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## EMPLOYMENT AT WILL: MISSOURI RECOGNIZES THE PUBLIC POLICY EXCEPTION

*Boyle v. Vista Eyewear, Inc.*<sup>1</sup>

The employment-at-will rule provides that in the absence of an employment contract or contrary statutory provision, a hiring for an unspecified length of time is terminable by the employee or the employer at any time, with or without cause.<sup>2</sup> The doctrine, developed at a time when less technical specialization of employee skills permitted greater "job-hopping" between more plentiful jobs,<sup>3</sup> has been roundly criticized in recent years for its failure to meet the needs and expectations of the employee in today's job market.<sup>4</sup> Understandably, modern business balks at the prospect of relinquishing its power to regulate the work force through the hiring and firing process. As a result, the discharge of at-will employees may be the most commonly litigated issue in the rapidly changing field of labor law.<sup>5</sup>

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1. 700 S.W.2d 859 (Mo. Ct. App. 1985).

2. *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. 1981) (en banc), cert. denied, 454 U.S. 1084 (1981); 53 AM. JUR. 2D *Master & Servant* § 43 (1970).

3. See Note, *Employment At Will: A Proposal to Adopt the Public Policy Exception in Florida*, 34 U. FLA. L. REV. 614, 621-22 (1982).

4. The condition of the modern employee has been described as follows:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis in original).

For a sampling of the commentary criticizing the at-will rule, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter Comment, *Wrongful Discharge*].

Opposition to the rule, however, is not unanimous. See generally Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

5. See Heinsz, *The Assault on the Employment At Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 856-58 (1983).

Under English common law a hiring for an unspecified length of time was presumed to have been intended to serve as an employment contract for one year.<sup>6</sup> Most early American courts followed this rule until the late nineteenth century<sup>7</sup> when the influence of the industrial revolution and laissez-faire economic thought reached the field of contract law.<sup>8</sup> The employer's legal responsibility to the employee gave way to prevailing notions of freedom of enterprise.<sup>9</sup> Accordingly, courts adopted the presumption that an employment contract of unspecified term was not for one year, but was terminable without liability by either party at any time.<sup>10</sup> The employment-at-

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6. The common law presumption is said to have had its origin in the Statute of Labourers which was enacted in the fourteenth century in response to the labor shortage resulting from the Black Death. See Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667 (1984); 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-64 (4th ed. 1936). The rule survived the repeal of the Statute, and the policy behind the rule is suggested in Blackstone's later statement:

[I]f the hiring be general, without any particular time limited, the law construes it to be for a year, upon a principle of natural equity, that the servant shall serve and the master maintain him throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (1783). See generally Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

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

8. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 681-87 (1979); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342-43 (1974) [hereinafter Note, *Job Security*].

9. See Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis — A Judge for Our Season*, 24 RUTGERS L. REV. 480, 481 (1970).

10. See, e.g., *Haney v. Caldwell*, 35 Ark. 156 (1879); *Harper v. Hassard*, 113 Mass. 187 (1873); *Finger v. Koch & Schilling Brewing Co.*, 13 Mo. App. 310 (1883); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). The employment-at-will doctrine as articulated in H. G. Wood's treatise was widely accepted by the American judiciary:

[W]ith 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 on 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 for the rate fixed for whatever time the party shall serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is terminable at the will of either party. . . .

H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). There is general agreement among the commentators that the authorities cited by Wood did not support his statement of the rule. See Feinman, *supra* note 6, at 125-27; Note, *Job Security*, *supra* note 8, at 341-42.

will doctrine reached its high-water mark when the U.S. Supreme Court struck down state and federal statutes limiting employers' rights to discharge unionized employees as unconstitutional.<sup>11</sup> Despite recent attempts to limit the scope of its application,<sup>12</sup> the rule remains well established.<sup>13</sup>

The at-will rule does not apply to all American workers. Collective bargaining agreements generally protect labor union members from discharge absent "cause" or "just cause,"<sup>14</sup> and civil service rules<sup>15</sup> and some constitutional provisions<sup>16</sup> protect governmental employees from arbitrary dismissal.

Commentators have proposed legislative abrogation of the at-will rule<sup>17</sup> to soften the impact of the rule on the two-thirds of the work force which is not protected by unionization or government employment.<sup>18</sup> Thus far only one state has taken this approach,<sup>19</sup> and no states have as yet adopted an

11. *Coppage v. Kansas*, 236 U.S. 1 (1915) (state statute prohibiting employers from making non-membership in labor unions a condition of employment violates due process clause of the fourteenth amendment); *Adair v. United States*, 208 U.S. 161 (1908) (federal statute barring discharge for unionization violates fifth amendment personal and property rights); see Comment, *Wrongful Discharge*, *supra* note 4, at 1933-34 (In *Coppage*, "the Constitution was held to protect an employer's freedom to contract with its employees on whatever terms it wished."); see also Comment, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 208-10 (1982) [hereinafter Comment, *Employer Rights*]. *Contra* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Congress has power to protect right to organize).

12. See *infra* notes 17-36 and accompanying text.

13. See Comment, *Wrongful Discharge*, *supra* note 4, at 1816 (two-thirds of the American work force is governed by the employment-at-will rule).

14. See M. TROTTA, *ARBITRATION OF LABOR-MANAGEMENT DISPUTES* 230-38 (1974).

15. Civil Service Reform Act of 1978 § 204(a), 5 U.S.C. § 7503 (Supp. II 1978).

16. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (state college teacher possesses property right in continued employment by virtue of college's de facto system of tenure and, thus, is entitled to fifth and fourteenth amendment procedural due process upon discharge); *Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974) (probationary teacher entitled to fifth and fourteenth amendment procedural due process where discharge for alleged mental instability constituted deprivation of liberty interest), *cert. denied*, 420 U.S. 976 (1975). See generally Lowy, *Constitutional Limitations on the Dismissal of Public Employees*, 43 BROOKLYN L. REV. 1 (1976).

17. See, e.g., Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519-31 (1976) (proposing a statute based on a just cause standard for firings with the adjudication of cases to be channelled into the arbitration process).

18. See Peck, *supra* note 4, at 8-10. Professor Peck has estimated that between 6,000 and 7,500 employees at will lose their jobs each year under conditions which would be considered unjust by an arbitration panel.

19. Montana law provides that a "servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for 1 year; a hiring at a daily rate, for 1 day; a hiring by piecework, for no specified term." MONT. CODE ANN. § 39-2-602 (1985).

unjust dismissal statute.<sup>20</sup> Existing state<sup>21</sup> and federal<sup>22</sup> legislation, however, does provide a limited measure of employee protection.

Judicial challenges to the at-will rule have been based upon both contract and tort theories. Employees' theories of recovery in contract have included reliance on an express or implied-in-fact promise,<sup>23</sup> an implied covenant of good faith and fair dealing,<sup>24</sup> and promissory estoppel.<sup>25</sup> Because of the limitations on relief afforded in contract actions<sup>26</sup> and potential obstacles to establishing a contract cause of action,<sup>27</sup> employees have increasingly sought recovery in tort.

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20. One example of an unjust dismissal statute is that which has been adopted by the United Kingdom which prohibits discharge absent some "substantial reason of a kind such as to justify the dismissal." Summers, *supra* note 17, at 514 (quoting the Industrial Relations Act 1971, § 24(2)(a), 41 Hal. Stat. 2062 (1971 Comp.)).

For a discussion of legislative efforts in the United States to limit the at-will doctrine, see Heinsz, *supra* note 5, at 862-65.

21. See, e.g., MICH. COMP. LAWS ANN. § 15.362 (West 1981); MO. REV. STAT. § 213.055 (1986); N.Y. EXEC. LAW § 296(1)(a), (3) (McKinney 1982); TEX. REV. CIV. STAT. ANN. art. 5207a (Vernon 1971); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1984).

22. Judicial and Judiciary Procedure Act, 28 U.S.C. § 1875 (Supp. 1982) (prohibiting discharge of an employee because of service on a petit or grand jury); National Labor Relations Act, 29 U.S.C. § 158(a)(1), (a)(3), (a)(4) (1977) (prohibiting discharge of an employee because of union activity); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1977 & Supp. 1982) (prohibiting discharge of an employee for filing suit or testifying in an action brought under the minimum wage and overtime laws); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1977 & Supp. 1982) (prohibiting discharge of an employee because of age); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1977) (prohibiting discharge of an employee for demanding a safe workplace); Employee Retirement Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1977) (prohibiting discharge of an employee to prevent vesting of her pension rights); Title IV, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1977) (prohibiting discharge of an employee because of race, religion, sex, color, or national origin).

23. See, e.g., R.S. Mikesell Assocs. v. Grand River Dam Auth., 627 F.2d 211 (10th Cir. 1980); O'Neill v. ARA Services, 457 F. Supp. 182 (E.D. Pa. 1978); Delzell v. Pope, 200 Tenn. 641, 294 S.W.2d 690 (1956).

24. See, e.g., Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). Professor Joan Krauskopf considers likely the recognition of the implied covenant of good faith and fair dealing by Missouri courts. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 212 n.166 (1983).

25. See, e.g., Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981).

26. Suits brought under a contract cause of action may limit recovery to lost wages. See, e.g., Alpern v. Hurwitz, 644 F.2d 943, 945 (2d Cir. 1981); Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 552 (1974). In addition to lost wages, plaintiffs in tort actions may also recover punitive damages. See, e.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186-90, 384 N.E.2d 353, 359-61 (1978); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

27. Courts have required that consideration other than the employee's services

Several traditional tort causes of action may be available to the discharged employee at will. First, an employer's conduct may be found to have been so "extreme and outrageous" that a court would allow a cause of action for intentional infliction of emotional distress.<sup>28</sup> While the discharge itself, if permissible under state law, will not satisfy the outrageous conduct requirement,<sup>29</sup> such conduct may be found in the employer's related acts.<sup>30</sup> Second, some courts have recognized the potential financial gains from employment as an interest protected by the tort of wrongful interference with prospective advantage.<sup>31</sup> Finally, at least one court has expressed its willingness to apply prima facie tort doctrine in the employment context upon a

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be given to render enforceable the employer's promise not to discharge without cause. *See, e.g.,* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964), *cert. denied*, 379 U.S. 914 (1964); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 623, 292 N.W.2d 880, 896-97 (1980). The "mutuality of obligation" doctrine may bar plaintiff's recovery. *See, e.g.,* Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 69, 139 So. 760, 761 (1932) ("[I]f the contract of employment be not binding on the employee . . . then it cannot be binding on the employer; there would be lack of 'mutuality.'"). Further, the employment relationship may be regarded as a series of unilateral contracts in which the employee accepts the employer's offers by continuing to perform employment duties. The employer may then end the relationship by declining to extend a subsequent offer. *See* 1 A. CORBIN, CONTRACTS § 70, at 13-17, 292-93 (1963). Finally, the statute of frauds may preclude enforcement of an oral employment agreement. *See, e.g.,* Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co., 344 S.W.2d 639, 642 (Mo. Ct. App. 1961).

28. The RESTATEMENT (SECOND) OF TORTS § 46 (1963), defines the cause of action: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *See, e.g.,* Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980) (adopting the Restatement definition, but finding no intentional infliction of emotional distress on the facts).

29. *See* Daniel v. Magma Copper Co., 127 Ariz. 320, \_\_\_, 620 P.2d 699, 703 (1980); Krauskopf, *supra* note 24, at 223-24.

30. *See, e.g.,* M.B.M. Co. v. Counce, 286 Ark. 269, 596 S.W.2d 681 (1980) (cause of action stated by employee submitting to polygraph test and initiating labor department investigation in order to receive final paycheck); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (employer discharging waitresses in alphabetical order in attempt to compel disclosure of stealing, constitutes outrageous conduct). *But see* Williams v. School Dist., 447 S.W.2d 256, 266-67 (Mo. 1969) (failure to show requisite outrageous conduct when school principal informs teacher of contract non-renewal while teacher is under sedation in doctor's office).

31. *See* Eib v. Federal Reserve Bank of Kansas City, 633 S.W.2d 432 (Mo. Ct. App. 1982). The *Eib* court set out the following elements as required to establish the cause of action:

- (1) existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) the absence of justification; and (5) resultant damage to the party whose relationship or expectancy has been disrupted.

*Id.* at 435 (footnote omitted).

finding of "intentional infliction of harm without an excuse or justification that is legally cognizable as such."<sup>32</sup> These traditional tort actions have not received wide judicial acceptance in at-will discharge cases.

Numerous jurisdictions, however, have recently begun to recognize a cause of action in tort for wrongful discharge.<sup>33</sup> This limitation on the employer's right to discharge an employee at will prohibits retaliatory and abusive discharge.<sup>34</sup> The term "public policy exception" is applied when the cause of action is based on the employer's contravention of some principle of public policy.<sup>35</sup> The Court of Appeals of the Western District of Missouri recently considered the public policy exception to the at-will rule in *Boyle v. Vista Eyewear, Inc.*<sup>36</sup>

Judy A. Boyle worked as a laboratory helper at Vista Eyewear, Inc., a manufacturer of optical products, from September 1977, to January 9, 1979.<sup>37</sup> Her duties included the hardening and testing of eyeglass lenses. Regulations of the United States Food and Drug Administration (FDA) require that all eyeglass lenses be tested for their resistance to shattering before being sold or distributed to the public.<sup>38</sup>

Mrs. Boyle established at trial that standard industry procedure is to harden all lenses by submitting them to a heat treatment or chemical treatment process.<sup>39</sup> Each lens is then tested for impact resistance by subjecting it to a drop test in which a steel ball is dropped onto the center of the lens from a height of 48 inches.<sup>40</sup>

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32. *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, —, 410 N.Y.S.2d 737, 739 (Sup. Ct. 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.2d 160 (1979), *appeal denied*, 48 N.E.2d 603, 421 N.Y.S.2d 1028 (1979) (malice not shown where employer records employee's telephone conversation and discharges employee after employee is arrested on criminal charges). *But see* *Dake v. Tuell*, 687 S.W.2d 191, 192 (Mo. 1985) (en banc) (Missouri employees may not contravene the employment-at-will doctrine "by cloaking their claims in the misty shroud of prima facie tort").

33. *See Employment-At-Will: A State By State Survey, 1983 Report of the Employment-At-Will Subcommittee, Employment and Labor Relations Law Committee, Litigation Section, A.B.A.* (D. Cathcart & M. Dichter, ed. 1983) (Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, Washington, West Virginia and Wisconsin have adopted or have indicated a willingness to adopt a public policy exception to the employment-at-will rule); *see also* *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818 (North Carolina adopts the public policy exception), *review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985); *Hauck v. Sabine Pilots, Inc.*, 672 S.W.2d 322 (Tex. Ct. App. 1985) (Texas adopts the public policy exception).

34. Krauskopf, *supra* note 24, at 232 n.307.

35. *See infra* notes 65-73 and accompanying text.

36. 700 S.W.2d 859 (Mo. Ct. App. 1985).

37. *Id.* at 861.

38. 21 C.F.R. § 801.410 (1986).

39. *Boyle*, 700 S.W.2d at 861.

40. *Id.*

Testimony of Mrs. Boyle and several other employees was then introduced to show that the drop test was never used at Vista and that the hardening treatment was omitted on many lenses.<sup>41</sup> Mrs. Boyle was nevertheless ordered to initial forms indicating that she had treated and tested each pair of lenses.<sup>42</sup>

During the course of her employment, Mrs. Boyle repeatedly complained to her supervisor and to the president of Vista about the impropriety of such a procedure. She was told to stop worrying and to continue performing her duties as she had been instructed. Mrs. Boyle then threatened to report the violations to the appropriate governmental authorities. After several months, during which Vista continued its practice, Mrs. Boyle and four other employees complained to the Occupational Safety and Health Administration (OSHA). Upon learning that OSHA had no jurisdiction over the matter, they filed a complaint with the FDA.<sup>43</sup> When Vista's president learned of this he asked the employees to withdraw their complaints and to tell the FDA that they had lied.<sup>44</sup> Several weeks later, OSHA conducted an investigation.<sup>45</sup>

Two months after the complaints were filed with the FDA, Mrs. Boyle's supervisor informed her that she was being fired for reporting to the president of the company that her supervisor had been using drugs.<sup>46</sup> Testimony regarding the circumstances surrounding the firing suggested, however, that the accusation may never have occurred and that the story may have been fabricated as a pretext to fire Mrs. Boyle in retaliation for contacting the FDA.<sup>47</sup>

Mrs. Boyle subsequently filed her petition, alleging in Count III that she was wrongfully discharged from her employment for filing complaints with OSHA and FDA.<sup>48</sup> The trial court granted defendant's motion to dismiss

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* The results of the investigation were not discussed in the opinion. The opinion also does not indicate whether the OSHA investigation was a result of Mrs. Boyle's complaint.

46. *Id.* at 861-62.

47. *Id.* at 862. On direct examination, the president testified that the plaintiff had told him that the plaintiff's supervisor had fired her for arguing with the supervisor. On cross examination, the president admitted that plaintiff had instead told him that she had been fired by her supervisor for allegedly informing the president that the supervisor was using drugs. The president testified, nevertheless, that the conversation with the plaintiff was the first time that the subject of drugs had been mentioned to him. Despite that, he claimed that he chose not to consult the supervisor regarding the false accusation on which the supervisor had supposedly based the plaintiff's discharge.

48. *Id.* Count I asserted a claim for overtime compensation. Count II asserted



Count III for failure to state a claim.<sup>49</sup> Mrs. Boyle prevailed on Counts I and II which were tried to a jury.<sup>50</sup> Both parties appealed, Mrs. Boyle asserting that the trial court had erred in dismissing Count III.<sup>51</sup>

The *Boyle* opinion sets forth a broad definition of public policy which at first blush would justify the expectation that a discharged employee will be afforded considerable protection from unjust dismissal: “[P]ublic policy” is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good.<sup>52</sup> While most courts have set out similarly expansive definitions,<sup>53</sup> the public policy exception has, with few exceptions, been narrowly interpreted in the jurisdictions which have recognized it.<sup>54</sup>

The predominant narrow construction of the public policy exception has been recognized as necessary to preserve the important interest of the employer in a free enterprise system in exercising his independent judgement in making personnel decisions.<sup>55</sup> The facts upon which a discharged employee can reach a jury in a particular jurisdiction is determined by that jurisdiction’s requirements for establishing a prima facie cause of action. Observers have noted that if a plaintiff can avoid summary judgment or directed verdict, his chance of success at trial is very good,<sup>56</sup> perhaps because of the jury’s tendency to identify with, and therefore believe, the employee.<sup>57</sup> Thus it is necessary that courts carefully delineate the requirements for a prima facie cause of action for wrongful discharge under the public policy exception.

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a claim for damages arising from the employer’s failure to issue a service letter stating the correct reason for her discharge pursuant to Mo. REV. STAT. § 290.140 (1978). This Note discusses the court’s opinion only with respect to Count III of Mrs. Boyle’s complaint.

49. *Boyle*, 700 S.W.2d at 862.

50. *Id.*

51. *Id.* at 862-63.

52. *Boyle*, 700 S.W.2d at 871. The court cited the following cases in support of this definition: *Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959) (en banc); *Dille v. St. Luke’s Hosp.*, 355 Mo. 436, 446, 196 S.W.2d 615, 620 (1946).

53. See, e.g., *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) (defining a violation of public policy as that which contravenes “good morals or any established interest of society”); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878-79 (1981) (defining public policy as that which “strike[s] at the heart of a citizen’s social rights, duties and responsibilities”).

54. See *Krauskopf*, *supra* note 24, at 233 (“[A]ll but a few courts are placing distinct boundaries on the wrongful discharge tort. . . .”); Comment, *Wrongful Discharge*, *supra* note 4, at 1932 (“[T]he public policy exception has limited only slightly the harshness of the at-will rule.”).

55. See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 136-145, 421 N.E.2d 876, 881-86 (1981) (Ryan, J., dissenting).

56. See *Blades*, *supra* note 4, at 1428; *Heinsz*, *supra* note 5, at 882.

57. See *Blades*, *supra* note 4, at 1428.

The requirement that the plaintiff be able to identify a particular public policy as expressed in a constitutional or statutory provision is said to provide "a workable means to screen cases on motion to dismiss for failure to state a cause of action or for summary judgment."<sup>58</sup> Recognizing a cause of action based on judicial declarations of public policy, it is argued, would result in a flood of "vexatious" lawsuits<sup>59</sup> and would render employers and employees uncertain as to the status of their relationship.<sup>60</sup> It is also argued that such an approach will create an uncertain legal climate which might deter employers from locating in the jurisdiction because of a perception that their free exercise of judgment might be hampered.<sup>61</sup>

The court of appeals' discussion of the public policy exception begins with a declaration that "[t]he public policy exception is a narrow exception to the at-will . . ." rule which provides a cause of action for wrongful discharge to an employee dismissed "in violation of a clear mandate of public policy."<sup>62</sup> While it is true that some language in the opinion could be construed as indicating the court's intent to create only a narrow exception to the rule,<sup>63</sup> the court's discussion suggests a much broader interpretation. The sources of "public policy" noted by the court, the cases cited, and the court's categorization of those cases indicate an apparent willingness on the court's part to recognize a broad exception to the at-will rule. Such an approach could have a detrimental effect on management's ability to efficiently regulate the workforce.<sup>64</sup>

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58. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 73, 417 A.2d 505, 513 (1980).

59. See *Blades*, *supra* note 4, at 1428.

60. See Comment, *Employment At Will: When Must an Employer Have Good Cause for Discharging an Employee?*, 48 Mo. L. REV. 113, 136 (1983).

61. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (Ryan, J., dissenting).

62. *Boyle*, 700 S.W.2d at 871.

63. The public policy exception is generally described as "narrow" only when limited in its application to the employee who has been asked to perform an illegal act or who has exercised a statutory right. See, e.g., *Krauskopf*, *supra* note 24, at 249 ("The paramount consideration that is consistent in the cases following the narrow majority rule is the existence of a statutorily required duty." (emphasis added)); Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-At-Will Rule*, 64 N.C.L. REV. 840, 847 (1986) ("The narrow view of the public policy exception . . . requires that public policy be legislatively declared." (emphasis added)). The *Boyle* court acknowledges the creation of a "narrow" exception to the employment-at-will rule. *Boyle*, 700 S.W.2d at 871. The court purports to base the exception only on "well established and clearly mandated" public policy. *Id.* at 878.

64. Professor *Blades* has analyzed the potential difficulties in this area:

Ordinarily, where both sides present equally credible versions of the facts, the plaintiff will have failed to carry his burden. However, there is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by dis-

Of primary importance in formulating a public policy exception to the employment-at-will rule is determining which sources of policy will give rise to the exception. The issue is whether the particular public policy contravened by the firing is of sufficient importance to justify infringement of the employer's prerogative to discharge employees. The majority of courts which have adopted the public policy exception<sup>65</sup> have looked to the source of the particular policy being evaluated for an indication of its importance. For instance, in *Brockmeyer v. Dun & Bradstreet*,<sup>66</sup> the Wisconsin Supreme Court noted the "vagueness of the concept of public policy . . .,"<sup>67</sup> describing it as "a broad concept embodying the community common sense and common conscience."<sup>68</sup> Further, the court recognized that other states have applied the public policy exception where "the discharge violates judicially conceived and defined notions of public policy, but does not necessarily contravene any explicit statutory provision."<sup>69</sup> Nevertheless, the court considered the

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grunted employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained. . . . Compromise of the employer's power to make such judgment about professional, managerial or other high-ranking employees . . . is especially undesirable. The higher ranking the employee, the more important to the success of the business is his effective performance. Compounding the potential for undue inhibition of the employer's judgment at the higher echelons of employment is the greater difficulty of articulating a basis for the discharge at that level. Compared to the wage earner, whose routine duties can usually be measured against a mechanical standard, the value of a salaried employee is more likely to be measured in such intangible qualities as imagination, initiative, drive, and personality. The employer's evaluation of the higher ranking employee is usually a highly personalized, intuitive judgment, and, as such, is more difficult to translate into concrete reasons which someone else — a jurymen — can readily understand and appreciate. Indeed, even if it is conceded that the protection from unwarranted discharges afforded the rank and file employees by labor agreements is appropriate, it might still be argued that no intrusion of any kind upon the employer's evaluation of higher echelon employees should be tolerated.

Blades, *supra* note 4, at 1428-29.

65. A number of courts faced with the issue of whether to adopt the public policy exception have declined to do so on the ground that such lawmaking is more appropriately in the province of the legislature. *See, e.g.,* Hinrichs v. Tranquillaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977); Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 794, 635 P.2d 992, 997 (Ct. App. 1981).

66. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

67. *Id.* at 573, 335 N.W.2d at 840.

68. *Id.*

69. *Id.* at 571, 335 N.W.2d at 839 (citing *Palmateer v. International Harvester*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), a "whistleblowing" case, as an example of the broadest view of the public policy exception). For a discussion of the "whistleblowing" cases, see *infra* notes 99-112 and accompanying text.

interests of the employee, the employer and society,<sup>70</sup> and concluded that the cause of action for wrongful discharge should be limited to cases in which the public policy contravened is evidenced by a constitutional or statutory provision.<sup>71</sup>

Indeed, most courts which have adopted the public policy exception have limited its application to circumstances in which the plaintiff can identify a specific constitutionally or statutorily expressed public policy which is contravened by the firing.<sup>72</sup> A minority of the courts have conferred a cause of action based on judicially determined public policy concerns.<sup>73</sup>

It is not clear which sources of public policy will support the wrongful discharge cause of action in Missouri. The *Boyle* court cited the following as sources of "public policy":<sup>74</sup> "the state constitution,"<sup>75</sup> "the letter and purpose of a constitutional, statutory or regulatory provision or scheme,"<sup>76</sup>

70. *Id.* at 574, 335 N.W.2d at 841. The court analyzed these interests under its proposed construction of the public policy exception:

Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences. Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits from our holding in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected from frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.

*Id.*

71. *Id.* at 573, 335 N.W.2d at 840.

72. *See, e.g.,* *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (discharge for refusal to submit to polygraph test where statute forbade employers from requiring such); *Tameney v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge for refusal to engage in illegal price-fixing scheme); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (discharge for obtaining legal representation in wage negotiations); *Glenn v. Clearman's Golden Cock Inn*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (discharge for engaging in union activity).

73. *See, e.g.,* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (discharge for informing law enforcement agency of criminal violations by a fellow employee); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (manager discharged for failure to require employee to make night cash deposit); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978) (discharge for reporting violations of state and federal law to employers).

74. *Boyle*, 700 S.W.2d at 871.

75. *Id.* (citing in support, *In re Rahn's Estate*, 316 Mo. 492, 500-02, 291 S.W. 120, 123 (1927), *cert. denied*, 274 U.S. 745 (1927) (post-World War I bequest to German Red Cross did not violate public policy since judicial decisions and federal statute did not prohibit bequest to alien enemy and beneficiaries were not "enemy" after armistice within meaning of U.S. and Missouri constitutional provisions prohibiting giving of aid and comfort to enemy)).

76. *Id.* (citing in support, *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370,

“the judicial decisions of the state and national courts,”<sup>77</sup> “the constant practice of the government officials,”<sup>78</sup> and, “in certain instances . . . professional codes of ethics.”<sup>79</sup> Unlike the Wisconsin court, the Missouri court did not explicitly indicate which of these sources express so clear a mandate of public policy that a firing in contravention of such policy will sustain a cause of action. Arguably, the court intended that a firing in violation of any of the above would state a cause of action and, indeed, examples were given of cases in which the courts relied on both legislative and judge-made public policy.<sup>80</sup> On the other hand, the holding in the case is worded so as to suggest that the cause of action requires a clear constitutional or statutory expression of such public policy.<sup>81</sup> This ambiguity is evident throughout the court’s analysis of the public policy exception.

The court divided the public policy exception cases into four categories. The first includes firings resulting when an employee has “declined to obey directions to commit a crime or to act contrary to public policy.”<sup>82</sup> The court discussed ten cases in this classification. In all but one, the plaintiff-employee

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652 P.2d 625 (1982) (federal antitrust laws cited as source of public policy against participating in antitrust violations); *Adler v. American Standard Corp.*, 291 Md. 31, 46, 432 A.2d 464, 472 (1981) (allegations of corporate misconduct too general and vague to establish that such misconduct contravened public policy as stated in statutory provision); *Nye v. Department of Livestock*, 196 Mont. 222, 228, 639 P.2d 498, 502 (1982) (administrative rules provide source of public policy supporting wrongful discharge action)).

77. *Id.* (citing in support, *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. 1959) (en banc) (statutes are “higher” evidence of public policy than judicial decisions and where legislature declined to abrogate law, the court declined also); *In re Rahn’s Estate*, 316 Mo. at 500-02, 291 S.W. at 123 (post-World War I bequest to German Red Cross did not violate public policy since judicial decisions and federal statute did not prohibit bequest to alien enemy and beneficiaries were not “enemy” after armistice within meaning of U.S. and Missouri constitutional provisions prohibiting giving of aid and comfort to enemy); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984) (discharging employee for refusing to engage in prostitution supports wrongful discharge cause of action)).

78. *Id.* (citing in support, *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 340 (1897) (declining to recognize a public policy exception to federal restraint of trade or commerce legislation for reasonable or well intentioned contracts)).

79. *Id.* (citing in support, *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (physician discharged for refusing to conduct research on potentially harmful substance does not state cause of action where research was conducted within FDA guidelines)). The *Pierce* court warns that not all professional codes of ethics 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 would not be sufficient [to support a public policy exception cause of action].” *Id.*

80. See *infra* notes 82-113 and accompanying text.

81. *Boyle*, 700 S.W.2d at 878; see *infra* text accompanying note 119.

82. *Boyle*, 700 S.W.2d at 873.

was fired for refusing to commit an act specifically prohibited either by statute or by regulation promulgated pursuant to statute.<sup>83</sup> For instance, in *O'Sullivan v. Mallon*,<sup>84</sup> an x-ray technician was discharged for refusing to perform catheterizations. Performing such catheterizations would have constituted a violation of the state's Medical Practice Act.<sup>85</sup> Noting the public's "foremost interest" in medical treatment, the Superior Court of New Jersey held "that an employee at will may not be terminated by an employer in retaliation for an employee's refusal to perform an illegal act."<sup>86</sup> The rationale for restricting an employer's prerogative to discharge an employee under such circumstances is compelling. As one court stated, "[A]n employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."<sup>87</sup>

In one of the cited cases, however, an employee was fired in contravention of a public policy not founded upon any legislative pronouncement. In *Magnan v. Anaconda Industries, Inc.*,<sup>88</sup> the plaintiff was fired for refusing to sign a statement prepared by his employer.<sup>89</sup> The statement purported to summarize the contents of a prior conversation between plaintiff and two company investigators during which plaintiff was questioned regarding the theft of company property.<sup>90</sup> Although the plaintiff had been promised that he would not be prosecuted for his possible complicity, he nevertheless refused to sign the statement, maintaining that it did not accurately reflect the contents of the earlier conversation.<sup>91</sup> After concluding that plaintiff's complaint did not state a cause of action based on the breach of an implied

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83. *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (refusal to engage in what the court interpreted as prostitution as defined in criminal statute); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to violate antitrust law and a consent decree); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (refusal to commit perjury); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to violate state law regarding pollution control reporting); *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818, *review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985) (refusal to commit perjury); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (1982) (refusal to violate a state board of pharmacy regulation); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978) (refusal to violate state law regarding medical care); *Delaney v. Taco Time Int'l, Inc.*, 297 Or. 10, 681 P.2d 114 (1984) (refusal to violate state defamation law); *Sabine Pilot Serv. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (refusal to violate federal water pollution laws).

84. 160 N.J. Super. 416, 390 A.2d 149 (1978).

85. *Id.* at 417, 390 A.2d at 149.

86. *Id.* at 418, 390 A.2d at 150.

87. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 480, 427 A.2d 385, 389 (1980).

88. 193 Conn. 558, 479 A.2d 781 (1984).

89. *Id.* at 561, 479 A.2d at 783.

90. *Id.* at 560-61, 479 A.2d at 782-83.

91. *Id.* at 561, 479 A.2d at 783.

covenant of good faith and fair dealing,<sup>92</sup> the court acknowledged that at-will employees are "entitled to judicial protection when the cause for dismissal is derived from some important violation of public policy."<sup>93</sup> Absent from the opinion is any discussion of the source of the public policy in question. Only in the trial court's instruction to the jury is there any indication of the specific public policy violated: "The state has an abiding interest in seeing to it that men are truthful in their affairs."<sup>94</sup> The instruction went on to state that efforts by the defendant to have the plaintiff sign a statement defendants knew to be false or that defendants did not care whether was true or false would be "contrary to public policy."<sup>95</sup> The case was remanded for a new trial,<sup>96</sup> arguably indicating the Connecticut Supreme Court's recognition of a cause of action for wrongful discharge in violation of public policy in the absence of a clear legislative indication of such policy.<sup>97</sup>

The inclusion of *Magnan* in its examples of public policy exception cases suggests the court of appeals' approval of the nonstatutory approach to public policy. This is further supported by the language used by the court to describe the above group of cases. The court refers to the cases as ones in which the plaintiff has "declined to obey directions to commit a crime or to act contrary to public policy."<sup>98</sup> The implication is that the court would look to sources of public policy other than those expressed in the constitution or statutes, thus broadening the scope of the exception to provide relief in cases in which the public policy violated is not legislatively based. Most courts which have dealt with the issue have applied the exception to this category of cases only when the plaintiff refused to violate a statute.<sup>99</sup>

92. *Id.* at 571-72, 479 A.2d at 788-89.

93. *Id.* at 569, 479 A.2d at 787.

94. *Id.* at 575 n.24, 479 A.2d at 790 n.24.

95. *Id.*

96. *Id.* at 577-78, 479 A.2d at 791. The trial court was found to have erred in submitting count one (breach of implied covenant of good faith) to the jury. Nevertheless, because the verdict for the plaintiff on that count was irreconcilable with the verdict against him on count two (retaliatory discharge in contravention of public policy) a new trial was ordered on count two.

97. The *Magnan* court relied on *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), for the proposition that Connecticut had recognized a public policy exception to the at-will rule. In its brief discussion of that case, the court noted that it had approved the cause of action "where the discharge contravenes a clear mandate of public policy." *Magnan*, 193 Conn. at 565, 479 A.2d at 785 (quoting *Sheets*, 179 Conn. at 474, 427 A.2d at 385 (emphasis added)). Further, the court cited to the Connecticut legislation providing the public policy which was contravened by *Sheets*' discharge. *Magnan*, 193 Conn. at 569, 479 A.2d at 787 (*Sheets*' employer's food labeling practices were in violation of Connecticut's Uniform Food, Drug and Cosmetic Act, CONN. GEN. STAT. § 19-222). To the extent that no clear mandate of public policy was proposed in *Magnan*, it can be argued that the court did not follow *Sheets*, but expanded the public policy exception as set forth in that decision.

98. *Boyle*, 700 S.W.2d at 873 (emphasis added).

99. See, e.g., *Sabine Pilot Serv. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985)

A second category of public policy exception cases discussed by the court includes the so called "whistleblowing" cases. Plaintiffs in these cases allege to have been discharged in contravention of the public policy favoring employee reports of wrongdoing to employers or to law enforcement agencies.<sup>100</sup> Courts have looked to the statutes which render the reported activity illegal as the source of public policy on which to base the public policy contravened by the firing.<sup>101</sup> To the extent that a particular legislature has imposed no obligation on private citizens to report incidents of wrongdoing, however, courts which recognize a whistleblowing cause of action under the public policy exception are creating their own public policy. There is, of course, considerable appeal in the argument that a criminal statute should serve as an adequate indication of a such public policy, but to declare that particular conduct is criminal is not the same as declaring the desirability of citizen assistance in curtailing such conduct. Recognizing such a cause of action will arguably serve to open the courtroom doors to any plaintiff that articulates a similarly appealing parallel between some existing statute and a non-statutory principle of "public policy" contravened by the discharge.<sup>102</sup>

Among the decisions discussed by the court in this category is the leading case of *Palmateer v. International Harvester Co.*<sup>103</sup> In *Palmateer*, the plaintiff

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(refusal to violate Federal Water Pollution Control Act); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 495-96, 265 N.W.2d 385, 388 (1978) (refusal to violate state law regarding pollution control reporting); see also *Krauskopf*, *supra* note 24, at 235, 247-48 (most courts limit the wrongful discharge tort to discharges violating statutory source of public policy). A case in which recovery was denied when the discharge was alleged to have violated the public policy favoring truthfulness is *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977) (discharge for refusal to sign a statement believed by employee to be false).

100. *Boyle*, 700 S.W.2d at 873-75. See generally Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based on Determinants of Public Policy*, 1977 Wis. L. REV. 777.

101. See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 132-33, 421 N.E.2d 876, 880 (1981) (relying on general criminal statutes for proposition that public policy favors "citizen crime-fighters"); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978) (finding "substantial public policy" in state consumer credit and protection act favoring an employee's seeking his institution's compliance).

102. For instance, suppose P is employed as the maintenance supervisor for the ABC property management company. During the course of performing his duties, P regularly installs high efficiency water heaters and furnaces as replacements for worn out units, and provides wall and ceiling insulation in excess of housing code requirements. ABC's owner discharges P upon learning of the unnecessary expenses that have been incurred by ABC as a result of P's practices. P files suit for wrongful discharge, alleging that the discharge contravenes the public policy favoring energy conservation. As evidence of such public policy, P's complaint points out statutes providing for an energy conservation tax credit on the federal income tax, appropriations by the general assembly to promote energy conservation programs, and establishment of Federal Energy Guidelines for home loan eligibility. The issue arises whether such statutes are sufficient indication of the public policy involved to justify recognition of P's cause of action in light of the fact that the firing did not result from P's failure to violate such statutes.

103. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).



was discharged for reporting criminal conduct by a fellow employee to law enforcement officials and for agreeing to cooperate in the investigation and prosecution.<sup>104</sup> The court acknowledged the public policy exception to the at-will rule and indicated that such public policy is to be found in the constitution and statutes, and when absent therefrom, in its judicial decisions.<sup>105</sup> Noting the absence of a statutory provision requiring a citizen to participate in crime prevention, the court determined nevertheless that public policy favors "citizen crime-fighters" and recognized the employee's cause of action for retaliatory discharge.<sup>106</sup>

The dissent strongly criticized the majority's reliance on judge-made public policy as a basis for the exception, warning courts to proceed cautiously when making public policy determinations. The dissent emphasized that no employer should be subject to suit merely because a discharged employee's "conduct was praiseworthy or because the public may have derived some benefit from it."<sup>107</sup> Commentators have expressed agreement:

Since most whistle-blowing cases involve management level employees where the courts traditionally defer to the employer's decision-making latitude, the dissent's objection is particularly sound. For the courts to make ad hoc public policy decisions where there are differing value judgments that reasonably could be made, would undermine the principle of deference to employer judgement.<sup>108</sup>

Courts have extended protection under the whistleblowing theory to employees discharged for seeking their employers' compliance with state pharmacy regulations,<sup>109</sup> consumer credit and protection laws,<sup>110</sup> and state nursing home regulations.<sup>111</sup> Along with *Palmateer*, these cases represent the minority position. The majority, requiring that the discharge violates a specific statutory provision, has denied relief to employees discharged for reporting that a corporate officer was taking kickbacks,<sup>112</sup> for revealing illegal foreign cur-

104. *Id.* at 127, 421 N.E.2d at 877, 879.

105. *Id.* at 130, 421 N.E.2d at 878.

106. *Id.* at 132-33, 421 N.E.2d at 880.

107. *Id.* at 139, 421 N.E.2d at 883 (Ryan, J., dissenting).

108. Krauskopf, *supra* note 24, at 239; *see also* Comment, *Employer Rights*, *supra* note 11, at 226-27 (*Palmateer* court delved into "the nebulous area of judicially created public policy" (quoting *Palmateer*, 85 Ill. 2d at 136, 421 N.E.2d at 881 (Ryan, J., dissenting))).

109. *See* *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (1982).

110. *See* *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

111. *See* *McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or. App. 107, 684 P.2d 21 (1984), *review denied*, 298 Or. 37, 688 P.2d 845 (1984).

112. *See, e.g.*, *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979).

rency transactions,<sup>113</sup> and for reporting violations of state security laws.<sup>114</sup> Thus, to the extent the Western District Court of Appeals recognized the whistleblowing cases as falling within the public policy exception, its decision is in accord with the minority.

Although two other categories of public policy exception cases were briefly discussed in the *Boyle* decision,<sup>115</sup> the court analyzed the case only in terms of the first two categories, the whistleblowing cases and the cases in which the employee is discharged for refusing to commit a crime or act contrary to public policy.<sup>116</sup>

According to Court III of her petition, Mrs. Boyle was fired for warning her employer that she would notify the FDA of the employer's illegal practices.<sup>117</sup> Further, according to the court: "She might have added, as the record indicates and the jury apparently believed, she was also fired for refusing to violate the FDA regulation, for persisting in hardening and testing lenses in

113. See, e.g., *Edwards v. Citibank*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. 1979).

114. See *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964).

115. *Boyle*, 700 S.W.2d at 875. The first of these categories includes "discharge of an at-will employee whose acts are those that sound public policy would encourage, for example, acceptance of a call to jury duty, seeking public office, asserting a right to elect or designate collective bargaining representatives, or joining a labor union." *Id.* The other category involves the "discharge of employees whose only sin was the filing of a workers compensation claim." *Id.* The cases illustrate the broad category of public policy exception cases in which the employee is discharged for exercising a constitutional or statutory right applicable to the employment situation. See, e.g., *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (discharge for engaging in union activity states a cause of action); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge for filing worker's compensation claim states cause of action). Among these were two Missouri cases which were discussed briefly but deemed inapplicable to the main case: *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. 1984) (en banc) (wrongful discharge cause of action stated when employee was discharged for exercising workers' compensation rights under MO. REV. STAT. § 287.780, but exception to at-will doctrine not relied on since statute gives employee cause of action against employer); *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. 1963) (Article I, § 29 of the Missouri Constitution creates a "modified at-will doctrine" conferring a wrongful discharge cause of action on employee discharged for engaging in union activities, but plaintiff was neither reinstated in his former position nor awarded punitive damages).

116. *Boyle*, 700 S.W.2d at 876-77.

117. The opinion states that "Count III alleg[ed] that she was wrongfully discharged from her employment for *filing complaints* with OSHA and FDA." *Id.* at 862 (emphasis added). Elsewhere, however, it is stated that she "was fired, according to Count III, because she *warned* defendants that she would notify the FDA of their illegal practices if they did not stop and because, despite her warnings, defendants chose to continue to violate the positive duty laid upon them by the federal regulation and to continue to insist that their employees do the same." *Id.* at 877 (emphasis added).

compliance with the regulation and for actually reporting defendant's violations to the FDA."<sup>118</sup> The court then states that any of these allegations, including those in Count III, would state a cause of action under the public policy exception.<sup>119</sup> The implication is that the court is prepared to recognize a cause of action when the plaintiff has been discharged for whistle-blowing to company personnel or to law enforcement officers, or for refusing to violate a statute. This is confirmed by the holding in the case:

Accordingly, where an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.<sup>120</sup>

With respect to discharge for refusal to violate the law, the decision follows the sound logic employed by the majority of jurisdictions. Employers and employees are on notice, by virtue of the constitution and statutes, of conduct which is prohibited by law and therefore not to be required by the employer of an employee. An employer who conducts his business within such clear constraints is free to critically evaluate the workforce, hiring and firing as required to maintain efficiency and productivity in the workplace. The disgruntled employee will be unable to hail the employer before a hostile jury unless that employee can point to a principle of public policy set out in a specific statutory or constitutional provision which was contravened by the employer.

The Missouri legislature has not imposed upon its citizens an obligation to "blow the whistle." By announcing a public policy favoring such conduct, the Western District Court of Appeals has expanded the public policy exception beyond the clear mandates enunciated in the state's constitution and statutes. Creation of a cause of action in an employee discharged for blowing the whistle should be left to the legislature.<sup>121</sup> The same is true of actions

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118. *Id.* at 877.

119. *Id.*

120. *Id.* at 878.

121. Michigan, for example, has enacted such a statute. See MICH. COMP. LAWS ANN. §§ 15.361-369 (West Supp. 1986), which provides in pertinent part:

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

involving discharges alleged to have been in violation of public policies not explicitly articulated in the constitution or statutes. Recognition of a wrongful discharge cause of action based on such judicially declared public policy creates uncertainty as to the legal rights of employers and employees,<sup>122</sup> giving employees an incentive to litigate and leaving the employer with no clear indication as to whether an employee's conduct serves some judicially determined public policy.

Because Mrs. Boyle was required by her employer to commit statutory violations, and because she was fired, in part, for refusing to carry out such violations, she would be protected under the public policy exception principle condemning discharge for refusal to violate the law. Recognition of the whistleblowing cause of action was thus unnecessary to the court's holding in the case.

Mr. Justice Sutherland wrote on the role of public policy in judicial decision making in 1930:

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not be the public policy of another.<sup>123</sup>

Such advice is sound regarding the public policy exception to the employment-at-will rule. Missouri courts should limit application of the new exception to cases in which the employer has contravened a clear mandate of public policy as expressed in the constitution or statutes.<sup>124</sup> As previously stated, this approach will benefit Missouri's employers and employees, largely through

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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 held by that public body, or a court action.

*Id.* at § 15.362 (West Supp. 1986); see also Westin, *Michigan's Law to Protect Whistleblowers*, Wall St. J., Apr. 13, 1981, at 18, col. 3.

122. See *supra* notes 59-61 and accompanying text.

123. *Patton v. United States*, 281 U.S. 276, 306 (1930).

124. Missouri courts have decided only one public policy exception case since *Boyle*. In *Beasley v. Affiliated Hosp. Prods.*, 713 S.W.2d 557 (Mo. Ct. App. 1986), the vice president-general manager of a hospital equipment manufacturer alleged that he had been asked by his employer to predetermine the winner of an advertised raffle of the company's equipment. The complaint stated that the employee was wrongfully discharged for refusing to obey the instructions which would have resulted in violations of Mo. REV. STAT. §§ 570.140-.160 (unfair trade practices) and 18 U.S.C. §§ 1343-1344 (mail and wire fraud). *Id.* at 560. The Eastern District Court of Appeals reversed the dismissal of the complaint, quoting from *Boyle* that employers "are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations promulgated pursuant to statute." *Id.* at 560 (citations omitted).

avoiding legal uncertainty in the workplace.<sup>125</sup> Such an approach will also serve to further the state's general economic interests<sup>126</sup> and its interest in judicial efficiency.<sup>127</sup>

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125. *See supra* notes 60, 64, 70 and accompanying text.

126. *See supra* notes 61, 70 and accompanying text.

127. *See supra* notes 59, 70 and accompanying text.