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# The Employment-at-Will Doctrine: A Proposal

By Daniel J. Koys\*  
Steven Briggs\*\*  
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[A]ll employers may dismiss employees at-will . . . for good cause, no cause, or even for cause morally wrong without being thereby guilty of legal wrong.<sup>1</sup>

## I. INTRODUCTION

The employment-at-will doctrine does not stem from any particular statute. Rather, it has evolved from a body of common law heavily influenced by employer interests.<sup>2</sup> The at-will doctrine was described by H.G. Wood in his 1877 treatise on master-servant relationships.<sup>3</sup> Wood wrote that, since hiring was done for an indefinite period, either the employer or the employee could sever the employment relationship at any time and for any reason.<sup>4</sup> He concluded that "a general or indefinite hiring [that is, one without a specific term] is prima facie a hiring at will."<sup>5</sup> The so-called "Wood's Rule" was quickly embraced by American courts.<sup>6</sup>

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1. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-20 (1884).

2. P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 131 (1968).

3. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). For a detailed discussion of the historical development of the at-will doctrine, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118 (1976).

4. H. WOOD, *supra* note 3, at § 134.

5. *Id.* at § 134 n.49.

6. Wald & Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB. LAW. 533, 535 (1985). See *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895). It has been suggested that the "Wood's Rule" finds dubious support in the authorities upon which it relies. See DeGiuseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 6 n.13 (1981); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341

The broad labor legislation of the New Deal era<sup>7</sup> and the more narrowly focused employee rights legislation of the past two decades have restricted the at-will doctrine.<sup>8</sup> For example, the National Labor Relations Act makes it illegal to fire employees because of union activity<sup>9</sup> and Title VII of the Civil Rights Act of 1964<sup>10</sup> prohibits discharge for racially motivated reasons.<sup>11</sup>

Despite this employee rights legislation, some sixty million employees still have no statutory protection against arbitrary discharge.<sup>12</sup> In recent years, however, a large number of courts have provided employees with increased protection by creating exceptions to the employment-at-will doctrine.<sup>13</sup> These exceptions are frequently based on four theories: (1) public policy, (2) implied contract, (3) breach of an implied covenant of good faith and fair dealing, and (4) tort. At present, courts in seven states have refused to recognize any exceptions to the at-will doctrine.<sup>14</sup>

This article reviews judicial treatment of the employment-at-will doctrine and suggests possible courses of action for this rapidly developing area of law.

## II. JUDICIAL EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE

### A. Public Policy

The public policy exception is based on the concept that an employer cannot terminate the employment relationship if the termination violates some public policy. Because of the vagueness of the

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(1974); see also Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 73 n.40 (1982).

7. See, e.g., National Labor Relations Act, 49 Stat. 449 (1935); 29 U.S.C. §§ 151-69 (1982).

8. See R. COVINGTON & A. GOLDMAN, *LEGISLATION PROTECTING THE INDIVIDUAL EMPLOYEE* (1982).

9. 29 U.S.C. § 158(a)(3) (1982).

10. 42 U.S.C. § 2000e to 2000e-17 (1982).

11. 42 U.S.C. § 2000e-2(a)(1) (1982).

12. Steiber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985); see also Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 205 (1982).

13. See Wald & Wolf, *supra* note 6, at 535.

14. See Williams v. Killough, 474 So. 2d 680 (Ala. 1985); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Gunn v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779 (1982); Amaan v. City of Eureka, 615 S.W.2d 414 (Mo. 1981) (en banc), cert. denied, 454 U.S. 1084 (1981). But see Lopez v. Bulova Watch Co., 582 F. Supp. 755 (D.R.I. 1984); Dake v. Tuell, 687 S.W.2d 191 (Mo. 1985); Rotondo v. Seaboard Foundry, Inc., 440 A.2d 751 (R.I. 1981); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979).

concept, most jurisdictions that allow an employee to maintain a cause of action for wrongful discharge require that the public policy against discharge be strong, clear and well-defined.<sup>15</sup> For example, although the Wisconsin Supreme Court recognizes an exception to the at-will doctrine when the termination "clearly contravenes the public welfare and gravely violates paramount requirements of public interest,"<sup>16</sup> that court has stated that judges should "proceed cautiously when making public policy determinations so that no employer is subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it."<sup>17</sup> Many courts limit an employer's otherwise broad authority to discharge at will only in fact settings in which a discharge "clearly violate[s] an express statutory objective or undermine[s] a firmly established principle of public policy."<sup>18</sup> Courts differ, however, as to what constitutes a sufficiently strong public policy to justify the exception.

Under the most limited application of the public policy theory, a discharge is wrongful only if the employee is discharged for exercising a personal statutory right (such as applying for workers' compensation<sup>19</sup> or refusing to take a lie detector test<sup>20</sup>) or for performing a statutory obligation (such as serving on a jury<sup>21</sup> or testifying under oath<sup>22</sup>). One California court has expressed the view

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15. *Percival v. General Motors Corp.*, 400 F. Supp. 1322 (E.D. Mo. 1975) (applying Michigan law), *aff'd*, 539 F.2d 1126 (8th Cir. 1976); *Campbell v. Ford Industries, Inc.*, 274 Or. 243, 546 P.2d 141 (1976); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984); *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

16. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

17. *Id.*, at 573-74, 355 N.W.2d at 840.

18. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 172, 610 P.2d 1330, 1332-33, 164 Cal. Rptr. 839, 842 (1980).

19. *Kistler v. Life Care Centers of Am., Inc.*, 620 F. Supp. 1268 (D. Kan. 1985); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984). *But see* *Portillo v. G.T. Price Prods., Inc.*, 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982) (California Labor Code § 132(a) provides the exclusive remedy for discharge in retaliation for filing a workers' compensation claim).

20. *See* *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979).

21. *See* *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc). *Contra* *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980).

22. *See* *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959); *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d

that courts have no power to declare public policy in wrongful discharge cases without statutory support.<sup>23</sup> Under such an approach, where statutory support exists, discharges for reasons that might otherwise be acceptable may be found to be wrongful discharges in violation of public policy.<sup>24</sup> Conversely, courts accepting this view do not recognize a cause of action where the employer's conduct was offensive to the employee personally, but not contrary to statute.<sup>25</sup>

In *Frampton v. Indiana Gas Co.*,<sup>26</sup> the Indiana Supreme Court held that public policy prohibits a retaliatory discharge for filing a workers' compensation claim. The court reasoned that:

[I]n order for the goals of the [workers' compensation] Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.<sup>27</sup>

Some jurisdictions have rejected even the narrow statutory public policy exception, holding that where the legislature has created a right, the statutory remedies for violation of that right are exclusive.<sup>28</sup> In *Dockery v. Lampert Table Co.*,<sup>29</sup> for example, an employee alleged that he had been discharged in retaliation for his

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818 (1985); *cf.* *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985) (employee discharged for honoring subpoena to appear at an administrative hearing). *But see* *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051 (5th Cir. 1981) (court refused to find employee wrongfully discharged where neither Georgia nor Texas law indicated that those jurisdictions would recognize wrongful discharge of employee who testified against employer in federal court).

23. *Mallard v. Boring*, 182 Cal. App. 2d 390, 396, 6 Cal. Rptr. 171, 175 (1960). *But see* *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27, 29 Cal. Rptr. 399, 401 (1959).

24. *See, e.g., Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979).

25. *See Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980). *But see* *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (en banc) (recognizing a cause of action for discharges arising out of "socially undesirable motives").

26. 260 Ind. 249, 297 N.E.2d 425 (1973).

27. *Id.* at 251-52, 297 N.E.2d at 427.

28. *See, e.g., Taylor v. Brighton Corp.*, 616 F.2d 256, 263-64 (6th Cir. 1980); *Bachand v. Connecticut Gen. Life Ins. Co.*, 101 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1981). *But see* *Holien v. Sears, Roebuck & Co.*, 298 Or. 76, 689 P.2d 1292 (1984) (en

filing of a workers' compensation claim. The court held that the employee could not bring an action for wrongful discharge because the state legislature had not provided a remedy for employer reprisal in the workers' compensation statute.<sup>30</sup>

A broader application of the public policy theory involves discharges which do not violate express statutory rights but which nonetheless undercut well-defined public policies underlying certain statutes.<sup>31</sup> For example, in *Harless v. First National Bank*,<sup>32</sup> a bank employee was discharged for reporting bank violations of consumer credit laws to state officials. The court held that the employee had been improperly discharged.<sup>33</sup> Stating that the at-will doctrine must be tempered where the employer's action contravenes some "substantial public policy," the court found in the state consumer credit statute a clear and unequivocal intent that consumers were to be protected. This public policy, the court continued, should not be frustrated by a holding that an employee who attempts to ensure his employer's compliance with the statute can be discharged without remedy.<sup>34</sup>

The broadest application of the public policy exception involves policies unrelated to specific legislative or regulatory provisions. In *Palmateer v. International Harvester Co.*,<sup>35</sup> the employer allegedly discharged the plaintiff for providing the police with information about a crime a fellow employee may have committed. The Illinois Supreme Court stated that while "[n]o specific constitutional or statutory provision requires a citizen to take an active

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banc) (employee could bring common-law suit for punitive damages for sexual harassment even though there was a statutory remedy).

29. 36 N.C. App. 293, 244 S.E.2d 272, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978), overruled by statute, N.C. GEN. STAT. § 97.6.1 (1985).

30. 36 N.C. App. at 298, 244 S.E.2d at 277. In the next session after the *Dockery* decision, the North Carolina General Assembly expressly authorized actions by employees discharged in retaliation for instituting workers' compensation claims or for testifying in regards to such claims. N.C. GEN. STAT. § 97.6.1 (1985). See *Sides v. Duke Hosp.*, 74 N.C. App. 331, 328 S.E.2d 818 (1985), for a discussion of the legislation.

31. See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (employee's discharge for refusing to join employer in lobbying for no-fault legislation held wrongful); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee could not be dismissed for refusing to participate in an illegal price-fixing scheme); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (discharge for ensuring that company's products complied with state labeling and licensing statutes was wrongful); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (discharge for reporting consumer credit law violations held unlawful).

32. 162 W. Va. 116, 246 S.E.2d 270 (1978).

33. *Id.* at 126, 246 S.E.2d at 276.

34. *Id.* at 124-26, 246 S.E.2d at 275-76.

35. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

part in the ferreting out and prosecution of a crime, . . . public policy nevertheless favors citizen crime fighters."<sup>36</sup> The court therefore concluded that discharge of an employee in response to such action contravened public policy.<sup>37</sup>

Similarly, in *Novosel v. Nationwide Insurance Co.*,<sup>38</sup> the plaintiff alleged that he had been discharged for refusing to participate in the employer's efforts to lobby the state legislature on behalf of no-fault insurance legislation. The Third Circuit determined that the plaintiff's discharge violated public policy as expressed in the first amendment to the federal Constitution.<sup>39</sup> The court reasoned that the protection of an employee's freedom of political expression is no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim.<sup>40</sup> According to the court, cases dealing with first amendment rights of public employees suggest that an important public policy is in fact implicated whenever the power to hire and fire is used to control employee political activities.<sup>41</sup>

### B. Implied Contract

In developing another exception to the employment-at-will doctrine, some courts have held that an implied employment contract may prohibit at-will discharges.<sup>42</sup> Under this theory, the employer's presumed right to discharge at will may be rebutted by evidence of an implied employment agreement.<sup>43</sup> In general, implied contract issues can be grouped into two categories: (1) written personnel policies and practices, and (2) oral promises of continued employment.

Courts in at least fourteen states have accepted the theory that

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36. *Id.* at 132, 421 N.E.2d at 880.

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

38. 721 F.2d 894 (3d Cir. 1983).

39. *Id.* at 900.

40. *Id.* at 899.

41. *Id.* at 900. It has been suggested that the court's application of the first amendment to private employment was incorrect. Wheeler & Browne, *Preemption of Wrongful Discharge Claims of Employees Covered by Collective Bargaining Agreements*, 1 LAB. LAW. 593, 608-09 (1985).

42. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 922-23 (1981); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 598, 292 N.W.2d 880, 885 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 629 (Minn. 1983); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 462, 443 N.E.2d 441, 443, 457 N.Y.S.2d 193, 195 (1982); *Ferraro v. Koelsch*, 124 Wis. 2d 154, 169, 368 N.W.2d 666, 674 (1985).

43. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 324-25, 171 Cal. Rptr. 917, 924 (1981).

written personnel policies or practices may constitute implied employment contracts.<sup>44</sup> The policies are often found in employee handbooks. In *Toussaint v. Blue Cross & Blue Shield of Michigan*,<sup>45</sup> a personnel manual stated that employees could be discharged only for just cause. Additionally, the termination procedure specified in the manual called for warnings, notices, and a disciplinary hearing prior to discharge. The company discharged the plaintiff without strictly adhering to the termination procedure.<sup>46</sup>

The Michigan Supreme Court held that the provisions in the personnel manual, unilaterally and voluntarily adopted by the employer and distributed to the employee at or after hiring, became part of the employment contract and gave the employee a contractual right to warning, notice, and a hearing prior to discharge.<sup>47</sup> The impact of this holding, however, was lessened by dicta stating that an employer could protect itself by having the employee sign a written contract which explicitly provides that the employment is terminable at will.<sup>48</sup>

Sears, Roebuck and Co. includes such a disclaimer in its employment applications:

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44. See *Fletcher v. Wesley Medical Center*, 585 F. Supp. 1260 (D. Kan. 1984); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984) (en banc); *Pugh v. See's Candies, Inc.*, 166 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Salimi v. Farmers Ins. Group*, 684 P.2d 264 (Colo. Ct. App. 1984); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettillie*, 333 N.W.2d 622 (Minn. 1983); *Sinnett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (S.D. 1983); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc); *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); cf. *Sweet v. Stormont-Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982) (employee bound by terms of contract where employee was aware of company policy, which was included in employment contract). For cases holding that a personnel manual does not create an enforceable contract, see *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668 (Ind. Ct. App. 1984); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976) (personnel manual is merely company's unilateral expression of policy and procedures); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (changes in the employment-at-will doctrine should come from the state legislature); *Richardson v. Charles Cole Memorial Hosp.*, 320 Pa. Super. 106, 466 A.2d 1084 (1983) (handbook does not amount to meeting of the minds required for existence of a contract).

45. 408 Mich. 579, 292 N.W.2d 880 (1980).

46. *Id.* at 595-98, 610-11, 292 N.W.2d at 884-88, 890-92.

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

48. *Id.* at 612 n.24, 292 N.W.2d at 891 n.24.

In consideration of my employment I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.<sup>49</sup>

A number of courts have ruled on the effectiveness of Sears' disclaimer. In *Novosel v. Sears, Roebuck & Co.*,<sup>50</sup> a long-time Sears employee was discharged after a dispute. The employee had signed an application containing the disclaimer. The court held that the disclaimer clearly established an at-will employment relationship and that the employee "could [not] reasonably have had a legitimate expectation of a right to a just cause determination prior to termination."<sup>51</sup>

However, several other courts have demonstrated a reluctance to enforce such disclaimers. It has been suggested that a disclaimer may be insufficient to negate oral representations.<sup>52</sup> For example, a New York court held that a disclaimer does not necessarily negate statements in the employee handbook.<sup>53</sup> Similarly, in *Reid v. Sears, Roebuck & Co.*,<sup>54</sup> the court held that the signing of a disclaimer does not automatically bar an employee's claim for wrongful discharge,<sup>55</sup> since there may be terms of the contract of employment implied in fact from the actions of the employer and its agents.<sup>56</sup>

Several courts have held that oral promises from management may constitute implied employment contracts preventing termina-

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49. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980).

50. 495 F. Supp. 344 (E.D. Mich. 1980).

51. *Id.* at 346; *accord* *Luft v. Sears, Roebuck & Co.*, 117 L.R.R.M. (BNA) 2704, 2706-07 (Iowa Dist. Ct. 1984); *see also* *Crain v. Burroughs Corp.*, 560 F. Supp. 849 (C.D. Cal. 1983); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 482-83, 199 Cal. Rptr. 613, 621-22 (1984); *Ledl v. Quick Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984).

52. *See* *McCauley v. Thygerson*, 732 F.2d 978, 980 (D.C. Cir. 1984); *Eller v. Houston's Restaurants, Inc.*, 117 L.R.R.M. (BNA) 2651 (D.D.C. 1984). In *Hillsman v. Sutter Community Hosp.*, 153 Cal. App. 3d 743, 755, 200 Cal. Rptr. 605, 613 (1984), the court ruled that a provision in the hiring agreement giving either party the right to terminate upon 30 days notice did not prevent the terminated employee from bringing an action for wrongful discharge.

53. *Tirrano v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984).

54. 588 F. Supp. 558 (E.D. Mich. 1984).

55. *Id.* at 560-61.

56. *Id.*

tion at will.<sup>57</sup> The Kentucky Supreme Court held that an employment contract could be implied from an employer's promise to an employee that the employee could continue to work unless fired "for cause."<sup>58</sup>

One court, however, ruled that the statute of frauds prevented a plaintiff from prevailing on a claim for breach of an oral contract.<sup>59</sup> Finding that the plaintiff had alleged a contract for permanent employment, the court held that because the parties had contemplated a period of employment longer than one year, the oral contract was barred by the statute of frauds.<sup>60</sup>

### C. *Implied Covenant of Good Faith and Fair Dealing*

A number of courts have recognized a cause of action for wrongful discharge based upon an implied covenant of good faith and fair dealing.<sup>61</sup> Under this exception to the at-will doctrine, employees discharged as a result of alleged malice or bad faith on the part of the employer may sue the employer for breach of an implied covenant.<sup>62</sup> Factors considered in determining whether a covenant

57. See *Reiver v. Murdoch & Walsh*, 118 L.R.R.M. (BNA) 2238 (D. Del. 1985); *Kitzmillier v. Washington Post, Inc.*, 115 L.R.R.M. (BNA) 3015 (D.D.C. 1984); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 283 N.W.2d 713 (1979); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Helle v. Landmark, Inc.*, 118 L.R.R.M. (BNA) 2325 (Ohio Ct. App. 1984). In *Hishon v. King & Spaulding*, 104 S. Ct. 2229 (1984), the Supreme Court commented that an oral promise to a law firm associate that the associate would be treated on a fair and equal basis may have constituted an implied contract ensuring consideration of her for promotion to partner. *Id.* at 2233-34.

58. *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983).

59. *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984).

60. *Id.* at 446-47, 203 Cal. Rptr. at 13; *see also* *Sorosky v. Burroughs Corp.*, 119 L.R.R.M. (BNA) 2785 (C.D. Cal. 1985). *Contra* *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 283 N.W.2d 713 (1979); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 463, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 196 (1982) ("Suffice it to say that the agreement between Weiner and McGraw-Hill, whether terminable at will or only for just cause, is not one which, by its terms, could not be performed within one year and, therefore, is not one which is barred . . .").

61. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455-56, 168 Cal. Rptr. 722, 729 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). *Contra* *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370, 377, 652 P.2d 625, 629 (1982) (imposing a duty to terminate in good faith would subject each discharge to judicial incursions into the amorphous concept of bad faith).

62. A California court has refused to recognize a cause of action based on the "naked

exists include (1) length of service; (2) employee performance as demonstrated by regular receipt of raises, bonuses, and promotions; (3) employer assurances that employment would continue; (4) employer practice of not terminating except for cause; and (5) no prior warning that the employee's job was in jeopardy.<sup>63</sup>

One of the first important cases finding an implied covenant of good faith and fair dealing in an employment contract was *Monge v. Beebe Rubber Co.*<sup>64</sup> In *Monge*, the New Hampshire Supreme Court held that termination of an employment-at-will contract, when motivated by bad faith or malice, or when based on retaliation, is not in the best interests of the economic system or the public good and thus constitutes a breach of contract.<sup>65</sup>

Development of this exception continued in *Fortune v. National Cash Register Co.*<sup>66</sup> In *Fortune*, a salesman with twenty-five years of service was discharged the day after the employer obtained a \$5,000,000 order on which the salesman was to have received a \$92,000 bonus. The Massachusetts Supreme Court upheld the jury's finding that the discharge was motivated by the employer's desire to avoid payment of the commission. Although the written employment contract clearly stated that the employment was at will, the court held that the contract contained an implied covenant of good faith and fair dealing and that the termination, not in good faith, constituted a breach of the contract.<sup>67</sup>

In *Cleary v. American Airlines, Inc.*,<sup>68</sup> a California court created a broad bad-faith exception to the employment-at-will rule. The

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covenant alone." The court stated that an action for breach of the implied covenant of good faith and fair dealing must always have some other basis, such as public policy, a statutory violation, an express or clearly implied contract, or some combination of elements, particularly longevity of service combined with some additional element. *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 445, 203 Cal. Rptr. 9, 12 (1984); see also *Wilson v. Vlastic Foods, Inc.*, 116 L.R.R.M. (BNA) 2419, 2421 (C.D. Cal. 1984).

63. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455-56, 168 Cal. Rptr. 722, 729 (1980).

64. 114 N.H. 130, 316 A.2d 549 (1974). The application of *Monge* was subsequently limited to situations where an employee is discharged because he or she performed an act that public policy would encourage or refused to do that which public policy would condemn. *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980); see also *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (plaintiff must show defendant was motivated by bad faith, malice, or retaliation and demonstrate that the discharge resulted from performance of an act encouraged by public policy or refusal to do an act condemned by public policy).

65. *Monge*, 114 N.H. at 133, 316 A.2d at 551.

66. 373 Mass. 96, 364 N.E.2d 1251 (1977).

67. *Id.* at 101, 364 N.E.2d at 1256.

68. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

court held that an employer can discharge a long-term employee only for just cause and that an unjust dismissal will render the employer liable for compensatory and punitive damages.<sup>69</sup> The court stated that “[t]ermination of employment without legal cause after such a period of time [eighteen years of satisfactory service] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts.”<sup>70</sup>

#### D. Tort Theory

While the public policy exception to the employment-at-will doctrine is often treated as a tort cause of action,<sup>71</sup> there is also a line of cases which have found an exception to the employment-at-will doctrine based solely on traditional tort concepts. Many jurisdictions have rejected the notion that termination of at-will employees gives rise to a cause of action for a prima facie tort (for example, infliction of intentional harm without excuse or justification).<sup>72</sup> Other courts, however, have recognized such a cause of action although some have been reluctant to hold that the facts of discharge cases meet the common-law requirements.<sup>73</sup>

At least one court has analogized wrongful discharge to tortious interference with performance of a contract.<sup>74</sup> Also, where an employer's conduct in discharging an employee is outrageous, there may be a cause of action for intentional infliction of emotional distress.<sup>75</sup>

A California court appears to have taken the tort exception to the at-will doctrine to an extreme. The court held, in *Wallis v.*

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69. *Id.* at 455, 168 Cal. Rptr. at 729.

70. *Id.*

71. *See* *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). *But see* *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

72. *See, e.g.*, *Kushner v. Ciba-Geigy Corp.*, 76 A.D.2d 950, 428 N.Y.S.2d 745 (1980).

73. *See, e.g.*, *Keating v. BBDO Int'l, Inc.*, 438 F. Supp. 676 (S.D.N.Y. 1977); *Cartwright v. Golub Corp.*, 51 A.D.2d 407, 381 N.Y.S.2d 901 (1976); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160, *appeal dismissed*, 48 N.Y.2d 603, 396 N.E.2d 207 (1979). *But see* *Dake v. Tuell*, 687 S.W.2d 191 (Mo. 1985) (en banc).

74. *See* *Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 422 A.2d 611 (1980). *But see* *Boreson v. Rohm & Haas, Inc.*, 526 F. Supp. 1230 (E.D. Pa. 1981), *aff'd*, 729 F.2d 1445 (3d Cir. 1984).

75. *See* *Rawson v. Sears, Roebuck & Co.*, 495 F. Supp. 776 (D. Colo. 1982); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Richey v. American Auto. Ass'n*, 380 Mass. 835, 406 N.E.2d 675 (1980); *see also* *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

*Superior Court*,<sup>76</sup> that breach of an employment contract creates a tort cause of action since ordinary contract damages offer no incentive for the defendant-employer not to breach. The *Wallis* court reasoned that even if a plaintiff-employee obtains a favorable judgment in contract, the defendant-employer will have to pay only what it would have had to pay the employee had the contract not been breached.<sup>77</sup>

### III. PROPOSAL

Because courts resolve disputes on a case-by-case basis, the judicially created exceptions to the employment-at-will doctrine present numerous unanswered questions. Attorneys working in this area of the law are uncertain as to the state of the wrongful discharge cause of action, employers are uncertain as to what discharges might lead to legal liability, and employees are uncertain as to what protection is available to them.<sup>78</sup> Following are recommended courses of action which, the authors believe, will provide both employees and employers with some badly-needed uniform protection and guidance.

#### A. Legislation

The at-will doctrine and its exceptions are creatures of state law. Thus the protection afforded employers and employees in the United States often depends upon the jurisdiction in which the discharge action happens to take place.<sup>79</sup> By contrast, most industrialized nations, including Germany, France, Great Britain, Italy, Sweden, Denmark, Norway, Canada, and Japan, have national statutes which provide employees with some protection from arbitrary discharge.<sup>80</sup> In Great Britain the Employment Protection Act<sup>81</sup> requires employers to specify the reason for dismissal and show that it was related to one of the following: (1) the capability or qualifications of the employee for performing work of the kind for which he was employed, (2) the employee's contract, (3) economic layoff, (4) conflict of continued employment with another

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76. 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984).

77. *Id.* at 1118-19, 207 Cal. Rptr. at 129.

78. Miller & Estes, *supra* note 6, at 103.

79. *Id.*

80. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 508-19 (1976); see also Association of the Bar of the City of New York, Committee on Labor & Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 176-80 (1981).

81. Employment Protection (Consolidation) Act, 1978, Part V.

statute, or (5) some other "substantial" reason.<sup>82</sup> According to one study, the main impact of Britain's Employment Protection Act has been employer development of procedures for discipline and dismissal.<sup>83</sup> Such procedures usually provide for progressive discipline and include the right to appeal a dismissal decision to higher managerial levels within the organization.<sup>84</sup>

In the United States some jurisdictions have provided employees with statutory protection from wrongful discharge. For example, some states have enacted "Whistleblower Protection Acts" or similar legislation designed to safeguard the rights of employees who report a violation or suspected violation of local, state or federal law.<sup>85</sup>

While there may be good reasons for preferring state legislation to federal legislation in some situations,<sup>86</sup> a federal statute guaranteeing all employees the right to fair treatment in disciplinary matters would provide welcome uniformity. A federal statute would extend the protections currently available only in some states<sup>87</sup> to employees in all states. Although federal legislation limiting the employment-at-will doctrine with respect to private employers is probably unlikely in the near future, there exists no good reason for not extending some sort of federal statutory protection to employees in all states.<sup>88</sup>

### B. *Personnel Practices*

As an alternative or addition to the legislative approach, individual employers can provide their employees with a guarantee of fair treatment in the area of discharge as well as a procedure for ensuring such treatment, while still protecting themselves from liability

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82. *Id.* at § 57.

83. Dickens, Hart, Jones & Weekes, *The British Experience Under a Statute Prohibiting Unjust Dismissal*, 37 *INDUS. & LAB. REL. REV.* 497, 513 (1984).

84. *Id.*

85. See Wald & Wolf, *supra* note 6, at 550-53. For a discussion of recent state legislative action, see Steiber, *supra* note 12, at 561-63.

86. Summers, *supra* note 80, at 521-24; see also *PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE* 81-82 (J. Steiber & J. Blackburn eds. 1983).

87. For a list of statutes limiting the employment-at-will doctrine, see Summers, *supra* note 80, at 491-99. See also *UNJUST DISMISSAL AND AT-WILL EMPLOYMENT* 24-26 (PLI 1982).

88. Commencing with the 1985 mid-winter meeting, the Individual Rights and Responsibilities in the Workplace Committee of the A.B.A.'s Section of Labor and Employment Law will undertake development of model legislation for consideration by Congress and state legislatures. For a list of the issues being considered by the Committee, see *Report of the Committee on Individual Rights and Responsibilities in the Work Place*, 1 *LAB. LAW.* 777, 784-85 (1985).

for wrongful discharge. Conventional wisdom recommends the elimination of any statements in personnel handbooks which expressly or impliedly affirm a right to job security, and the implementation of disclaimers which attempt to reduce the employer's exposure to liability for wrongful discharge based upon the implied contract theory.<sup>89</sup> Such disclaimers, however, "may be sowing the seeds of discontent."<sup>90</sup> Protection of employees from arbitrary discharge may not only be ethically or legally required; it may also be good business practice. One commentator suggests a marked correlation between a secure work force and both high productivity and quality output.<sup>91</sup>

In addition to the fact that disclaimers may not be in the best interests of either employers or employees, the effectiveness of disclaimers must be considered in light of the reluctance of some courts to permit disclaimers to defeat wrongful discharge claims.<sup>92</sup> Rather than attempting to avoid the duty (whether legal or moral) to treat employees fairly by eliminating statements assuring fair treatment in employee handbooks or by using disclaimers, employers should consider establishing procedures for enforcing the assurances of fair treatment provided in the employee handbooks.

One option available to employers is the establishment of fair hearing procedures, such as arbitration. Once established, these procedures would be the sole vehicle for ensuring fair treatment.<sup>93</sup> By complying with its own employment termination procedures, an employer may avoid liability for breach of contract.<sup>94</sup>

Many courts have held that an employee must exhaust available contractual grievance procedures before bringing an action against

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89. See, e.g., Meyerowitz, *Save Your Business Client from a Wrongful Discharge Suit*, 71 A.B.A.J. 66, 68 (1985); Wald & Wolf, *supra* note 6, at 545-47, 580. A disclaimer will not prevent liability for a discharge in contravention of a clear public policy. See *infra* note 100 and accompanying text.

90. Meyerowitz, *supra* note 89, at 68; cf. Wald & Wolf, *supra* note 6, at 580. See St. Antoine, *The Revision of Employment-at-Will Enters a New Phase*, 36 LAB. L.J. 563, 564 (1985).

91. St. Antoine, *supra* note 90, at 567.

92. See *supra* notes 52-56 and accompanying text.

93. For a discussion of grievance procedures involving nonunion employers, see R. COULSON, *THE TERMINATION HANDBOOK* (1981). See also *PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE* 4-20 (J. Steiber & J. Blackburn eds. 1983). See *Damrow v. Thumb Coop. Terminal, Inc.*, 126 Mich. App. 354, 337 N.W.2d 338 (1983), for a detailed discussion of the obligations arising from a written termination procedure. See also *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982); *Yartzoff v. Democrat Herald Publishing Co.*, 281 Or. 651, 576 P.2d 356 (1978).

94. See, e.g., *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983). Failure to comply with such procedures may result in liability. See, e.g., *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985).

an employer for wrongful discharge.<sup>95</sup> Furthermore, an arbitrator's decision that just cause exists for dismissal of an employee has been held to be *res judicata* in a subsequent wrongful discharge lawsuit.<sup>96</sup> Although the cases requiring exhaustion of a contractual grievance procedure generally involve collective bargaining agreements,<sup>97</sup> the same result should obtain wherever the contract (implied or expressed) creating the right sought to be enforced also creates the sole procedure for enforcing that right.<sup>98</sup>

By providing a procedure for enforcement of the right to fair treatment, employers can limit their liability for wrongful discharge while providing employees with reasonable protection from arbitrary discharge. The creation of a secure work force will, it is hoped, result in increased worker productivity and high quality output.<sup>99</sup>

However, the establishment of such a procedure will not protect the employer where an employee claims that his discharge violated public policy. Three courts have held that the employee in such a situation is not required to exhaust the contractual procedures provided by a collective bargaining agreement before filing for wrongful discharge.<sup>100</sup> Neither a disclaimer nor an arbitration procedure will prevent liability for a discharge that contravenes public policy. Prevention of liability for such violations can be accomplished only through a fair and honest performance evaluation system, good exit interviews, and an effective discharge review procedure.<sup>101</sup>

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95. See, e.g., *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986); *Harper v. San Diego Transit Corp.*, 764 F.2d 663 (9th Cir. 1985); *Aiello v. Apex Marine Corp.*, 610 F. Supp. 1255 (E.D. Pa. 1985); *Hillar v. Dobelman*, 607 F. Supp. 111 (E.D. Mo.), *aff'd*, 774 F.2d 886 (8th Cir. 1985); *Azzi v. Western Elec. Co.*, 19 Mass. App. Ct. 392, 474 N.E.2d 1166 (1985); *Gonzalez v. Northwest Airlines, Inc.*, 201 N.J. Super. 422, 493 A.2d 547 (1985); *Bryant v. Pacific Power & Light*, 701 P.2d 1165 (Wyo. 1985).

96. *Woodruff v. Associated Grocers of Iowa*, 364 N.W.2d 215 (Iowa 1985).

97. See *supra* note 95.

98. Where a constitutionally protected interest in continued employment is involved, the right to due process is not defined by or conditioned on the public employer's choice of procedures for its deprivation. *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1492-93 (1985).

99. See *supra* note 91 and accompanying text.

100. *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2314 (1985); *Puchert v. Agasalud*, 67 Hawaii 25, 677 P.2d 449 (1984), *appeal dismissed sub nom. Pan Am. World Airways, Inc. v. Puchert*, 105 S. Ct. 2693 (1985); *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 105 S. Ct. 3513 (1985); see also *Burgess v. Chicago Sun-Times*, 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1985). *Contra Lamb v. Briggs Mfg.*, 700 F.2d 1092 (7th Cir. 1983); *McKiness v. Western Union Tel. Co.*, 667 S.W.2d 738 (Mo. App. 1984).

101. R. Moon, *Avoiding Liability for Wrongful Discharge — Management Planning*

#### IV. CONCLUSION

The rapidly developing judicial exceptions to the employment-at-will doctrine, with resultant inconsistencies and inequities, have created numerous problems for both employers and employees. Although federal legislation may eliminate some of these problems, such legislation is not likely to be forthcoming in the near future.

Employers may be able to limit their exposure to liability for wrongful discharge — and at the same time give employees protection from arbitrary discharge — by adopting fair hearing procedures for review of employment termination decisions. Such procedures may not only protect the employer from liability, but may also be good business practice. Finally, because a fair hearing procedure may not protect an employer from liability for all discharges, employers should also initiate procedures to ensure that disciplinary decisions are not made in bad faith or in violation of public policy.

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and Litigation Tactics 6 (unpublished paper presented to meeting of Labor and Employment Law Section, American Bar Association, Aug. 1, 1983). See Decker, *At-Will Employment in Pennsylvania*, 87 DICK L. REV. 477, 504-05 (1983), for a list of suggestions to aid an employer in minimizing potential liability.