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Contract Law: An Alternative to Tort Law as a Basis for Wrongful Discharge Actions in Illinois

INTRODUCTION

Employment relationships should reflect current economic and social relationships among people.¹ In Illinois, however, the law governing employer-employee relations has not kept pace with changes in economic and social conditions. An employment relationship in Illinois which is not controlled by a collective bargaining agreement or an individual contract specifying a definite duration is considered terminable at will.² A terminable at will employment contract permits either the employer or the employee to end their relationship arbitrarily.³ Under this type of contract, an employer incurs no liability for discharging an employee, regardless of the employee's job performance, seniority, or loyalty to the employer.⁴

The harshness of the terminable at will rule on employees, who by the nature of the employment relationship occupy a weaker bargaining position than do their employers,⁵ has led courts in

¹ 3A A. Corbin, Contracts § 674 (1960).
⁴ See generally cases cited at note 3 supra.
⁵ The Illinois Supreme Court has expressly recognized that employees occupy inherently unequal positions. Palmateer v. Int'l Harvester Co., No. 53780, slip op. at 2 (Ill. April, 1981). Other Illinois decisions acknowledge by implication the disparity that exists between the employer and the employee. Right of control by the employer over the employee, for
many jurisdictions to question the soundness of allowing employers unfettered freedom in discharging personnel. This article will pro-


vide a survey of the judicial development in Illinois of a cause of action in tort for the wrongfully discharged employee. Contract law will then be proposed as an alternative to tort law as a basis for a wrongful discharge action in Illinois.

**HISTORY**

The terminable at will rule was an outgrowth of the late nineteenth century belief in freedom to contract and laissez-faire policies, as well as a response to the labor shortages accompanying industrial growth during that period. Courts adopted the terminable at will rule to safeguard entrepreneurs.

Terminable at will contracts were classified by courts as unilateral. The employer's offer of compensation for services was accepted by the employee's performance of the acts specified in the offer. When an employer discharged an employee, courts viewed the termination not as a breach of contract, but as a withdrawal of the employment offer. Because employers were not bound to retain an employee for any definite period, employer control over personnel was maximized.

Economic and social conditions in the United States have changed dramatically since the terminable at will rule was adopted. The emergence in the twentieth century of large, impersonal corporations has reduced the number of persons self-employed, thereby increasing the proportion of employees to employ-
The widening employee-employer ratio has had the effect of both diminishing the bargaining power of employees and minimizing employer recognition of the needs of individual workers.\textsuperscript{15} As employment conditions have changed, so too have the concerns and expectations of employees.\textsuperscript{16} In particular, job security has become far more important to modern employees than it was to their nineteenth century counterparts.\textsuperscript{17} Labor organizations have been formed to soften the effect on employees of these changing conditions.\textsuperscript{18} In addition, statutes have been enacted to protect employees from the heightened control that employers possess over personnel.\textsuperscript{19} Despite this protection of employees by unions and legislatures, the terminable at will rule is still generally applied by courts in situations not governed by statutes,\textsuperscript{20} collective bargaining agreements,\textsuperscript{21} or individual contracts that include definite duration terms.\textsuperscript{22} Many Americans are thereby left without job security.\textsuperscript{23}

\textbf{JUDICIAL MODIFICATION OF THE TERMINABLE AT WILL RULE}

Although the terminable at will rule does have harmful consequences, it also has important advantages. Most notably, the rule leaves employers with the discretion necessary for the exercise of

\textsuperscript{15} Blades, supra note 5, at 1416.
\textsuperscript{16} Note, \textit{Implied Contract Rights}, supra note 7, at 337-38.
\textsuperscript{17} Blades, supra note 5, at 1416.
\textsuperscript{18} Note, \textit{Implied Contract Rights}, supra note 7, at 338-39.
\textsuperscript{19} Id.
\textsuperscript{20} Blades, supra note 5, at 1410; Comment, \textit{Protecting At Will Employees}, supra note 5, at 1827.
\textsuperscript{22} Blades, supra note 5, at 1405, 1410 (claiming that less than one quarter of the American working population is covered by collective bargaining agreements); Comment, \textit{Protecting At Will Employees}, supra note 5, at 1816.
\textsuperscript{23} See generally notes 2 & 6 supra.
\textsuperscript{24} Comment, \textit{Protecting At Will Employees}, supra note 5, at 1816 (citing U.S. Bureau of the Census, Dep't. of Commerce, \textit{Statistical Abstract of the United States: 1979}, at 427 (table 704); Id. at 392 (table 644); Id. at 313 (table 509)).
sound business judgment. The ability of an employer to control his or her workforce is essential if the employer is to respond effectively to the changes and uncertainties of the business world. Control over personnel is also basic to the employer-employee relationship, which is defined largely by the employer's dominance.

These advantages led courts which questioned the overall soundness of the rule to merely temper, not destroy, the employer's power to discharge personnel. This modification is consistent with the recognition by legislatures of the vulnerability of employees, and demonstrates a beginning awareness in many courts that the terminable at will rule can produce unacceptably detrimental effects on both workers and society. In order to strike a proper balance among the competing concerns of the employer, the employee, and society, courts weigh each interest in a given fact situation before concluding that a wrongful discharge has occurred.

The result of using the balancing test has been that the employer's termination powers have been only slightly modified.


26. Comment, Employment At Will, supra note 5, at 237; Comment, Protecting At Will Employees, supra note 5, at 1835.

27. See note 5 supra.


31. See generally cases cited at note 6 supra.
Wrongful discharge actions in jurisdictions other than Illinois have been predicated on contract, tort and broad public policy grounds. When public policy alone is relied upon to justify limitation of the terminable at will rule, it is often unclear whether the action sounds in tort or in contract. Illinois courts have stated clearly, however, that wrongful discharge is a tort for which punitive damages may be awarded.

The first Illinois cases to recognize a cause of action for wrongful discharge were *Leach v. Lauhoff Grain Co.* and *Kelsay v. Motorola, Inc.* In both cases, terminable at will employees were discharged from their jobs in retaliation for filing Workmen's Compensation claims. Both courts held that the tortious discharges

32. This Note uses the term "wrongful discharge" to encompass claims in all jurisdictions where an employee has brought suit to contest his or her discharge. The claim, however, has been labelled "retaliatory discharge," *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 179, 384 N.E.2d 353, 356 (1978); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 1023, 366 N.E.2d 1145, 1146 (4th Dist. 1977). When public policy alone is relied upon to justify limitation of the terminable at will rule, it is often unclear whether the action sounds in tort or in contract. Illinois courts have stated clearly, however, that wrongful discharge is a tort for which punitive damages may be awarded.


36. See generally cases cited at note 35 supra.


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contravened the public policy of Illinois as indicated in the Workmen's Compensation Act. Because the cases were based on a tortious public policy violation and not on the contractual relationship between the employer and the employee, the courts were free to bypass the terminable at will rule in order to hold the employers liable. Both courts, however, stated that their decisions were merely exceptions to, not abandonments of, the terminable at will rule.

After the Kelsay decision, numerous legal commentators expressed the hope that the tort cause of action for wrongful discharge would be extended by Illinois courts to cover employment terminations not involving Workmen's Compensation claims. The judiciary, however, has been reluctant to expand any tort in the absence of compelling reasons. The major obstacle in Illinois to enlarging the tort of wrongful discharge is the judiciary's approach to ascertaining what constitutes public policy. Appropriately, the Illinois Supreme Court has described public policy as the "Achilles heel" of the tort of retaliatory discharge.

The term "public policy" is considered incapable of precise definition. The definition has been purposely left vague so that the term might be adapted to a myriad of circumstances. Rather than defining public policy, Illinois courts have limited themselves to identifying the sources of public policy — the Illinois Constitu-


43. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 189, 384 N.E.2d 353, 360 (1978); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 1024, 366 N.E.2d 1145, 1147 (4th Dist. 1977). For further analysis of Kelsay and Leach, see generally sources cited at note 44, infra.

44. Fillippi & Popko, Workmen's Compensation: New Cause of Action for Retaliatory Discharge, 68 ILL. B.J. 329, 332 (1980); Note, Tort Remedy, supra note 7, at 581; Comment, Tort Action, supra note 7, at 679; Comment, A Remedy for the Abusively Discharged, supra note 5, at 585.


tion, statutes, and, absent guidelines from these sources, judicial decisions.49

Despite the intent to leave the definition of public policy flexible, the courts have construed Illinois law as requiring a strict test for determining when public policy considerations are present.50 The challenged act must be "pregnant with evil" before it can be held to have encroached upon public policy.51

A particularly restrictive approach to public policy is found in Illinois decisions interpreting exculpatory clauses.52 In these cases, Illinois courts have mandated that public policy be settled before any conduct will be held to violate it.53 Dependence on only settled public policy, however, destroys any creative decision-making by the courts. The courts are precluded from formulating new policy through the use of trends in, or analogies to, Illinois statutes, constitutional clauses or judicial decisions.

Public Policy and Wrongful Discharge

The requirement that public policy be settled is no longer exclusive to cases involving exculpatory clauses. Settled public policy has also been required in recent cases involving wrongful discharge. A review of the major decisions discussing wrongful discharge claims illustrates both the courts' reluctance to find public policy violations and the necessary connection in Illinois between tort and public policy.

Criscione v. Sears, Roebuck & Co.54 was the first case after Leach55 to consider public policy in relation to the tort of wrongful


54. 66 Ill. App. 3d 664, 384 N.E.2d 91 (1st Dist. 1978).

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discharge. The plaintiff, who had been a Sears employee for ten years, alleged that Sears had engaged in a course of conduct designed to force him to resign, thereby preventing him from receiving unemployment compensation.\(^5\) The court decided that because Sears’s actions did not violate the mandates of the Illinois Constitution or any statute, no public policy interests had been offended.\(^9\) No mention was made by the court of judicial decisions as a source of policy. By ignoring the reasoning applied in *Leach*,\(^5\) *Criscione* implicitly eliminated judicial decisions as a source to which the court may look for public policy statements.\(^6\) Further, the court commented that the legislature’s inaction in altering Illinois employment policies precluded the courts from declaring new policy.\(^6\) The absence of public policy contravention allowed the court to apply the terminable at will rule, which freed Sears from liability regardless of its reasons for discharging the plaintiff.\(^4\)

Another appellate court case which addressed whether a cause of action in tort for wrongful discharge would be applicable outside of the Workmen’s Compensation context was *Palmateer v. Interna-

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56. 66 Ill. App. 3d 664, 665-66, 384 N.E.2d 91, 92 (1st Dist. 1978). The plaintiff had been ill and was restricted to light duty. Shortly thereafter, he was transferred to a highly technical position for which he was given no training. His ensuing inability to perform the new job resulted in an ultimatum from management that he consent to a demotion or lose his job. He refused to comply and was discharged.

57. Id., at 668, 384 N.E.2d at 93 (the court considered the discharge in retaliation for filing a Workmen’s Compensation claim in *Leach* a violation of public policy found in a statute).


59. See notes 49-53 supra and accompanying text. The court in *Leach*, while recognizing that the sources of public policy are confined to the Illinois Constitution, statutes, and judicial decisions, 51 Ill. App. 3d 1022, 1024, 366 N.E.2d 1145, 1147 (4th Dist. 1977), softened the traditional Illinois interpretation of public policy by describing it as that which has a mere “tendency” to be injurious to the public or against the public good. Id., 366 N.E.2d at 1147. The *Leach* court’s analysis of public policy, however, has remained peculiar to that decision and to the dissenting opinions in cases where wrongful discharge claims have been denied. See *Roxier v. St. Mary’s Hosp.*, 88 Ill. App. 3d 994, 1002, 411 N.E.2d 50, 56 (5th Dist. 1980) (dissenting opinion); *Palamteer v. Int’l Harvester Co.*, 85 Ill. App. 3d 50, 54, 406 N.E.2d 595, 599 (3d Dist. 1980) (dissenting opinion), rev’d, No. 53780 (Ill. April, 1981). The *Kelsay* decision also did not define public policy broadly. Rather, the court looked solely to the Workmen’s Compensation Act as a source from which to derive a public policy statement. 74 Ill. 2d 172, 180-82, 184-86, 384 N.E.2d 353, 356-57 (1978). By focusing on a statutory source of policy, the *Kelsay* decision did not compel lower courts to enlarge their perceptions of public policy.

60. 66 Ill. App. 3d at 669, 384 N.E.2d at 95.

61. Id. at 669-70, 384 N.E.2d at 94-95.
tional Harvester Co. The plaintiff, who had been employed by International Harvester for fifteen years, alleged that his employment was terminated for cooperating in a police investigation of another employee. Dismissal of the complaint, however, was affirmed because the court could locate no Illinois precedent where an employee had been discharged for participating in a police investigation. The court justified its decision by asserting that Illinois courts are reluctant to expand a tort in the absence of compelling reasons. As in Criscione, lack of a public policy violation permitted the court to apply the terminable at will rule.

The Palmateer decision went even farther than Criscione in limiting the sources from which to derive public policy. By looking only to cases with identical fact situations, the court ignored an available statutory source of public policy. As the dissenting opinion in Palmateer pointed out, the plaintiff was forced to choose between his job and participating in a police investigation, thus subverting the general policy advanced by the Illinois Criminal Code.

The Illinois Supreme Court, however, reversed the lower court's decision. Although the court recognized the harshness of the terminable at will rule and the unequal bargaining positions occupied by employers and employees, it still relied on the existence of "established" and "clearly mandated" public policy in concluding that the plaintiff had stated a cause of action. As in Kelsay, the court claimed that the legislature had created the public policy allegedly violated. The legislatively created public policy in

63. Id. at 51, 406 N.E.2d at 596-97.
64. Id., 406 N.E.2d at 596-97.
65. Id. at 52, 406 N.E.2d at 597.
66. Id., 406 N.E.2d at 597-98.
67. Id., 406 N.E.2d at 598.
68. Id., 406 N.E.2d at 597-98.
69. Id.
70. Id. at 57, 406 N.E.2d at 601.
71. Id.
73. Id. slip op. at 2, 4, 7.
74. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
75. Palmateer v. Int'l Harvester Co., No. 53780, slip op. at 5-6 (Ill. April, 1981).
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Palmateer was found in the Illinois Criminal Code,\textsuperscript{76} which the employee under investigation was alleged to have violated.\textsuperscript{77} Thus, although Palmateer extended Kelsay to a fact situation other than a discharge for filing a Workmen's Compensation claim, Palmateer may still be confined to circumstances where a discharge violates settled public policy.

The predominant message of Criscione and Palmateer is that Illinois courts are hesitant to expand the Kelsay court's recognition of a tortious cause of action for wrongful discharge. These cases unnecessarily restrict the sources in which public policy may be found.\textsuperscript{78} Reliance on only settled public policy encourages courts to depend on precedent rather than to develop new and relevant policy.\textsuperscript{79} This approach, however, confuses the law governing public policy with that regarding precedent.\textsuperscript{80} As former Illinois Supreme Court Justice Walter V. Schaefer stated, "precedent speaks for the past; policy for the present and future."\textsuperscript{81} According to Justice Schaefer, decisions having current social value must reflect a balance of policy and precedent considerations.\textsuperscript{82}

The conservative stand taken by Illinois courts regarding stare decisis further inhibits the development of new law. Before firmly established judicial law will be changed by the courts, it must be shown to contravene constitutional or statutory principles, or to be likely to act as a serious detriment to the public interest.\textsuperscript{83} Moreover, the courts are reluctant to introduce changes in the law absent legislative support for the modifications.\textsuperscript{84}

Because the terminable at will rule is firmly entrenched in Illinois law, judicial adherence to it is consistent with the courts' loyalty to precedent. In turn, because recent cases involving wrongful discharge claims apply the same rules with regard to public policy and stare decisis, it has become extremely difficult to develop the tort cause of action for wrongfully discharged employees. The restricted applicability of tort law, however, need not leave employ-

\textsuperscript{76} ILL. REV. STAT. ch. 38, ¶ 1-1 et seq. (1979).
\textsuperscript{77} No. 53780, slip op. at 6.
\textsuperscript{78} See notes 54-71 supra.
\textsuperscript{79} See notes 80-81 infra and accompanying text.
\textsuperscript{80} Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 24 (1966) [hereinafter cited as Schaefer].
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Maki v. Frelk, 40 Ill. 2d 193, 196-97, 239 N.E.2d 445, 447 (1968).
\textsuperscript{84} Id. But see Schaefer, supra note 80, at 3, 24 (stating that the legislature has little time for keeping the common law current).
ees unprotected against wrongful discharges. If employment agreements were brought into conformity with general Illinois contract law, a breach of contract action for wrongful discharge would be available to employees.

**Contract Law as a Basis for a Wrongful Discharge Cause of Action**

Although a contract action usually will not support an award of punitive damages,⁸⁵ there are a number of advantages to proceeding in contract rather than tort. First, a breach of contract claim, unlike a tort action, would not be predicated on a public policy violation. The terms of the employment contract, as implied in law or fact, would be the basis for the cause of action.⁸⁶ The plaintiff would thereby avoid the problems posed by the Illinois courts' reluctance to find policy violations.⁸⁷ Second, the use of contract law would allow the court to substitute well-settled contract principles for the outdated precedent regarding the terminable at will rule. Third, both the employment relationship and the terminable at will rule are based on contract principles.⁸⁸ The rules governing terminable at will employment agreements, however, are no longer consistent with the law applied to other contracts.⁸⁹ Modification of the terminable at will rule through use of general contract theory would promote consistency in Illinois contract law, and force the courts to modernize the rule. By applying contract principles, the terminable at will rule could become an effective tool for protecting both an employee's desire for job security and an employer's interest in retaining the necessary discretion for making sound business decisions.

The use of contract law in Illinois as a successful basis for a

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⁸⁵. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 187, 384 N.E.2d 353, 360 (1978). The potential for punitive damages in a tort action should not be over-emphasized. The Kelsay court was careful to point out that punitive damages are not favored, and that courts must exercise caution to make sure that punitive damages are not unwisely awarded. Id. at 188, 384 N.E.2d at 360.

⁸⁶. See notes 132-191 infra and accompanying text.

⁸⁷. See generally notes 44-84 supra and accompanying text.

⁸⁸. Board of Educ. v. Indus. Comm'n, 53 Ill. 2d 167, 171-72, 290 N.E.2d 247, 250 (1972); Wolverine Ins. Co. v. Jockish, 83 Ill. App. 3d 411, 415-16, 403 N.E.2d 1290, 1293-94 (3d Dist. 1980); Comment, Employment at Will, supra note 5, at 240. It should also be noted that one Illinois court has barred an employee from bringing a wrongful discharge claim on the basis of tort when the employee was covered by a collective bargaining agreement that allowed the employer to discharge for just cause only. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 406, 407 N.E.2d 95, 98 (3d Dist. 1980).

⁸⁹. See generally notes 14-24 supra and accompanying text.
Wrongful discharge suit necessitates an analysis of general contract law. Obstacles to the use of contract law as a means of limiting an employer’s power are found in both the law governing the requirements for a valid contract and the rules for construing a contract. In order to bring a successful suit, an employee would have to be able to avoid flaws in the form of the contract as well as in the contract’s terms.

Requirements of a Valid Contract

Mutuality of Obligation

In addition to the traditional elements of offer, acceptance, and consideration, some Illinois courts treat mutuality of obligation as an independent requirement for a valid contract. The term mutuality of obligation has been defined in two different ways by Illinois courts. Determining the correct definition of this concept is crucial to the use of contract law as a means to limit an employer’s ability to discharge an employee arbitrarily.

One interpretation defines mutuality of obligation as requiring that “both parties are bound or neither is bound” to the contract. If mutuality of obligation is not present, the contract is declared void and unenforceable. Symmetry is the crux of this definition of mutuality. Accordingly, terminable at will employment con-

91. See notes 92-99 infra and accompanying text.
92. 1 S. Williston, Contracts § 105A (3d ed. 1967); Blades, supra note 5, at 1419-21; Comment, Employment at Will, supra note 5, at 240.
93. Vogel v. Pekoc, 157 Ill. 339, 342, 42 N.E. 386, 387 (1895). It is interesting to note that the employee in Vogel was the defendant. Id. at 340, 42 N.E. at 386. The employment contract restricted the defendant employee’s ability to quit by requiring that he first give notice. Id. at 341, 42 N.E. at 386. Because the plaintiff employer was not bound to keep the defendant in its employ, but the defendant was not free to quit without notice, the contract was considered void for lack of mutuality. Id. at 342-43, 42 N.E. at 387. See also Meadows v. Radio Indus., Inc., 222 F.2d 347, 348 (7th Cir. 1955); Gardiakos v. Vanguard Communications, Inc., 38 Ill. App. 3d 937, 939, 350 N.E.2d 210, 212 (1st Dist. 1976); Krafftco Corp. v. Koblus, 1 Ill. App. 3d 635, 638, 274 N.E.2d 153, 155 (4th Dist. 1971); Hillman v. Hodag Chemical Corp., 96 Ill. App. 2d 204, 207, 238 N.E.2d 145, 147 (1st Dist. 1968).
95. By implication, see generally cases cited at note 106, infra. See also Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Blades, supra note 5, at 1425-26 (describing mutuality of obligation as merely an appeal to symmetry and hollow notions).
tracts are valid because neither party is bound to the agreement. If an employer's right to terminate at will is hampered, the contract will be void unless the employee's ability to quit is also restricted. This interpretation of mutuality has rendered unenforceable numerous employment contracts when employees have sued for wrongful discharge.

97. Vogel v. Pekoc, 157 Ill. 339, 343, 42 N.E. 386, 387 (1895); accord, Blades, supra note 5, at 1419. See generally cases cited at notes 102 & 103 infra. Restricting the employee's ability to quit has been described as unacceptable in the United States, perhaps because of the national abhorrence to slavery. Blades, supra note 5, at 1425. The employee's right to choose for whom to work has become too valuable to be circumscribed in order to prevent abuse of the almost negligible coercive power of the employee's threat to quit his or her job. The situation of the employer differs drastically. Id. at 1425-26.

The Vogel mutuality requirement can be avoided by proving that the employment contract was unilateral. The classification of the contract as unilateral becomes important mainly because of its ensuing allocation of contractual duties. A promisor is the only party who is bound to the contract. J. Calimari & J. Perillo, Contracts § 1-10 (2d ed. 1977); 1 A. Corbin, Contracts § 21 (1963). Thus, when the employer is the promisor, the employer is the only party against whom the contract can be enforced. 1 A. Corbin, Contracts § 152 (1963). Because the promisor is the only party legally bound to the contract, it is immaterial that the employee, but not the employer, has the ability to arbitrarily terminate the relationship. 1 A. Corbin, Contracts § 152 (1963).

In a unilateral contract, the employer is bound to his or her offer once the offeree begins performance. 1 A. Corbin, Contracts § 49 (1963). The offer is also sometimes considered irrevocable once the offeree foreseeably changes position in reliance on the offer. Id. The employee, however, remains free not to complete performance unless acceptance of the offer implied a promise to fully perform. Id. at § 21; 1 S. Williston, Contracts § 60, at 187 (3d ed. 1967). Thus, mutuality of obligation requirements are not present when contracts are unilateral.

The assertion of the existence of a unilateral contract does have its drawbacks. For example, having a unilateral contract may leave the employee with minimal job security. Because employment contracts have been regarded as a series of unilateral offers, see note 11 supra, the employer is bound to his or her offer only until the requested performance is completed. 1 A. Corbin, Contracts § 49 (1963). Thus, unless the offer states or implies a specific duration, see notes 132-191 infra and accompanying text, the practical effect of construing the contract as unilateral is to allow the employer to withdraw the offer at any time, without incurring liability, by discharging the employee. See notes 12 & 13 supra and accompanying text. The task for the employee, then, becomes to prove implications in the contract that the offer was for a definite duration by virtue of the performance requested or the promise made by the employer. See notes 132-193 infra and accompanying text.

An employee may also be able to avoid the mutuality doctrine by arguing that it is a rule of construction rather than a substantive requirement. This argument finds some support in Hillman v. Hodag Chem. Corp., 96 Ill. App. 2d 204, 238 N.E.2d 145 (1st Dist. 1968). The court in Hillman stated that mutuality must be determined as a matter of construction. Id. at 207, 238 N.E.2d at 147. In turn, the court's focus should be on the language of the con-
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Employment contracts restricting the employer's, but not the employee's, ability to terminate the employment relationship need not be held unenforceable for lack of mutuality. Another line of Illinois cases treats mutuality of obligation as a requirement synonymous with the need for consideration.99 Equating mutuality to determine whether mutuality exists. Id., 238 N.E.2d at 147. Because rules of contract construction require judicial consideration of the intent of the parties as indicated by the language of the contract, this approach would free the courts from being forced to automatically declare that a contract binding the employer, but not the employee, is void for lack of mutuality.

Further support for minimizing the use of the mutuality doctrine is found in Palmateer v. Int'l Harvester Co., No. 53780 (III. April, 1981), where the court described the doctrine as “harsh” and containing “shortcomings” due to its lack of recognition that employers and employees possess disparate bargaining power. Id. slip op. at 2.


Treating mutuality and consideration as interchangeable terms has been described as better reasoned in both theory and justice than the Vogel approach. 1A A. CORBIN, CONTRACTS § 152 (1963); 1 S. WILLISTON, CONTRACTS § 105A (3d ed. 1967); Blades, supra note 5, at 1419-20; Comment, Employment At Will, supra note 5, at 219. The symmetry requirement for mutuality is considered theoretically confusing because of its inconsistency with other contract law. 1 S. WILLISTON, CONTRACTS § 105A (3d ed. 1967). See generally 1A A. CORBIN, CONTRACTS § 152 (1963).

For example, the Illinois Supreme Court in Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 108, 133 N.E.2d 711, 714 (1921), stated that if mutuality were held to be a required element in every contract, to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral contract. Because a promisor is the only party in an executory unilateral contract who can be legally bound to the agreement, J. CALMARI & J. PERILLO, CONTRACTS § 1-10 (2d ed. 1977); 1 A. CORBIN, CONTRACTS § 21 (1963), mutual obligation is lacking. 1A A. CORBIN, CONTRACTS § 152 (1963); 1 S. WILLISTON, CONTRACTS § 105A (3d ed. 1967). The Armstrong court recognized that unilateral contracts possess unquestionable validity in Illinois, however, and thus decided that consideration, not mutuality, was the necessary element for creating a binding contract. 301 Ill. 102, 108, 133 N.E.2d 711, 714 (1921).

Another area of contract law inconsistent with the Vogel definition of mutuality involves contracts for permanent employment. In Illinois, before a permanent employment contract is declared enforceable against the employer, the employee must show that he or she supplied consideration in addition to rendering services. Heuvelman v. Triplet Elec. Instrument Co., 23 Ill. App. 2d 231, 236, 161 N.E.2d 875, 877 (1st Dist. 1959); Goodman v. Motor Prod. Corp., 9 Ill. App. 2d 57, 77, 132 N.E.2d 356, 365-66 (2d Dist. 1956). The additional consideration, though, need not restrict the employee's ability to quit his or her job. Molitor v. Chicago Title & Trust Co., 325 Ill. App. 124, 59 N.E.2d 695 (1st Dist. 1945); Jones v. Stoneware Pipe Co., 277 Ill. App. 18 (4th Dist. 1934) (an employee's release of claim for damages was sufficient consideration to support a contract for permanent employment). Because the employer's right to terminate the employment relationship is infringed upon by the contract terms promising permanency, there exists no mutuality in the sense that the contract is equally enforceable by the parties.

But see Molitor v. Chicago Title & Trust Co., 325 Ill. App. 124, 59 N.E.2d 695 (1st Dist. 1945), where the court stated that when the intention of the parties clearly was to enter a
with consideration would avoid the problems encountered when an employer and employee are bound in different ways to the employment relationship.\textsuperscript{100}

Adequacy of Consideration

Consideration is required to prevent the enforcement of gratuitous promises.\textsuperscript{101} Generally, Illinois courts will not question the sufficiency of consideration supporting a contract unless the consideration is so grossly inadequate as to shock the conscience of the court.\textsuperscript{102} In addition, Illinois law does not require the consideration to be reciprocal.\textsuperscript{103} Thus, even when a party makes only one promise in exchange for numerous promises by the other party, the consideration is valid.\textsuperscript{104} When applied to the terminable at will employment contract, the law of consideration, unlike the mutuality doctrine, would permit an employee's mere performance of services\textsuperscript{105} to constitute adequate consideration for an employer's permanent employment contract, the contract was binding even though the employee's only consideration was his promise to render services. \textit{Id.} at 135, 159 N.E.2d at 699. \textit{Molitor} was distinguished by the \textit{Goodman} court on its facts. In \textit{Goodman}, the court stated that the plaintiff in \textit{Molitor} had given additional consideration because he had quit a former job and moved to Chicago, and the employer knew that these sacrifices were made in consideration for the promise of permanent employment. Goodman v. Motor Prod. Corp., 9 Ill. App. 2d 57, 77, 132 N.E.2d 356, 366 (2d Dist. 1956).

\textsuperscript{100} See notes 93-98 supra and accompanying text.


\textsuperscript{103} Cox v. Grant, 57 Ill. App. 3d 922, 925, 373 N.E.2d 820, 823 (5th Dist. 1978)(where the tenant's promise to pay rent was sufficient consideration even though the landlord had agreed to allow the tenant to break the lease, but did not himself have the freedom to evict the tenant arbitrarily); Aristocrat Window Co. v. Randell, 56 Ill. App. 2d 415, 206 N.E.2d 545 (1st Dist. 1965)(where the employer's promise to pay wages was sufficient consideration for the employee's promise to both work and give notice, even though the employer could discharge the employee for good cause without notice).

\textsuperscript{104} \textit{See generally} cases cited at note 103 supra.

\textsuperscript{105} Performance of services would be the consideration an employee at will would need to provide in order to avoid giving an illusory promise. An illusory promise is one where the
promises of both job security and compensation for those services. The ability under consideration principles to limit the employer's freedom to discharge, without restricting the employee's right to quit, is the advantage to adopting this analysis.

Instead of following the flexible consideration requirements applied to other contracts, Illinois courts have used rigid rules to test the adequacy of consideration in terminable at will employment contracts. Although strict rules may be justified for executory terminable at will contracts, where by definition neither party is bound to honor the terms of the agreement, application of rigid rules is unfounded once the employee has begun performance of the terms of the contract. The employee's performance should be regarded as a sufficient detriment to the employee, or benefit to the employer, to constitute binding consideration. In turn, because the law already binds the employer to his or her promise to compensate the employee once the employee has rendered services, both parties would be bound to the contract. The risk of enforcing a gratuitous promise would thereby be eliminated.

The harshness of the consideration rules governing terminable at will employment contracts is best illustrated by cases where an employer has promised permanent employment and payment of wages in return for an employee's services. The general rule in

promisor is free not to honor the commitment. Dasenbrock v. Interstate Restaurant Corp., 7 Ill. App. 3d 295, 302, 287 N.E.2d 151, 156 (5th Dist. 1972). Because a terminable at will employment contract by definition allows the parties to abandon their contractual relationship at any time, an employee's mere promise to work could be considered illusory. 1 A. CORBIN, CONTRACTS § 152 (1963); see text accompanying notes 110-113 supra. See also Bonner v. Westbound Records, Inc., 76 Ill. App. 3d 736, 394 N.E.2d 1303 (1st Dist. 1979); Litow v. Aurora Beacon News, 61 Ill. App. 2d 127, 209 N.E.2d 668 (2d Dist. 1965).

107. See notes 108-131 infra and accompanying text.
108. See notes 3 & 105 supra.
109. See notes 110-113 infra and accompanying text.
110. See note 101 supra and accompanying text.
111. 1 A. CORBIN, CONTRACTS § 152 (1963).
112. Id.
113. Id.
114. "Permanent" does not mean eternal. Rather, a "permanent" employment contract is commonly interpreted as an agreement for definite work at a stated salary for a specific work period. 1 A. CORBIN, CONTRACTS § 96 (1963). "Permanent" has also been described as binding the parties for as long as an employee can work and an employer is engaged in business. 1 S. WILLISTON, CONTRACTS § 39 (3d ed. 1967). See also Molitor v. Chicago Title & Trust Co., 325 Ill. App. 24 133, 59 N.E.2d 695, 698 (1st Dist. 1945)(where the court stated that it would be unreasonable to hold that the employer had bound himself for as long as both parties lived, regardless of business conditions or the employee's performance).
these situations is that before a permanent employment contract is enforceable, the employee must provide consideration in addition to the services for which compensation is to be paid.\textsuperscript{116} If this additional or special consideration is lacking, the contract is deemed terminable at will,\textsuperscript{116} thereby allowing the employer to disregard his or her promise of a permanent employment relationship.\textsuperscript{117} The severity of the rule is enhanced by the reluctance of Illinois courts to find the additional consideration necessary to support the employer's promise of job security.\textsuperscript{118}

The application of particularly rigid consideration principles to terminable at will employment contracts lacks a strong legal basis. This deficiency is seen clearly in the case of Cox v. Grant,\textsuperscript{119} which involved a terminable at will lease.\textsuperscript{120} Although the tenant reserved the right to terminate the relationship at any time, the landlord was not free to break the lease arbitrarily.\textsuperscript{121} Nonetheless, the court

\begin{itemize}
\item \textsuperscript{116} Cf. Meadows v. Radio Indus., Inc., 222 F.2d 347, 349 (7th Cir. 1955). See also Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N.E. 359 (1904).
\item \textsuperscript{117} See generally cases cited at note 3 supra.
\item \textsuperscript{118} See, e.g., Meadows v. Radio Indus., Inc., 222 F.2d 347 (7th Cir. 1955) (holding that the employee who gave up former employment and moved from Wisconsin to Chicago, with the understanding that his employment was to be permanent, had not provided sufficient additional consideration to bind the employer to a permanent contract); Heuvelman v. Triplett Elec. Instrument Co., 23 Ill. App. 2d 231, 161 N.E.2d 875 (1st Dist. 1959) (the employee's foregoing another employment opportunity was not held to bind the employer to a contract of permanent employment); Goodman v. Motor Prod. Corp., 9 Ill. App. 2d 57, 77, 132 N.E.2d 356 (2d Dist. 1956) (a distributor's devotion of full time and attention to selling supplier's products was deemed inadequate consideration for a permanent contract). See also 1 A. Corbin, \textit{Contracts} § 96 (1963) (asserting that when an employee has greatly changed his or her position, the court should fill in gaps of indefinite terms of employment contract by liberally interpreting contract terms and by making inferences from performances already rendered).
\item \textsuperscript{119} The above cases deal with reliance as a possible form of consideration. Treating reliance as consideration, however, seems to confuse the law regarding promissory estoppel and that pertaining to consideration. This confusion apparently stems from the Illinois courts' different interpretations of promissory estoppel. One interpretation treats promissory estoppel as a species of consideration. See, e.g., Wickstrom v. Vern E. Alden Co., 99 Ill. App. 2d 254, 263, 240 N.E.2d 401, 406 (1st Dist. 1968). The other interpretation defines promissory estoppel as a substitute for consideration when ordinary consideration requirements are not met. See, e.g., Bank of Marion v. Fritz Co., 57 Ill. 2d 120, 124, 311 N.E.2d 138, 140 (1974); Bonner v. Westbound Records, Inc., 76 Ill. App. 3d 736, 748, 394 N.E.2d 1303, 1311 (1st Dist. 1979).
\item \textsuperscript{120} 57 Ill. App. 3d 922, 373 N.E.2d 820 (5th Dist. 1978).
\item \textsuperscript{121} 57 Ill. App. 3d 923, 373 N.E.2d at 821.
\end{itemize}
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upheld the contract. First, the court relied on the general rule that consideration should not be scrutinized to determine its adequacy. Second, the court recognized that symmetry in consideration is unnecessary. Consequently, even though only the tenant could terminate the lease without incurring liability, the contract was valid.

Cox demonstrates that general contract law is applicable to terminable at will agreements. The continued application of strict rules to terminable at will employment contracts suggests that the nature of the employment relationship justifies the imposition of unusually harsh rules. Such a conclusion, however, ignores the inherently unequal positions of the employer and the employee. Because the employer possesses greater bargaining leverage, it makes little sense to protect the employer by presuming that, despite the language of his or her promise, the employer intended the relationship to be terminable at will. This inequity becomes even more apparent when the law presumes that an employee has knowledge that, absent additional consideration, an employer's promise of permanent employment is unenforceable.

Dissimilar treatment of employment contracts also overlooks the essentially contractual nature of the employer-employee relationship. In the interests of consistency, the law of consideration which governs other types of contracts should be applied to terminable at will employment contracts. If consistency were obtained, the court would be free to enforce the intentions and expectations.

122. Id. at 926, 373 N.E.2d at 823.
123. Id.
124. Id. at 925, 373 N.E.2d at 823.
125. Id. at 926, 373 N.E.2d at 823.
126. Requiring separate consideration before a contract for permanent employment is enforceable has been described as artificial because no obvious reasons exist for breaking the contract into two separate parts, one to employ and one to employ permanently. Blades, supra note 5, at 1419-20; Note, Implied Contract Rights, supra note 7, at 351 n.113.
127. See note 5 supra and accompanying text.
128. See note 5 supra and accompanying text.
of the parties\textsuperscript{131} as evidenced by the terms of the contract for which they originally bargained.

\textit{Construction of Indefinite Terms}

Even if an agreement contains all of the necessary components of a valid contract, it may be unenforceable if its terms are so indefinite that a court is unable to interpret them.\textsuperscript{132} Because a terminable at will contract contains no definite term of duration, a court's ability to remedy the uncertainty becomes critical.

The goal of all judicial construction of contracts is to enforce the intent of the parties.\textsuperscript{133} Intent is to be derived initially from the language of the contract.\textsuperscript{134} When contract provisions are absent or indefinite, however, a court must place itself in the position of the parties\textsuperscript{135} and consider the surrounding circumstances to determine the parties' intentions. Preference is given to a construction of the contract which will establish a binding relationship between the parties.\textsuperscript{136}

Despite the flexible analysis used to construe most contracts, courts frequently rely on mechanical rules when interpreting employment contracts.\textsuperscript{137} When employment contracts do not contain definite terms of duration,\textsuperscript{138} courts presume that the parties intended their relationship to be terminable at will.\textsuperscript{139} Although the

\textsuperscript{131} See notes 133-136 infra and accompanying text.
\textsuperscript{135} In re Estate of Klinker, 80 Ill. App. 3d 28, 30-31, 399 N.E.2d 299, 301 (5th Dist. 1979); Dassenbrock v. Interstate Restaurant Corp., 7 Ill. App. 3d 293, 295, 287 N.E.2d 151, 153-54 (5th Dist. 1972).
\textsuperscript{137} See notes 138-168 infra and accompanying text.
\textsuperscript{139} See generally cases cited at notes 2 & 3 supra.
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ultimate focus should be on intent, the consequence of this presumption is that courts ignore what the parties actually contemplated.140

Lack of attention to the intent of the parties is particularly harmful in employment contracts, which are typically short, informal and nonspecific.141 Although parties to an employment contract may intend to be bound, they may have no specific duration in mind for the employment relationship.142 The absence of specificity in the contract, however, has the effect of invoking the terminable at will rule. The real intent of the parties is lost in the process.143

Outside of terminable at will contracts, agreements with indefinite provisions are usually cured by implying terms to clarify the contract.144 Implication of terms in a terminable at will contract could curb an employer's power to terminate the contract arbitrarily. Because this approach is used with other types of indefinite contracts, it has a solid legal foundation.145 Moreover, the use of implied terms would not restrict the exercise of an employer's sound business judgment. Implication could be used by both parties to the contract, thereby protecting the employer as well as the employee.

Implied-in-Fact Terms

There are a number of sources from which to imply terms of employment contracts. The most common sources are personnel policies, compensation rates, and customs of trade.

1. Personnel Policies

Whether policy statements in personnel manuals may be construed as implied terms of employment agreements has been hotly

141. 3A A. Corbin, Contracts § 684 (1963).
142. Id.
143. See note 140 supra.
145. See generally cases cited at note 144 supra.
debated. Illinois has taken a hybrid approach by incorporating in an employment contract those personnel manual provisions which were introduced by the employer subsequent to entering into the contract. The subsequent introduction of policy terms acts as a modification of the original agreement. If an employee continues to work after the personnel policy becomes effective, the employee is presumed to have consented to the modification. On the other hand, when the policy was adopted prior to the formation of an employment contract, the terms are not incorporated.

An employee who accepts work from an employer who has already promulgated a personnel policy is considered not to have bargained for that policy. Thus, the policy is not incorporated into the terms of the employment contract.

This distinction is artificial. The Illinois decisions do not satisfactorily explain why continuing to work, as opposed to commencing work, constitutes the bargaining and the consideration sufficient to render policy statements part of the contract terms.

146. See, e.g., Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (the court assumed that a policy handbook constituted part of the employment contract terms); McQueeney v. Glenn, 400 N.E.2d 806 (Ind. App. 1980) (the court refused to construe personnel policy as part of the contract because restricting the employer's, but not the employee's, ability to terminate the employment relationship destroyed mutuality of obligation); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (the court held that the employer should be bound by the act of implementing personnel policy); Chin v. AT&T, 410 N.Y.S. 737 (Sup. Ct. 1978) (the court reasoned that an employment manual cannot comprise contract terms because policy provisions are not sufficiently definite and inclusive to create a valid contract).


149. Id.


151. Id. at 121-22, 397 N.E.2d at 443-46.

152. Note that other Illinois cases have held that consideration besides rendering services must be furnished before an employer's ability to discharge the employee may be restricted. See generally cases cited at notes 99, 114-118 supra and accompanying text.

153. An explanation for the different holdings in Carter and Sargent could be that the court in Sargent wanted to limit the application of Carter. The soundness of the Sargent approach to limiting Carter is questionable. If an introduction of personnel policy subsequent to the creation of an employment contract is binding as a modification of the original agreement's terms, a change in a pre-existing policy should also be binding on the employer. Thus, if an employee entered an employment relationship with an employer who already possessed a stated policy, a change in the policy would bind the employer. If a mere change in policy were sufficient to bind the employer, Sargent has accomplished little in its limitation of Carter.
Moreover, the judiciary’s approach ignores the reasonable expectations of the parties. When an employer formulates personnel policy, the logical inference is that he or she is seeking to establish guidelines for employee performance. In addition, when the policy restrains the employer’s ability to discharge employees, the employer presumably anticipates a beneficial result, such as improved employee attitudes or work performance. Formulation of personnel policy also foreseeably induces employee reliance on that policy. In fact, if this were not the result, the employer’s purpose for creating the policy would seemingly be defeated.

These considerations recently led the Supreme Court of Michigan to hold that an employer’s policy statement requiring discharges to be made only for good cause constituted a term of the employment contract.\textsuperscript{154} The court, in \textit{Toussaint v. Blue Cross & Blue Shield},\textsuperscript{155} found that the employee’s reasonable reliance on the policy was an intended and natural consequence of the creation of the policy.\textsuperscript{156} In particular, the court described the policy statements as “instinct with obligation”\textsuperscript{157} and thus binding on the employer.\textsuperscript{158} Therefore, the employer was estopped from maintaining that the policy statements were illusory and unenforceable.\textsuperscript{159}

The \textit{Toussaint} court’s approach is a realistic assessment of the expectations of an employer and employee who are operating according to guidelines established by the employer. By holding the employer responsible for the natural consequences of formulating policy, and by requiring the employee’s reliance on that policy to be reasonable, the court struck an appropriate balance between the

\begin{itemize}
\item \textsuperscript{154} Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).
\item \textsuperscript{155} Id.
\item \textsuperscript{156} Id. at 613, 292 N.W.2d at 892-93.
\item \textsuperscript{157} Id. at 613, 292 N.W.2d at 892.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 621, 292 N.W.2d at 895. The \textit{Toussaint} decision bound the employer although the employment contract did not contain an express provision regarding the duration of the employment relationship. \textit{Id.} at 596-97, 292 N.W.2d at 883-84. The terminable at will rule, however, was interpreted by the court to be a mere rule of construction, not substantive law. \textit{Id.} at 600, 292 N.W.2d at 885. As such, the court felt justified in adhering to the general rule of contract construction that agreements are to be interpreted in accordance with the parties’ intentions. \textit{Id.} Development of personnel policy, reasoned the court, was adequate evidence that the employer did not intend the employment relationship to be terminable at will. \textit{Id.} at 614, 292 N.W.2d at 892. In turn, acceptance of the job offer and reliance on the personnel policy was a manifestation by the employee of assent to the provisions in the policy. \textit{Id.} The result was a valid contract in which the policies of the employer were implied terms.
\end{itemize}
Although the *Toussaint* approach has not been applied in Illinois to employment contracts, it does find support in Illinois law. First, at least one Illinois court has acknowledged that an agreement may be "instinct with obligation," notwithstanding a lack of express commitment in the language of the contract. Applying this rule to an employment contract could bind the employer to policy statements, even though the employer did not expressly agree to follow such policy.

Second, the Illinois Supreme Court has already used policy statements as a source from which to imply contract terms. In *Steinberg v. Chicago Medical School*, the court held that an explanation in a school catalogue regarding procedures used for making admissions decisions was binding on the institution. The applicant's return of the application with the required processing fee acted as an offer to apply. When the school accepted the application, a binding contract was formed, and its terms were those stated in the school catalogue. The court also reasoned that the information in the catalogue had induced the plaintiff to apply to that school. Because this reliance was both foreseeable and justified, the school was bound by its representations.

The rationale of *Steinberg* should also govern situations where an employee enters into an agreement with an employer who formulated personnel policy before the employee was hired. An employee's foreseeable and justifiable reliance on policy statements by the employer should bind the employer. Personnel policy could thereby be incorporated into the contract terms. Even when these policy terms would limit an employer's ability to discharge employees, inclusion of the policy into the employment contract should

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160. The court also stated that if an employer does not want to be bound interminably to the personnel policy, the employer could notify employees that the policy was subject to unilateral change. This would destroy any reasonable expectations that employees could have regarding the continuation of the policy. Employees would, however, still be entitled to expect that whatever policy was in force would be applied uniformly. *Id.* at 619, 292 N.W.2d at 894-95.


162. *Id.* at 744, 394 N.E.2d at 1308-09.

163. 69 Ill. 2d 320, 371 N.E.2d 634 (1977).

164. *Id.* at 330-32, 371 N.E.2d at 639.

165. *Id.*

166. *Id.*

167. *Id.* at 333, 371 N.E.2d at 641.

168. *Id.* at 333-34, 371 N.E.2d at 641.
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Not be viewed as an unwarranted detriment to the employer. Rather, incorporation should be considered an enforcement of the intentions of the parties.

2. Compensation Rates

Using compensation rates as implied terms of duration has been suggested as a way of avoiding application of the terminable at will rule. This approach presumes that the parties to an employment agreement intend their contractual relationship to last for at least as long as the agreed upon compensation term. Such an interpretation of compensation terms would transform an otherwise terminable at will employment contract into an agreement possessing a definite duration, thereby limiting the employer's ability to discharge the employee arbitrarily.

In Grauer v. Valve & Primer Corp., the Illinois appellate court for the Second District adopted this approach to justify its deviation from the terminable at will rule. The court reasoned that an employment contract that provided for an annual salary and review indicated an intent by the parties to enter into a relationship with a definite duration. The court rejected the general rule that employment contracts are terminable at will even if they contain provisions specifying compensation periods. The drawback to

170. Id.
171. Id.
173. Id. at 155, 361 N.E.2d at 865.
174. Id. Although the court did not expressly reject the general rule that compensation rate stipulations do not constitute definite terms, the evidence on which the court relied to justify its decision was sufficiently weak, when compared to cases where the general rule has been applied, to indicate a departure by the court from the terminable at will rule. See, e.g., Buian v. J. L. Jacobs and Co., 428 F.2d 531 (7th Cir. 1971); Atwood v. Curtiss Candy Co., 22 Ill. App. 2d 369, 161 N.E.2d 355 (1st Dist. 1959).


A reasonable notice requirement may also be a proper term to imply in the employment contract. 1 S. WILLISTON, CONTRACTS § 39 (3d ed. 1967). This view has found support in one Illinois case dealing with a terminable at will municipal services contract. In Cabak v. City of St. Charles, 61 Ill. App. 3d 57, 63, 377 N.E.2d 548, 552 (2d Dist. 1978), the court stated that the proper method of terminating an executory service contract was to give notice. Requiring notice before terminating an employment contract was also raised in Kraftco Corp. v. Koblus, 1 Ill. App. 3d 635, 640, 274 N.E.2d 153, 156-57 (4th Dist. 1971), where the court recognized that a strong argument could be made that reasonable notice is a prerequisite to terminating an at will relationship. The court, however, then noted that prior terminable at will employment contract cases had not required notice. Id.
the *Grauer* approach is that employees under contracts providing for compensation to be calculated on less than an annual basis would be left with little job security. Thus, the *Grauer* analysis would be beneficial only to those employees whose compensation was calculated on the basis of a substantial period of time.

3. Custom of Trade or the Common Law of the Job

Another way to supply the agreement with a definite term of duration is to consider the nature of the particular job or industry involved. By emphasizing the particular job covered by the contract, a court could provide a term of duration consistent with the customs of the industry. This would not compel courts to undertake a mode of analysis with which they are unfamiliar. Courts are often required to decide customs of trade when construing collective bargaining agreements or contracts for the sale of goods. Consequently, it would not be difficult for courts to apply a similar analysis to employment relationships not covered by collective bargaining agreements.

**Implied-in-Law Term of Good Faith**

The ability of courts to impose contractual obligations by operation of law provides an important alternative to extracting contract terms from the conduct of the parties. The advantage of implied-in-law terms is their lack of dependence on the actions or expressions of the contracting parties. Therefore, regardless of the existence of personnel policies, annually based compensation terms, or strong trade customs, an employee could obtain damages for being wrongfully discharged.

In Illinois, all contracts are construed as requiring the parties to

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175. Note, *Implied Contract Rights*, supra note 7, at 356. In Illinois, this approach would be consistent with the rule of contract construction that requires a court to place itself in the position of the parties, to ascertain their reasonable expectations. See note 135 supra.

176. United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Note, *Implied Contract Rights*, supra note 7, at 360. In fact, it is recognized in Illinois that a collective bargaining agreement, because of both the complexity of matters it governs and the need to have a comprehensible document, must be written in indefinite terms. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 405, 407 N.E.2d 95, 98 (3d Dist. 1980). When a dispute arises, the “common law of the industry” is relied upon by the courts to clarify the vague terms in the agreement. *Id.* (by implication, citing United Steelworkers v. Warrior & Gulf Navigation, 363 U.S. 574 (1960)).

177. Comment, *Protecting At Will Employees*, supra note 5, at 1833.

178. Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 335, 371 N.E.2d 634, 641 (1977); J. CALIMARI & J. PERILLO, CONTRACTS § 1-12, at 19 (2d ed. 1977).
deal fairly and to act in good faith.\textsuperscript{179} This rule of construction possesses enormous potential for limiting an employer's power to make arbitrary discharges.\textsuperscript{180} In the first place, the good faith requirement is applied uniformly to all contracts, including employment contracts.\textsuperscript{181} The employee suing for breach of an employment contract would thereby avoid the discriminatory treatment frequently given employment contract cases.\textsuperscript{182} Moreover, the good faith requirement could protect an employee from retaliatory discharge, without restricting an employer's ability to exercise sound business judgment.

To make the good faith requirement a feasible solution to employer abuse of termination rights, a practical definition of good faith must be formulated. The good faith definition should be responsive to the competing interests of the employer and the employee. In order to balance these interests, the definition of good faith should look to the conduct of both parties in performing their contract duties.

Attention to sound business judgment would focus on the conduct of the employer. If an employee were discharged for sound business reasons, the good faith standard implied in the employment contract would not be breached. This would allow the employer to maintain a high degree of discretion in making business decisions and personnel determinations. The employer's personnel decisions would be protected further by the general reluctance of the courts to scrutinize business decisions.\textsuperscript{183}

In order to protect the employee, on the other hand, consideration would also have to be given to his or her behavior. Guidelines for unacceptable employee conduct can be found in the law regard-


\textsuperscript{180} See generally Comment, Protecting At Will Employees, supra note 5, at 1836-44.


\textsuperscript{182} See notes 107 & 135 infra.

ing terminations made for good cause.\textsuperscript{184} Typical incidents giving an employer good-cause to discharge include employee inefficiency, dishonesty, and failure to perform any or part of the job duties.\textsuperscript{185}

Good cause has always been an acceptable reason for an employer to discharge an employee.\textsuperscript{186} Even when a contract binds an employer to an employment relationship for a definite duration, the employer is free to discharge the employee at any time if good cause exists.\textsuperscript{187}

Thus, by including good cause and sound business judgment in the definition of good faith, courts would not be confronted with unfamiliar concepts. This proposed definition of good faith would allow the employer to discharge an employee performing satisfactorily, if business conditions required such a termination. If an employer disguised an arbitrary termination as an exercise of sound business judgment, however, courts would be required to examine more closely the employer’s reasons for the termination.

Existing rules of contract construction would protect an employer from spurious claims by disgruntled employees. When reviewing contract performance, Illinois courts favor an interpretation that does not constitute bad faith.\textsuperscript{188} In the employment contract situation, an employer who had two reasons for discharging an employee, one based on good cause and the other on bad faith, would remain free to discharge for good cause.\textsuperscript{189} Thus, despite the coexistence of good and bad faith reasons, the discharge would not be considered a breach of the employment contract.\textsuperscript{190}

The good faith requirement would comport with the reasonable expectations of the parties to an employment agreement. A dis-

\textsuperscript{184} Good cause has generally been defined as a failure by the employee to perform duties in the scope of employment with the prudence that would ordinarily be used by a reasonable employee in like circumstances. Comment, Employment At Will, supra note 5, at 229.

\textsuperscript{185} Id. at 229-30.


\textsuperscript{187} Familiarity with good cause has been increased by the frequency with which collective bargaining agreements require employers to discharge employees for good cause only. Comment, Protecting At Will Employees, supra note 5, at 1816. In addition, one Illinois court has already discussed wrongful discharge as a violation of a collective bargaining agreement term requiring discharges to be only for just cause. Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 405, 407 N.E.2d 95, 98 (3d Dist. 1980).


\textsuperscript{189} Id.

\textsuperscript{190} Id.
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charge would have to be made for good cause or pursuant to sound business goals. The only activity by the employer that would constitute a breach of an employment contract, then, would be a termination for an illegitimate business objective or as retaliation against an employee. The employee should be able to rely on continued employment for as long as he or she renders adequate services, and the employer is able to pay wages. In turn, the employer has a right to expect competent performance by the employee.191

CONCLUSION

The potential is great for using contract principles to prevent wrongful discharges. Technically, Illinois law imposes no insurmountable obstacles to modifying the terminable at will rule. The success of modification rests with the willingness of Illinois courts to adapt the terminable at will rule to current social and economic needs. The ability to effect change by using existing law is the major advantage of predicking a wrongful discharge action on contract theory. If contract law were adopted as a basis for tempering the terminable at will rule, the impediments present when tort law constitutes the basis for wrongful discharge would be avoided. Moreover, contract law would protect the expectations of employers as well as employees. These changes in the terminable at will rule would result in a far more equitable and realistic assessment of employment relationships.

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191. See notes 184-187 supra.