAL. LAB. CODE §§ 6310-6312 (West Supp. 1983).

259. 138 Cal. App. 3d at 303, 188 Cal. Rptr. at 168.

federal statutes were enumerated by the United States Supreme Court in *Cort v. Ash*.²⁶⁰ Under the *Cort* standards, when determining whether Congress intended to create a private right of action, courts should consider the " 'language and focus of the statute, its legislative history, and its purpose' " as well as "whether the cause of action is 'one traditionally relegated to state law.' " ²⁶¹ In analyzing state law, courts have similarly relied on the language and purpose of the statute, including its legislative history, in determining whether a claim for wrongful termination can be maintained.²⁶²

Retaliatory discharge cases arising under state workers' compensation laws without express statutory remedies are most illustrative of the types of private rights which will be implied under state law. The Court of Appeals of Kentucky in *Firestone Textile Co. Div. v. Meadows*²⁶³ recently adopted the public policy exception to protect an employee allegedly dismissed in retaliation for filing a claim under the state workers' compensation law which did not provide protection against such discriminatory acts. Prior to this decision, courts in Indiana,²⁶⁴ Michigan,²⁶⁵ Illinois,²⁶⁶ and Kansas²⁶⁷ had recognized an implied right of action for retaliatory discharge under state workers' compensation acts similarly without express statutory remedies. Private rights of action, however, have not been implied, even in the absence of statutory remedies, under OSHA;²⁶⁸ other state workers'

260. 422 U.S. 66 (1975). The *Cort* standards were reviewed further by the Supreme Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); see also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). See generally Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Defense, or Mutual Abdication?*, 50 FORDHAM L. REV. 611 (1982).

261. *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 770-71 n.21 (1981) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). See *Smith v. Amerada-Hess Corp.*, 612 F.2d 212 (5th Cir.), cert. denied, 449 U.S. 952 (1980) (implied private cause of action recognized to protect seaman-employee for exercising his rights under the Jones Act, 46 U.S.C. § 688).

262. See, e.g., *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

263. No. 81-2460 (Ky. Ct. App. Nov. 12, 1982). *Accord Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983).

264. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

265. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

266. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

267. *Murphy v. City of Topeka-Shawnee County Dep't of Lab. Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

268. *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980); *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977); see also *McCarthy v. Bark Peking*, 676 F.2d 42 (2d Cir. 1982) (no need to reach private cause of action

compensation laws;²⁶⁹ federal and state equal employment statutes;²⁷⁰ the Vocational Rehabilitation Act of 1973;²⁷¹ and the Consumer Credit Protection Act.²⁷²

V. Adherence to the Employment-at-Will Rule

Courts continue to adhere to the rule that employment relationships of an indefinite duration may be terminated at any time without notice "for good cause, for no cause, or even for cause morally wrong. . . ."²⁷³ The reluctance of certain jurisdictions to adopt exceptions to the at-will rule, in the absence of a legislative mandate, is demonstrated by recent decisions. Aside from the apparent difficulties in defining public policy, courts are wary of becoming in effect the legislators of such policy by formulating exceptions to the at-will rule.²⁷⁴ Similarly, courts have declined to imply the "good faith"

issue where administrative remedies were exhausted under OSHA), *vacated on other grounds*, 103 S. Ct. 809 (1983) (remanded for further consideration in light of *Director, Office of Workers' Compensation Programs v. Perini N. River Ass'n*, 103 S. Ct. 63 (1983)).

269. *Green v. Amerada-Hess Corp.*, 612 F.2d 212 (5th Cir.) (Mississippi law), *cert. denied*, 449 U.S. 952 (1980); *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *cf.* *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. Ct. App. 1974) (discharge of rehired employee nine months after he filed workers' compensation claim was not unlawful); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 259 S.E.2d 812 (1979) (no cause of action to recover damages for mental distress allegedly caused by retaliatory discharge for filing workers' compensation claim).

270. *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982); *Dadas v. Prescott, Ball & Turben*, 529 F. Supp. 203 (N.D. Ohio 1981); *McCluney v. Jos. Schlitz Brewing Co.*, 489 F. Supp. 24 (E.D. Wis. 1980).

271. *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979).

272. *LeVick v. Skaggs Cos.*, 701 F.2d 777 (9th Cir. 1983); *McCabe v. City of Eureka*, 500 F. Supp. 59 (E.D. Mo. 1980), *aff'd*, 644 F.2d 680 (8th Cir. 1981); *but see Ellis v. Glover & Gardner Constr. Co.*, No. 80-3726 (M.D. Tenn. Mar. 29, 1983) (private right of action recognized).

273. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).

274. *See, e.g., Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 794, 635 P.2d 992, 997 (1981) ("The wisdom of adopting the relief advocated . . . is best evaluated by the legislative branch and the determination of the appropriate format for such proposed legislative change, if any, is best weighed by the legislature."); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 302, 461 N.Y.S.2d 232, 235 (1983) ("Both of these aspects of the issue, involving perception and declaration of relevant public policy . . . are best and more appropriately explored and resolved by the legislative branch of our government.") (citation omitted); *see cases cited in note 292 infra*.

condition into at-will employment relationships, thereby subjecting further "uncertainty" into these relationships.²⁷⁵

A. Rejection of the "Good Faith" Condition

A number of jurisdictions have declined to recognize the implied covenant of good faith and fair dealing in employment-at-will contracts.²⁷⁶ Refusing to follow the rationale of *Monge v. Beebe Rubber Co.*²⁷⁷ and *Fortune v. National Cash Register Co.*,²⁷⁸ the Supreme Court of Hawaii in *Parnar v. American Hotels, Inc.*,²⁷⁹ stated:

Like the court in *Monge*, we "cannot ignore the new climate prevailing generally in the relationship of employer and employee." Nor can we discount the trend to submit the employer's power of discharge to closer judicial scrutiny in appropriate circumstances. But to imply into each employment contract a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of bad faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts.²⁸⁰

An implied duty of fair dealing has also been rejected in at-will employment relationships under federal statutory and case law.²⁸¹

275. See, e.g., *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266, 270 (Fla. Dist. Ct. App. 1983) ("A basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of [employment] relationships.").

276. See, e.g., *Butz v. Hertz Corp.*, 554 F. Supp. 1178 (W.D. Pa. 1983) (federal statutory and common law); *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982) (Arkansas law); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (Indiana law); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982); *Schwartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

277. 114 N.H. 130, 316 A.2d 549 (1974); see notes 129-31 *supra* and accompanying text for a discussion of *Monge*.

278. 373 Mass. 96, 364 N.E.2d 1251 (1977); see notes 146-49 *supra* and accompanying text for a discussion of *Fortune*.

279. 652 P.2d 625 (Hawaii 1982). The *Parnar* court adopted the public policy exception for the State of Hawaii where plaintiff alleged she was discharged in order to induce her to leave jurisdiction, thereby preventing her from testifying before a grand jury investigating antitrust violations. See notes 176-231 *supra* for a discussion of the public policy exception.

280. 652 P.2d at 629.

281. *Butz v. Hertz Corp.*, 554 F. Supp. 1178, 1182 (W.D. Pa. 1983) ("A general duty of fair dealing in employment situations does not exist in federal statutory or case law. Absent a specific federal law to the contrary, business people may conduct their affairs as they desire, whether they be fair or unfair.").

The most extensive debate on the rejection of the implied "good faith" condition is found in *Murphy v. American Home Products Corp.*²⁸² In this case, the New York Court of Appeals was confronted with the issue, as one of five causes of action,²⁸³ of whether plaintiff's claim that he was summarily discharged in retaliation for reporting certain alleged accounting improprieties to defendant's officials, as required by internal company regulations, constituted a breach of his at-will employment contract. The court perceived the issue as one founded on the recognition of the "good faith" condition rather than on the implied "just cause" standard recognized in other cases.²⁸⁴ Even though plaintiff had alleged that he was discharged for performing his job in accordance with express company regulations, the court, over a dissenting opinion, declined to apply the "good faith" condition to at-will employment relationships reasoning that "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."²⁸⁵ The court, therefore, concluded that the recognition of the implied-in-law obligation of "good faith" as well as the tort of abusive discharge should be left to the state legislature.²⁸⁶

The dissent in *Murphy* argued that there is "no compelling policy reason to read the implied obligation of good faith out of contracts

282. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); for a further discussion of this case, see notes 305-14 *infra* and accompanying text.

283. Plaintiff also alleged causes of action for abusive discharge; intentional infliction of emotional distress; *prima facie* tort; and age discrimination under state law. 58 N.Y.2d at 297, 461 N.Y.S.2d at 233.

284. See notes 368-400 *infra* for a discussion of implied "just cause" conditions in at-will employment relationships.

285. 58 N.Y.2d at 304-05, 461 N.Y.S.2d at 237. The court specifically limited its holding in *Weiner v. McGraw-Hill Co.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) based on the "totality" of the parties' relationship, a contractual right to job security may exist in an at-will employment relationship, to cases involving an "express limitation" on the rights of employers to discharge employees at-will. 58 N.Y.2d at 305, 461 N.Y.S.2d at 237; for a further discussion of *Weiner*, see notes 388-97 *infra* and accompanying text.

286. 58 N.Y.2d at 305-06 n.2, 461 N.Y.S.2d at 238 n.2. In this regard, the court stated:

[T]here has been much criticism of the traditional conception of the legal obligations and rights which attach to an employment at will. It may well be that in the light of modern economic and social considerations radical changes should be made. As all of us recognize, however, resolution of the critical issues turns on identification and balancing of fundamental components of public policy. Recognition of an implied-in-law obligation of good faith as restricting the employer's right to terminate is as much a part of this matrix as is recognition of the tort action for abusive discharge. We are of the view that this aggregate of rights and obligations should not be

impliedly terminable at will. To do so belies the 'universal force' of the good faith obligation which . . . the law reads into 'all contracts.'"²⁸⁷ Declining to defer the recognition of the "good faith" condition to the legislature, the dissent stated that a common law principle such as the at-will rule "can properly be changed by the courts but, more importantly, . . . the rule has for at least a century been subject to the 'universal force' of the good faith rule."²⁸⁸ Accordingly, the dismissal of plaintiff's breach of contract action was viewed as being "wholly inconsistent" with the longstanding application of the "good faith" obligation.²⁸⁹

B. Rejection of the Public Policy Exception

The overwhelming number of jurisdictions still have not recognized the tort of abusive discharge. Although certain jurisdictions have not specifically rejected the public policy exception when confronted with this cause of action,²⁹⁰ currently there is no basis for concluding that these jurisdictions will abandon the at-will rule. This point is readily confirmed by the recent decision of the New York Court of Appeals in *Murphy v. American Home Products Corp.*²⁹¹ which declined to recognize the public policy exception in the absence of legislative action. Like New York, a number of jurisdictions have refused to adopt the public policy exception in the absence of legislation.²⁹²

approached piecemeal but should be considered in its totality and then resolved by the Legislature. . . .

Id. at 306 n.2, 461 N.Y.S. 2d at 238 n.2. See also *Bergamini v. Manhattan & Bronx Surface Transit Operating Authority*, No. 15721N (1st Dep't June 21, 1983) (discussion of the applicability of *Murphy* to public employees).

287. 58 N.Y.2d at 313, 461 N.Y.S.2d at 242 (Meyer, J., dissenting).

288. *Id.* at 314, 461 N.Y.S.2d at 243 (Meyer, J. dissenting); accord *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Hawaii 1982) ("Because the courts are a proper forum for modification of the judicially created at-will doctrine, it is appropriate that we correct inequities resulting from harsh application of the doctrine by recognizing its inapplicability in a narrow class of cases.") (footnote omitted).

289. 58 N.Y.2d at 315, 461 N.Y.S.2d at 243 (Meyer, J., dissenting). Justice Meyer outlined in his dissenting opinion those other areas of the law where the implied "good faith" condition has been recognized. See *id.* at 311-13, 461 N.Y.S.2d at 242.

290. See, e.g., Arizona: *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); Colorado: *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); Idaho: *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); Iowa: *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); Nebraska: *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980); Washington: *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977).

291. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

292. See, e.g., *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (Ct. App.), cert. denied, 295 N.C. 465, 246 N.E.2d 215 (1978); *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981).

1. New York Cases

Prior to *Murphy v. American Home Products Corp.*,²⁹³ a number of federal courts, relying on dicta in *Chin v. American Telephone & Telegraph Co.*,²⁹⁴ had opined that a cause of action for abusive discharge could exist under New York law where an employee established that a public policy of the state had been violated by the defendant-employer. Causes of action for abusive discharge were, therefore, sustained by these courts for a discharge based solely on age;²⁹⁵ a discharge designed to deprive employees of pension rights;²⁹⁶ a discharge in retaliation for an employee's refusal to accede to the preferential hiring and scheduling demands of a union at a hospital;²⁹⁷ and a discharge based on alleged sex, age and national origin discrimination.²⁹⁸ A number of other federal court cases, however, dismissed wrongful termination claims on the ground that New York did not recognize the tort of abusive discharge for violations of public policy.²⁹⁹

Although several trial courts upheld abusive discharge claims on motions to dismiss,³⁰⁰ other state courts uniformly agreed that New York did not recognize the public policy exception.³⁰¹ In *Pavolini v.*

293. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

294. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979). Plaintiff in *Chin* alleged that he was discharged in retaliation for his political beliefs and associations.

295. *Rio v. Presbyterian Hosp.*, No. 82-3950 (S.D.N.Y. Apr. 1, 1983); *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287 (S.D.N.Y. 1981).

296. *Hovey v. Lutheran Medical Center*, 516 F. Supp. 554 (E.D.N.Y. 1981); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980).

297. *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982).

298. *Kovalesky v. A.M.C. Assoc. Merchandising Corp.*, 551 F. Supp. 544 (S.D.N.Y. 1982).

299. *See, e.g., Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983 (S.D.N.Y. 1982); *Boniuk v. New York Medical College*, 535 F. Supp. 1353 (S.D.N.Y. 1982). *See also Shaitelman v. Phoenix Mut. Life Ins. Co.*, 517 F. Supp. 21 (S.D.N.Y. 1980) (no cause of action for wrongful discharge under *Chin* where no public policy identified as being violated).

300. *See, e.g., Marino v. New York Life Ins. Co.*, No. 13838-79 (Sup. Ct. Nassau County June 25, 1981) *rev'd in part*, N.Y.L.J., June 2, 1983 at 11, col.2 (2d Dep't 1983); *Balancio v. American Optical Corp.*, No. 13229-80 (Sup. Ct. Westchester County May 21, 1981); *see also Murphy v. American Home Prods. Corp.*, 112 Misc. 2d 507, 447 N.Y.S.2d 218 (Sup. Ct. N.Y. County), *modified*, 88 A.D.2d 870, 451 N.Y.S.2d 770 (1st Dep't 1982), *aff'd*, No. 35 (N.Y. Ct. App. Mar. 29, 1983); *Opedal v. Atlantic Cos.*, N.Y.L.J., Nov. 2, 1972 at 2, col. 4 (Sup. Ct. N.Y. County 1972), *aff'd*, 42 A.D.2d 520, 344 N.Y.S.2d 478 (1st Dep't 1973).

301. *See, e.g., Pavolini v. Bard Air Corp.*, 88 A.D.2d 714, 451 N.Y.S.2d 288 (3d Dep't 1982); *Marinzulich v. National Bank of N. Am.*, 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980); *Fletcher v. Greiner*, 73 A.D.2d 591, 422 N.Y.S.2d 130 (2d Dep't 1979); *O'Donnell v. Weiser*, No. 12089-81 (Sup. Ct. N.Y. County July 8, 1982); *Ackerman v. Bank Leumi Trust Co.*, No. 42455-80 (Sup. Ct. N.Y. County

Bard Air Corp.,³⁰² for example, the Appellate Division, Third Department, held that an employee allegedly discharged for reporting safety violations to the Federal Aviation Administration and for refusing to falsify flight records did not have a cause of action for abusive discharge. In *Marinzulich v. National Bank of North America*³⁰³ an employee did not have an abusive discharge claim for uncovering evidence of an alleged embezzlement. Similarly, in *Fletcher v. Greiner*,³⁰⁴ an employee's claim for abusive discharge based on sex discrimination was dismissed on the grounds that New York did not recognize this cause of action.

In *Murphy v. American Home Products Corp.*³⁰⁵ the New York Court of Appeals confirmed that "[t]his court has not and does not now recognize a cause of action in tort for abusive or wrongful discharge of an employee; such recognition must await action of the Legislature."³⁰⁶ The court of appeals thereby affirmed the dismissal of plaintiff's abusive discharge claim by the Appellate Division, First Department, for his failure to state a cause of action.³⁰⁷ The trial court, although acknowledging that New York had not yet recognized the public policy exception, sustained the claim on a motion to dismiss by declining "to put plaintiff out of court, without at least affording him the opportunity to avail himself of disclosure procedures."³⁰⁸

Plaintiff in *Murphy*, an at-will employee, had alleged that he was wrongfully terminated in retaliation for reporting to corporate officials, as required by internal company regulations,³⁰⁹ certain account-

Apr. 14, 1981), *aff'd without opinion*, 85 A.D.2d 937 (1st Dep't 1981), *appeal denied*, 56 N.Y.2d 501 (1982).

302. 88 A.D.2d 714, 451 N.Y.S.2d 288 (3d Dep't 1982). It should be noted that the appeal of this case was scheduled to be argued before the New York Court of Appeals at the same time as *Murphy*, but was remanded on jurisdictional grounds to the trial court for further proceedings.

303. 73 A.D.2d 886, 423 N.Y.S.2d 1014 (1st Dep't 1980); *accord* *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

304. 73 A.D.2d 591, 422 N.Y.S.2d 130 (2d Dep't 1979).

305. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

306. *Id.* at 297, 461 N.Y.S.2d at 233.

307. 88 A.D.2d 870, 451 N.Y.S.2d 770 (1st Dep't 1982). *But see* *Waldman v. Englishtown Sportswear Ltd.*, 460 N.Y.S.2d 552, 556 (1st Dep't 1983) (based on *Chin*, "no cause lies for wrongful or abusive discharge absent a showing by plaintiff that the discharge was in violation of a public policy. . . .").

308. 112 Misc. 2d 507, 510, 447 N.Y.S.2d 218, 220 (Sup. Ct. N.Y. County 1982).

309. The defendant's "Master Accounting Manual," according to the plaintiff, "mandated that he act as a whistle blower with regard to any financial irregularities committed by defendant's personnel." Brief for Plaintiff-Respondent-Cross-Appellant at 9, *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

ing improprieties in violation of applicable law³¹⁰ designed to give unwarranted bonuses to high-ranking officials by artificially inflating the growth in the defendant's income. Plaintiff also alleged that he was discharged in retaliation for his refusal to engage in the unlawful activity.³¹¹

Despite these compelling facts, the court summarily dismissed the plaintiff's cause of action for abusive discharge stating "that such a significant change in our law is best left to the Legislature."³¹² In support of its decision, the court cited various state statutes protecting employees from discharge for engaging in certain activities³¹³ and also noted that proposed "whistle-blower" legislation was pending before the New York State Legislature.³¹⁴

2. Other Recent Decisions

Other jurisdictions have also refused to recognize the public policy exception in the absence of a legislative mandate. In *Kelly v. Mississippi Valley Gas Co.*,³¹⁵ for example, the Supreme Court of Mississippi held that an employee discharged in retaliation for filing a claim under the Mississippi Workmen's Compensation Law³¹⁶ did not have a cause of action, even though state law did not protect him against retaliatory discharges. In declining to adopt the public policy exception in the absence of a statutory mandate, the court stated that "[t]his public policy decision is not only proper, but an exclusive, subject for the Legislature to consider."³¹⁷ Similarly, in *Bottijliso v. Hutchison Fruit Co.*,³¹⁸ the Court of Appeals of New Mexico refused to sustain a claim for retaliatory discharge under the New Mexico Workmen's Compensation Act,³¹⁹ reasoning that "the issue of whether a new

310. Plaintiff relied on N.Y. PENAL LAW § 175.05(1)-(4) (McKinney 1975 & Supp. 1982-1983), which prohibits the falsification of an enterprise's business records.

311. Plaintiff, who was over 50 years old when he was dismissed, also alleged that age was a contributing factor to his dismissal in violation of state equal employment law. 58 N.Y.2d at 298, 461 N.Y.S.2d at 233. With respect to this cause of action, the court held that the plaintiff had timely filed a complaint for age discrimination based on the three-year statute of limitations of the N.Y. CIV. PRAC. LAW § 214(2) (McKinney Supp. 1982-1983) and not the one-year period of N.Y. EXEC. LAW § 297(5) (McKinney 1982). The court limited the application of the one-year period to actions commenced before the New York State Human Rights Commission. The plaintiff's age discrimination claim was, therefore, reinstated. 58 N.Y.2d at 306-07, 461 N.Y.S.2d at 238-39.

312. 58 N.Y.2d at 301, 461 N.Y.S.2d at 235.

313. *Id.* at 302-03 n.1, 461 N.Y.S.2d at 236 n.1.

314. See note 89 *supra* for the provisions of this bill.

315. 397 So. 2d 874 (Miss. 1981).

316. MISS. CODE ANN. §§ 71-3-1 to 71-3-13 (1972 & Supp. 1982).

317. 397 So. 2d at 877 (footnotes omitted).

318. 96 N.M. 789, 635 P.2d 992 (1981).

319. N.M. STAT. ANN. §§ 52-1-1 to 52-1-69 (1978).

cause of action should be recognized in this state for retaliatory dismissal is more appropriately addressed to the state legislature than to the judiciary."³²⁰

Furthermore, "whistle-blower" protection has been denied to at-will employees in the absence of statutory protection. In *Maus v. National Living Centers, Inc.*³²¹ a Texas appellate court declined to infer from state nursing home legislation protection from retaliatory discharge for a nurse who complained to her superiors that patients were being neglected and receiving poor care. In *Taylor v. Foremost-McKesson, Inc.*³²² an employee allegedly terminated in an attempt to cover up certain accounting irregularities and other illegal activities by corporate officials was similarly not protected under Georgia law. Noting that the Georgia courts have declined to adopt a common law exception to the statutory codification of the at-will rule,³²³ the Fifth Circuit affirmed the dismissal of the plaintiff's claim.

VI. Other Theories of Recovery

In addition to the public policy exception, courts in wrongful discharge cases have considered causes of action in tort for fraud,³²⁴ negligence,³²⁵ intentional and negligent infliction of severe emotional distress,³²⁶ *prima facie* tort,³²⁷ defamation,³²⁸ and tortious interference

320. 96 N.M. at 794-95, 635 P.2d at 997-98.

321. 633 S.W.2d 674 (Tex. Ct. App. 1982).

322. 656 F.2d 1029 (5th Cir. 1981).

323. GA. CODE ANN. § 34-7-1 (1982).

324. *See, e.g.*, *DuSesoi v. United Refining Co.*, 549 F. Supp. 1289 (W.D. Pa. 1982); *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982); *Shoucair v. Read*, 88 A.D.2d 718, 451 N.Y.S.2d 281 (3d Dep't 1982); *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679 (W. Va. 1981).

325. *Chamberlain v. Bissell Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982).

326. *Cummings v. Walsh Constr. Co.*, 31 Fair Empl. Prac. Cas. (BNA) 930 (S.D. Ga. 1983); *Avallone v. Wilmington Medical Center, Inc.*, 553 F. Supp. 931 (D. Del. 1982); *Forde v. Royal's, Inc.*, 537 F. Supp. 1173 (S.D. Fla. 1982); *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982); *Rawson v. Sears Roebuck & Co.*, 530 F. Supp. 776 (D. Colo. 1982); *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); *Droz v. Pacific Nat'l Ins. Co.*, 138 Cal. App. 3d 181, 188 Cal. Rptr. 10 (1982); *Gmuer v. Garner*, 426 So. 2d 972 (Fla. Dist. Ct. App. 1982); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982).

327. *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982); *Shaitelman v. Phoenix Mut. Life Ins. Co.*, 517 F. Supp. 21 (S.D.N.Y. 1980); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

328. *Adler v. American Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982); *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, 429 A.2d 492 (1980); *Vacca v. General Elec. Credit Corp.*, 88 A.D.2d 740, 451 N.Y.S.2d 869 (3d Dep't 1982); *Nye v. Department of Livestock*, 639 P.2d 498 (Mont. 1982).

with employment contracts.³²⁹ Employees have also relied on the doctrines of promissory³³⁰ and equitable³³¹ estoppel to establish liability for the wrongful termination of at-will relationships. Although actual liability on the foregoing theories of recovery has not been imposed in many at-will cases, these theories are frequently pleaded as alternative causes of action to abusive discharge claims.

A. Tortious Interference with Employment Contracts

In order to state a cause of action for tortious interference with employment contracts, employees must allege the following:

the existence of a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.³³²

329. *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. 1981); *RJM Sales & Mktg. Inc. v. Banfi Prods. Corp.*, 546 F. Supp. 1368 (D. Minn. 1982); *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); *Cashman v. Shinn*, 109 Ill. App. 3d 1112, 441 N.E.2d 940 (1982); *Pinsof v. Pinsof*, 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1982); *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21.

330. *Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002 (8th Cir. 1982); *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Rawson v. Sears, Roebuck & Co.*, 554 F. Supp. 327 (D. Colo. 1983); *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981).

331. *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981); *Reiter v. Yellowstone County*, 627 P.2d 845 (Mont. 1981); *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982).

332. *Pinsof v. Pinsof*, 107 Ill. App. 3d 1031, 1037, 438 N.E.2d 525, 529 (1982) (quoting *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 363, 300 N.E.2d 331, 333 (1973)); *accord* *Cashman v. Shinn*, 109 Ill. App. 3d 1112, 441 N.E.2d 940 (1982).

Section 766 of the Second Restatement of Torts defines "Intentional Interference with Performance of Contract by Third Person" as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1979).

Section 767 sets forth the following factors for determining whether there has been tortious interference:

In determining whether an actor's conduct is intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

It is generally agreed that a party to an employment relationship cannot be liable for tortious interference with that relationship.³³³

Most courts have not considered employment-at-will contracts as cognizable business relationships for purposes of tortious interference.³³⁴ Recent cases, however, have departed from this rule where both parties to the at-will employment relationship were willing and desirous of continuing the relationship.³³⁵ In *Cashman v. Shinn*³³⁶ an Illinois appellate court, although recognizing this exception to the general rule, nevertheless held that plaintiff-president did not as a matter-of-law have the necessary expectation of continued employment where the evidence established that all of the defendant's directors had agreed to fire him if he did not resign.³³⁷ In other cases where less than a majority of a board of directors had attempted to oust an employee, presumptions of continued employment were sustained.³³⁸

Managerial and supervisory personnel will not be liable for tortious interference with employment contracts where they are acting on behalf of the employer within their scope of employment.³³⁹ Corporate officials, however, acting in bad faith or with malice for their own personal benefit may be liable in tort for their wrongful interference.³⁴⁰ The burden of proof to establish privilege as an affirmative

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

Id. § 767.

333. *Cummings v. Walsh Constr. Co.*, 31 Fair Empl. Prac. Cas. (BNA) 930 (S.D. Ga. 1983); *Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

334. *RJM Sales & Mktg., Inc. v. Banfi Prods. Corp.*, 546 F. Supp. 1368 (D. Minn. 1982); *Pinsof v. Pinsof*, 107 Ill. App. 3d 1031, 438 N.E.2d 525 (1982).

335. *Cashman v. Shinn*, 109 Ill. App. 3d 1112, 441 N.E.2d 940 (1982); *Kemper v. Worcester*, 106 Ill. App. 3d 121, 435 N.E.2d 827 (1982); *TAD, Inc. v. Siebert*, 63 Ill. App. 3d 1001, 380 N.E.2d 963 (1978); *see generally* RESTATEMENT (SECOND) OF TORTS § 766 comment g (1979).

336. 109 Ill. App. 3d 1112, 441 N.E.2d 940 (1982).

337. *Id.* at 1118, 441 N.E.2d at 944.

338. *Kemper v. Worcester*, 106 Ill. App. 3d 121, 435 N.E.2d 827 (1982); *Kozlowsky v. Westminster Nat'l Bank*, 6 Cal. App. 3d 593, 86 Cal. Rptr. 52 (1970).

339. *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); *Gram v. Liberty Mutual Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21.

340. *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *cf. Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21.

defense to a cause of action for tortious interference with employment contracts is on the defendants.³⁴¹

B. Promissory and Equitable Estoppel

As a general proposition of law, "the principle of promissory or equitable estoppel cannot be utilized to create primary contractual liability where none would otherwise exist."³⁴² Essential to the principles of estoppel is the detrimental reliance by one party upon the representations of the other party.³⁴³ "[A]lthough equitable estoppel might transform an otherwise nonbinding agreement into a legally binding contract,"³⁴⁴ most courts continue to reject wrongful discharge claims based on the principles of estoppel.³⁴⁵

In *Rawson v. Sears, Roebuck & Co.*,³⁴⁶ for example, a federal district court, applying Colorado law, held that the allegations of plaintiff-employee that he did several acts in reliance on defendant's promise that he would have a job "until his retirement" did not state a

In *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 51 U.S.L.W. 4343 (U.S. Apr. 4, 1983) (No. 81-1574), the United States Supreme Court held that the NLRA preempted a supervisor's state court action against a union for tortious interference with his employment contract.

341. *Crossen v. Foremost-McKesson, Inc.*, 537 F. Supp. 1076 (N.D. Cal. 1982); *Mayer v. Sturdy N. Sales, Inc.*, 91 Cal. App. 3d 69, 154 Cal. Rptr. 43 (1979).

342. *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903, 905 (Ala. 1982).

343. *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981); *Reiter v. Yellowstone County*, 627 P.2d 845 (Mont. 1981). Section 90 of the Second Restatement of Contracts defines promissory estoppel as follows:

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

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

Equitable estoppel has been defined as follows:

The doctrine of estoppel in pais (equitable estoppel) in its traditional form states that a party who is guilty of a misrepresentation of existing fact upon which the other party justifiably relies to his detriment is estopped from denying his utterances or acts to the detriment of the other party. . . .

[I]t is now clear that under the modern doctrine of estoppel a misrepresentation of fact is not necessary—a promise or an innocent representation of fact being sufficient to form the basis of an estoppel, whether it be denominated "equitable" or "promissory." Under this view actual fraud, bad faith or intent to deceive is not essential.

J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 445-46 (2d ed. 1977) (footnotes omitted) (emphasis in original).

344. *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903, 905 (Ala. 1982).

345. *Walker v. Modern Realty of Mo., Inc.*, 675 F.2d 1002 (8th Cir. 1982); *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982); *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982); *Reiter v. Yellowstone County*, 627 P.2d 845 (Mont. 1981); *Brower v. Holmes Transp., Inc.*, 140 Vt. 114, 435 A.2d 952 (1981).

346. 554 F. Supp. 327 (D. Colo. 1983).

cause of action under the doctrine of promissory estoppel.³⁴⁷ The court also held that the plaintiff's claim was not supported by the understanding of other employees that their employment with the defendant would continue "as long as they were performing in a satisfactory manner."³⁴⁸ In *Grouse v. Group Health Plan, Inc.*,³⁴⁹ however, the Supreme Court of Minnesota held that the defendant-employer was liable on the theory of promissory estoppel where the plaintiff had left his former position in reliance on the defendant's promise of employment which was revoked prior to the plaintiff's commencement of employment.³⁵⁰

VII. The Effect of Personnel Policies on the Employment-at-Will Rule

Implied rights to continued employment, absent cause for termination, based on the provisions of company personnel policies are still recognized in a limited number of jurisdictions.³⁵¹ Most courts, however, do not consider personnel policy manuals or other employee handbooks as binding contracts of employment for a definite or unspecified duration terminable only for "just cause."³⁵² In this regard, courts have noted that these documents do not contain the "essential elements" of employment agreements concerning the terms and conditions of employment, the length of employment, and the job duties and responsibilities of a particular position.³⁵³ Nevertheless, company

347. *Id.* at 330.

348. *Id.*

349. 306 N.W.2d 114 (Minn. 1981).

350. The court held that the plaintiff "had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [the defendant] once he was on the job." *Id.* at 116. *But see* *Pepsi-Cola Gen. Bottlers, Inc. v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982) (cause of action based on promissory estoppel recognized but claim dismissed where proof of damages was insufficient).

351. *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir.) (California law), *cert. denied*, 454 U.S. 835 (1981); *Brudnicki v. General Elec. Co.*, 535 F. Supp. 84 (N.D. Ill. 1982) (Illinois law); *Schwartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981).

352. *See, e.g.*, *Avallone v. Wilmington Medical Center*, 553 F. Supp. 931 (D. Del. 1982); *Williams v. Delta Haven, Inc.*, 416 So. 2d 637 (La. Ct. App. 1982); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (1982). *See generally* DeGiuseppe, *supra* note 1, at 44-49.

353. *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979);

personnel policies relating to fringe benefits may give rise to enforceable contract rights for at-will employees.³⁵⁴

A. Contractual Rights to Job Security

Recent cases demonstrate that personnel policies are generally regarded by a majority of jurisdictions as unilateral expressions of company policy not creating enforceable contract rights to job security.³⁵⁵ In *Gates v. Life of Montana Insurance Co.*³⁵⁶ an employee who was summarily terminated did not have a breach of contract claim, even though the defendant had "issued an employee handbook which stated that prior to dismissal for unsatisfactory performance a warning would be given to the employee."³⁵⁷ In dismissing this claim, the Supreme Court of Montana stated:

The employee handbook was not distributed until about two years after [plaintiff] was hired. It constituted a unilateral statement of company policies and procedures. Its terms were not bargained for, and there was no meeting of the minds. The policies may be changed unilaterally at any time. The employee handbook was not a part of [plaintiff's] employment contract at the time she was hired, nor could it have been a modification to her contract because there was no new and independent consideration for its terms. . . . Therefore the handbook requirement of notice prior to termination is not enforceable as a contract right.³⁵⁸

Similarly, in *Avallone v. Wilmington Medical Center*,³⁵⁹ a nurse did not have a contractual claim for wrongful discharge under Delaware

accord Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976).

354. See notes 368-400 *infra* and accompanying text. See generally DeGiuseppe, *supra* note 1, at 50-68.

355. See, e.g., Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (North Carolina law); Rogers v. IBM Corp., 500 F. Supp. 867 (W.D. Pa. 1980) (Pennsylvania law); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1979); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979). *Contra* Pine River State Bank v. Metfille, No. C8-82-543 (Minn. Apr. 29, 1983); Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, 645 P.2d 1381, *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (personnel policy procedures relating to termination created implied-in-fact contract rights).

356. 638 P.2d 1063 (Mont. 1982).

357. *Id.* at 1066.

358. *Id.*

359. 553 F. Supp. 931 (D. Del. 1982).

law based on a grievance procedure in an employee handbook which was promulgated approximately nine years *after* she was initially employed.³⁶⁰

Courts have also been reluctant to imply a "just cause" standard in employment relationships of an indefinite duration.³⁶¹ In *Parker v. United Airlines, Inc.*³⁶² plaintiff-employee alleged that she had an implied agreement with the defendant that her employment could only be terminated for "just cause."³⁶³ Plaintiff's claim was based on an employment status form to which she assented stating that "she would be granted 'regular employment' upon completion of a six-month probationary period"; a statement by the defendant's president that she would be "treated fairly" on her job; and an employee manual which did not expressly state that she could be summarily discharged, but provided that "an employee may be discharged for cause, furloughed for economic reasons, or resign."³⁶⁴ The plaintiff also claimed that the defendant's grievance procedure implied a "just cause" standard for terminations of employment.³⁶⁵

Despite the clear language of the employee manual concerning terminations of employment, the Washington appellate court held that the plaintiff's "claim of an implied agreement amounts merely to

360. *Id.* at 936-37. The federal court, in reaching its decision, relied on *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982), where the court stated:

The *Booklet* in question here was issued by defendant after plaintiff began her employment. It was a unilateral expression of the defendant's policies and procedures on a number of topics, issued for the guidance and benefit of employees. The *Booklet* does not grant to any employee a specific term of employment and does not, therefore, alter plaintiff's "at will" employment status. No error was committed by the Superior Court in awarding summary judgment for defendant.

Id. at 1097.

361. See cases cited in note 352 *supra*; see also *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (employer's determination of "just cause" under personnel policy suffices and actual "just cause" for discharge need not be established).

362. 32 Wash. App. 722, 649 P.2d 181 (1982).

363. *Id.* at 724, 649 P.2d at 183.

364. *Id.*

365. *Id.* The grievance procedure was instituted for the following reason:

In any sizeable organization, friction or misunderstanding may arise because of the wide variety of circumstances under which employees work. It is, therefore, to the advantage of both the employee and the company that a method of presenting problems be provided so that corrections and adjustments can be made where appropriate. In this light, the employee grievance procedure has been established as outlined below *to provide a method for correcting the misapplication of company policies and/or procedures.*

Id. at 726-27, 649 P.2d at 183-84 (emphasis in original).

her subjective understanding that she would be discharged only with just cause. . . . [S]uch an understanding is insufficient in law to imply an agreement.”³⁶⁶ In reaching this decision, the court stated that the absence in the employee manual of an *express* right to terminate employees at-will did not imply that discharges could only be effectuated for cause. Moreover, the court declined to infer any job security rights from the defendant’s grievance procedure which, according to the court, merely reflected “company policy to treat employees in a fair and consistent manner, allowing full discussion of adverse actions.”³⁶⁷

1. Michigan Cases

In *Toussaint v. Blue Cross & Blue Shield of Michigan*³⁶⁸ the Supreme Court of Michigan held that company personnel policies and procedures can give rise to contractual rights for continued employment, absent cause for termination, “just as are rights so derived to bonuses, pensions and other forms of compensation as previously held by Michigan courts.”³⁶⁹ In recognizing this principle, the court found sufficient evidence of an express agreement not to discharge except for “just cause” based on the specific language of the defendant’s personnel policy manual and oral assurances of job security given to the plaintiff during his hiring interview.³⁷⁰ The *Toussaint* court noted, however, that an exception to this holding could exist where an employer who has not agreed to job security protects “itself by entering into a written contract which explicitly provides that the employee serves at the pleasure or at the will of the employer or as long as his services are satisfactory to the employer.”³⁷¹

Relying on the exception set forth in *Toussaint*, a federal court in *Novosel v. Sears, Roebuck & Co.*³⁷² held that under Michigan law an employee had no “legitimate expectation” of job security based on a statement in his employment application providing that he could “be terminated, with or without cause, and with or without notice, at any

366. *Id.* at 727, 649 P.2d at 184.

367. *Id.*

368. 408 Mich. 579, 292 N.W.2d 880 (1980); *see generally* DeGiuseppe, *supra* note 1, at 46-50.

369. 408 Mich. at 619, 292 N.W.2d at 894.

370. *Id.* at 620, 292 N.W.2d at 895. *See also* Lichnovsky v. Ziebart Int’l Corp., 414 Mich. 228, 324 N.W.2d 732 (1982) (franchise agreement for indefinite period terminable only for “cause” was enforceable).

371. 408 Mich. at 612 n.24, 292 N.W.2d at 891 n.24.

372. 495 F. Supp. 344 (E.D. Mich. 1980).

time, at the option of either the Company or [the employee].’ ”³⁷³ In *Schipani v. Ford Motor Co.*,³⁷⁴ however, a Michigan appellate court subsequently limited the *Toussaint* exception by recognizing that written or oral assurances of continued employment may negate an express disclaimer of job security contained in an employment contract.³⁷⁵ Further clarification of the *Toussaint* rule was provided in *Schwartz v. Michigan Sugar Co.*³⁷⁶ where a Michigan appellate court recognized that implied-in-fact contractual rights to job security can exist based on the circumstances of an employment relationship, even in the absence of express statements of company policy or procedure.³⁷⁷

373. *Id.* at 346.

The application stated in full:

I certify that the information contained in this application is correct to the best of my knowledge and understand that falsification of this information is grounds for dismissal in accordance with Sears, Roebuck and Co. policy. I authorize the references listed above to give you any and all information concerning my previous employment and any pertinent information they may have, personal or otherwise, and release all parties from all liability for any damage that may result from furnishing same to you. *In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or 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 of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.*

Id. (emphasis in original).

374. 102 Mich. App. 606, 302 N.W.2d 307 (1981).

375. *Id.* at 613-14, 302 N.W.2d at 310-11. The plaintiff in *Schipani* signed a written employment contract which stated:

I understand that my employment is not for any definite time, and may be terminated at any time, without advance notice by either myself or Ford Motor Company.

Id. at 610, 302 N.W.2d at 309. With respect to the effect of this disclaimer, the court stated that the decision of *Kari v. General Motors Corp.*, 402 Mich. 926, 282 N.W.2d 925 (1978), *rev'g* 79 Mich. App. 93, 261 N.W.2d 222 (1977), may indicate that “under appropriate circumstances, oral promises may negate the effect of disclaimers which are intended to absolve employers from liability for policies presented in handbooks or other employer literature.” 102 Mich. App. at 614, 302 N.W.2d at 311; see cases cited in note 407 *infra* for a discussion of the effect of disclaimers on fringe benefits set forth in personnel policies.

376. 106 Mich. App. 471, 308 N.W.2d 459 (1981).

377. *Id.* at 478, 308 N.W.2d at 461-62. Concerning the requirements for implied-in-fact contracts, the court quoted the following language from *Erickson v. Goodell Oil Co.*, 384 Mich. 207, 211-12, 180 N.W.2d 798, 800 (1970):

A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of men, show a mutual intention to contract. *In re Munro's Estate* (1941), 296 Mich. 80 [295 N.W. 567]. A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties,

Federal courts in recent cases have narrowly construed the parameters of *Toussaint* in determining whether employees had been denied their contractual rights to job security under company personnel policies. In *Chamberlain v. Bissell Inc.*,³⁷⁸ for example, a federal district court held that an employer had "good cause" under company policy to discharge the plaintiff without notice based on actual and anticipated work-related problems with his job performance.³⁷⁹ Because the company had not adopted a prior notice policy, the court affirmed the plaintiff's discharge reasoning that "*Toussaint* itself imposes no duties on employers, it merely holds that employers may impose duties on themselves through the adoption and dissemination of employment policies."³⁸⁰ Similarly, in *Summers v. Sears, Roebuck & Co.*,³⁸¹ a federal district court, applying Michigan law, held that the plaintiff had no "legitimate expectation of a just cause determination prior to demotion" under express company policy which permitted his employment to be summarily terminated and precluded his reliance on subsequent representations to the contrary.³⁸²

but is to be gathered by implication for or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. *Miller v. Stevens* (1923), 224 Mich. 626 [195 N.W. 481].

106 Mich. App. at 477, 308 N.W.2d at 461.

The *Schwartz* court, therefore, concluded:

Thus, an employer's conduct and other pertinent circumstances may establish an unwritten "common law" providing the equivalent of a just cause termination policy. Rules and understandings, promulgated and fostered by the employer, may justify a legitimate claim to continued employment. *Toussaint, supra*, 408 Mich. 617-18, 292 N.W.2d 880, quoting *Perry v. Sindermann*, 408 U.S. 593, 601-603, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972). Nonetheless, a mere subjective expectancy on the part of an employee will not create such a legitimate claim. *Perry, supra*.

106 Mich. App. at 477-78, 308 N.W.2d at 462.

378. 547 F. Supp. 1067 (W.D. Mich. 1982).

379. *Id.* at 1078-79.

380. *Id.* at 1080.

381. 549 F. Supp. 1157 (E.D. Mich. 1982).

382. *Id.* at 1162. The plaintiff's employment contract provided:

In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or 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 of the Company, has any 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 1161. See also *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982) (NLRA preempted breach of employment contract claim under Michigan law).

2. *Weiner v. McGraw-Hill, Inc.*

New York courts have generally agreed that, absent mutuality of obligation, personnel policy manuals and other employee handbooks do not create enforceable contract rights to job security.³⁸³ In this regard, the court in *Chin v. American Telephone & Telegraph Co.*³⁸⁴ noted that these documents do not “describe or define the duties and responsibilities of the particular position, the length of employment or the terms of compensation—all essential elements in an employment agreement.”³⁸⁵ Similarly, in *Edwards v. Citibank, N.A.*³⁸⁶ it was recognized that “[t]he issuance of a manual by the employer . . . does not create an equitable estoppel which would preclude the employer from terminating an employee’s employment except in compliance with the manual.”³⁸⁷

In *Weiner v. McGraw-Hill, Inc.*,³⁸⁸ however, the New York Court of Appeals held that a contractual right to job security can exist in employment relationships for an indefinite term, even in the absence of mutuality of obligation, based on the presence of “sufficient consideration.”³⁸⁹ Concerning the sufficiency of consideration, the court

383. See, e.g., *Kings v. Cornell Univ.*, 81 A.D.2d 712, 439 N.Y.S.2d 445 (3d Dep’t 1981); *Cerkevich v. Port Authority of N.Y. & N.J.*, N.Y.L.J., Dec. 1, 1981, at 6, col. 4 (Sup. Ct. N.Y. County 1981); *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff’d*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep’t), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980); *Chin v. American Tel & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff’d*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep’t), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979); *but see* *Wernham v. Moore*, 77 A.D.2d 262, 432 N.Y.S.2d 711 (1st Dep’t 1980) (motion to dismiss denied where Mission Society manual could have constituted bilateral agreement to discharge only for cause); *Williams v. Action for a Better Community, Inc.*, 51 A.D.2d 876, 380 N.Y.S.2d 138 (4th Dep’t 1976) (employee who was a “permanent employee” under personnel practices code could only be discharged for “justifiable cause”).

384. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff’d*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep’t), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979).

385. 96 Misc. 2d at 1073, 410 N.Y.S.2d at 739.

386. 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep’t), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

387. 74 A.D.2d at 1073, 425 N.Y.S.2d at 328.

388. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

389. *Id.* at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196. In *Stewart v. Albert Einstein College of Medicine*, N.Y.L.J., Mar. 15, 1983, at 12, col. 4 (Sup. Ct. Bronx County 1983), a plaintiff’s allegations of “sufficient consideration” based on his 20 years of exemplary service and the existence of a layoff provision recognizing seniority rights in a company manual did not establish the existence of a contract where the manual was issued 12 years after the plaintiff was initially employed and was merely a guide to day-to-day personnel policy decisions.

stated, “[f]ar from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.”³⁹⁰ In determining whether the presumption of an employment-at-will status is overcome, the court instructed the trier of fact to consider the “totality” of the parties’ relationship, “‘including their writings’ . . . and their antecedent negotiations.”³⁹¹

Plaintiff-employee in *Weiner* claimed that “he was discharged without the ‘just and sufficient cause’ or the rehabilitative efforts specified in the employer’s personnel handbook and allegedly promised at the time he accepted the employment.”³⁹² The plaintiff, who was summarily dismissed for “lack of application,” had allegedly been induced by the defendant to leave another company with the assurance that he would not be discharged without cause. This assurance was evidently confirmed by a statement in an employment application form providing that the plaintiff’s “employment would be subject to the provisions of [the defendant’s] ‘handbook on personnel policies and procedures.’ ”³⁹³ The plaintiff also claimed that he had rejected other employment offers based on the assurance of job security and had been specifically instructed to follow the “strict procedures” of the dismissal standards set forth in the defendant’s handbook in order to avoid any legal liability for the company.³⁹⁴

Based on these facts, the *Weiner* court found “sufficient evidence of a contract and a breach to sustain a cause of action.”³⁹⁵ Two justices dissented from the majority decision on the grounds that there was no evidence that the defendant had intended to be contractually bound by the contents of its personnel policies and employment applications.³⁹⁶ The dissent also implied that the majority’s decision could force businesses to move out of New York State resulting in further job losses.³⁹⁷

The parameters of the *Weiner* decision were severely limited by the New York Court of Appeals in *Murphy v. American Home Products Corp.*³⁹⁸ to cases involving an “express limitation” on an employer’s

390. 57 N.Y.2d at 464, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

391. *Id.* at 466, 443 N.E.2d at 446, 457 N.Y.S.2d at 198.

392. *Id.* at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

393. *Id.*

394. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

395. *Id.*

396. *Id.* at 467, 443 N.E.2d at 446, 457 N.Y.S.2d at 198 (Wachtler, J., dissenting).

397. *Id.* at 469, 443 N.E.2d at 447, 457 N.Y.S.2d at 199.

398. 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983). For a further discussion of *Murphy*, see notes 305-14 *supra* and accompanying text.

right to discharge employees at will.³⁹⁹ The plaintiff in *Murphy* alleged that he was wrongfully terminated for reporting to officers and directors of the defendant-employer, in accordance with internal company regulations contained in a manual, certain unlawful accounting practices and for refusing to engage in these improprieties. Without allowing discovery, the court dismissed the plaintiff's breach of contract claim stating that his "general references" to the alleged manual did not suffice under *Weiner* to state a cause of action.⁴⁰⁰

B. Contract Liability for Fringe Benefits

Courts continue to recognize that company personnel policies may create an implied-in-fact contract liability for fringe benefits in employment-at-will relationships provided that the offer is communicated to employees.⁴⁰¹ Notice of benefit policies may be disseminated to employees through personnel policy manuals, company notices, other employees or past practice. After receiving notice of these policies, employees can accept the offer of the fringe benefits by remaining in the employ of the company.⁴⁰² The principle of promissory estoppel may also entitle employees to receive personnel policy benefits.⁴⁰³

Sufficient consideration for the offer of the fringe benefits is provided by the employees' continued services to the company.⁴⁰⁴ Most jurisdictions agree that it is immaterial whether employees would have continued their employment even in the absence of the company benefit policies in determining whether sufficient consideration exists.⁴⁰⁵ As long as the benefit policy creates an offer capable of acceptance by continued employment, it will not be viewed as a mere

399. 58 N.Y.2d at 305, 461 N.Y.S.2d at 237.

400. *Id.*

401. *See, e.g.,* Fletcher v. Amax, Inc., 160 Ga. App. 692, 288 S.E.2d 49 (1982); Brooks v. Carolina Tel. & Tel. Co., 56 N.C. App. 801, 290 S.E.2d 370 (Ct. App. 1982); Saunders v. Big Bros., Inc., 115 Misc. 2d 845, 454 N.Y.S.2d 787 (N.Y.C. Civ. Ct. 1982); *see generally* DeGiuseppe, *supra* note 1, at 50-68.

402. Hinkeldey v. Cities Serv. Oil Co., 470 S.W.2d 494, 502 (Mo. 1971); DeVita v. Rand McNally & Co., 44 Misc. 2d 906, 256 N.Y.S.2d 9 (Justice Ct. 1965); *see* DeGiuseppe, *supra* note 1, at 51-53.

403. Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. 1959); Hilton v. Alexander & Baldwin, Inc., 66 Wash. 2d 30, 400 P.2d 772 (1965).

404. Chinn v. China Nat'l Aviation Corp., 138 Cal. App. 2d 98, 291 P.2d 91 (1955); Cain v. Allen Elec. & Equip. Co., 346 Mich. 568, 78 N.W.2d 296 (1956); Hercules Powder Co. v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949). *But see* Rynar v. Ciba-Geigy Corp. 560 F. Supp. 619 (N.D. Ill. 1983) (mutuality of obligation required for severance pay plan).

405. Anthony v. Jersey Cent. Power & Light Co., 51 N.J. Super. 139, 143 A.2d 762 (Super. Ct. App. Div. 1958); Martin v. Mann Merchandising, Inc., 570 S.W.2d 208 (Tex. Civ. App. 1978).

gratuity payable at the discretion of a company.⁴⁰⁶ The use of disclaimers in personnel policy manuals, however, may negate the intent to create a contractual offer capable of acceptance for fringe benefits.⁴⁰⁷

Employers may establish the terms and conditions upon which employees are entitled to receive fringe benefits.⁴⁰⁸ Similarly, employers may modify on notice to employees company fringe benefit plans, provided that the modification does not cause the forfeiture of accrued benefits.⁴⁰⁹ Nevertheless, ambiguities concerning the eligibility of employees to receive personnel policy benefits are generally resolved against the employer.⁴¹⁰

1. Vacation Benefits

Vacation benefits, like severance pay,⁴¹¹ bonuses,⁴¹² and commissions,⁴¹³ have been considered as a deferred form of compensation giving rise to enforceable contract rights in at-will employment rela-

406. See DeGiuseppe, *supra* note 1, at 53-54.

407. *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 150 A.2d 607 (1958); *Spooner v. Reserve Life Ins. Co.*, 47 Wash. 2d 454, 287 P.2d 735 (1955); *Calkins v. Boeing Co.*, 8 Wash. App. 347, 506 P.2d 329 (1973); *but see Novack v. Bilnor Corp.*, 26 A.D.2d 572, 271 N.Y.S.2d 117 (2d Dep't 1966) (disclaimer in profit-sharing agreement construed as offer for unilateral contract).

408. See, e.g., *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *New Mexico State Lab. & Indus. Comm'n v. Deming Nat'l Bank*, 96 N.M. 673, 634 P.2d 695 (1981).

409. *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949); *but see Reading & Bates, Inc. v. Whittington*, 208 So. 2d 437 (Miss. 1968) (modification in term of employment without notice was ineffective to deprive employee of workers' compensation benefits).

410. *Fujimoto v. Rice Grande Pickle Co.*, 414 F.2d 648 (5th Cir. 1969); *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494 (Mo. 1971).

411. See, e.g., *Rozeboom v. International Harvester Co.*, No. C82-214A (N.D. Ga. Feb. 7, 1983); *Fletcher v. Amax, Inc.*, 160 Ga. App. 692, 288 S.E.2d 49 (1982); *Brooks v. Carolina Tel. & Tel. Co.*, 56 N.C. App. 801, 290 S.E.2d 370 (Ct. App. 1982); *Saunders v. Big Bros., Inc.*, 115 Misc. 2d 845, 454 N.Y.S.2d 787 (N.Y.C. Civ. Ct. 1982); see generally DeGiuseppe, *supra* note 1, at 56-60; Comment, *Severance Pay, Sales of Assets, and the Resolution of Omitted Cases*, 82 COLUM. L. REV. 593 (1982). See also *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), *aff'd without opinion*, 618 F.2d 110 (7th Cir. 1980) (federal rather than state law applied in action to enforce severance pay plan under ERISA).

412. See generally *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931 (Ind. Ct. App. 1982); DeGiuseppe, *supra* note 1, at 61-65.

413. See generally DeGiuseppe, *supra* note 1, at 65-68; see also *Drummey v. Henry*, 115 Mich. App. 107, 320 N.W.2d 309 (1982) (oral agreement for commissions was not unenforceable under the statute of frauds), *appeal denied*, 330 N.W.2d 691 (Mich. 1983); *Mackie v. LaSalle Indus.*, 460 N.Y.S.2d 313 (1st Dep't 1983) (at-will employee was not entitled to commissions after the termination of her employment).

tionships.⁴¹⁴ Unlike company policy statements on termination procedure,⁴¹⁵ courts generally agree that employees may be entitled to receive these benefits under plans promulgated or modified *after* their initial date of employment.⁴¹⁶ Moreover, state law may protect the rights of employees to receive vested vacation benefits in accordance with the provisions of company policy.⁴¹⁷

As with other fringe benefits, employers may establish the terms and conditions on which employees are entitled to receive vacation benefits provided these conditions are not unlawful or otherwise contrary

414. See, e.g., *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982); *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *Berteau v. Wiener Corp.*, 362 So. 2d 806 (La. Ct. App. 1978); *New Mexico State Lab. & Indus. Comm'n v. Deming Nat'l Bank*, 96 N.M. 673, 634 P.2d 695 (1981); *Glenville Gage Co. v. Industrial Bd. of Appeals*, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 777, 417 N.E.2d 1009, 436 N.Y.S.2d 621 (1980); *Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978); *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208 (Tex. Civ. App. 1978).

415. See notes 355-67 *supra* and accompanying text.

416. See, e.g., *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208 (Tex. Civ. App. 1978) (severance pay).

417. Under New York law, for example, it is clear that vacations with pay are a "benefit or wage supplement" within the meaning of § 198-c(2) of the New York Labor Law. See, e.g., *Ross v. Specialty Insulation Mfg. Co.*, 71 A.D.2d 766, 419 N.Y.S.2d 311 (3d Dep't 1979). That section places upon employers certain time limits within which earned wage supplements or benefits must be provided to employees. Before the provisions of section 198-c become applicable, however, it must be established that the employer in question is a party to an "agreement" to pay or provide such benefits. *Id.* Such an agreement may exist where an employer has promulgated a written personnel policy providing for vacations with pay upon the completion of specified lengths of service or specified annual or semi-annual dates. See *Glenville Gage Co. v. Industrial Bd. of Appeals*, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 777, 417 N.E.2d 1009, 436 N.Y.S.2d 621 (1980). In order to facilitate the resolution of fringe benefit claims, section 195 of the New York Labor Law requires employers to notify all employees, in writing or by public posting of "the employer's policy on sick leave, vacation, personal leave, holidays and hours." N.Y. LAB. LAW § 195 (McKinney Supp. 1982-1983).

Once it has been established that an "agreement" to provide vacation benefits exists, an employer may not postpone the payment or provision for such a benefit more than 30 days after it becomes due. *Id.* § 198-c(1). Where an employer does postpone the benefit more than 30 days after it is required to provide it, the employer may be found guilty of a misdemeanor. *Id.* Where the employer is a corporation, the president, secretary, treasurer or other appropriate officer may be subject to criminal sanctions. *Id.* A civil penalty also may be assessed against employers under the provisions of the New York Labor Law. *Id.* § 197. Nevertheless, it must be emphasized that it is the terms of the agreement and not statutory law which determines when a benefit is required to be provided to an employee. See *Ross v. Specialty Insulation Mfg. Co.*, 71 A.D.2d 766, 419 N.Y.S.2d 311 (3d Dep't 1979).

to public policy.⁴¹⁸ Courts have recognized that employees have no "inherent right" to vacations or payment for unused vacation time other than those rights established by the agreement of the parties.⁴¹⁹ In this regard, the accrual of vacation benefits may be subject to valid condition precedents concerning the eligibility of employees to receive vacations.⁴²⁰ Once vacation benefits have accrued, however, they may not be forfeited.⁴²¹

Recent cases demonstrate that employers may not be required to convert vacation time into a lump sum payment in the absence of an agreement to that effect.⁴²² In *Sweet v. Stormont Vail Regional Medical Center*⁴²³ the Supreme Court of Kansas held that there was nothing under Kansas law prohibiting an employer from conditioning the payment of unused vacation time "on the giving of notice, or length of service or any other term which is not unconscionable."⁴²⁴ The Kansas Supreme Court thus upheld a two-week notice requirement under company policy for the lump sum payment of vacation benefits on voluntary terminations.⁴²⁵ Similarly, in *New Mexico State Labor & Industrial Commission v. Deming National Bank*,⁴²⁶ the Supreme Court of New Mexico held that an employee who voluntarily terminated her employment prior to her scheduled vacation period did not have a claim for vacation pay under company policy prohibiting the payment of compensation in lieu of vacation time.⁴²⁷ The court rea-

418. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *New Mexico State Lab. & Indus. Comm'n v. Deming Nat'l Bank*, 96 N.M. 673, 634 P.2d 695 (1981).

419. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274, 1280 (1982) (citing *Wheeler v. Mission Elec. & Plumbing Supply, Inc.*, 267 Or. 209, 515 P.2d 1323 (1973); *Walters v. Center Elec., Inc.*, 8 Wash. App. 322, 506 P.2d 883 (1973); Annot., 91 A.L.R.2d 1078 (1968)).

420. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *New Mexico State Lab. & Indus. Comm'n v. Deming Nat'l Bank*, 96 N.M. 673, 634 P.2d 695 (1981); *Glenville Gage Co. v. Industrial Bd. of Appeals*, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 777, 417 N.E.2d 1009, 436 N.Y.S.2d 621 (1980).

421. *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982); *Berteau v. Wiener Corp.*, 362 So. 2d 806 (La. Ct. App. 1978); *DeVita v. Rand McNally & Co.*, 44 Misc. 2d 906, 256 N.Y.S.2d 9 (Justice Ct. 1965).

422. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *New Mexico State Lab. & Indus. Comm'n v. Deming Nat'l Bank*, 96 N.M. 673, 634 P.2d 695 (1981); *accord Phillips v. Memphis Furniture Mfg. Co.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978).

423. 231 Kan. 604, 647 P.2d 1274 (1982).

424. *Id.* at 610, 647 P.2d at 1280.

425. *Id.*

426. 96 N.M. 673, 634 P.2d 695 (1981).

427. *Id.* at 674, 634 P.2d at 696.

soned that the condition requiring employees to take vacation time in order to receive vacation pay was not "unconscionable or against public policy."⁴²⁸

The issue of when vacation benefits vest or accrue has also been subject to recent judicial scrutiny. In *Suastez v. Plastic Dress-Up Co.*⁴²⁹ plaintiff-employee was terminated prior to the anniversary date on which his vacation benefits would have fully accrued under company policy. Plaintiff claimed that he had a vested right to a proportionate share of his vacation pay for the amount of time he actually worked. The company argued that the plaintiff had failed to satisfy the condition precedent to the vesting of vacation rights under company policy and, therefore, was not entitled to receive any vacation pay.⁴³⁰

In interpreting the phrase "vested vacation time" under section 227.3 of the California Labor Code,⁴³¹ the Supreme Court of California held that vacation benefits are a form of deferred compensation which, like wages, are earned on a pro rata basis as services are rendered. The court, in reaching this conclusion, stated:

428. *Id.* In support of its decision, the court quoted the following language from *Bondio v. Joseph Binder, Inc.*, 24 So. 2d 398, 401 (La. Ct. App. 1946):

The stipulation in the contract for the allowance of a vacation to employees is merely a recognition by management and labor that a short interval of complete rest and relaxation from daily routine with the benefit of full pay is essential to the mental and physical wellbeing of the workman. Such vacations or rest periods not only redound to the good of the daily worker but also to industry, in that the employee returns to his job refreshed, healthier and with new vigor and zeal. Vacation, therefore, contemplates a continuance of employment. The parties to the agreement, in contracting for the allowance of vacations, did not intend that the stipulation should be considered as providing a cash bonus in lieu of vacation pay for those employees who might see fit to discontinue their employment prior to the time the employer fixed the dates upon which the vacations would be given.

96 N.M. at 674, 634 P.2d at 696.

429. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).

430. *Id.*

431. CAL. LAB. CODE § 227.3 (West Supp. 1983) provides:

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy *respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.*

The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.⁴³²

The implementation of the *Suastez* decision, however, was enjoined by a federal district court pending a hearing on whether the decision is preempted by the provisions of ERISA and the NLRA.⁴³³

2. Forfeiture for Competition Clauses

In most jurisdictions, deferred compensation agreements may contain "forfeiture for competition" clauses providing for the forfeiture of specified benefits should employees elect to work for a competitor.⁴³⁴ These clauses are considered to be, in effect, a condition precedent to an employee's entitlement to deferred compensation.⁴³⁵ Courts, however, have not enforced "forfeiture for competition" clauses where they were an unreasonable restraint on trade.⁴³⁶ Moreover, the provisions of ERISA⁴³⁷ have been interpreted to prohibit the forfeiture of

432. 31 Cal. 3d at 784, 647 P.2d at 128, 183 Cal. Rptr. at 852; *but see* Lucian v. All States Trucking Co., 116 Cal. App. 3d 972, 171 Cal. Rptr. 262 (1981) (employer not liable for incentive bonuses where employees voluntarily quit prior to date on which the benefits were payable).

433. *See* DAILY LAB. REP. (BNA) No. 41, at A-7 to A-8 (Mar. 1, 1983). For a discussion of ERISA preemption of state law concerning pension and welfare plans, see *Sasso v. Vachris*, 116 Misc. 2d 797, 456 N.Y.S.2d 629 (Sup. Ct. Nassau County 1982).

434. *See generally* DeGiuseppe, *supra* note 1, at 66-68.

435. *See, e.g.*, *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *Shandor v. Wells Nat'l Serv. Corp.*, 478 F. Supp. 12 (N.D. Ga. 1979); *Sheppard v. Columbus Packaging Co.*, 146 Ga. App. 202, 245 S.E.2d 887 (1978); *Kristt v. Whelan*, 4 A.D.2d 195, 164 N.Y.S.2d 239 (1st Dep't 1957), *aff'd*, 5 N.Y.2d 807, 155 N.E.2d 116, 181 N.Y.S.2d 205 (1958).

436. *See* notes 439-41 *infra* and accompanying text.

Unlike forfeiture for competition clauses, anti-competitive covenants seek to prevent employees from directly competing with their employers both during and after the term of employment within a specified time period and area. Most jurisdictions will uphold anti-competitive covenants if they are "reasonable" as to time and area limitations. Nevertheless, such covenants are generally disfavored in the law because they tend to restrict competition. *See generally* *Shandor v. Wells Nat'l Serv. Corp.*, 478 F. Supp. 12 (N.D. Ga. 1979); *Puritan-Bennett Corp. v. Richter*, 8 Kan. App. 2d 311, 657 P.2d 589 (1983).

437. 29 U.S.C. § 1053(a) (1976).

accrued retirement benefits where employees go to work for a competitor.⁴³⁸

Most jurisdictions enforce "forfeiture for competition" clauses without regard to the reasonableness of the restraint on the affected employee.⁴³⁹ Other courts have adopted a reasonableness test based on the circumstances of the parties' relationship to enforce forfeiture clauses only to the extent they are reasonable.⁴⁴⁰ Some courts, however, have held that unreasonably broad "forfeiture for competition" clauses are invalid and not subject to judicial modification.⁴⁴¹

In *Kroeger v. Stop & Shop Cos.*⁴⁴² a Massachusetts appellate court interpreted the validity of a "golden handcuffs" forfeiture clause designed to prevent key employees from working for competitors under the reasonableness test adopted in *Cheney v. Automatic Sprinkler Corp. of America*.⁴⁴³ The clause in question provided that the plaintiff, a key employee, "would lose all" if he went to work for a competitor east of the Mississippi River "for so long as he lives."⁴⁴⁴ The plaintiff, within one year after terminating his employment at the request of the defendant, went to work for another retail food company which operated stores in the same general area as the defendant.⁴⁴⁵

In applying the *Cheney* standards, the *Kroeger* court affirmed the limitation of the restrictive period of the "golden handcuffs" to one year on the grounds that the lifetime prohibition went well beyond

438. *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977); *Cheney v. Automatic Sprinkler Corp. of Am.*, 377 Mass. 141, 145-46 n.5, 385 N.E.2d 961, 964 n.5 (1979).

439. *See, e.g.*, *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971); *Woodward v. Cadillac Overall Supply Co.*, 396 Mich. 379, 240 N.W.2d 710 (1976); *see generally* Annot., 18 A.L.R.3d 1246 (1968).

440. *See, e.g.*, *Food Fair Stores, Inc. v. Greeley*, 264 Md. 105, 285 A.2d 632 (1972); *Cheney v. Automatic Sprinkler Corp. of Am.*, 377 Mass. 141, 385 N.E.2d 961 (1979); *Lavey v. Edwards*, 264 Or. 331, 505 P.2d 342 (1973).

441. *See, e.g.*, *Almers v. South Carolina Nat'l Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975); *Union Cent. Life Ins. Co. v. Balistrieri*, 19 Wis. 2d 265, 120 N.W.2d 126 (1963).

442. 13 Mass. App. Ct. 310, 432 N.E.2d 566, *appeal denied*, 386 Mass. 1102, 440 N.E.2d 1175 (1982).

443. 377 Mass. 141, 385 N.E.2d 961 (1979).

444. 13 Mass. App. Ct. at 311, 432 N.E.2d at 567. "Competing business" was defined by the agreement as businesses located east of the Mississippi River except for the States of Florida, Georgia, Alabama, Mississippi and Louisiana.

445. *Id.* at 314, 432 N.E.2d at 569. The defendant operated stores in the New England states, New York and New Jersey, while the competing company had locations in New York, New Hampshire, Vermont and Massachusetts. The only direct local competition between the two companies was in Manchester, New Hampshire. *Id.* at 315, 432 N.E.2d at 569.

the defendant's "legitimate interests."⁴⁴⁶ In considering whether the plaintiff's total forfeiture of deferred compensation, including retirement benefits, was reasonable, the court noted the inequities arising from the defendant's own abandonment of the "golden handcuffs" agreement as well as the policy considerations in avoiding the forfeiture of earned retirement benefits.⁴⁴⁷ In this regard, the court devised the rule that "when an employee is discharged in circumstances involving no misconduct by the employee . . . , the employee's deferred compensation benefits should not be forfeited to the extent those benefits have been earned, even though the employee violates a valid post-employment restriction."⁴⁴⁸ The plaintiff, therefore, received his proportionate share of accrued retirement benefits in accordance with this rule.⁴⁴⁹

VIII. Conclusion

The judicial response to the recognition of public policy exceptions to the employment-at-will rule demonstrates that courts are unwilling

446. *Id.* The defendant conceded that there were no trade secrets involved. *See Greenwich Mills Co. v. Barrie House Coffee Co.*, 91 A.D.2d 398, 459 N.Y.S.2d 454 (2d Dep't 1983) (even without express non-solicitation agreement, ex-employee with knowledge of trade secrets is barred from soliciting former employer's customers). In addition to the reduction in the time limitation of the "golden handcuffs," the court affirmed the geographical limitation of the agreement to the New England states, New York and New Jersey. 13 Mass. App. Ct. at 317-18, 432 N.E.2d at 571. *See generally* Blake, *Employment Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Mertz, *Recent Developments Concerning Employee Covenants Not to Compete: A Quiet "Corbinization" of Massachusetts Law*, 12 NEW ENG. L. REV. 647 (1977).

447. 13 Mass. App. Ct. at 320-22, 432 N.E.2d at 572-73. With respect to reviewing the reasonableness of forfeiture clauses for key employees, the court stated:

A key executive's bargaining status does not . . . remove the reasonableness of his promise from consideration; it does, however, enlarge judicial tolerance of restraints by an employer which might be seen as unreasonable between parties of unequal bargaining strength.

Id. at 319, 432 N.E.2d at 571.

448. *Id.* at 320-21, 432 N.E.2d at 572.

449. *Id.* With respect to the amount of the plaintiff's recovery, the court stated:

In the case at bar, the employment agreement contemplated retirement at age sixty-five, unless retirement occurred earlier because of total and permanent disability. [Plaintiff] was forty-eight in 1961 when the agreement was entered into, thus the agreement envisioned seventeen years of service by him. He had worked ten years when [defendant] terminated his employment. [Plaintiff] had, therefore, earned ten seventeenths of his retirement benefits. The judge found that the cost of purchasing the annuity benefits [plaintiff] would have received was \$71,000. Accordingly, [plaintiff] is entitled to recover ten seventeenths of that amount *viz.*, \$41,765.

Id. at 321, 432 N.E.2d at 572-73 (footnote omitted).

to effectuate the purposes of federal and state statutes in the absence of a clear legislative intent to create private rights of action under these laws. Courts are also reluctant to adopt causes of action in tort for abusive discharge to protect employees who are summarily discharged for furthering a public interest to the detriment of their employers. In this regard, the balancing of the rights of parties in employment relationships with considerations of public policy has been viewed as a function of the legislature.

The recognition of public policy exceptions to the at-will rule, however, does not have to be considered an exclusive function of the legislature. Courts, in the absence of adequate statutory remedies, should ensure that the public interests expressed in federal and state law are not circumvented through the abusive discharge of employees. Based on these considerations, courts should not continue to place undue emphasis on the lack of a clear legislative intent to create private rights of action where an entire statutory framework can be frustrated by the unlawful concerns of employers. Nevertheless, absent the appropriate statutory basis, courts would not be obligated to recognize private rights of action to protect employees from retaliatory discharges in contravention of federal and state law.

Moreover, the protection of employees under a given statute can be achieved without adopting broad causes of action in tort for abusive discharge by limiting retaliatory discharge claims to clear mandates of public policy as expressed in federal or state law. Courts, therefore, would not be confronted with the task of defining the rights and obligations of the parties in employment relationships in a piecemeal fashion. Instead, the courts would be effectuating the public policies already set forth in federal and state law, thereby complementing the legislative function of maintaining the proper balance between public interests and the rights of employers and employees. In the final analysis, however, the parameters of the public policy exception will probably be defined by the legislature in most jurisdictions based on the conceded difficulties courts have had in determining the measure of protection which should be afforded to employees under the at-will rule.