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## Assault on the Employment at Will Doctrine: Management Considerations

Timothy J. Heinsz

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## THE ASSAULT ON THE EMPLOYMENT AT WILL DOCTRINE: MANAGEMENT CONSIDERATIONS

TIMOTHY J. HEINSZ\*

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### I. INTRODUCTION

The traditional rule in American labor relations law has been employment at will: when an employee is hired for an indefinite period of time,

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the employee or the employer may terminate the relationship without cause at any time.<sup>1</sup> The harshness of this rule has been substantially modified. The National Labor Relations Act,<sup>2</sup> Title VII of the Civil Rights Act of 1964,<sup>3</sup> the Age Discrimination in Employment Act,<sup>4</sup> the Equal Pay Act,<sup>5</sup> and a number of other federal<sup>6</sup> and state statutes now limit an employer's unfettered discretion to fire workers. Many workers also are protected by collective bargaining grievance and arbitration provisions, nearly 80% of which require that employees can be terminated only for just cause.<sup>7</sup> Despite these protections, the employment at will doctrine leaves between one-third and two-thirds of the work force<sup>8</sup> without legal recourse upon termination.

Although followed by a majority of states, the at will doctrine is being significantly limited in a growing number of jurisdictions.<sup>9</sup> Terminations at will may become the most popular labor-related cause of action in the 1980's, as illustrated by such recent cases as *Cancellier v. Federated Department Stores*.<sup>10</sup> Three management level employees of over seventeen years seniority claimed that their terminations violated California law<sup>11</sup> and the Age

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1. *E.g.*, Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge For Our Season*, 24 RUTGERS L. REV. 480, 481 (1970); Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 484-91; 53 AM. JUR. 2D *Master & Servant* § 43 (1970); Annot., 12 A.L.R.4th 544, 549 (1982).

2. 29 U.S.C. §§ 151-169 (1976).

3. 42 U.S.C. §§ 2000e to 2000e-16 (Supp. V 1981).

4. 29 U.S.C. §§ 621-634 (1976).

5. 29 U.S.C. § 206(d) (1976).

6. *See, e.g.*, Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466, 471-82 (1983).

7. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979).

8. *Id.*

9. For criticism by legal scholars, see generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *supra* note 7; Pierce, Mann & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1983); Summers, *supra* note 1; Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22D ANNUAL CONF. ON LABOR 171 (1970); Comment, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *Termination of the At Will Employee: The General Rule and the Wisconsin Rule*, 65 MARQ. L. REV. 637 (1982); Comment, *Employment at Will: When Must an Employer Have Good Cause for Discharging an Employee?*, 48 MO. L. REV. 113 (1983); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

10. 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982).

11. California recognizes an implied covenant of good faith and fair dealing in employment relationships. *Id.* at 1318. *See also* cases cited at note 14 *infra*.

Discrimination in Employment Act (ADEA).<sup>12</sup> They recovered \$1.9 million in damages and \$400,000 in attorneys' fees.<sup>13</sup> At least twenty-seven states<sup>14</sup> have allowed causes of action for wrongful discharges, and the ero-

12. 29 U.S.C. §§ 621-634 (1976).

13. 672 F.2d at 1315.

14. California: *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 172, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 841 (1980); *Adelson v. Regents of Univ. of Cal.*, 128 Cal. App. 3d 891, 895, 180 Cal. Rptr. 676, 678 (1982); *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917, 922 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 450, 168 Cal. Rptr. 722, 726 (1980); *Hepp v. Lockheed-Cal. Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978); *Rabago-Alvarez v. Dart Indus.*, 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222, 224 (1976); *Drzewiecki v. H & R Block*, 24 Cal. App. 3d 695, 703, 101 Cal. Rptr. 169, 173 (1972); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 797, 13 Cal. Rptr. 769, 772 (1961); *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959); *Miller & Estes, Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65 (1983). Connecticut: *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 480, 427 A.2d 385, 386 (1980); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, —, 429 A.2d 492, 493 (1980). Florida: *Chatelier v. Robertson*, 118 So. 2d 241, 244 (Fla. 1960). Idaho: *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 332, 563 P.2d 54, 57 (1977). Illinois: *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 140, 421 N.E.2d 876, 878 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 189, 384 N.E.2d 353, 357 (1978); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1025, 366 N.E.2d 1145, 1146 (1977); *Grove & Gary, Employment At Will in Illinois: Implications and Anticipations for the Practitioner*, 31 DE PAUL L. REV. 359 (1983). Indiana: *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973). Kansas: *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 497, 630 P.2d 186, 192 (1981); *Comment, Limiting the Employer's Absolute Right of Discharge: Can Kansas Courts Meet the Challenge?*, 29 U. KAN. L. REV. 267 (1981). Louisiana: *Griffith v. Sollay Found. Drilling*, 373 So. 2d 979, 982 (La. 1979). Maine: *Terrio v. Millenocket Community Hosp.*, 379 A.2d 135, 137 (Me. 1977). Maryland: *Adler v. American Standard Corp.*, 290 Md. 615, 619, 432 A.2d 464, 467 (1981). Massachusetts: *Gram v. Liberty Mutual Ins. Co.*, 1981 Mass. Adv. Sh. 2287, —, 429 N.E. 2d 21, 29 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 101, 364 N.E.2d 1251, 1255 (1977). Michigan: *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 589, 292 N.W.2d 880, 884 (1980); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 263, 283 N.W.2d 713, 715 (1979); *Trombetta v. Detroit, Toledo, & Ronton Ry.*, 81 Mich. App. 489, 495, 265 N.W.2d 385, 388 (1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 648, 245 N.W.2d 151, 153 (1976). Minnesota: *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). Missouri: *Henderson v. St. Louis Hous. Auth.*, 605 S.W.2d 800, 803 (Mo. 1979); *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 252 (Mo. 1963). Montana: *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982); *Keneally v. Orgain*, 606 P.2d 127, 129 (Mont. 1979). New Hampshire: *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 920, 436 A.2d 1140, 1143 (1981); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 552 (1974). New Jersey: *Lally v. Copygraphics*, 85 N.J. 668, 738, 428 A.2d 1317, 1323 (1981); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 157, 443 A.2d 728, 731 (App. Div. 1982). New York: *Savodnik v. Korvettes*, 488 F.

sion of the at will doctrine probably will continue. As stated a number of years ago by Professor Corbin:

The relations between . . . employer and employee have been subject to constant evolution during the history of Anglo-American law. It is not too much to say that this is the most important and far reaching manifestation of the evolution of society, of human civilization, of the legal, social, political, and economic relations of men and women with each other. There are no longer the old relations of owner and slave. . . . [W]e are in the midst of a period in which the pot boils hardest and the process of change the fastest.<sup>15</sup>

This Article will explore the employment at will theory: its history, proposed statutory changes, and judicial limits. It will also offer suggestions to management for shaping employment policies to fit the modern interpretations of the doctrine.

## II. HISTORY

Employment at will has been a relatively recent legal development.

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Supp. 822, 826 (E.D.N.Y. 1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 462, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 197 (1982); *Chin v. American Tel. & Tel.*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. 1978), *aff'd mem.*, 70 A.D.2d 791, 416 N.Y.S.2d 160, *appeal denied*, 48 N.Y.2d 603, 421 N.Y.S.2d 1028 (1979). *But see* *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 297, 448 N.E.2d 86, 88, 461 N.Y.S.2d 232, 235-36 (1983). North Carolina: *Bennet v. Eastern Rebuilders*, 52 N.C. App. 579, 584, 279 S.E.2d 46, 49 (1981); *Beal v. K.H. Stephenson Supply Co.*, 36 N.C. App. 505, 510, 244 S.E.2d 463, 465 (1978). Oregon: *Simpson v. Western Graphics Corp.*, 293 Or. 96, —, 643 P.2d 1276, 1278 (1982); *Brown v. Transcon Lines*, 284 Or. 597, 603, 588 P.2d 1087, 1090 (1978); *Yartoff v. Democrat-Herald Publishing Co.*, 281 Or. 651, 658, 576 P.2d 356, 359 (1978); *Sabin v. Willamette W. Corp.*, 276 Or. 1083, 1088, 557 P.2d 1344, 1348 (1976); *Nees v. Hocks*, 272 Or. 210, 218, 536 P.2d 512, 515 (1975); *Speciale v. Tektronix, Inc.*, 38 Or. App. 441, 444, 590 P.2d 734, 736 (1979). Pennsylvania: *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); *Geary v. United States Steel Corp.*, 456 Pa. 171, 176, 319 A.2d 174, 178 (1974) (*dicta*); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, —, 386 A.2d 119, 120 (1978); Comment, *The Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 DUQ. L. REV. 477 (1983). South Dakota: *Goodwyn v. Sencore, Inc.*, 389 F. Supp. 824, 830 (D.S.D. 1975). Texas: *Murray Corp. v. Brooks*, 600 S.W.2d 897, 903 (Tex. Civ. App. 1980). Washington: *Saruff v. Miller*, 90 Wash. 2d 880, 886, 586 P.2d 466, 469 (1978); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977). West Virginia: *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 682 (W. Va. 1981); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 182 (W. Va. 1980); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978). Wisconsin: *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 561, —, 335 N.W.2d 834, 836 (1983).

15. 3A A. CORBIN, CORBIN ON CONTRACTS § 674 (1960), *quoted in* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 551 (1974).

Initially, an indefinite hiring was not presumed to be at will, but was considered to be of specific duration. During the fourteenth and fifteenth centuries, when labor was scarce, a hiring without any particular time limit was considered to be for one year; the master could not dismiss the servant without "reasonable cause."<sup>16</sup> In the eighteenth and nineteenth centuries, the English rule provided that unless expressed to the contrary, a term of employment was presumed to be for one year.<sup>17</sup> A number of American jurisdictions followed this rule.<sup>18</sup> Others held that the period of payment designated the term of employment; thus, if payment was monthly, the employment contract was monthly and renewable each month as the relationship continued.<sup>19</sup>

It was not until the middle of the nineteenth century that American jurisdictions began to hold that an indefinite hiring was considered an employment terminable at will. As outlined by Horace Wood in his treatise on master-servant relations:

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.<sup>20</sup>

This view soon became the law in almost all states.<sup>21</sup> Since even "perma-

16. See 1 W. BLACKSTONE, COMMENTARIES 425-26 (1765).

17. See *Fawcett v. Cash*, 110 Eng. Rep. 1026 (K.B. 1834); *The King v. Inhabitants of Hampreston*, 101 Eng. Rep. 116 (K.B. 1793).

18. See, e.g., *Adams v. Fitzpatrick*, 125 N.Y. 124, 128, 26 N.E. 143, 145 (1891).

19. See *Moline Lumber Co. v. Harrison*, 128 Ark. 260, 263, 194 S.W. 25, 26 (1917); *Pinckney v. Talmage*, 32 S.C. 364, 365, 10 S.E. 1083, 1084 (1890).

20. H. WOOD, MASTER AND SERVANT § 134 (1877), *questioned in Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 601-09, 292 N.W.2d 880, 886-90 (1980).

21. See *Bender Ship Repair v. Stevens*, 379 So. 2d 594, 595 (Ala. 1980); *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 322, 620 P.2d 699, 701 (1980); *Givens v. Hixson*, 275 Ark. 370, 372, 631 S.W.2d 263, 264 (1982); *Justice v. Stanley Corp.*, 35 Colo. App. 1, —, 530 P.2d 984, 985 (1974); *Somers v. Cooley Chevrolet Co.*, 146 Conn. 627, 629, 153 A.2d 426, 428 (1959); *Haney v. Laub*, 312 A.2d 330, 332 (Del. 1973); *Ivy v. Army Times Publishing Co.*, 428 A.2d 831, 832 (D.C. 1981); *Roy Jorgensen Assoc., Inc. v. Deschenes*, 409 So. 2d 1188, 1190 (Fla. Dist. Ct. App. 1982); *Wilkinson v. Trust Co. of Ga. Assoc.*, 128 Ga. App. 473, 475, 197 S.E.2d 146, 148 (1973); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 332, 563 P.2d 54, 57 (1977); *Mildfelt v. Lair*, 221 Kan. 557, 563, 561 P.2d 805, 811 (1977); *Production Oil Co. v. Johnson*, 313 S.W.2d 411, 413 (Ky. 1958); *Pechon v. National Corp. Serv.*, 234 La. 397, 406, 100 So. 2d 213, 216 (1958); *Blaisdell v. Lewis*, 32 Me. 515, 516 (1851); *Chesapeake & Potomac Tel. Co. v. Murray*, 198 Md. 526, 532, 84 A.2d 870, 873 (1951); *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962); *Rape v. Mobile O.R. Ry.*, 136 Miss. 38, 39, 100 So. 585, 588 (1924); *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. 1981) (en banc); *Alford v. Life-*

ment" or "lifetime" employment was inherently indefinite, the courts held it could be ended at will by either party.<sup>22</sup> Even when employees claimed that an employer had specifically promised to terminate only for proper cause, the courts would find employment at will. They reasoned that such promises must be supported by consideration separate from the employee's obligation to work.<sup>23</sup> Employers were free to terminate employees for good reason, bad reason, or no reason.<sup>24</sup>

The rule is not based on contract principles, for the employer-employee relation is that of principal to agent.<sup>25</sup> An agency is formed by con-

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Savers, Inc., 210 Neb. 441, 442, 315 N.W.2d 260, 261 (1982); Jorgensen v. Pennsylvania Ry., 25 N.J. 541, 551, 138 A.2d 24, 28 (1958); Garza v. United Child Care, Inc., 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct. App. 1975); Parker v. Borock, 5 N.Y.2d 156, 160, 156 N.E.2d 297, 298, 182 N.Y.S.2d 577, 582 (1959); Presnell v. Pell, 298 N.C. 715, 722, 260 S.E.2d 611, 616 (1979); Wood v. Buchanan, 72 N.D. 216, 219, 5 N.W.2d 680, 682 (1942); Brown v. Toledo Mental Hygiene Clinic, 63 Ohio App. 2d 192, 194, 410 N.E.2d 1262, 1264 (1978); Singh v. City Serv. Oil Co., 554 P.2d 1367, 1369 (Okla. 1976); Thomas v. Bourdette, 45 Or. App. 195, 199, 608 P.2d 178, 180 (1980); Geary v. United States Steel Corp., 456 Pa. 171, 175, 319 A.2d 174, 177 (1974); Oken v. National Chain Co., — R.I. —, —, 424 A.2d 234, 235 (1981); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, —, 278 S.E. 607, 609 (1981); Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981); Hans v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. Civ. App. 1982); United Servs. Auto. Ass'n v. Tull, 571 S.W.2d 551, 553 (Tex. Civ. App. 1978); Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979); Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979); Norfolk & S. Ry. v. Harris, 190 Va. 966, 976, 59 S.E.2d 110, 113 (1950); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977); Kovachik v. American Auto. Ass'n, 5 Wis. 2d 188, 191, 92 N.W.2d 254, 255 (1958); Luken v. Goit, 430 P.2d 607, 611 (Wyo. 1967).

22. See *Page v. Carolina Coach Co.*, 667 F.2d 1156, 1158 (4th Cir. 1982); *Littell v. Evening Star Newspaper Co.*, 120 F.2d 36, 37 (D.C. Cir. 1941); *Russell & Axon v. Handshoe*, 176 So. 2d 909, 912 (Fla. 1965); *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135, 137 (Me. 1977); *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 294, 266 N.W. 872, 874 (1936); *Rape v. Mobile O.R. Ry.*, 136 Miss. 38, 39, 100 So. 585, 586 (1924); *Gonzales v. United States Southwest Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979); *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct. App. 1975); *Still v. Lance*, 279 N.C. 254, 259, 82 S.E.2d 403, 406 (1971); *Gainey v. Coker's Pedigreed Seed Co.*, 227 S.C. 200, 205, 87 S.E.2d 486, 489 (1955); *Orsini v. Trojan Steel Co.*, 219 S.C. 272, 276, 64 S.E.2d 878, 879 (1951); *Weber v. Perry*, 201 S.C. 8, 12, 21 S.E.2d 193, 194 (1942); *Smith v. Beloit Corp.*, 40 Wis. 2d 550, 554, 162 N.W.2d 585, 587 (1968); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 392, 153 N.W.2d 587, 589 (1967).

23. See note 67 and accompanying text *infra*.

24. See note 1 and accompanying text *supra*. This doctrine had a constitutional basis during the substantive due process era. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908) (both overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)).

25. See RESTATEMENT (SECOND) OF AGENCY § 2 comment a, § 25 (1958) (employer is the principal, employee is the agent). The contractual obligation arises

sent and it is not necessarily a contract which requires consideration.<sup>26</sup> The relationship's commencement and duration depend upon a mutual and voluntary agreement of the parties.<sup>27</sup> With few exceptions, the principal or agent has the *power* to terminate the relationship, even when there is no *right* to do so.<sup>28</sup> Both parties are required to work in close association for the principal's benefit<sup>29</sup> and owe mutual fiduciary duties.<sup>30</sup> Either should be free to terminate the relationship at will.

The employment at will doctrine was compatible with American commerce in the nineteenth and early twentieth centuries.<sup>31</sup> Most businesses were relatively small, and close relationships existed between masters and servants.<sup>32</sup> There was also a preference for freedom of contract. If an employee wished to prevent termination at will, he needed to seek contractual protection from his employer.<sup>33</sup> This rarely occurred because most jobs were not founded upon contracts, and unequal bargaining power existed

only once wages or services have been accepted. Otherwise, the refusal to perform or accept services is not a breach of contract, but the exercise of a reserved power to terminate the relationship. See 1 A. CORBIN, *supra* note 15, § 96.

26. "While the agency relation is not necessarily contractual in nature, it is fundamentally a consensual relationship, in that it requires some manifestation by the principal that he wishes the agent to act for him and some indication of the agent's consent to act for the principal." W. SELL, *AGENCY* § 1, at 1 (1975) (footnotes omitted). See also *RESTATEMENT (SECOND) OF AGENCY* §§ 15, 16 (1958).

27. *RESTATEMENT (SECOND) OF AGENCY* § 1 comment a, § 15 comments a, b (1958).

28. According to the *Restatement (Second) of Agency*:

The principal has power to revoke and the agent has power to renounce, although doing so is in violation of a contract between the parties and although the authority is expressed to be irrevocable. A statement in a contract that the authority cannot be terminated by either party is effective only to create liability for its wrongful termination.

*RESTATEMENT (SECOND) OF AGENCY* § 118 comment b (1958). See also W. SELL, *AGENCY* § 218 (1975). A power given an agent by a principal as security for sufficient consideration cannot be revoked at the will of the creator. *RESTATEMENT (SECOND) OF AGENCY* §§ 138, 139 (1958). For example, a mortgagee is often given a power to sell property if the mortgagor defaults in payment. This authorization cannot be revoked at the mortgagor's will. W. SELL, *supra*, § 229.

29. *RESTATEMENT (SECOND) OF AGENCY* §§ 376-398 (1958).

30. *Id.* §§ 376-398, 432-458; H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 4 (1979); W. SELL, *AGENCY* § 2 (1975).

31. See Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 *UMKC L. REV.* 189 (1983).

32. For a discussion of the evolution of American industry from small craft businesses to mass production enterprises, see B. Commons, *Industrial Stages, Classes and Organizations*, in 3 *DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 19, 30-58 (1910).

33. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908) (both overruled in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)).



between employers and employees.<sup>34</sup> There was, however, little call for change; most workers were relatively mobile and opportunities could always be found elsewhere in the growing nation. It has only been in the last ten years, as mobility and opportunities have declined, that employment at will has been seriously challenged. Close relationships between business owners and employees often do not exist in our modern world of multinational corporations.<sup>35</sup> The consensual nature of the employer-employee status is absent.

Most industrial nations have protected job security. France, Germany, Great Britain, and Sweden have laws against unjust dismissals.<sup>36</sup> The United States stands almost alone in retaining the employment at will doctrine. In 1982, the International Labor Organization passed the Convention and Recommendation on Termination of Employment at the Initiative of the Employer.<sup>37</sup> The Convention committed industrial employers to safeguard workers rights before termination. The United States was one of the few countries that vetoed the document.

### III. STATUTES

No legislature has adopted an unjust dismissal statute, but several have considered them. California<sup>38</sup> and Montana<sup>39</sup> have codified the general rule that employment is terminable at will absent a contract for a definite period. South Dakota, however, has abrogated the at will doctrine. Its law states that a "servant is presumed to be 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 one year."<sup>40</sup> The employer has the burden of proving grounds for termination, such as habitual neglect or willful breach of duty, or continued incapacity.<sup>41</sup>

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34. See, e.g., *Plant v. Woods*, 176 Mass. 492, 504, 57 N.E. 1011, 1015 (Holmes, J., dissenting); SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 131 (1969); Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 181-87 (1931); Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826-29 (1980).

35. Cf. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 66, 416 A.2d 505, 511 (1980) (everyone works for either big government or big business).

36. Summers, *supra* note 1, at 508-519.

37. Convention and Recommendation on Termination of Employment at the Initiative of the Employer, as adopted by the Int'l Labor Organization, June 22, 1982, reprinted in *The Employment-At-Will Issue*, 111 LAB. REL. REP. (BNA) No. 23, at 72-74 (Nov. 22, 1982).

38. The law provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." CAL. LABOR CODE § 2922 (West 1971).

39. See MONT. CODE ANN. § 39-2-503 (1981).

40. S.D. CODIFIED LAWS ANN. § 60-1-3 (1978).

41. *Goodwyn v. Sencore, Inc.*, 389 F.Supp. 824, 829 (D.S.D. 1975).

In 1980, the Corporate Democracy Act<sup>42</sup> was introduced into the House of Representatives. Title IV, entitled "Rights of Employees," proposed to amend the National Labor Relations Act (NLRA).<sup>43</sup> Section 1 of the NLRA would insure that workers would not be deprived of "employment on the basis of their having exercised their constitutional, civil, or other legal rights, or because of their refusal to engage in unlawful conduct as a condition of employment."<sup>44</sup> Section 7 would grant employees the "right to be secure in their employment from discharge or adverse action with respect to the terms or conditions of their employment except for just cause."<sup>45</sup> An additional subsection would have made it "an unfair labor practice for an employer to discharge or otherwise discriminate against an employee except for just cause."<sup>46</sup> The bill died in committee at the end of the Ninety-sixth Congress.<sup>47</sup>

Several states are considering legislation that would limit the employment at will doctrine. Perhaps the most comprehensive proposal is before the Michigan House Judiciary Committee.<sup>48</sup> It would prohibit discharges without just cause,<sup>49</sup> thereby protecting employees not secured by collective bargaining, civil service, or tenure.<sup>50</sup> The bill exempts confidential and managerial employees, and businesses employing ten or fewer workers.<sup>51</sup> Employers would be required to notify employees within fifteen days of the reasons for discharge and to inform the employee of the right to request

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42. H.R. 7010, 96th Cong., 2d Sess., 126 CONG. REC. 7489 (1980), *reprinted in* The Employment-At-Will Issue, 111 LAB. REL. REP. (BNA) No. 23, at 7-8 (Nov. 22, 1982).

43. 29 U.S.C. §§ 151-168 (1976).

44. H.R. 7010, § 401(c).

The term 'just cause' shall be defined in accordance with the common law of labor contracts established pursuant to section 301 of the National Labor Relations Act, except that such term shall not include (A) the exercise of constitutional, civil, or legal rights; (B) the refusal to engage in unlawful conduct as a condition of employment; (C) the refusal to submit to polygraph or other similar tests; or (D) the refusal to submit to a search of someone's person or property, other than routine inspections, conducted by an employer without legal process.

*Id.* § 401(b).

45. *Id.* § 401(d).

46. *Id.* § 401(f).

47. For a comprehensive federal statutory proposal regulating the discharges of at will employees, see Jenkins, *supra* note 6, at 512-24.

48. H.B. 5892, 81st Legis., Reg. Sess. (introduced June 17, 1982), *reprinted in* The Employment-At-Will Issue, 111 LAB. REL. REP. (BNA) No. 23, at 66 (Nov. 22, 1982).

49. *Id.* § 3(1). The employee must work for an employer for not less than 15 hours per week for at least six months.

50. *Id.* § 3(1)-(3).

51. *Id.* § 4(1).

arbitration.<sup>52</sup> The worker could challenge the termination before the Michigan Employment Relations Commission by filing a written complaint within thirty days after receiving the discharge notice.<sup>53</sup> At the request of the employee, the Commission would be required to appoint a mediator to resolve the dispute.<sup>54</sup> If settlement did not occur within thirty days, the employee would have a right to arbitration.<sup>55</sup> Parties would share arbitration costs equally, and the arbitrator would rule within thirty days after a hearing was set.<sup>56</sup> The arbitrator could sustain the discharge, reinstate the employee with no back pay, partial back pay, full back pay, or severance pay.<sup>57</sup> The award would be final, binding, and enforceable in court.<sup>58</sup>

Some workers have used existing state and federal statutes as bases to set aside discharges for improper cause. In *Cancellier v. Federated Department Stores*,<sup>59</sup> the plaintiffs joined a tort law claim of improper discharge<sup>60</sup> with an alleged violation of the Age Discrimination in Employment Act (ADEA).<sup>61</sup> This allowed them to recover liquidated, compensatory, and punitive damages.<sup>62</sup> These statutes, however, offer only ancillary protec-

52. *Id.* § 4(2).

53. *Id.* § 5(a). The limit is extended to 45 days if an employer meets the statute's posting requirements but fails to properly notify the employee of the arbitration rights. *Id.* § 5(2). Absent notice or posting, an employee would have one year from the date of discharge to file a complaint. *Id.* § 5(3).

54. *Id.* § 6(1).

55. *Id.* § 6(2), (3).

56. *Id.* §§ 8(1), 11(1). The parties may agree to extend the limit. *Id.* § 11(1).

57. *Id.* § 11(2).

58. *Id.* § 12. The circuit court is limited to determining whether: the arbitrator exceeded his jurisdiction, the award is unsupported by the evidence, or the award was procured by fraud or collusion. *Id.* § 13.

59. 672 F.2d 1312 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982).

60. Traditional state tort theory can be a workable approach. For example, in *Geist v. Martin*, 675 F.2d 859 (7th Cir. 1982), the plaintiff alleged intentional infliction of emotional distress. She claimed that her husband, a general agent of the defendant insurance company, had been discharged in retaliation for exercising loan privileges. The court found that the complaint stated a state law cause of action. *Id.* at 862. *See also* *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); *Milton v. Illinois Bell Tel. Co.*, 101 Ill. App. 3d 75, 79, 427 N.E.2d 829, 832 (1982); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145, 355 N.E.2d 315, 318 (1976); *McCullough v. Certain Teed Prods. Corp.*, 70 A.D.2d 771, 774, 417 N.Y.S.2d 353, 354 (1979). *But see* *Rogers v. IBM*, 500 F. Supp. 867, 870 (W.D. Pa. 1980); *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234, 1239 (S.D.N.Y. 1979); *O'Neill v. ARA Servs.*, 457 F. Supp. 182, 188 (E.D. Pa. 1978); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 56, 551 P.2d 779, 782 (1976).

61. 29 U.S.C. §§ 621-634 (1976).

62. The ADEA allows liquidated damages, limited to unpaid wages owed, for willful violations. *Id.* § 626(b). Most courts have not allowed compensatory or punitive damages under the ADEA. *See, e.g.*, *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Vazquez v. Eastern Air Lines*, 579 F.2d 107, 112

tion, for no legislation directly addresses wrongful discharges. Management groups have made little effort to support legislation protecting employees from wrongful discharge because this could erode their present discretion. Promoting statutes curbing the employment at will doctrine has not been a top priority for organized labor.<sup>63</sup> Most unions already have protected their members with collective bargaining agreements, and they have other more pressing legislation needs. Therefore, the courts are the key to reforming the employment at will doctrine.<sup>64</sup>

#### IV. CONTRACT RECOVERY FOR WRONGFUL DISCHARGE

##### A. *Express and Implied Contracts*

A majority of courts have presumed that an indefinite or permanent hiring is terminable at the will of either party. Even though employment is primarily an agency relationship, the courts have analyzed the employee's status in contractual terms.<sup>65</sup> They have been unwilling to find express or implied contracts not to terminate without proper cause for lack of mutuality of obligation.<sup>66</sup> Absent a specific contract clause preventing termina-

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(1st Cir. 1978); *Murphy v. American Motors Sales Corp.*, 570 F.2d 1226, 1227 (5th Cir. 1978); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). By combining a wrongful discharge tort action with an ADEA claim, a plaintiff may recover attorney's fees, as well as compensatory and punitive damages. *See* 29 U.S.C. § 626(b) (1976). In *Cancellier*, the plaintiffs were awarded \$1.9 million, plus attorneys' fees of \$400,000. 672 F.2d at 1315.

63. *See* The Employment-At-Will Issue, 111 LAB. REL. REP. (BNA) No. 23, at 25-26 (Nov. 22, 1982) (statement of Clyde Summers, Fordham Professor of Law, University of Pennsylvania).

64. The New York Court of Appeals recently held that despite the deficiencies of the employment at will rule, the decision to change it should be left to the legislature. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 300, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 236 (1983). *See also* *Gil v. Metal Serv. Corp.*, 412 So. 2d 706, 708 (La. Ct. App.), *cert. denied*, 414 So. 2d 379 (La. 1982); *Dockery v. Lamphaet Table Co.*, 36 N.C. App. 293, 300, 244 S.E.2d 272, 277, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981); *Hans v. National Living Centers, Inc.*, 633 S.W.2d 674, 676 (Tex. Civ. App. 1982). This approach overlooks the lack of legislative response to the problem. With little interest in reform by any special interest groups, the prospect of legislative change seems dim. The courts created the employment at will rule, they are free to abrogate it.

65. *See* Comment, *Employment at Will: When Must an Employer Have Good Cause for Discharging an Employee?*, 48 MO. L. REV. 113, 117 (1983).

66. *See* *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 838 (7th Cir. 1980); *United Steelworkers v. University of Ala.*, 599 F.2d 56, 60 (5th Cir. 1979); *Littel v. Evening Star Newspaper Co.*, 120 F.2d 36, 37 (D.C. Cir. 1941); *Chatelier v. Robertson*, 118 So. 2d 241, 244 (Fla. Ct. App. 1960); *Collins v. Parsons College*, 203 N.W.2d 594, 598 (Iowa 1973); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895, 568 P.2d 764, 769 (1977) (en banc).

tion, an employee can end his employment at any time and for any reason. Many courts have refused to bind employers to implied promises not to discharge without just cause since there is no mutual obligation on the part of employees. Therefore, employees must prove consideration, apart from the promise to serve, before employers are required to continue employment.<sup>67</sup>

Even when an employer promises to discharge only for just cause, he may successfully assert a statute of frauds defense. Except for collective bargaining agreements, most employment relationships are based on oral understandings. In many states, oral agreements are unenforceable if their terms exceed one year.<sup>68</sup> When an employee claims that there is a binding promise not to terminate without proper cause, the relationship would normally be intended to last for more than one year. Thus, some courts refuse to enforce oral agreements on the ground that they violate the statute of frauds.<sup>69</sup>

An increasing number of jurisdictions are rejecting the strict contractual approach. They have made the presumption of hiring at will a rule of construction rather than an interpretation of law.<sup>70</sup> The presumption puts

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67. See *Ryan v. J.C. Penney Co.*, 627 F.2d 836, 838 (7th Cir. 1980); *United Steel Workers v. University of Ala.*, 599 F.2d 56, 60 (5th Cir. 1979); *Sartin v. Columbus Util. Comm'n*, 421 F. Supp. 393, 401 (D. Miss. 1976); *Foster Wheeler Corp. v. Zell*, 250 Ala. 146, 148, 33 So. 2d 255, 256 (1948); *Collins v. Parsons College*, 203 N.W.2d 594, 598 (Iowa 1973); *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305, 311 (Iowa 1971); *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 303, 266 N.W. 872, 874 (1936); *Hindle v. Morrison Steel Co.*, 92 N.J. Super. 75, 83, 223 A.2d 193, 196 (App. Div. 1966); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895, 568 P.2d 764 (1977) (en banc); *Smith v. Beloit Corp.*, 40 Wis. 2d 550, 162 N.W.2d 585, 587 (1968); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 394, 153 N.W.2d 587, 590 (1967); see also Comment, *supra* note 34, at 1819-20.

68. See, e.g., CAL. CIV. CODE § 1624 (West 1973); ILL. ANN. STAT. ch. 59, § 1 (Smith-Hurd 1973); IOWA CODE § 622.32 (1950); KY. REV. STAT. ANN. § 371.010 (Bobbs-Merrill 1972); MICH. STAT. ANN. § 26.922 (Callaghan 1982); NEB. REV. STAT. § 36-202 (1978); N.Y. GEN. OBLIG. LAW § 5-701 (McKinney 1978). "Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance." RESTATEMENT (SECOND) OF CONTRACTS § 130(1)(1979). See also RESTATEMENT (SECOND) OF AGENCY § 468 (1958).

69. See *Weisse v. Engelhard Minerals & Chem. Corp.*, 571 F.2d 117, 119 (2d Cir. 1978); *Swafford Ice Cream v. Sealtest*, 252 Ark. 1181, 1187, 483 S.W.2d 202, 205 (1972); *Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co.*, 344 S.W.2d 639, 642 (Mo. Ct. App. 1961).

70. The independent consideration requirement should be treated as a rule of construction. "[A] contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary." *Drzewiecke v. H & R Block*, 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr.

the burden on the employee to convincingly demonstrate that an employer has agreed to limit discharges without proper cause. If the employee's mere promise to render services is sufficient consideration to imply a covenant not to discharge without proper cause, then every employment relationship would be terminable only for just reasons. By treating the doctrine as a rebuttable inference, however, an employee would be allowed to prove an agreement to discharge for cause without always having to show independent consideration. Courts should not mechanically and arbitrarily construe employment agreements; they should treat them as ordinary contracts, and attempt to give effect to the parties' intentions as demonstrated by the language used, the contract purposes, and the circumstances under which the agreement was made.<sup>71</sup> Separate consideration should not be the sole determinant of whether an agreement exists to terminate only for just cause. Indeed, requiring separate consideration is contrary to the general contract principle that courts should not inquire into the adequacy of consideration.<sup>72</sup> As stated by Professor Corbin: "A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises."<sup>73</sup> There is no reason why an employee's services cannot bind an employer to pay wages and to refrain from wrongful termination.<sup>74</sup>

The courts have begun to look at a variety of factors to determine whether an employer is contractually bound to discharge an employee only for cause. These factors include: the employment duration,<sup>75</sup> employee

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169, 174 (1972). *See* Pugh v. See's Candies, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 602, 440 N.E.2d 998, 1002 (1982); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983).

71. *See* Pugh v. See's Candies, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980); Annot., 60 A.L.R.3d 226, 232 (1974).

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1979); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 4-3, at 136-39 (2d ed. 1977).

73. 1 A. CORBIN, *supra* note 15, § 125, at 535-36.

74. *See* Pugh v. See's Candies, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 926 (1981); Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 602, 440 N.E.2d 998, 998 (1982); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 587, 292 N.W.2d 880, 885 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983).

75. Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1318 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982); Foley v. Community Oil Co., 64 F.R.D. 561, 564 (D.N.H. 1974); Pugh v. See's Candies, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 924 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 448, 168 Cal. Rptr. 722, 728 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 105, 364 N.E.2d 1251, 1258 (1977). Other courts have given no weight to the length of time an employee has worked. *See, e.g.,* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.) (over 28 years), *cert. denied*, 379 U.S. 914 (1964); Mau v.

commendations and promotions,<sup>76</sup> the employer's failure to criticize or discipline,<sup>77</sup> oral assurances of continued employment made at hiring or during employment,<sup>78</sup> past company policies,<sup>79</sup> policy and practice handbooks,<sup>80</sup> any grievance procedure,<sup>81</sup> whether an employee has given up a tenured or permanent position,<sup>82</sup> the accrued employee benefits,<sup>83</sup> and

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Omaha Nat'l Bank, 207 Neb. 308, 312, 299 N.W.2d 147, 147 (1980) (same); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 895, 568 P.2d 764, 769 (1977) (17 years).

76. Pugh v. See's Candies, 116 Cal. App. 3d 311, 316, 171 Cal. Rptr. 917, 922 (1981); Savodnik v. Korvettes, 488 F. Supp. 822, 824 (E.D.N.Y. 1980).

77. Pugh v. See's Candies, 116 Cal. App. 3d 311, 317, 171 Cal. Rptr. 917, 922 (1981).

78. *Id.*; Rabago-Alvarez v. Dart Indus., 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222, 225 (1976); Terrio v. Millenocket Community Hosp., 379 A.2d 135, 137 (Me. 1977); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 584, 292 N.W.2d 880, 884 (1980); Sarruf v. Miller, 90 Wash. 2d 880, 884, 586 P.2d 466, 469 (1978).

79. Hepp v. Lockheed-Cal. Co., 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978) (cause of action allowed laid off employee not rehired in accordance with company's established policy to fill openings with persons laid off within the past two years); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 620, 292 N.W.2d 880, 892 (1980) (discriminatory enforcement of policies).

80. Wagner v. Sperry Univac, 458 F. Supp. 505, 520 (E.D. Pa. 1978); Adelson v. Regents of Univ. of Cal., 128 Cal. App. 3d 891, 896, 180 Cal. Rptr. 676, 679 (1982); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 585, 292 N.W.2d 880, 884 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983); Arie v. Intertherm, Inc., 648 S.W.2d 142, 153 (Mo. Ct. App. 1983); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982); Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125, —, 645 P.2d 1381, 1384 (Ct. App.), *cert. denied*, 98 N.M. 336 (1982); Simpson v. Western Graphics Corp., 293 Or. 96, —, 643 P.2d 1276, 1279 (1982); Yartoff v. Democrat Herald-Publishing Co., 281 Or. 651, 657, 476 P.2d 356, 359 (1978); Sabin v. Willamette W. Corp., 276 Or. 1083, 1087, 557 P.2d 1344, 1345 (1976). Many courts, however, find that policy manuals and employment procedures do not imply a contract not to terminate without just cause. *See, e.g.*, Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 295 (8th Cir. 1982); Rogers v. IBM, 500 F. Supp. 867, 869 (W.D. Pa. 1980); McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); Heideck v. Kent Gen. Hosp., 446 A.2d 1095, 1096 (Del. 1982); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 58, 551 P.2d 779, 781 (1976); Aldahir v. Mobil Oil Exploration, 420 So. 2d 714, 715 (La. Ct. App. 1982); Williams v. Delta Haven, Inc., 416 So. 2d 637, 638 (La. Ct. App. 1982); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 314, 299 N.W.2d 147, 151 (1980); Williams v. Biscuitville, Inc., 40 N.C. App. 405, 408, 253 S.E.2d 18, 20, *cert. denied*, 297 N.C. 457, 256 S.E.2d 810 (1979); Parker v. United Airlines, 32 Wash. App. 722, 729, 649 P.2d 181, 183 (1982).

81. Cleary v. American Airlines, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 625 (Minn. 1983).

82. McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); Chatterlier v. Robertson, 118 So. 2d 241, 244 (Fla. 1960); Collins v. Parsons College, 203

the general practice of the employer's trade or industry.<sup>84</sup> These circumstances may prove that an employer has expressly or impliedly promised not to terminate an employee without just cause.<sup>85</sup>

Some courts have applied the statute of frauds defense restrictively in employment contexts. In *Rowe v. Noren Pattern & Foundry Co.*,<sup>86</sup> the court refused to apply the statute of frauds to an employer's oral promise not to terminate an employee without just cause. The issue was not whether the parties intended to extend the employment beyond one year, but whether the contract may have been completed in less than one year. The court concluded that the agreement was capable of being completed within a year because the employer could have terminated the plaintiff for just cause within that time.<sup>87</sup> The court also suggested that promissory estoppel or detrimental reliance theories could completely circumvent the statute of frauds.<sup>88</sup>

The new approach was taken in *Weiner v. McGraw-Hill, Inc.*<sup>89</sup> An employee claimed that upon hiring he was assured by company agents that the firm would not terminate employees without just cause. The job application stated that employment would be subject to the provision of the company's "handbook on personnel policies and procedures."<sup>90</sup> The handbook

N.W.2d 594, 598 (Ia. 1973); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 197 (1982).

83. *Lemmon v. Cedar Point, Inc.*, 406 F.2d 94, 96 (6th Cir. 1969); *Savodnik v. Korvettes*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980); *Haney v. Laub*, 312 A.2d 330, 333 (Del. 1973); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 259, 283 N.W.2d 713, 716 (1979); *Eib v. Federal Reserve Bank*, 633 S.W.2d 432, 435 (Mo. Ct. App. 1982); *Langdon v. Saga Corp.*, 569 P.2d 524, 528 (Okla. Ct. App. 1977).

84. *Hepp v. Lockheed-Cal. Co.*, 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978). See also *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 893, 568 P.2d 764, 768 (1977) (no contract to discharge only for just cause, but court looked to custom and usage to determine whether such an agreement existed).

85. The courts should also consider written and oral negotiations, business custom and usage, the situations of the parties, the nature of the employment, and the special circumstances of the case. See Annot., 60 A.L.R.3d 216 (1974).

86. 91 Mich. App. 254, 283 N.W.2d 713 (1979).

87. *Id.* at 257, 283 N.W.2d at 715. See also *Mercer v. C.A. Robert Co.*, 570 F.2d 1232, 1236 (5th Cir. 1978); *Young v. A-T-O, Inc.*, 484 F. Supp. 626, 628 (E.D. Mo. 1980); *White Lighting Co. v. Wolfson*, 48 Cal. 2d 336, 341, 438 P.2d 345, 349, 66 Cal. Rptr. 697, 700 (1968); *Mildfelt v. Lair*, 221 Kan. 557, 562, 561 P.2d 805, 811 (1977); *Touissant v. Blue Cross & Blue Shield*, 408 Mich. 579, 612, 292 N.W.2d 880, 891 (1982); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 466, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 197 (1982); *Hardin Assoc., Inc. v. Brunett*, 613 S.W.2d 4, 7 (Tex. Civ. App. 1980).

88. 91 Mich. App. at 257, 283 N.W.2d at 715. See also *J. CALAMARI & J. PERILLO*, *supra* note 72, § 19-48, at 736-38.

89. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

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



stated that "[t]he company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed."<sup>91</sup> The employee contended that based on these undertakings, he had left his former job, forfeiting accrued fringe and salary benefits. After eight years, the company discharged the plaintiff, contending that it was free to do so under the employment at will doctrine. The New York Court of Appeals found the evidence sufficient to support a contract not to terminate without just cause.<sup>92</sup>

The court noted that its task was not to search for mutuality of obligation, which is not essential to a binding contract, but to find consideration, a fundamental requisite for any agreement.<sup>93</sup> Consideration could consist of a benefit to the promisor or a detriment to the promisee, and its value was not crucial so long as it was acceptable to the promisee.<sup>94</sup> The court concluded that there was sufficient evidence of a contract because: the plaintiff had been induced to leave his first employer by the assurance that the company would not dismiss him without cause, the assurance was incorporated in the employment application, the plaintiff rejected offers of other employment in reliance on the assurance, and the company had applied the just cause provisions of the handbook and policy manuals to other employees.<sup>95</sup> Carefully scrutinizing all the circumstances surrounding the employment relation should lead more courts to find implied promises not to terminate without just cause. Ordinary contract damages would be recovered, including injury from the breach and expectation damages from the performance. Such damage awards have been substantial.<sup>96</sup>

### B. *Promissory Estoppel*

An employee who is unable to prove a contract might proceed on the theory of promissory estoppel, based on section 90 of the Restatement (Second) of Contracts.<sup>97</sup> For example, in *Grouse v. Group Health Plan, Inc.*,<sup>98</sup> the

91. *Id.* at 460-61, 443 N.E.2d at 442, 457 N.Y.S.2d at 194.

92. *Id.* at 463-64, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. *But cf.* *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 297, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 236 (1983) (rejected tort of abusive discharge and implied promise of good faith dealing).

93. 57 N.Y.2d at 464, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

94. *Id.* at 465-66, 443 N.E.2d at 444, 457 N.Y.S.2d at 196.

95. *Id.*, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

96. *See, e.g.*, *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980) (\$300,000 award for breach of implied agreement not to terminate without just cause). For a discussion of damages recoverable in a contract action, see J. CALAMARI & J. PERILLO, *supra* note 72, §§ 14-1 to 14-36.

97. "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 enforce-

plaintiff accepted a position as a pharmacist, then quit his former job and turned down another offer. The defendant refused to hire the plaintiff when it became dissatisfied with references that were not checked until after the plaintiff was extended an offer. The court applied the principle of promissory estoppel and held that a cause of action for damages arose even though the defendant had repudiated the contract prior to performance.<sup>99</sup> The court also found that the plaintiff would have had a cause of action even if he had been wrongfully terminated after employment had begun.<sup>100</sup> In promissory estoppel cases, recovery is limited to reliance injury "as justice requires,"<sup>101</sup> and excludes expectancy damages. Thus in *Grouse*, the damages were limited to the losses the plaintiff sustained by quitting his old job and turning down the offer of another.<sup>102</sup>

### C. Implied Covenants of Good Faith and Fair Dealing

A court may also find an implied promise by the employer not to discharge in bad faith. This approach is based on the theory that parties entering into an employment relationship promise that they will act in good faith and will deal fairly.<sup>103</sup> Courts in California,<sup>104</sup> Massachusetts,<sup>105</sup> and

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ment of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979). See also J. CALAMARI & J. PERILLO, *supra* note 72, §§ 6-1 to 6-13.

98. 306 N.W.2d 114 (Minn. 1981).

99. *Id.* at 116. See also *Scott v. Lane*, 409 So. 2d 791, 794 (Ala. 1982); *Nilsson v. Cherokee Candy & Tobacco Co.*, 639 S.W.2d 226, 228 (Mo. Ct. App. 1982). *But cf.* *Walker v. Modern Realty*, 675 F.2d 1002, 1004 (8th Cir. 1982) (no equitable modification of wrongful discharge action); *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903, 905 (Ala. 1982) (same).

100. 306 N.W.2d at 116.

101. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

102. 306 N.W.2d at 116. In *Pepsi-Cola Gen. Bottlers v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982), the court held that even though an employee demonstrated justifiable reliance by leaving a previous job based upon a promise of new employment by the company, it would award plaintiff only nominal damages plus expenses spent in reliance on the promise of the job, since the new employment would only have been at will. *Id.* at 699.

103. This duty is recognized in RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979):

The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

This theory is applied in insurance cases because of the inequality in bargaining power between the insurer and the insured. The insurer is compelled to act in good faith and deal fairly. See, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 63 Cal. App. 3d

New Hampshire<sup>106</sup> have found that justified expectations of continued employment should not be denied in bad faith. In *Fortune v. National Cash Register Co.*,<sup>107</sup> a salesman was due a large commission under company policy. Shortly after the sale, the company terminated him without paying the commission. The plaintiff had worked for the company for twenty-five years. Even though the parties' employment contract explicitly allowed either to terminate at will, the court implied a covenant of good faith and fair dealing. It found that the covenant was violated when the employer attempted to deprive the employee of compensation by terminating him.<sup>108</sup>

The good faith and fair dealing standard is not the same as the just cause rule. This is illustrated by *Gram v. Liberty Mutual Insurance Co.*<sup>109</sup> The company mistakenly fired the plaintiff on a supervisor's advice that the plaintiff had violated company policy. In fact, there was no company policy covering the matter. The court noted that the company's failure to prove good cause for the termination did not necessarily mean it had acted in bad faith. The absence of just cause is only one factor in determining the employer's good faith. The court found that the company was merely mistaken; there was no proof that it had acted in bad faith or with improper motives.<sup>110</sup> Under the implied covenant of good faith and fair dealing, the

659, 673, 133 Cal. Rptr. 899, 908 (1976); Diamond, *The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions*, 64 MARQ. L. REV. 425 (1981); Comment, *Tort Liability for an Insurer's Bad Faith Refusal to Settle: A Developing Trend Appropriate for Adoption in Missouri*, 45 MO. L. REV. 103 (1980).

104. See *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir.), cert. denied, 103 S. Ct. 131 (1982); *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917, 922 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980).

105. See *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, —, 429 N.E.2d 21, 25 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 104, 364 N.E.2d 1251, 1256 (1977); *Siles v. Travenol Laboratories*, 13 Mass. App. Ct. 354, —, 433 N.E.2d 103, 106 (1982).

106. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 551 (1974). *But see* *Howard v. Door Wolen Co.*, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980). Montana courts may accept the good faith doctrine. See *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1067 (Mont. 1982).

107. 373 Mass. 96, 364 N.E.2d 1251 (1977).

108. *Id.* at 106, 364 N.E.2d at 1257. For a similar case involving an employer depriving an employee of an earned commission, see *Maddaloni v. Western Mass. Bus Lines*, 386 Mass. 877, 438 N.E.2d 351 (1982). The New York Court of Appeals recently refused to imply a fair dealing obligation, finding it inconsistent with the "employer's unfettered right to terminate . . . employment at any time." *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 296, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983). See also *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 509, 573 P.2d 907, 909 (1977); *Jones v. Keogh*, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979).

109. 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21 (1981).

110. *Id.* at —, 429 N.E.2d at 25.

employer's motive and intentions displace the objective just cause test.

A different measure of damages may be applied in breach of implied covenant cases. In *Cleary v. American Airlines*,<sup>111</sup> the California Court of Appeals recognized an implied covenant of good faith and fair dealing. Although the court spoke in terms of the violation of an implied covenant, it held that the plaintiff could recover damages similar to those allowed in tort actions, including compensatory and punitive damages.<sup>112</sup> This reasoning could have a great impact on causes of action for improper termination. Because the covenants of good faith and fair dealing are implied, they apply regardless of the parties express contract.

## V. THE TORT OF WRONGFUL DISCHARGE

Traditionally, there has been no tort cause of action for wrongful discharge because employers have no duty to terminate employees only for proper cause. *Petermann v. Teamsters Local 396*<sup>113</sup> was one of the first cases to recognize such a duty. The plaintiff, a union business agent, alleged that he had been terminated because he refused to perjure himself before a state legislative committee. Under a California statute, employment without fixed duration was considered terminable "for any reason whatsoever."<sup>114</sup> This doctrine was subject to considerations of public policy, though, and the court concluded that the union was requiring the plaintiff to commit a criminal act that would interfere with the administration of justice and violate "the state's declared policy against perjury" in the California penal code.<sup>115</sup>

Most courts that have recognized the public policy cause of action have required proof of improper intent by the employer and a violation of a duty founded upon a statute that mandates an individual obligation or creates a personal right.<sup>116</sup> In *Sheets v. Teddy's Frosted Foods*,<sup>117</sup> the plaintiff managed the company's food processing section. He was fired after complaining to the company that it was mislabeling its food products. The

111. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

112. *Id.* at 457, 168 Cal. Rptr. at 730.

113. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

114. CAL. LABOR CODE § 2922 (West 1971).

115. 174 Cal. App. 2d at 188, 344 P.2d at 27. *See* CAL. PENAL CODE §§ 118, 653(f) (West 1970). *But see* *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. 1981); *Ivy v. Army Times Publication Co.*, 428 A.2d 831 (D.C. 1981).

116. *See* *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 174, 610 P.2d 1332, 1335, 164 Cal. Rptr. 839, 843 (1980); *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 476, 427 A.2d 385, 387 (1980); *Trombetta v. Detroit, Toledo & Ironton Ry.*, 81 Mich. App. 489, 496, 265 N.W.2d 385, 388 (1978); *Nees v. Hocks*, 272 Or. 210, 218, 536 P.2d 512, 515 (1975); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, —, 335 N.W.2d 834, 836 (1983).

117. 179 Conn. 471, 427 A.2d 385 (1980).

court allowed the cause of action, noting that if the company required the plaintiff to perform improper acts he would violate state food labeling statutes and would risk criminal penalties.<sup>118</sup> Other tort actions have been brought by workers discharged for refusing to engage in illegal price fixing,<sup>119</sup> declining to alter pollution control reports required by statute,<sup>120</sup> performing jury duty,<sup>121</sup> and attempting to get a bank to conform to consumer protection laws.<sup>122</sup>

Other courts have allowed actions by employees who have been terminated for exercising rights protected by statutes, especially workers' compensation laws. In *Murphy v. City of Topeka-Shawnee County Department of Labor*,<sup>123</sup> an employee alleged that he had been terminated solely because he had obtained a workers' compensation recovery. The employer contended that the complaint failed to state a cause of action because the plaintiff was employed at will and subject to discharge at any time. The court rejected this argument and found that even an at will hiring is subject to legal rights and obligations.<sup>124</sup> Although the workers' compensation law had no provisions specifically preventing employers from discharging employees for exercising rights under the law,<sup>125</sup> the court found that this was the clear public policy and that the plaintiff had a cause of action. At least nine jurisdictions have similarly ruled.<sup>126</sup> Other statutory or constitutional

118. *Id.* at 479, 427 A.2d at 388.

119. *See* *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 169, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840 (1980).

120. *See* *Trombetta v. Detroit, Toledo & Ironton Ry.*, 81 Mich. App. 489, 491, 265 N.W.2d 385, 388 (1978).

121. *See* *Nees v. Hocks*, 272 Or. 210, 212, 536 P.2d 512, 513 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super 28, —, 386 A.2d 119, 120 (1978).

122. *See* *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978).

123. 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

124. *Id.* at 497, 630 P.2d at 192.

125. The defendant argued that the Kansas legislature has twice failed to approve bills that would have expressly allowed causes of action based on terminations for pursuing workers' compensation claims. The court was not persuaded that this failure evinced a legislative intent to bar the plaintiff's claim. *Id.* at 496, 630 P.2d at 192.

126. *See* *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 253, 297 N.E.2d 425, 427 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 647, 245 N.W.2d 151, 154 (1976); *Henderson v. St. Louis Hous. Auth.*, 605 S.W.2d 800, 803 (Mo. 1979); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 150 (Mo. Ct. App. 1983); *Lally v. Copygraphics*, 85 N.J. 668, 670, 428 A.2d 1317, 1319 (1981); *Brown v. Transcon Lines*, 284 Or. 597, 611, 588 P.2d 1087, 1094 (1978); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178, 182 (W. Va. 1980). Other jurisdictions, however, have barred actions by employees allegedly fired for pressing workers' compensation claims. *See* *Green v. Ameranda Hess Corp.*, 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980); *Blevins v. General Elec. Co.*, 491 F. Supp. 521, 525 (W.D. Va. 1980); *Greenspan v. National Medical Care, Inc.*, 485 F. Supp. 311, 316 (E.D. Va. 1980); *Segal v. Arrow Indus.*, 364 So. 2d 89, 90 (Fla. Dist. Ct. App. 1978); *Dockery*

rights protected from unwarranted discharge include: free speech;<sup>127</sup> interference with contractual rights;<sup>128</sup> privacy, such as freedom from sexual harassment<sup>129</sup> and immunities from taking polygraph examinations;<sup>130</sup> privileges to enforce minimum wage requirements;<sup>131</sup> and rights to participate in union activities.<sup>132</sup>

Some courts have looked to sources other than statutes to support the duty not to terminate. In *Kallman v. Grand Union Co.*,<sup>133</sup> the plaintiff was a pharmacist in charge of one of defendant's New Jersey stores. His supervisor informed him that although the rest of the store would be open on July 4th, the pharmacy would be closed. The plaintiff was told by the state pharmacy board that this was illegal. The company kept the pharmacy open on July 4th, staffed by another pharmacist, and fired the plaintiff. The New Jersey Superior Court held that this termination conflicted with two public policies: (1) the New Jersey statutes which required a pharmacist to be on duty whenever the premises were open, and (2) the pharmacists' professional code of ethics.<sup>134</sup> These policies gave rise to an action for

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v. Lampart Table Co., 36 N.C. App. 293, 300, 244 S.E.2d 272, 277, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, —, 259 S.E.2d 812, 813 (1979); *Raley v. Darling Shop, Inc.*, 216 S.C. 536, 538, 59 S.E.2d 148, 149 (1950).

127. *See DeBleeker v. Montgomery County*, 292 Md. 498, 506, 438 A.2d 1348, 1352 (1982).

128. *See Cleary v. American Airlines*, 111 Cal. App. 3d 443, 452, 168 Cal. Rptr. 722, 727 (1980). *But see Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 600, 440 N.E.2d 998, 1006 (1982).

129. *See Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 332, 563 P.2d 54, 58 (1977) (dictum); *Keneally v. Organ*, 606 P.2d 127, 129 (Mont. 1980) (dictum); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 552 (1974). *But see Forde v. Royal's Inc.*, 537 F. Supp. 1173, 1175 (S.D. Fla. 1982).

130. *See Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979). *But see Larsen v. Motor Supply Co.*, 117 Ariz. 507, 509, 573 P.2d 907, 909 (1977).

131. *See Montalvo v. Zamora*, 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401, 405 (1970).

132. *See Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 796, 13 Cal. Rptr. 769, 772 (1961); *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 245, 249 (Mo. 1963); *Krystad v. Lau*, 65 Wash. 2d 827, 845, 400 P.2d 72, 83 (1965). Other courts have not allowed actions for wrongful discharges related to labor relations. *See Catania v. Eastern Airlines*, 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980); *Sand v. Queen City Packing Co.*, 108 N.W.2d 448, 451 (N.D. 1961). Still others have found that these are within the exclusive jurisdiction of the NLRB, thus precluding state tort actions. *See Viestenz v. Fleming Cos.*, 681 F.2d 699, 702 (10th Cir.), *cert. denied*, 103 S. Ct. 303 (1982); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479, 484 (E.D. Mich. 1982).

133. 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982). *But see Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

134. 183 N.J. Super. at 158, 443 A.2d at 730.

wrongful discharge. *Kallman* could have serious implications if employers will be bound by employees' professional codes. It seems unlikely that employers or the associations drafting the codes intended that employers be bound simply because they have hired covered employees.<sup>135</sup>

A few courts have also imposed judicially declared public policies, especially in the context of whistle-blowing. In *Palmateer v. International Harvester Co.*,<sup>136</sup> the plaintiff alleged that he had been fired for giving information to the police concerning a fellow employee's criminal activities. Although there was no statutory duty or right to assist law enforcement authorities, the court declared that encouraging this cooperation was a public policy that would prevent the plaintiff's termination.<sup>137</sup>

Perhaps the most liberal judicial approach to public policy was taken in *Cloutier v. Great Atlantic & Pacific Tea Co.*<sup>138</sup> The plaintiff, a store manager, had been with the company for thirty-six years. He was terminated after his store lost \$30,000 in a Sunday burglary. The company claimed that the employee had violated internal regulations requiring daily and weekend deposits of cash receipts. The plaintiff contended that the discharge was wrongful because the defendant had violated the public policy requiring that employers maintain safe workplaces. The store was located in a high-crime area, and the company no longer provided police escorts for employees making deposits. The New Hampshire court suggested that the company was creating safety hazards by requiring bank deposits without police protection, perhaps breaching its OSHA duty to provide a safe work place.<sup>139</sup> The burglary had occurred on the plaintiff's day off, and a state statute required that workers have one day off per week.<sup>140</sup> The court held, however, that a public policy duty could arise even though the obligation was not based on a statute or a strong and clear policy. It was for the jury to decide whether there was a policy strong enough to outweigh the employer's right to discharge at will. The plaintiff was awarded \$92,000.<sup>141</sup>

As courts get further away from the statutes, the duties imposed upon employers become more vague. There is a difference between requiring

135. See *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982) (auditors' code of ethics and extensive state regulation of utility accounting systems confer no employee rights and form no public policy exception).

136. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

137. *Id.* at 130, 421 N.E.2d at 880. But see *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 194, 251 S.E.2d 51, 52 (1978) (no cause of action for wrongful discharge of employee who contended he was about to report supervisor's criminal activities).

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

139. See 29 U.S.C. § 659(a) (1976).

140. See N.H. REV. STAT. ANN. § 275.33 (1977).

141. Cf. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, —, 335 N.W.2d 834, 840 (1983) (whether a public policy prevents wrongful discharge is a question of law).

that an employer not force a worker to commit perjury, and preventing an employer from firing an individual who causes a substantial loss when the person fails to make a bank deposit. In cases like *Cloutier* and *Palmateer*, courts must not only define public policy, but must also look at the substance of the allegations underlying the discharge. For instance, the *Palmateer* court may have to inquire whether there was criminal conduct involved, or in cases like *Cloutier*, determine whether working conditions are unsafe.

It is difficult for employers to plan around liability based on the vagaries of judges. While some courts favor job security and abolishing the at will doctrine, others stress the rights of employers to manage their businesses efficiently. It is questionable whether tort actions and juries are appropriate for determining public policy limits.<sup>142</sup> Therefore, many states have circumscribed the wrongful discharge tort by requiring plaintiffs to prove violation of a statute or some other clear and substantial policy.

## VI. MISSOURI LAW

Missouri has adhered to the employment at will doctrine. The courts have consistently stated that no cause of action for wrongful discharge will exist without a contract for a definite term or a specific statutory provision. Otherwise, the employer has the right to terminate at any time and for any reason.<sup>143</sup>

There have been some recent exceptions, especially where employees are discharged or discriminated against for filing workers' compensation claims. The workers' compensation statute expressly prohibits such firings.<sup>144</sup> In *Arie v. Intertherm, Inc.*,<sup>145</sup> the plaintiff claimed that she was

142. See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

143. *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo.) (en banc), cert. denied, 454 U.S. 1084 (1981); *Howe v. St. Louis Union Trust Co.*, 392 S.W.2d 625, 627 (Mo. 1965); *Maddock v. Lewis*, 386 S.W.2d 406, 410 (Mo.), cert. denied, 381 U.S. 929 (1965); *Carr v. Montgomery Ward & Co.*, 363 S.W.2d 571, 574 (Mo. 1963); *ACF Indus. v. Industrial Comm'n*, 320 S.W.2d 484, 492 (Mo. 1959); *Christy v. Petrus*, 365 Mo. 1187, 1189, 295 S.W.2d 122, 124 (1956) (en banc); *Culver v. Kurn*, 354 Mo. 1158, 1159, 193 S.W.2d 602, 603 (1946); *Newman v. Greater Kan. City Baptist & Community Hosp. Ass'n*, 604 S.W.2d 619, 622 (Mo. Ct. App. 1980); *Cooper v. City of Creve Coeur*, 556 S.W.2d 717, 719 (Mo. Ct. App. 1977); *Maxey v. General Elec. Co.*, 382 S.W.2d 67, 69 (Mo. Ct. App. 1964); *Finger v. Koch & Schilling Brewing Co.*, 13 Mo. App. 310, 311 (1883). Some courts have held that an employment contract is a prerequisite to any action for wrongful discharge. See *Williams v. Kansas City Pub. Serv. Co.*, 294 S.W.2d 36, 39 (Mo. 1956); *Williams v. Jones*, 562 S.W.2d 391, 395 (Mo. Ct. App. 1978).

144. "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer." MO. REV. STAT. § 287.780 (1978). Before this law was



terminated after she suffered an industrial injury. A jury awarded her \$40,000.<sup>146</sup> In upholding the verdict, the court of appeals found that the at will rule was limited by the protection of the statute.<sup>147</sup> Because of the statute, *Arie* arguably represents only a limited exception to the at will rule. Other developments belie this contention.

One deviation from the at will rule involves discharges allegedly violating constitutional rights.<sup>148</sup> In *Smith v. Arthur C. Baue Funeral Home*,<sup>149</sup> the Missouri Supreme Court allowed a cause of action for a plaintiff who claimed that he was discharged for attempting to secure union representation. The plaintiff relied on a state constitutional provision that guaranteed employees the right to organize and bargain collectively.<sup>150</sup> Although the court would not grant affirmative injunctive relief to enforce this right, it remanded the case to determine whether the provision supported a tort action for wrongful discharge.<sup>151</sup>

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amended in 1969, the Missouri Supreme Court found no cause of action for those discharged in retaliation for filing workers' compensation claim because the statute provided for criminal sanctions and not civil suits for damages. *See Christy v. Petrus*, 365 Mo. 1187, 1194, 295 S.W.2d 127, 128 (1956) (en banc); *see also Narens v. Campbell Sixty-Six Express*, 347 S.W.2d 204, 205 (Mo. 1961).

145. 648 S.W.2d 142 (Mo. Ct. App. 1983).

146. *Id.* at 145. The petition alleged two counts: count I claimed a violation of the worker's compensation law; count II was based on the Missouri service letter statute. *See MO. REV. STAT. § 290.140* (1978). The jury awarded plaintiff \$25,000 on count I and \$15,000 on count II. 648 S.W.2d at 145.

147. 648 S.W.2d at 150. It was for the jury to determine whether the termination was motivated by the filing of a workers compensation claim.

148. Missouri courts have recognized causes of action where constitutional rights are violated or where third parties have interfered with the employment relationship. The courts' statements of the traditional rule were either dicta, or the substantive evidence has not supported wrongful discharge allegations; dismissals have been justified even under the more liberal standards adopted in other states. The only exception is *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (en banc), which was overruled by the legislature. Krauskopf, *supra* note 31, at 253-54. For a different view, see Comment, *Fire at Will: An Analysis of the Missouri At Will Employment Doctrine*, 25 ST. LOUIS U.L.J. 845, 860-61 (1982).

149. 370 S.W.2d 249 (Mo. 1963).

150. *See MO. CONST. art. I, § 29* ("employees shall have the right to organize and to bargain collectively through representatives of their own choosing").

151. The court in *Smith* relied on confusing precedent, *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. 1957) (en banc). Employees in *Quinn* brought an action under article I, § 29 when their employer responded to organization attempts with threats and discharges. Although the court enjoined the coercion, it denied other relief on the grounds that the constitution did not provide for compensatory damages or mandatory bargaining. The employee in *Smith* sought an injunction against coercion, and damages for refusal to reinstate with back wages. Relying on *Quinn*, the court denied reinstatement and back pay. It further denied a prohibitory injunction against interference with the plaintiff's right to select a bargaining agent be-

Another inroad was suggested in 1982 by *Eib v. Federal Reserve Bank*.<sup>152</sup> The plaintiff, an at will employee,<sup>153</sup> contended she had been improperly fired after she became engaged, based on a policy which purportedly prohibited relatives from bank employment.<sup>154</sup> She alleged that two officials of the bank had intentionally interfered with her relationship with her employer. The court found a cause of action for intentional interference with a noncontractual employment relationship.<sup>155</sup> No binding contractual relationship between the employer and the employee was required; only a reasonable expectancy of financial benefits was necessary.<sup>156</sup> It was incumbent upon the plaintiff, however, to demonstrate bad faith.<sup>157</sup>

Although the court denied that recovery was based on the tort of wrongful discharge,<sup>158</sup> the result resembles those in the implied covenant of good faith cases. Many discharged employees should be able to fulfill the *Eib* requirement that their termination deprives them of a reasonable expectancy of financial benefits. Because most discharges are initiated by supervisors or personnel officials, third party interference with the employment relationship can also be shown. The critical issue will be the

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cause the plaintiff was the only employee and, as an at will employee, he could not be reinstated. The court allowed the plaintiff a jury trial on his claim that the discharge violated his constitutional right to seek union representation. 370 S.W.2d at 254.

152. 633 S.W.2d 432 (Mo. Ct. App. 1982).

153. Federal reserve banks are precluded by Congress from restricting their right to discharge at will. *Id.* at 435; 12 U.S.C. § 341 (1976). See *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1095 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Armano v. Federal Reserve Bank*, 468 F. Supp. 674, 676 (D. Mass. 1979).

154. The bank contended that its policy prohibited relatives or prospective relatives of supervisors from employment at the bank. The plaintiff argued that this reason was pretextual, because other employees had been engaged and married without losing their jobs. 633 S.W.2d at 433.

155. The court outlined these requirements:

- 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). See also *Williams v. Irwin-Willert Co.*, 604 S.W.2d 640 (Mo. Ct. App. 1980); *Casterline v. Stuerman*, 588 S.W.2d 86 (Mo. Ct. App. 1979).

156. 633 S.W.2d at 435.

157. *Id.* at 436.

158. "This is not . . . an action for wrongful discharge, for an employee cannot maintain that action absent an employment contract for a definite term or contrary statutory provision, in which event the employer may discharge an employee at any time." *Id.*

good faith of company officials.<sup>159</sup>

Other Missouri developments have been favorable to employees bringing wrongful discharge actions. The courts have upheld oral promises to employ over statute of frauds objections.<sup>160</sup> Missouri courts also have been more willing to bend the separate consideration requirement by finding consideration in an employee's leaving another job or remaining with a current job for a given time.<sup>161</sup> Perhaps most important is the *Arie* holding, which recognized the plaintiff's claim that she was a permanent employee.<sup>162</sup> Notwithstanding the employer's assertion that the employment was temporary, the court upheld the jury finding that the plaintiff was permanently employed. This decision was based on oral representations of the personnel manager, as well as statements in the employee handbook. The court determined that company rules could give rise to an employment contract. When these rules are relied upon, they become enforceable obligations.<sup>163</sup>

159. *Id.*

160. *See* Wood v. James B. Nutter & Co., 416 S.W.2d 635, 638 (Mo. 1967); Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639, 643 (Mo. Ct. App. 1961); Gale v. J. Kennard & Sons Carpet Co., 182 Mo. App. 498, 517, 165 S.W. 842, 847 (1914).

161. *See* Fletcher v. Agar Mfg. Corp., 45 F. Supp. 650, 651 (W.D. Mo. 1942) (agreement to relinquish present employment and devote full time to services of an employer was consideration sufficient to support life employment contract); Nilsson v. Cherokee Candy & Tobacco Co., 639 S.W.2d 226, 228 (Mo. Ct. App. 1982) (remaining in employment even in a position which was terminable at will can be consideration for a promise of an annual bonus); Vondras v. Titanium Research & Dev. Co., 511 S.W.2d 883, 886 (Mo. Ct. App. 1974) (employee's promise to perform services and to use best efforts is consideration for a written employment contract with a definite term). For an early discussion that mutuality of obligation is another way of stating the rule of consideration, see Schonwald v. F. Burkhart Mfg. Co., 356 Mo. 435, 449, 202 S.W.2d 7, 14 (1947).

162. 648 S.W.2d at 151. The relevance of whether the plaintiff was a permanent or temporary employee was not based on any claim of an employment contract's use of the term "permanent." The court noted that the general rule in Missouri is that "the term 'permanent' when used in an employment contract with reference to the term of employment means nothing more than an indefinite employment" and that such a "contract is terminable at the will of either party and no action will lie for an alleged wrongful discharge." *Id.* at 150. Whether the plaintiff was a permanent or temporary employee was important because the company had given her a service letter stating that she was a "temporary employee." *Id.* at 149. If this was untruthful, as the court determined that it was, the employer was liable for damages under the old service letter statute. *See* MO. REV. STAT. § 290.140 (1978) (repealed 1982).

163. The court held:

Where . . . upon the hiring of an employee said employee is given a handbook containing policy statements of the employer and rules of employment there arises contractual rights in the employee without evidence that

Although Missouri ostensibly adheres to the at will rule, employees have been increasingly successful in wrongful discharge actions. Statutory, constitutional, and contractual protections have been expanded to narrow the number of permissible discharges without cause.

## VII. MANAGEMENT CONSIDERATIONS

There are a number of decisions management officials must make in light of the increased recognition of contractual and tort causes of action for wrongful discharge. At the outset, employers must determine whether to attempt to preserve all of the management discretion and prerogatives inherent in the employment at will doctrine, or realize that there will be a diminution of discretion and plan accordingly. Either policy presents difficult choices. For instance, the more an employer informs employees that the company will act fairly in regard to terminations, the more likely courts are to hold that these promises are enforceable<sup>164</sup> or give rise to a duty that will support a tort action. On the other hand, denying all limits on the employment at will doctrine is unrealistic. A proper recognition of the doctrine is necessary to pre-discharge planning.

Management should consider the profile of the average wrongful termination plaintiff and his effect on the jury. Most are males in middle management with many years of service. These employees are rarely covered by the NLRA<sup>165</sup> or collective bargaining agreements. Their terminations are purportedly not based on age, so the ADEA does not apply.<sup>166</sup> Lacking other legal recourse, these men likely will pursue wrongful discharge suits.

The role of the jury is significant. It can review contracts to determine whether an expressed or implied agreement exists to terminate for cause and whether management has violated the agreement.

The jury is always permitted to determine the employer's true rea-

the parties mutually agreed that the policy statements would create contractual rights in the employee, and this despite the fact that the statement of policy is not signed by the parties and could be unilaterally amended by the employer without notice to the employee, and contains no reference to any specific employee, his job description, or compensation.

*Id.* at 153 (citing *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980)).

164. See *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 465, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 450, 168 Cal. Rptr. 722, 726 (1980); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 614, 292 N.W.2d 880, 895 (1980).

165. Supervisors of employers covered by the NLRA are expressly excluded from its protections. See 29 U.S.C. § 152(2), (3), (11) (1976).

166. See 29 U.S.C. §§ 621-634 (1976). *But see Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1316 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982).

son for discharging the employee. . . . In addition to deciding questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?<sup>167</sup>

A jury may also consider whether the employer uniformly enforced its rules, and set aside discriminatory discharges, as in *Touissant v. Blue Cross & Blue Shield*.<sup>168</sup> These factors are similar to those weighed by labor arbitrators to determine the propriety of discharges under collective bargaining agreements, which require just cause for discharge.<sup>169</sup> In effect, cases like *Touissant* imply a just cause discharge agreement in an employment relationship, with a jury rather than an arbiter acting as the trier of fact.

Juries may have even more latitude in tort cases. In *Cloutier*, the court held that it was the role of the jury to assess whether an employer had violated a public policy and to determine whether a duty existed in the first place.<sup>170</sup> This standard gives juries flexibility to second guess employers' judgments, markedly limiting management discretion. Juries invariably will find for the older worker who has been fired without prospects of re-employment, at the expense of management.<sup>171</sup>

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167. *Touissant v. Blue Cross & Blue Shield*, 408 Mich. 579, 621, 622, 292 N.W.2d 880, 895-96 (1980). *But see* *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (en banc) (although handbook and personnel policies could impose a just cause standard, a court could not make an independent determination of just cause but decide only if upon substantial evidence the employer's decision was made in good faith).

168. 408 Mich. at 624, 292 N.W.2d at 897.

169. *See* F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 610-66 (3d ed. 1976); M. TROTTA, *ARBITRATION OF LABOR-MANAGEMENT DISPUTES* 236-37 (1974). Because discharge is the most severe employment penalty, the burden of proof is on the employer to show that the act occurred, and that the degree of discipline is warranted. *Kroger Co.*, 71 Lab. Arb. (BNA) 989, 991 (1978) (Heinsz, Arb.). *See also* *Chemical Leaman Tank Lines*, 55 Lab. Arb. (BNA) 435, 437 (1970) (Rohman, Arb.); *G. Heilman Brewing Co.*, 54 Lab. Arb. (BNA) 1, 10 (1969) (Solomon, Arb.).

170. *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 920, 436 A.2d 1140, 1144 (1981).

171. *See* *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1315 (9th Cir.), *cert. denied*, 103 S. Ct. 131 (1982); *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, —, 429 N.E.2d 21, 24 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 100, 364 N.E.2d 1251, 1255 (1977); *Touissant v. Blue Cross & Blue Shield*, 408 Mich. 579, 595, 292 N.W.2d 880, 883 (1980); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 145 (Mo. Ct. App. 1983); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 919, 436 A.2d 1140, 1142 (1981); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 130, 316 A.2d 549, 550 (1974); *Nees v. Hocks*, 272 Or. 210, 211, 536 P.2d 512, 513 (1975).

Employers must evaluate all aspects of the employment relationship with the reminder that management policies and practices might be reviewed by a jury. Although management might wish to maintain the utmost discretion from hiring to termination, personnel policies should insure that discretion is exercised fairly. Otherwise, wrongful discharge suits will increase, and morale and positive employee relations will deteriorate.

### A. Hiring

Recruiters often oversell positions to prospective employees to insure that the company secures the best applicants. Statements or promises alleged to have been made by hiring personnel often have been resurrected years later as bases for wrongful discharge claims.<sup>172</sup> These oral representations are a legitimate basis for liability.<sup>173</sup> This evidence is difficult to refute because company officials who hire cannot remember every statement made to each candidate, or the officials may have long since left the company when the suit is brought.<sup>174</sup> Recruiters should avoid overstatements, for a jury may construe them as promises of job security.

Job advertisements and interviews should avoid terms like "tenure," "permanent employment," "full-time," and "you will work for us as long as you are doing the job."<sup>175</sup> These words can give rise to expectations of continued employment and act as an estoppel when a worker is later terminated. Job descriptions should accurately describe the employee's duties so that a person cannot later claim an improper discharge because he was forced to perform a task which was not agreed upon at hiring.

A properly worded job application can discourage expectations that termination will be based only on just cause. Since the application can be written in accordance with company policy and is not dependent upon the official who is discussing employment with a job applicant, it can reinforce the idea that the employment is terminable at will. It is also a good opportunity for a company to disclaim any oral statements which might lead to

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172. *See, e.g.*, *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 317, 171 Cal. Rptr. 917, 919 (1981) (plaintiff told by president-general manager that "if you are loyal to . . . [the company] and do a good job, your future is secure"); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 447, 168 Cal. Rptr. 722, 724 (1980) (plaintiff claimed an oral contract arose upon his hiring in 1958, 18 years before discharge).

173. *See Pugh v. See's Candies*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980). A number of courts have recognized these oral representations notwithstanding the statute of frauds. *See* notes 86-88 and accompanying text *supra*.

174. *See, e.g.*, *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 317, 171 Cal. Rptr. 917, 919 (1981) (company president that made oral assurances over 30 years prior to the discharge was deceased).

175. *Id.* at 317, 171 Cal. Rptr. at 919; *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 597, 292 N.W.2d 880, 884 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 465, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982).

an applicant's belief in permanent job security. The application should affirm that if the applicant believes that contrary statements indicating job security have been made, he should clarify them through a designated person other than the one discussing the hiring. In *Novosel v. Sears, Roebuck & Co.*,<sup>176</sup> the court granted the company's motion for summary judgment, partly on the basis of disclaimers in the job application that the plaintiff had signed.<sup>177</sup>

In some instances, the parties may prefer an individual contract. The employer should remember that if a contract is for a specific term, the legal presumption is that the employer cannot abrogate it without good cause.<sup>178</sup> If an employer wishes to make the hiring at will, despite a written contract for a definite term, the employer must specify this in the contract in a manner clear to the applicant. A discussion about the hiring at will and a clause in bold face type should be integrated into the hiring process. A clause for liquidated damages might also be considered, since damages in wrongful discharge cases are often speculative.<sup>179</sup>

#### B. Probationary Period

"Probationary period" has a definite meaning in collective bargaining. Under most probationary clauses, a union agrees that management can terminate an employee without justification during an initial period of employment.<sup>180</sup> Once this time has elapsed, however, the employee receives all of the protections of the labor contract and can be discharged only with just cause. Because this meaning is so well understood in labor relations, employers should avoid using the term "probation" with respect to employees hired at will. Otherwise a court or a jury might construe the term to mean that a worker who completes a probationary period becomes a permanent employee, unless he is fired for just cause.<sup>181</sup> Instead, all references to initial periods of employment should be termed "trial," "examination," "introductory," or "commencement."

176. 495 F. Supp. 344 (E.D. Mich. 1980).

177. *Id.* at 346. The application included this disclaimer:

I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated 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.

178. *See* *Alpern v. Hurwitz*, 644 F.2d 943, 945 (2d Cir. 1981).

179. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356(1)(1979); J. CALAMARI & J. PERILLO, *supra* note 72, § 14-31.

180. F. ELKOURI & E. ELKOURI, *supra* note 169, at 613-14.

181. *See, e.g., Toussaint*, 408 Mich. at 612, 292 N.W.2d at 892 (1980).

During the initial hiring, an employer should carefully evaluate an employee. It is at this period that individuals who will present difficulties should be terminated, if possible, in order to avoid later wrongful discharge suits filed by longer-term employees. The introductory period should be long enough so that supervisors and management officials have time to properly appraise the employee's performance. Management should also be careful in extending examination periods for individual employees unless it is done according to a uniform company policy. Otherwise those terminated without receiving such an extension could claim discrimination and wrongful discharge.

### C. *Employment Policies and Practices*

Most employers, particularly larger ones, have found it to be good management policy to establish written employee policies and procedures.<sup>182</sup> In this way, front line supervisors will be aware of a company's labor relations procedures and will be able to apply uniform guidelines to employee conduct. Written personnel manuals also tell employees their rights and duties. Situations like *Toussaint v. Blue Cross and Blue Shield*, where the employer had a 260 page employee manual, are not unusual.<sup>183</sup> If an employee files a wrongful discharge action, personnel manuals and employment policies will be the primary evidence of whether there was a contract not to terminate without just cause. These written policies should never promise more employment rights than the company can deliver and they should be drafted in a manner which promotes the efficiency of the operation. The Michigan Supreme Court responded to the argument in *Toussaint* that enforcing contracts requiring cause for discharge will lead to employee incompetence and inefficiency: "[N]o employer is obliged to enter into such a contract . . . [and] those who do . . . must be permitted to establish their own standards for job performance and to dismiss for non-adherence to those standards although another employer or the jury might have established lower standards."<sup>184</sup>

To minimize the chance that written procedures will be considered enforceable promises, employers should: (1) express that manuals and policies are not contracts and give rise to no contractual obligations;<sup>185</sup> (2) reserve the right to change at any time, with or without notice, any of the policies or practices; (3) state that the policy is that employees are terminable at will; and (4) delete all language which implies vested rights of termination for cause, including phrases like "your employment is secure," "you will be treated fairly," or any other words that might be construed to limit an em-

182. See note 172 *supra*.

183. 408 Mich. at 579, 292 N.W.2d at 880.

184. *Id.* at 623, 292 N.W.2d at 896-97.

185. *Kari v. General Motors Corp.*, 79 Mich. App. 93, 98, 261 N.W.2d 222, 224 (1977), *rev'd*, 402 Mich. 926, 282 N.W.2d 925 (1978); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 314, 299 N.W.2d 147, 150 (1980).



employer's right to discharge.<sup>186</sup> An employer should also consider listing types of offenses or unacceptable conduct, but the standard for work performance should give management considerable discretion to determine the propriety of an employee's conduct.<sup>187</sup> A statement should be specifically included that any listing of infractions and discipline is not exclusive.

A good example of such an approach is *Kari v. General Motors Corp.*,<sup>188</sup> where the court held that a personnel handbook was not a contract between the employer and the employee. The manual contained this statement printed in italics and outlined in red:

The contents of this handbook are presented as a matter of information only. While General Motors believes wholeheartedly in the plans, policies, and procedures described here, they are not conditions of employment. General Motors reserves the right to modify, revoke, suspend, terminate, or change any or all such plans, policies, or procedures, in whole or in part, at any time, with or without notice. The language used in this handbook is not intended to create, nor is it to be construed to constitute, a contract between General Motors and any one or all of its employees.<sup>189</sup>

Courts have also reviewed companies' past practices. In *Pugh v. See's Candies*,<sup>190</sup> the court considered that the company had an oral policy not to discharge its employees but for good cause. All employers have unwritten employment practices, since it is impossible to cover every instance of the employment relation in written personnel policies. These unwritten practices should be carefully scrutinized to insure that none give rise to any contractual expectations of job security. If a review reveals that such practices exist, an employer should change them by giving explicit notice to employees disavowing the policy and defining its changes in order to avoid claims of detrimental reliance by terminated workers.<sup>191</sup>

Another type of evidence in many wrongful discharge cases is performance appraisals.<sup>192</sup> Courts and juries undoubtedly will give little weight to employer explanations of the shortcomings of a worker who has received

186. See note 164 *supra*.

187. See *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980) (employer failed to follow termination guidelines); *Hepp v. Lockheed-Cal. Co.*, 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978) (same).

188. 79 Mich. App. 93, 261 N.W.2d 222 (1977), *rev'd*, 402 Mich. 926, 282 N.W.2d 925 (1978).

189. *Id.* at 95, 261 N.W.2d at 223.

190. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). See also *Hepp v. Lockheed-Cal. Co.*, 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978).

191. F. ELKOURI & E. ELKOURI, *supra* note 169, at 519.

192. A recent survey of personnel executives found that over 90% of companies responding had a formal program for appraising employees' performance. Performance Appraisal Programs, Personnel Policies Forum Survey No. 135 (BNA), at 3 (Feb. 1983).

numerous promotions and glowing evaluations.<sup>193</sup> Job reports are often written simply to justify a standard raise or a minor promotion. In other instances, supervisors make job evaluations positive to avoid friction with employees or to make the supervisor's unit look productive. These overstated appraisals can be devastating evidence. On the other hand, properly performed job evaluations can bring employees with work problems to light at an early stage, when the difficulties can be corrected or the employee released. A major consideration is impressing upon supervisors that performance appraisals must conform to the truth. The following should be used in all work evaluations: (1) objective criteria to measure job performance; (2) only firsthand data and observations; (3) personal conferences between supervisors and employees, and candid disclosures to the employee of strengths and deficiencies; and (4) an appeal or objection procedure for employees who disagree with evaluations. Appeal procedures must be established such that employees can use them without fear of reprisal and such that supervisors will not feel challenged or threatened by their use.<sup>194</sup>

Finally, periodic audits of personnel files and practices should be undertaken. Many employee files, which can span years of employment, contain outdated and improper material.<sup>195</sup> Management officials should follow this rule: if you cannot justify the documents or statements about an employee to yourself, you certainly will not be able to justify them to a jury.

Whistle-blowing cases require special consideration. An increasing number of employees are alleging that they have been wrongfully terminated for reporting improper or illegal acts to the company or government officials.<sup>196</sup> These cases can present a significant problem to companies that deal in products or services that affect public health, safety or welfare. In *Pierce v. Ortho Pharmaceutical Corp.*,<sup>197</sup> the plaintiff doctor disagreed with her employer, a drug manufacturer, concerning the use of saccharin in an experimental medicine. The plaintiff terminated her employment and brought a wrongful discharge action. Although the business of the employer involved serious risks due to the unknown consequences of experimental drugs, and even though the company had followed all FDA

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193. *See Savodnik v. Korvettes*, 488 F. Supp. 822, 825 (E.D.N.Y. 1980); *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 316-17, 171 Cal. Rptr. 917, 919 (1981); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 919, 436 A.2d 1140, 1144 (1981).

194. Although a large number of employers have performance reviews, only one-third provide a formal grievance procedure for nonunion employees. *See Performance Appraisal Programs, Personnel Policies Forum Survey No. 135 (BNA)*, at 19-20 (Feb. 1983).

195. Seventy-five per cent of the respondents with formal appraisal program kept these records indefinitely. *Id.* at 20-21.

196. *See* note 117 and accompanying text *supra*.

197. 84 N.J. 58, 417 A.2d 505 (1980).

requirements for using experimental drugs, a sympathetic jury could easily view the plaintiff as a champion of the public interest.

One way to deflect whistle-blowing lawsuits is to formulate a written policy requiring that employees report what they consider to be improper or illegal practices to a specified high level official. These reports must be kept confidential and resolved as promptly as possible. This policy would give a company an opportunity to rectify improper or unwarranted activities by lower level supervisors or employees. An employee who circumvented the internal procedure by directly filing a lawsuit would not be in a sympathetic position, since the person has breached his or her obligation to report such conduct to those in a position of authority.

#### D. *Discipline and Employee Complaints*

Most employers who operate under collective bargaining agreements apply the concept of progressive discipline to employee misconduct.<sup>198</sup> This system gives supervisors an opportunity to counsel and warn employees before discharge. Warnings allow employees the chance to correct deficiencies in job performance. Related to the notion of progressive discipline is the establishment of an internal mechanism to handle employee complaints concerning discipline, work evaluations, job promotions, and other employment related matters.<sup>199</sup> Grievance procedures enable upper management to correct supervisory mistakes or to reinforce proper decisions by front line foremen concerning the disciplining or evaluation of employees. These policies enhance the fairness of employment decisions and make them less susceptible to an attack in a suit for wrongful termination.

#### E. *Termination*

The employer should follow a specific procedure to insure that all circumstances surrounding termination are known and that all factors are honestly evaluated.<sup>200</sup> Discharges usually are initiated by lower level supervisors and often are accompanied by improper motives or discrimination which may give rise to wrongful discharge suits. In many cases, management officials are ignorant of the problem until the employee sues.<sup>201</sup> Termination procedure should at least include an unbiased review by a designated official, such as the personnel director or plant manager. Since many wrongful discharge lawsuits involve long term supervisory personnel, a company should also consider requiring prior approval by a corporate

198. F. ELKOURI & E. ELKOURI, *supra* note 169, at 630-32; GRIEVANCE GUIDE (BNA) 10-11 (5th ed. 1978).

199. Brown, *Limiting Your Risks in the New Russian Roulette—Discharging Employees*, 8 EMPLOYEE REL. L.J. 380, 399-401 (1982-1983).

200. F. ELKOURI & E. ELKOURI, *supra* note 169, at 632-34.

201. *See, e.g.*, Gram v. Liberty Mut. Ins. Co., 1981 Mass. Adv. Sh. 2287, —, 429 N.E.2d 21, 26 (1981).

level officer before an employee with a certain number of years is discharged.

Employers should also establish internal grievance procedures for terminated workers, offering employees a forum to appeal firing decisions. This review should be made by an individual who is removed from the daily operations that gave rise to the discharge but who can effectively recommend either sustaining or overturning the discipline. Review insures fairness when the serious step of discharge is taken; employees have a full opportunity to present the other side.<sup>202</sup>

Some companies have allowed voluntary arbitration of discharges before a neutral arbitrator.<sup>203</sup> The aggrieved employee and management choose a third party to hear the dispute and render a final, binding award. Some critics might complain that, as in *Cleary v. American Airlines*,<sup>204</sup> a grievance procedure may be construed as an implied promise and the employer's failure to follow it can become the basis for a wrongful discharge lawsuit. Others might contend that arbitration would abolish the at will doctrine and eliminate management discretion to fire incompetent workers. On the contrary, a grievance-arbitration dispute resolution mechanism for discharges has much to offer. Most commentators agree that courts will continue to erode the employment at will doctrine by allowing juries to find implied agreements not to terminate except for cause, elements of promissory estoppel, or public policy duties which have been violated by discharges.<sup>205</sup> A proper arbitration scheme should require the employee to exhaust this internal remedy before filing a lawsuit, as presently occurs in labor arbitration under company-union collective bargaining agreements.<sup>206</sup>

The parties should be able to define the standards of employment and determine the authority of an arbitrator to review a firings. The parties' intent should control the arbitrator.<sup>207</sup> For instance, an employer could state that its officials should be the judge of whether an employee has met production standards and that their decisions should be overturned only if the employee presents clear and convincing evidence to the contrary. Another method to limit the discretion of the arbitrator is to include a clause that the arbitrator can only make a determination as to whether the em-

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202. For an example of a comprehensive internal dispute resolution procedure adopted by the Garrett Corporation, a large Los Angeles aerospace firm, see *Preventing Disputes*, 1 ALTERNATIVES TO HIGH COST LITIGATION 1, 10-11 (1983).

203. *Id.*

204. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722.

205. See notes 97-141 and accompanying text *supra*.

206. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 575 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

207. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 623, 292 N.W.2d 880, 897 (1980).

ployee committed the misconduct which has been alleged, and if the arbitrator finds that misconduct has occurred, then he or she must uphold the penalty assessed by management.<sup>208</sup> There is a ready source of labor arbitrators<sup>209</sup> who are experts in balancing employees' rights and management interests.<sup>210</sup> Unlike most juries, arbitrators tend not to be biased in the em-

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208. Reflecting the strong national labor policy regarding arbitration, the Supreme Court has limited the federal standard of review for the decisions and awards of arbitrators. *See* *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). So long as the award "draws its essence from the collective bargaining agreement," a reviewing court must enforce it. 363 U.S. at 597. Where the parties restrict the contractual authority of an arbitrator by limiting the remedies which an arbitrator can grant or the extent to which an arbitrator can make a decision, the arbitrator is not authorized to exceed the limits. *See* *Grand Rapids Die Casting Corp. v. Local Union No. 159, U.A.W.*, 684 F.2d 413, 416 (6th Cir. 1982); *Alabama Educ. Ass'n v. Alabama Professional Staff Org.*, 655 F.2d 607, 609 (5th Cir. 1981); *International Bhd. of Firemen & Oilers Local 935-B v. Nestle Co.*, 630 F.2d 474, 477 (6th Cir. 1980); *Mistletoe Express Serv. v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977); *Monogahela Power Co. v. IBEW Local No. 2332*, 566 F.2d 1196, 1199 (4th Cir. 1976); *Timken Co. v. Local No. 1123 United Steelworkers*, 482 F.2d 1012, 1014 (6th Cir. 1973); *Amanda Bent Bolt Co. v. Local 1549, UAW*, 451 F.2d 1277, 1280 (6th Cir. 1971); *UAW Local 342 v. T.R.W.*, 402 F.2d 727, 732 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969); *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 564 (8th Cir. 1964); *ARCO Polymers v. Oil, Chemical & Atomic Workers Local 8-74*, 517 F. Supp. 681, 685 (W.D. Pa. 1981).

209. *See* F. ELKOURI & E. ELKOURI, *supra* note 169, at 24-25; O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 66-74 (1973); D. NOLAN, *LABOR ARBITRATION LAW AND PRACTICE* 12-22 (1979).

210. The Supreme Court has recognized the expertise of labor arbitrators: The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

ployee's favor.

Voluntary arbitration would limit the damages which employees have been recovering in actions based upon breach of implied covenant of good faith and fair dealing or in tort suits. Under a contractual system of arbitration, compensatory or punitive damages are rarely allowed.<sup>211</sup> Arbitrators usually limit remedies to sustaining the termination or reinstating the employee with or without backpay.<sup>212</sup> Requiring employees to bear part of the arbitration expenses deters frivolous complaints. Arbitration would aid all parties by limiting the cost and delays of litigation.<sup>213</sup>

Perhaps the most significant benefit of a voluntary arbitration system is that courts are likely to uphold arbitrators' decisions if a full and fair hearing has been allowed.<sup>214</sup> Many courts have deferred to employee discharge arbitration awards.<sup>215</sup> Consequently, a large number of companies like Bank of America, Control Data, Pitney-Bowes, and Trans World Airlines include grievance procedures in their employee personnel practices.<sup>216</sup>

Discharged employees should be given exit interviews.<sup>217</sup> These are particularly appropriate for employees with a number of years of service. Although emotions run high on both sides after a termination, an employer should always remember that a loss of employment is a devastating personal experience. Often company personnel can provide aid through counseling or referral to services such as placement and social services agencies. In addition, accrued rights and the availability of insurance, pension or other benefits can be explained to the employee. An exit interview also provides a last opportunity for an employer to determine whether employee claims or lawsuits are likely. Management might also want to consider at

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United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

211. Arbitrators have generally been unwilling to award punitive or exemplary damages because their retributive aspect is foreign to the need for amicable settlement of disputes through grievance and arbitration procedures. O. FAIRWEATHER, *supra* note 209, at 303. *See also* M. HILL, JR. & A. SINICROP, *REMEDIES IN ARBITRATION* 184-85 (1981); D. NOLAN, *supra* note 209, at 188-89.

212. O. FAIRWEATHER, *supra* note 209, at 280-300; M. HILL & A. SINICROP, *supra* note 211, at 40-96; D. NOLAN, *supra* note 209, at 183-84.

213. Federal civil cases that proceed to trial average 19 months from filing to disposition. UNITED STATES ADMINISTRATORS OFFICE OF THE U.S. COURTS, *ANNUAL REPORTS OF THE DIRECTOR* A-30 (1979). During the same year, the average time from the filing of a grievance to the rendering of an award by an arbitrator was a little over eight months. 1981 FEDERAL MEDIATION & CONCILIATION SERVICE ANNUAL REPORT 39.

214. *See* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 624, 292 N.W.2d 880, 897 (1980).

215. *See* Corbin v. Pan Am. World Airways, 432 F. Supp. 939, 943 (N.D. Cal. 1976).

216. *See* Wall St. J., Jan. 3, 1983, at 26, col. 3.

217. Brown, *supra* note 199, at 398.

this time the advisability of a severance agreement. The company might decide to offer accrued benefits and/or additional benefits, such as a monetary settlement or offer of a favorable reference letter, in return for an employee release or covenant not to sue and an agreement not to discuss the situation or settlement with others.<sup>218</sup> These settlements are a valuable alternative to costly litigation.

### VIII. CONCLUSION

The employment at will doctrine presents management with a two-edged sword. In the wake of the continuing erosion of the employment at will theory, the delusion that a company can fire employees for any reason or no reason invites disaster. On the other hand, the more an employer establishes policies of progressive discipline, employee grievance and review procedures, and voluntary arbitration, the more it may be found to be bound by such practices. By carefully tailoring employment practices, however, an employer should be able to decrease the potential liability for wrongful discharges on the theory of contractual violations of agreements not to discharge without just cause and to avoid the establishment of unwarranted expectations which can give rise to an action based upon promissory estoppel. Cautious drafting will not eliminate suits for wrongful discharge based on either the theory of a breach of an implied covenant of good faith and fair dealing or based on a wrongful discharge tort theory, but the use of independent review mechanisms and appropriate grievance-arbitration procedures should minimize the possibilities of terminations motivated by improper intent or which violate public policy. The goal of modern labor relations is certainly to treat the individual employee fairly and justly. By establishing such procedures, employers will insure that those employees who must be dismissed are done so with just cause—which is the best defense against any action of alleged wrongful discharge.

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218. See Bakely, *Erosion of the Employment At-Will Doctrine*, 8 J. CONTEMP. L. 63, 82-83 (1982).