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 rule\(^1\) 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.\(^4\)

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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.
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

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. The rule was incorporated into the American common law in *Martin v. New York Life Insurance Co.* and, by the beginning of the twentieth century, became the primary authority with respect to the termination of employment relationships for an indefinite term.

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.

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).

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).

Reflecting a concern for economic growth and entrepreneurship, the United States Supreme Court in Adair v. United States affirmed the at-will rule based on the principles of freedom of contract and freedom of enterprise. 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. The Court in Coppage v. Kansas subsequently declared unconstitutional under the fourteenth amendment state legislation similar to the federal statute in Adair.

Support for the employment-at-will rule was also based on the contractual doctrine of mutuality of obligation. 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.” The contractual doctrines of mutuality of remedy and consideration were similarly raised as sufficient justification for the at-will rule.

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.


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.


\(^{19}\) 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-

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).

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.\textsuperscript{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.\textsuperscript{30} Mutuality of obli-

\begin{quote}
"[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.)
\end{quote}

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).


\textsuperscript{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);
gination 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


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.


company representatives. Even assurances of "steady" employment may not suffice to establish a permanent employment contract terminable only for "just cause." 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." Oral agreements for permanent employment, however, may not be enforceable under the statute of frauds. Moreover, the doctrines of promissory and equitable estoppel cannot be used to create primary contractual liability where none would have otherwise existed.


Coach Co.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{45}

2. \textit{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.\textsuperscript{46} In most jurisdictions, the speci-
fication of an employee’s salary for a specific period does not create a
contract for the period named. Independent consideration is not
required, however, to support an agreement for a definite term em-
ployment relationship provided that the agreement is based upon the
mutual promises of the parties. Where an employment contract is
for a specified period, “just cause” is generally required for termina-
tion prior to the expiration date of the agreement. 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 negotia-
tions respecting terminability, a court should look within the four corners
of the contract, and to the facts and circumstances surrounding the mak-
ing, performing, and terminating of the contract, including actions of the
parties and the prevailing practice, if any, in the industry. Henry v. J.B.

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:

[1]In the absence of facts and circumstances which indicate that the agree-
ment 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 1892) (Connecticut law)
(Henkel distinguished on grounds that employee's allegations of one-year em-
ployment 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.” DuSeso 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. Stifft
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.
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).

1982).

49. Alpern v. Hurwitz, 644 F.2d 943 (2d Cir. 1981); Ghalam v. Tesson Ferry,
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
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.\textsuperscript{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.\textsuperscript{51} In \textit{Gollberg v. Bramson Publishing Co.}\textsuperscript{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, \textit{infra}.\textsuperscript{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.\textsuperscript{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 \textit{Gollberg} court rejected plaintiff's contentions that the termination provision of his employment agreement only applied to the renewal periods rather

\textsuperscript{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 \textit{Foster} stated that following rule in support of its decision:

\textit{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.}\textsuperscript{51} 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)).


\textsuperscript{52} Id. at 225.

\textsuperscript{53} 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.

\textit{Id.}
than the initial period of his employment.\textsuperscript{55} In reaching its decision, the court rejected any arguments based on the plaintiff's expectation of employment for a one-year period.\textsuperscript{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.\textsuperscript{57} In Muller v. Stromberg Carlson Corp.\textsuperscript{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.\textsuperscript{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."\textsuperscript{60} Because the plaintiff

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{58} 427 So. 2d 266 (Fla. Dist. Ct. App. 1983).

\textsuperscript{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.

\textsuperscript{60} Id. at 268. The court also rejected plaintiff's argument that the defendant was required to give him specific annual salary increases.
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* and *NLRB v. Jones & Laughlin Steel Corp.* 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* and *Coppage v. Kansas* 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) 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 559 (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.


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.

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." Similarly, the provisions of the Railway Labor Act 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. Federal statutes also prohibit employment discrimination based on race, color, religion, sex or national origin, age, and physical handicap.

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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, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); 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. 3791 (U.S. Apr. 19, 1983) (No. 82-1075); Webb Ford, Inc., 689 F.2d 733, 739 (7th Cir. 1982). The United States Supreme Court in NLRB v. Transportation Management Corp., No. 82-1075 (U.S. June 15, 1983), held that the NLRB's allocation of the burden of proof was "clearly reasonable" under the NLRA.


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.")


Other federal legislation includes so-called “whistle-blower” statutes\(^3\) 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,\(^4\) the Air Pollution Prevention and Control Act,\(^5\) the Federal Water Pollution Control Act,\(^6\) and the Railroad Safety Act.\(^7\) Employees are similarly protected from discharge under the Occupational Safety and Health Act of 1970 (OSHA)\(^8\) for filing safety complaints\(^9\) or for refusing to work under conditions which they reasonably believe to be dangerous to their safety.\(^10\)

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,\(^11\) the assertion of their rights under federal wage and overtime laws,\(^12\) or their status as veterans of the Vietnam

\(^{3}\) 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.


\(^{10}\) 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).


\(^{12}\) 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. Under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), employers may not discharge employees in order to prevent them from attaining vested rights to pension or welfare benefits. Federal civil service employees are also statutorily protected from unfair discharges.

B. State Legislation

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


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


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
Michigan and Connecticut have recently enacted "whistleblower" 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. 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." Employees may be reinstated with full back pay, seniority and fringe benefits, including reasonable attorneys' fees and costs.

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.

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.


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.

employees who report to the state auditor improper governmental actions or the misuse of public funds. 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. 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.

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.


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, \( \text{age} \), and physical handicap. 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. Pennsylvania and West Virginia have recently banned employment discrimination based on certain other disabilities. Fair employment legislation was also adopted in 1982 in a number of other jurisdictions.

(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.


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 must be subject to fines up to $10,000 or imprisonment, or both. CAL. LAB. CODE § 6311 (West. Supp. 1983).


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. 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. In addition, state labor laws, like the NLRA, protect employees against discharges or other discriminatory actions designed to encourage or discourage union membership.

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; for refusing to take polygraph or psychological stress evaluation tests as a condition...
of employment; for serving as jurors; for appearing as witnesses in criminal actions; for wage assignments or income executions; for filing workers’ compensation claims; for asserting their rights under minimum wage laws; for refusing to be fingerprinted; and for commencing or participating in certain court or public body actions against the employer. Occupational safety and health laws were recently passed in Wisconsin and Connecticut 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.

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, certain jurisdictions have specifi-
cally declined to recognize a tort remedy for "bad faith" terminations of employment.\textsuperscript{121} Recovery in tort has been granted for abusive discharges in violation of public policy,\textsuperscript{122} even in the face of specific statutory remedies designed to safeguard the public policies in question.\textsuperscript{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.\textsuperscript{124} Causes of action have been sustained for the breach of the "good faith" condition based on considerations of public policy\textsuperscript{125} and to prevent terminations of employment designed to deprive employees of accrued benefits.\textsuperscript{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."\textsuperscript{127} Courts have not, however, "equated the absence of good cause for the discharge of an employee with the absence of good faith."\textsuperscript{128}


\textsuperscript{122} See notes 176-231 infra and accompanying text.

\textsuperscript{123} See notes 250-59 infra and accompanying text.


The New Hampshire Supreme Court in Monge v. Beebe Rubber Co.\textsuperscript{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."\textsuperscript{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.\textsuperscript{131} Monge was subsequently cited by a federal court in Pstragowski v. Metropolitan Life Insurance Co.\textsuperscript{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."\textsuperscript{133}

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

\textsuperscript{129} 114 N.H. 130, 316 A.2d 549 (1974); for a further discussion of Monge, see DeGiuseppe, supra note 1, at 24-25.
\textsuperscript{130} 114 N.H. at 133, 316 A.2d at 551-52.
\textsuperscript{131} 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.
\textit{Id.} at 133, 316 A.2d at 551-52.
\textsuperscript{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. \textit{Id.} at 2.
\textsuperscript{133} \textit{Id.}; accord Foley v. Community Oil Co., 64 F.R.D. 561 (D.N.H. 1974).
\textsuperscript{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.
\textsuperscript{135} \textit{Id.} at 297, 414 A.2d at 1274.
\textsuperscript{136} \textit{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.\textsuperscript{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.,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{138} 121 N.H. 915, 436 A.2d 1140 (1981).

\textsuperscript{139} Id. at 921-22, 436 A.2d at 1143-44 (citations omitted).

\textsuperscript{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.

\textsuperscript{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 summar-
ily fired him for his negligence in failing to handle the funds in the
appropriate manner, even though he had been an exemplary em-
ployee for thirty-six years.\textsuperscript{142}

Based on the reasons for his dismissal and the manner in which he
was terminated after thirty-six years of exemplary service, the
\textit{Cloutier} court found that the defendant had acted in bad faith and
with malice in discharging the plaintiff.\textsuperscript{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 OSHA\textsuperscript{144} and the mandate of state law requir-
ing a day of rest for all workers.\textsuperscript{145}

2. Massachusetts Law

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

\begin{footnotes}
\item[142] Id. at 922, 436 A.2d at 1143.
\item[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 allega-
tions made against him for his "'violation of company bookkeeping procedure.' " Id.
at 918, 436 A.2d at 1142, 1144. The \textit{Cloutier} court found that these facts constituted
bad faith and malice under \textit{Monge}. \textit{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. \textit{Id.}, 436 A.2d at 1144.
\item[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
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." \textit{Id.}, 436 A.2d at 1145.
\item[145] \textit{Id.} at 923-24, 436 A.2d at 1145. The \textit{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.
\item[146] 373 Mass. 96, 364 N.E.2d 1251 (1977); see DeGiuseppe, \textit{supra} note 1, at 27-
28, for a further discussion of \textit{Fortune}.
\end{footnotes}
breach of the contract." 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." 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.

Recent decisions demonstrate that employees may have enforceable claims under Massachusetts law for "bad faith" terminations involving deprivation of benefits as well as violations of public policy. 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." For discharges of this nature, an employee may recover under the rule established in Gram v. Liberty Mutual Insurance Co. 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. . . ."


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.”

In *Cort v. Bristol-Myers Co.* 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. 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. While noting that the public policy protecting against unlawful invasions of privacy could give rise to a claim for a “bad faith” discharge, 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.


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."\footnote{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.*\footnote{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."\footnote{161} A "bad faith" discharge claim for allegedly earned commissions was rejected, however, *Siles v. Travenol Laboratories, Inc.*\footnote{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.\footnote{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."\footnote{164} The California rule was first applied in *Cleary v. American Airlines, Inc.*,\footnote{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..." (footnotes omitted).

\footnote{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.").}
\footnote{160. 386 Mass. 877, 438 N.E.2d 351 (1982).}
\footnote{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.}
\footnote{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.}
\footnote{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.”

The scope of the California rule was clarified in *Pugh v. See's Candies, Inc.* 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.”

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. In *Crossen v. Foremost-McKesson, Inc.*, 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. As support for its decision, the *Crossen* court reasoned that

166. *Id.* at 455-56, 168 Cal. Rptr. at 729. The *Clearly* 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.


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).


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., 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." The Court of Appeals for the Ninth Circuit in Cancellier v. Federated Department Stores, 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." 

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. 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.

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


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.


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.\textsuperscript{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;\textsuperscript{183} for refusing to violate the law;\textsuperscript{184} and for furthering a public interest to the detriment of their employers.\textsuperscript{185} Employees discharged on grounds prohibited by statute\textsuperscript{186} or condemned by general public policy considerations\textsuperscript{187} 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

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\textsuperscript{182} Id. at 130, 421 N.E.2d at 878-79 (citation omitted).


public policy. Claims for retaliatory discharge, therefore, have been denied where an employee's dismissal could only be characterized as "unfair"; where only "sheer speculation" supported an employee's claim that he was terminated for refusing to lie during an employment discrimination investigation; where an employee did not allege that he was fired for exercising a specific right or duty; and where employees had no statutory right or obligation to object to certain alleged illegal price discounts and promotional allowances for favored customers.

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, and where an employee merely complained about the adequacy of customer service and maintenance of company machines.

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.*, 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. A similar result was reached

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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\textsuperscript{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.\textsuperscript{198}

Nevertheless, the holding of Cook was directly rejected by another Illinois appellate court in Wyatt v. Jewel Companies, Inc.\textsuperscript{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.\textsuperscript{200} State “whistle-blower” legislation also appears to afford protection from retaliatory discharges for all employees regardless of the availability of contractual remedies.\textsuperscript{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\textsuperscript{202} the Supreme Court of Appeals of West Virginia held

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

\textsuperscript{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. \textit{Id.} at 1035, 438 N.E.2d at 527.


\textsuperscript{200} Contrary to the holding in \textit{Cook}, the \textit{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 \textit{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. \textit{Id.} at 1035, 438 N.E.2d at 527.

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

\textsuperscript{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. \textit{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 obtain-
ing 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.\textsuperscript{203} A federal
court in Crossen v. Foremost-McKesson, Inc.,\textsuperscript{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.\textsuperscript{205} The fed-
eral court distinguished the decisions in the California cases of Cleary
v. American Airlines, Inc.\textsuperscript{206} and Mayes v. Sturdy Northern Sales,
Inc.\textsuperscript{207} where causes of action for wrongful terminations were sus-
tained against individual defendants not acting within the scope of
their employment as agents of the corporation.\textsuperscript{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.\textsuperscript{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 employ-
ees discharged in retaliation for exercising a legal right or for refusing
to violate the law.\textsuperscript{210} In Parnar v. American Hotels, Inc.\textsuperscript{211} the Su-
preme 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 defend-
ant. "Whistle-blower" protection has also been provided in some

\textsuperscript{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." \textit{Id.} (footnote omitted). \textit{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).

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

\textsuperscript{205} 537 F. Supp. at 1080.

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

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

\textsuperscript{208} 537 F. Supp. at 1080.

\textsuperscript{209} See note 181 \textit{supra} for a discussion of public policy sources.

\textsuperscript{210} See notes 213-17 & 219-25 \textit{infra} and accompanying text.

\textsuperscript{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.\footnote{212}

Implied causes of action under state workers’ compensation acts for retaliatory discharges continue to be recognized under the public policy exception.\footnote{213} The Court of Appeals of Kentucky in Firestone Textile Co. Division v. Meadows\footnote{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. . . .”\footnote{215} Like certain other jurisdictions, the Kentucky Workers’ Compensation Act\footnote{216} did not contain any “provision specifically restricting an employer from discharging an employee for the latter’s exercise of his rights thereunder.”\footnote{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.\footnote{218}

\footnote{212}See notes 219-25 infra and accompanying text.


\footnote{214}No. 81-2460 (Ky. Ct. App. Nov. 12, 1982).

\footnote{215}Id. at 1.

\footnote{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)).

\footnote{217}No. 81-246, slip op. at 4.

“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., 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.” An Illinois appellate court in Petrik v. Monarch Printing Corp. 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. The Petrik court rejected the defendant’s contention that the decision of the Supreme Court of Illinois in Palmateer v. International Harvester Co. required the actual notification of public authorities of alleged violations of the law in order to sustain a cause of action for retaliatory discharge. 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.


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.


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.\textsuperscript{225}

A professional code of ethics was recognized in the New Jersey case of Kalman v. Grand Union Co.\textsuperscript{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 law\textsuperscript{227} and the provisions of the Code of Ethics of the American Pharmaceutical Association.\textsuperscript{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.\textsuperscript{229} on the grounds that the pharmaceutical code of ethics, unlike the Hippocratic Oath in Pierce, coincided with the public policy.\textsuperscript{230} Courts in other jurisdictions, however, have rejected the use of professional codes of ethics as sources of public policy in wrongful discharge cases.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{228} The code of ethics provided in pertinent part:

\begin{itemize}
\item 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.
\end{itemize}
183 N.J. Super. at 158, 443 A.2d at 730 (emphasis in original).
\item \textsuperscript{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.
\item \textsuperscript{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.").
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).


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.

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 jurisdiction\(^{245}\) 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."

\(^{239}\) 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.


\(^{242}\) 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.


\(^{246}\) 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.\textsuperscript{247} reached the same conclusion in narrowly construing the provisions of the Pennsylvania Human Rights Act (PHRA)\textsuperscript{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.”\textsuperscript{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.\textsuperscript{250} In Lally v. Copygraphics,\textsuperscript{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-


\textsuperscript{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." In Cancellier v. Federated Department Stores 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." In Brown v. Transcon Lines 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. A similar result was reached in Hentzel v. Singer Co. where a California appellate court held that the remedial provisions of the California Occupational Safety and Health Act of 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.

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).
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.
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*. 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.' " 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.

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* 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, Michigan, Illinois and Kansas 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; other state workers'


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


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
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compensation laws;\textsuperscript{269} federal and state equal employment statutes;\textsuperscript{270} the Vocational Rehabilitation Act of 1973;\textsuperscript{271} and the Consumer Credit Protection Act.\textsuperscript{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. . . ."\textsuperscript{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.\textsuperscript{274} Similarly, courts have declined to imply the "good faith"
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

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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.").


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.").
EMPLOYMENT-AT-WILL RULE

The most extensive debate on the rejection of the implied "good faith" condition is found in *Murphy v. American Home Products Corp.* In this case, the New York Court of Appeals was confronted with the issue, as one of five causes of action, 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. 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." 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.

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

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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.


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.


1. New York Cases

Prior to Murphy v. American Home Products Corp., a number of federal courts, relying on dicta in Chin v. American Telephone & Telegraph Co., 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; a discharge designed to deprive employees of pension rights; a discharge in retaliation for an employee’s refusal to accede to the preferential hiring and scheduling demands of a union at a hospital; and a discharge based on alleged sex, age and national origin discrimination. 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.

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

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.
Bard Air Corp., 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 an employee did not have an abusive discharge claim for uncovering of an alleged embezzlement. Similarly, in Fletcher v. Greiner, 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. 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." 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. 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."

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, certain account-
ing improprieties in violation of applicable law\textsuperscript{310} 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.\textsuperscript{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."\textsuperscript{312} In support of its decision, the court cited various state statutes protecting employees from discharge for engaging in certain activities\textsuperscript{313} and also noted that proposed "whistle-blower" legislation was pending before the New York State Legislature.\textsuperscript{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.,\textsuperscript{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 Law\textsuperscript{316} 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."\textsuperscript{317} Similarly, in Bottifiliso v. Hutchison Fruit Co.,\textsuperscript{318} the Court of Appeals of New Mexico refused to sustain a claim for retaliatory discharge under the New Mexico Workmen's Compensation Act,\textsuperscript{319} reasoning that "the issue of whether a new

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{312} 58 N.Y.2d at 301. 461 N.Y.S.2d at 235.

\textsuperscript{313} Id. at 302-03 n.1, 461 N.Y.S.2d at 236 n.1.

\textsuperscript{314} See note 89 supra for the provisions of this bill.

\textsuperscript{315} 397 So. 2d at 874 (Miss. 1981).

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

\textsuperscript{317} 397 So. 2d at 877 (footnotes omitted).

\textsuperscript{318} 96 N.M. 789, 635 P.2d 992 (1981).

\textsuperscript{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.”

Furthermore, “whistle-blower” protection has been denied to at-will employees in the absence of statutory protection. In *Maus v. National Living Centers, Inc.* 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.* 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, 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, negligence, intentional and negligent infliction of severe emotional distress, *prima facie* tort, defamation, and tortious interference

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320. 96 N.M. at 794-95, 635 P.2d at 997-98.
322. 656 F.2d 1029 (5th Cir. 1981).
with employment contracts. Employees have also relied on the doctrines of promissory and equitable 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.


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.


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.\textsuperscript{333}

Most courts have not considered employment-at-will contracts as cognizable business relationships for purposes of tortious interference.\textsuperscript{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.\textsuperscript{335} In \textit{Cashman v. Shinn}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{340} The burden of proof to establish privilege as an affirmative

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

\textit{Id.} § 767.


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

\textsuperscript{337} \textit{Id.} at 1118, 441 N.E.2d at 944.


defense to a cause of action for tortious interference with employment contracts is on the defendants.\textsuperscript{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."\textsuperscript{342} Essential to the principles of estoppel is the detrimental reliance by one party upon the representations of the other party.\textsuperscript{343} "[A]lthough equitable estoppel might transform an otherwise nonbinding agreement into a legally binding contract,"\textsuperscript{344} most courts continue to reject wrongful discharge claims based on the principles of estoppel.\textsuperscript{345}

In Rawson v. Sears, Roebuck & Co.,\textsuperscript{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


\textsuperscript{342} Bates v. Jim Walter Resources, Inc., 418 So. 2d 903, 905 (Ala. 1982).

\textsuperscript{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:

\begin{quote}
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.
\end{quote}

\textsuperscript{344} Bates v. Jim Walter Resources, Inc., 418 So. 2d 903, 905 (Ala. 1982).


\textsuperscript{346} 554 F. Supp. 327 (D. Colo. 1983).
cause of action under the doctrine of promissory estoppel. 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.” In Grouse v. Group Health Plan, Inc., 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.

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. 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.” 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. 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).
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

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


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

357. Id. at 1066.

358. Id.

law based on a grievance procedure in an employee handbook which was promulgated approximately nine years after she was initially employed.0

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).

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." 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

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


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.


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].


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.


379. *Id.* at 1078-79.

380. *Id.* at 1080.


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.


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. In this regard, the court in Chin v. American Telephone & Telegraph Co. 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.” Similarly, in Edwards v. Citibank, N.A. 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.”

In Weiner v. McGraw-Hill, Inc., 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.” Concerning the sufficiency of consideration, the court


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


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


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 coexistensive 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. 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.

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. 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. The principle of promissory estoppel may also entitle employees to receive personnel policy benefits.

Sufficient consideration for the offer of the fringe benefits is provided by the employees' continued services to the company. 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. As long as the benefit policy creates an offer capable of acceptance by continued employment, it will not be viewed as a mere

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399. 58 N.Y.2d at 305, 461 N.Y.S.2d at 237.
400. Id.
The use of disclaimers is 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.
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).
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).
Unlike company policy statements on termination procedure, courts generally agree that employees may be entitled to receive these benefits under plans promulgated or modified *after* their initial date of employment. Moreover, state law may protect the rights of employees to receive vested vacation benefits in accordance with the provisions of company policy.

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


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


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.\footnote{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.\footnote{419} In this regard, the accrual of vacation benefits may be subject to valid condition precedents concerning the eligibility of employees to receive vacations.\footnote{420} Once vacation benefits have accrued, however, they may not be forfeited.\footnote{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.\footnote{422} In \textit{Sweet v. Stormont Vail Regional Medical Center}\footnote{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."\footnote{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.\footnote{425} Similarly, in \textit{New Mexico State Labor \& Industrial Commission v. Deming National Bank},\footnote{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.\footnote{427} The court rea-
soned that the condition requiring employees to take vacation time in order to receive vacation pay was not "unconscionable or against public policy."  

The issue of when vacation benefits vest or accrue has also been subject to recent judicial scrutiny. In *Suastez v. Plastic Dress-Up Co.* 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.

In interpreting the phrase "vested vacation time" under section 227.3 of the California Labor Code, 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).


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


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).

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

Most jurisdictions enforce "forfeiture for competition" clauses without regard to the reasonableness of the restraint on the affected employee. 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. Some courts, however, have held that unreasonably broad "forfeiture for competition" clauses are invalid and not subject to judicial modification.

In *Kroeger v. Stop & Shop Cos.*, 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*. 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." 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.

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...
the defendant's "legitimate interests." 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. 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." The plaintiff, therefore, received his proportionate share of accrued retirement benefits in accordance with this rule.

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.