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EMPLOYMENT AT WILL: DO THE EXCEPTIONS OVERWHELM THE RULE? †

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An employee's ability to retain his job traditionally has been subject to the employment-at-will rule. Under this rule, an employer could discharge his employee for no cause, good cause, or even bad cause.¹ This long-standing rule was recognized uniformly throughout the nation, and until recently was applied without hesitation to give an employer the right to discharge an employee for any reason.² During the past two decades, however, a surge of judicial in-

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¹ The case most frequently cited in support of this rule is *Payne v. Western & Atl. R.R. Co.*, 82 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915):

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

Id., 82 Tenn. at 518-19. *See also* *Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 554, 112 P. 886, 888 (1910); *McLaughlin v. Ford Motor Co.*, 269 F.2d 120, 125 (6th Cir. 1959); *Laiken v. American Bank & Trust Co.*, 34 A.D.2d 514, 308 N.Y.S. 111, 112 (1960).

² *See, e.g.*, *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594, 595 (Ala. 1980); *Miller v. Missouri Pac. Transp. Co.*, 225 Ark. 475, 481, 283 S.W.2d 158, 161 (1955); *Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co.*, 158 Cal. 551, 555, 112 P. 886, 888 (1910); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513, 514 (1978); *Somers v. Cooley Chevrolet Co.*, 146 Conn. 627, 629, 153 A.2d 426, 428 (1959); *Motion Picture Machine Projectionists Protective Union, Local No. 473 v. Rialto Theatre Co.*, 25 Del. Ch. 347, 360, 17 A.2d 836, 840 (1941); *Taylor v. Greenway Restaurant, Inc.*, 173 A.2d 211 (Mun. App. D.C. 1961); *Wynne v. Ludman Corp.*, 79 So.2d 690, 691 (Fla. 1955); *West v. First Nat'l Bank of Atlanta*, 145 Ga. App. 808, 245 S.E.2d 46, 47 (1978); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 333, 334, 563 P.2d 54, 58 (1979); *Atwood v. Curtiss Candy Co.*, 22 Ill. App.2d 369, 371, 161 N.E.2d 355, 357 (1959); *Davis v. Davis*, 197 Ind. 386, 391, 151 N.E. 134, 135 (1926); *Hanson v. Central Show Printing Co.*, 256 Iowa 1221, 1226, 130 N.W.2d 654, 657 (1964); *Lorson v.*

tervention has threatened the continued legal validity of the employment-at-will rule and the traditional relationship between an employer and an employee. The central theme of this revolution in the employment relationship is an emerging protection of the employee's job security.

Courts have begun to provide such protection by carving out exceptions to the traditional rule in tort and contract law. To protect against discharges for "bad cause," some courts have created a public policy exception to the employment-at-will rule. These courts have recognized a tort of wrongful discharge, under which employees can sue when their discharge violates public policy. Other courts, under the rubric of contract law, have granted even

Falcon Coach, Inc., 214 Kan. 670, 679, 522 P.2d 449, 457 (1974); *Gambrel v. United Mine Workers of America*, 249 S.W.2d 158, 159-60 (Ky. 1952); *Pechon v. National Corp. Service, Inc.*, 234 La. 397, 406, 100 So.2d 213, 216 (1958); *Chesapeake & Potomac Tel. Co. v. Murray*, 198 Md. 526, 535-36, 84 A.2d 870, 874 (1951); *Askinas v. Westinghouse Elec. Corp.*, 330 Mass. 103, 106, 111 N.E.2d 740, 741 (1953); *McClain v. Township of Royal Oak*, 276 Mich. 185, 187, 267 N.W. 613 (1936); *Lundeen v. Cozy Cab Mfg. Co.*, 288 Minn. 98, 100, 179 N.W.2d 73, 75 (1970); *Carr v. Montgomery Ward & Co.*, 363 S.W.2d 571, 574 (Mo. 1963); *Jorgensen v. Pennsylvania R.R. Co.*, 25 N.J. 541, 554, 138 A.2d 24, 32 (1958); *Parker v. Borock*, 5 N.Y.2d 156, 159, 182 N.Y.S.2d 577, 579, 156 N.E.2d 297, 298 (1959); *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971); *Wood v. Buchanan*, 72 N.D. 216, 221, 5 N.W.2d 680, 682 (1942); *Coe v. Burwell Nurseries*, 2 Ohio App.2d 102, 105, 206 N.E.2d 577, 580 (1965); *Sooner Broadcasting Co. v. Grotkop*, 280 P.2d 457, 461 (Okla. 1955); *Densen v. Edmunds*, 272 Or. 345, 349, 537 P.2d 77, 79 (1975); *Fawcett v. Monongahela Ry. Co.*, 391 Pa. 134, 139, 137 A.2d 768, 771 (1958); *School Comm. of Providence v. Board of Regents for Educ.*, 112 R.I. 288, 291, 308 A.2d 788, 790 (1973); *Orsini v. Trojan Steel Co.*, 219 S.C. 272, 276, 64 S.E.2d 878 (1951); *Combs v. Standard Oil Co. of Louisiana*, 166 Tenn. 88, 90, 59 S.W.2d 525, 526 (1933); *NHA, Inc. v. Jones*, 500 S.W.2d 940, 943 (Tex. Civ. App. 1973); *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978); *Plaskitt v. Black Diamond Trailer Co.*, 209 Va. 460, 465, 164 S.E.2d 645, 649 (1968); *Webster v. Schauble*, 65 Wash. 2d 849, 852, 400 P.2d 292, 294 (1965); *Wright v. Standard Ultramarine & Color Co.*, 141 W. Va. 368, 381, 90 S.E.2d 459, 467 (1955); *Kovachik v. American Auto. Ass'n*, 5 Wis. 2d 188, 190, 92 N.W.2d 254, 255 (1958); *Lukens v. Goit*, 430 P.2d 607, 611 (Wyo. 1967).

The employment-at-will rule also has been recognized in major treatises, see S. WILLISTON, 9 WILLISTON ON CONTRACTS, § 1017 (3d ed. 1967); A. CORBIN, CORBIN ON CONTRACTS, § 684 (1960 & Supp. 1971); RESTATEMENT OF CONTRACTS, § 246 (1932), and has been discussed and criticized frequently in law review commentary. See Madison, *The Employee's Emerging Right to Sue For Arbitrary or Unfair Discharge*, 6 EMP. REL. L.J. 422 (1980); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 HARV. L. REV. 1816, 1818-19 (1980) [hereinafter cited as Note, *At Will Employees*]; Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y. L. SCH. L. REV. 743, 744-45 (1979); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4-5 (1979); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WISC. L. REV. 777, 780-84 (1977) [hereinafter cited as Comment, *Whistle Blowing*]; Note, *A Remedy for Malicious Discharge of the At-Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758, 761 (1975); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HAST. L.J. 1435, 1438-43 (1975) [hereinafter cited as Note, *Abusive Discharge*]; Comment, *Employment At Will and the Law of Contracts*, 23 BUFF. L. REV. 211, 212-16 (1973); Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis — A Judge for Our Season*, 24 RUTGERS L. REV. 480, 481 (1970); Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22ND ANNUAL CONFERENCE ON LABOR 171 (1970); Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) [hereinafter cited as Blades]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-45 (1974) [hereinafter cited as Note, *Implied Contract Rights*].

greater job security to employees by moving in the direction of a "good cause" requirement for employee discharges. These exceptions to the employment-at-will rule may develop into a legal requirement that employers establish good cause to effectuate the discharge of an employee. Such a requirement would fundamentally alter the traditional employer-employee relationship, and would impose enormous burdens on employers. Accordingly, it is submitted that courts should proceed with caution when making inroads on this century-old common law rule.³ The harsh consequences which were the outgrowth of bad faith employment practices should be remedied. Imposing on employers the burden of justifying, in a court of law, each and every discharge of an employee, however, may not be an appropriate solution. The good cause standard which may be implied into the employment contract, while providing job security to the at-will employee, will result in great burdens upon an employer's personnel practices. It may unduly restrict employers from exercising discretion in workforce selection. Communal judgment should not be permitted to second-guess personnel decisions particularly among higher-level confidential and managerial employees. If an employer is required to justify each employee termination the result will be costly inefficiencies and court policing of employment practices. Employee expectations must not be defeated but should be limited to express promises, justifiable before an experienced labor-relations neutral.⁴ Furthermore, the burden of proving that the employer had a bad cause for discharge should remain upon the employee at all times. Limitations to the emerging exceptions to the traditional rule may help to avoid placing the employer in the inexorable dilemma of retaining employees or paying for the expensive defense of a necessary action.

In order to determine the appropriate contours of the employment-at-will rule, this article will begin by tracing the origins and historical development of the rule. It will then examine the job security accorded public sector employees which may provide, by analogy, justifications and guidelines for court intervention in the private sector employment relationship. It will discuss how an at-will employee may sue in tort when a discharge violates public policy, and

³ It may be alternatively argued, however, that when the socio-economic conditions that result in the development of the common law have radically changed, the rationale for the rule no longer exists and the law is no longer in the best interests of society. Commenting on the development of the common law Oliver Wendell Holmes, Jr., stated, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

Complete judicial repudiation of a universally applied doctrine, however, may cause great socio-economic disturbance unless it is adopted gradually. Expectations should not be thwarted by complete repudiation of a doctrine upon which society relies. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 133-34 (rev. ed. 1954). "Efficient ordering of the economy depends on planning by individuals or firms and such planning, it can be argued, depends on predictability." J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 4 (1973). An employer must not be burdened with a new doctrine without an opportunity to consider its consequences when entering the employment relationship.

⁴ See text and notes at notes 271-312 *infra*.

suggest appropriate limitations on this tort action. Several emerging contract law exceptions to the rule will also be examined. These exceptions include remedies predicated on detrimental reliance, implied promises of good faith and fair dealing, and express promises of continued employment in the absence of cause for discharge. The problems arising from jury determinations of what constitutes good cause for discharge will be discussed. The article will conclude with an examination of the interrelationship between tort and contract claims and those brought under employment discrimination statutes.

I. THE DEVELOPMENT AND UNDERLYING POLICIES OF THE EMPLOYMENT-AT-WILL RULE

A. *Development of the Rule*

The formulation of the employment-at-will rule crystallized in the late nineteenth century. The American rule developed from the background of English employment law, but deviated from it in significant respects. The rule reflected the principles of contract law and the laissez-faire economics of the late nineteenth century.

1. The English Law

The English courts determined that when an employment contract contained a provision for an annual salary, the employer impliedly agreed to a one-year term of employment.⁵ The courts imposed liability for breach of the employment contract if the employee was discharged without good cause at any time during the year.⁶ The rationale for implying this one-year contract of employment originally was to protect seasonal farm workers.⁷ As the English economy developed, the rule was extended to protect the new group of factory employees.⁸ Lack of work usually was not considered a good cause for discharge. Consequently, it was difficult for an employer to effectuate a discharge under the English rule without incurring liability for breach of contract.⁹ To defeat the presumption of a one-year contract of employment, a different intent would have to be clearly expressed on the face of the contract.¹⁰ A contrary intent also could be established through a clearly defined custom of the industry, which evidenced a shorter contract duration.¹¹

This presumption of a one-year contract of employment, implied from the

⁵ See Note, *Implied Contract Rights*, *supra* note 2, at 340. The presumption was carried forth to the United States and was applied in all circumstances unless a contrary intent was manifest in the agreement. P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 125 (1969).

⁶ Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEG. HIST. 118, 119-20 (1976) [hereinafter cited as Feinman].

⁷ See *id.*

⁸ *Id.*

⁹ *Id.* at 119.

¹⁰ *Id.* at 120.

¹¹ *Id.*

term "annual," was inconsistent with an analogous rule in English landlord-tenant law. Under English landlord-tenant law, the length of a periodic tenancy was determined from the interval between rental payments.¹² Where rent was paid on a monthly basis, the rental contract was presumed to remain in force and effect only for one month. Thus, a landlord could evict a tenant, for any reason, by providing the tenant with one month's notice.¹³ The courts would have been more consistent, therefore, if they had implied the employment contract term from the period of wage payments rather than from the term "annual salary."¹⁴ By analogy to the rule for periodic tenancies, an employee who was paid every two weeks could have expected the contract to remain in effect for two-week intervals. Consistency between the two bodies of law would have required a two-week notice period to terminate the contract of employment.

The English rule requiring an annual hiring period was subsequently modified so that an employee could be discharged without good cause when given a period of notice during which he would receive severance pay.¹⁵ The length of the notice requirement varied among the industries from one to twelve months.¹⁶ The notice requirement was predicated upon the custom of an industry¹⁷ or, more recently, upon statute.¹⁸ Thus, the parties to an employment contract began to rely upon certain fixed notice requirements which became an implied term of the contract and which replaced the one-year term of employment.¹⁹ The employer had to have a good cause when discharging an employee to avoid payment of wages during the notice period.²⁰

2. Development of the American Rule

Although the development of the employment-at-will rule in this country borrowed from English law principles governing the employment relationship,

¹² See *Simmons v. Crossley*, 2 K.B. 95 (Div'l Ct.).

¹³ *Id.*

¹⁴ For an in-depth discussion of this possible development in modern American employment cases see Annot., 93 A.L.R.3d 659 (1979). See also *Singh v. City Serv. Oil Co.*, 554 P.2d 1367, 1369 (Okla. 1976).

¹⁵ F. BATH, *THE LAW OF MASTER AND SERVANT* 63-64 (5th ed. 1967).

¹⁶ See *Feinman*, *supra* note 6, at 121.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ These periods vary from one to eight weeks. See 11 and 12 Eliz. II, c. 49. Redundancy pay developed as an additional protection for employees who were discharged due to the elimination of their position for economic reasons. See generally *Industrial Relations Review and Report* No. 246 (April, 1981) and No. 250 (June, 1981). In recognition of the fluctuations of the business cycle and the need for employers to reduce their work force when economic conditions warranted, the notice provisions of the English law gradually were shortened and ultimately were codified in the Contracts of Employment Act of 1963, 11 and 12 Eliz. II, c. 49.

²⁰ In addition, England is one of 65 nations that impose a statutory requirement that there should be a "valid reason for the job termination connected with the capacity or conduct of the worker or based on the operational requirements of the employer." See *Employer Discipline: I.L.O. Report*, 18 RUTGERS L. REV. 446, 449 (1964); St. Antoine, *Employee Terminations and the*

in its final formulation, the American rule deviated in significant respects from its English precursor. In the early nineteenth century, some American jurisdictions adopted the substance of the English rule by holding that the inclusion of an annual salary provision in an employment contract raised a presumption that the parties intended a one-year contract.²¹ This rule reflected the traditional American notion that the master was responsible for the health and well-being of his servants.²²

Changes in the law of contracts and in the economic realities of the nation, however, led to the demise of the English rule in the United States. With the industrialization of the nation in the late nineteenth century, the employment relationship became more impersonal;²³ employers no longer assumed paternalistic responsibilities for their employees' security.²⁴ In addition, under the formalistic contract doctrines developed by the courts during this period,²⁵ employers no longer incurred obligations merely from their status as employers.²⁶ Instead, employers became bound only on those promises which they clearly obligated themselves to perform.²⁷

As a response to these developments in the nation's economy and in the law of contracts, the courts adopted what came to be known as the employment-at-will rule, sometimes referred to as the "Wood rule" for the lawyer who first stated the principle.²⁸ Under this rule, the courts presumed that all employment contracts could be terminated at will for any reason unless

Erosion of the At-Will Doctrine, DEVELOPING RIGHTS OF EMPLOYEES IN THE WORKPLACE, 42 (1981) (Seminar, Chicago, Ill., December, 1981) [hereinafter cited as DEVELOPING RIGHTS]. See also Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976) [hereinafter cited as Summers], which compares the good cause discharge statutes of France, Great Britain, West Germany, and Sweden. See *id.* at 508-19.

²¹ See Note, *Implied Contract Rights*, *supra* note 2, at 340 & n.48; see also Feinman, *supra* note 6, at 127-28.

²² The master-servant law of the United States was derived from the English common law. See Feinman, *supra* note 6, at 118. The economic relationship of the early nineteenth century was predominantly the single employee-employer relationship. See *id.* at 123. See also Note, *Abusive Discharge*, *supra* note 2, at 1438-39. Journeymen frequently learned skills in the homes of their master. See Feinman, *supra* note 6, at 123. From this close interpersonal relationship, the industrialization of the nineteenth century emerged, posing complex legal problems which were to be answered by the courts. See *id.* See also Note, *Abusive Discharge*, *supra* note 2, at 1440-43. For an in-depth study of the historical development of American industrialism, see N. WARE, *THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895* (1929); N. WARE *THE INDUSTRIAL WORKER 1840 TO 1860* (1924); 2 J. KENT, *COMMENTARIES ON AMERICAN LAW*, 258-66 (rev. ed. 1896). See also Note, *At Will Employees*, *supra* note 2, at 1824-25.

²³ T. COCHRAN & W. MILLER, *THE AGE OF ENTERPRISE* 325-26 (rev. ed. 1961).

²⁴ See Feinman, *supra* note 6, at 123-24. See also Note, *Abusive Discharge*, *supra* note 2, at 1440-41.

²⁵ See Note, *At Will Employees*, *supra* note 2, at 1824-25. See also Feinman, *supra* note 6, at 124-25.

²⁶ See Note, *At Will Employees*, *supra* note 2, at 1824.

²⁷ *Id.* at 1825-26.

²⁸ The rule was named after its original proponent who wrote:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is deter-

the intent of the parties was clearly expressed to provide for a definite period of employment.²⁹ The rule permitted the employer to discharge an employee for good cause, for no cause or even for a bad cause unless the employer relinquished this right by an agreement providing for a definite period of employment.³⁰

The employment-at-will rule became institutionalized in the late nineteenth century in a series of New York cases. In the definitive case of *Martin v. New York Life Insurance Co.*,³¹ the court held that the annual salary term of an employment contract did not automatically result in a presumption that the contractual period of employment was for a full year.³²

As the rule became accepted throughout the nation, courts presumed that the parties to employment contracts intended those contracts to be for no definite duration.³³ The courts refused to interfere with the nature of the employment contract, thereby creating the presumption that an employee could be discharged at any time.³⁴ Under the rule, the presumed contractual intent of the parties differed from that which had existed under English common law. Under the American employment-at-will rule, the employer did not bear the burden of proof to establish an intent that the contract was for less than one year. This burden was placed upon the employee who was required to establish that the parties intended to create an employment for a definite period.³⁵

B. The Policies Behind the Rule

The adoption of the employment-at-will rule was prompted by the economic realities of an industrializing society. It conformed to the principles of contract law which existed during the period. The rule benefited employers because it permitted their employment practices to respond to changes in the business cycle.³⁶ Had the English model been adopted, an employer would have been liable to pay the remainder of an annual salary in every instance in which an

minable at the will of either party, and in this respect there is no distinction between domestic and other servants.

H. WOOD, *MASTER AND SERVANT* § 134 (1st ed. 1877). According to one commentator, there was no adequate legal support for the rule of law thus stated. See Feinman, *supra* note 6, at 126. Indeed, the cases cited by Wood to support the rule were distinguished in a recent decision of the Michigan Supreme Court because they did not discuss what result would occur when an employer expressly promised a good cause for discharge. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 601-03, 292 N.W.2d 880, 886-87 (1980). Nevertheless, the rule was adopted in numerous jurisdictions, see Feinman, *supra* note 6, at 126, and was hailed as the universal rule by S. WILLISTON, 1 *WILLISTON ON CONTRACTS* § 39 (rev. ed. 1938).

²⁹ See Feinman, *supra* note 6, at 126.

³⁰ *Id.*; Note, *At Will Employees*, *supra* note 2, at 1825-26.

³¹ 148 N.Y. 117, 42 N.E. 416 (1895).

³² *Id.* at 121, 42 N.E. at 417.

³³ See Feinman, *supra* note 6, at 129.

³⁴ See *id.*

³⁵ See Note, *At Will Employees*, *supra* note 2, at 1825-26.

³⁶ See G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 227-316 (7th ed. 1973) [hereinafter cited as BLOOM & NORTHRUP].

employee was discharged or placed on layoff.³⁷ Rather than being a variable cost of production,³⁸ labor would have become a fixed cost, impeding the free transfer of capital and the growth of the economic system.³⁹ Market forces would not have reacted to establish true labor demand.⁴⁰ In contrast, under the employment-at-will rule, an employer could alter the size of his workforce to meet his changing production requirements without subjecting his decision to a jury determination of whether cause existed for the decision. Although the rule proved beneficial to the employer in a business-planning sense, it also resulted in hardship for employees. The costs of the business cycle were imposed entirely upon the employee. His attachment to his job was minimized with a resultant loss in control over his economic livelihood.⁴¹

The contract principles of consideration, mutuality of obligation, and mutuality of remedy also supported the development of the employment-at-will rule. The principle of mutuality of obligation⁴² required that both parties to a contract be legally bound to perform their promises.⁴³

In an employment contract, however, the employee effectively was free to quit his employment at a moment's notice.⁴⁴ Although the employer could always sue the employee for damages under a breach of contract theory, the employer's recovery was limited to his actual losses.⁴⁵ Unless the employee had unique abilities, the recovery was worthless because the employer was bound to employ a replacement.⁴⁶ In addition, the courts were not permitted to enforce the contract specifically without violating the prohibition against involuntary servitude contained in the thirteenth amendment.⁴⁷ Therefore, the courts

³⁷ See text and notes at notes 5-11 *supra*.

³⁸ See A. REES, *THE ECONOMICS OF WORK AND PAY* 53-68 (2d ed. 1979). Rees discusses the labor market and the interrelationship between wages, capital and the derived demand for labor arising from the demand for the final product. Furthermore, the author discusses the "marginal productivity theory of the demand for any factor of production." *Id.* at 54. Although the employment-at-will rule is not discussed, it appears that impeding the employer's ability to place employees on layoff would tend to make labor costs fixed over both the long run and short run.

³⁹ *Id.* at 53-68.

⁴⁰ BLOOM & NORTHRUP, *supra* note 36, at 227-316.

⁴¹ Blades, *supra* note 2, at 1405.

⁴² See A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1950 & Supp. 1971).

⁴³ See *id.*

⁴⁴ See Blades, *supra* note 2, at 1419.

⁴⁵ See generally RESTATEMENT (SECOND) OF CONTRACTS § 367, comment c (1981). In most circumstances, the employer's damages are limited to the costs of finding a replacement employee. Pepe, *Employer's Breach of Contract, Third-Party Interference and Post-Relationship Conduct*, DEVELOPING RIGHTS, *supra* note 20, at 59-61 [hereinafter cited as Pepe].

⁴⁶ *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 367, comment a (1981), which prohibits the issuance of an injunction in a personal service contract.

⁴⁷ *H.W. Gossard Co. v. Crosby*, 132 Iowa 155, 109 N.W. 483 (1906), where the court stated: "When a court of equity intervenes to compel the employee to specifically perform a contract for personal service, his service becomes involuntary, and his position becomes one of involuntary servitude, a condition utterly incompatible with our institutions, and the fundamental law of the land." *Id.* at 170, 109 N.W. at 488-89. See generally 4 J. POMEROY, *EQUITIES JURISPRUDENCE* § 1343 (5th ed. 1943); *American Broadcasting Co. v. Wolf*, 438 N.Y.S.2d 482, 485 (1981).

concluded that if the employee effectively was not obligated to continue to provide his services, the employer similarly should not be obligated to continue to provide employment. As a result of the principles of mutuality of obligation and mutuality of remedy, employment contracts for life were interpreted to be in effect for an indefinite period and unenforceable.⁴⁸

The doctrine of consideration was an additional legal justification for the employment-at-will rule.⁴⁹ The principle of mutuality of consideration required that the parties to a contract give consideration for their respective promises. In an employment contract, the employee would provide his labor in consideration for his pay.⁵⁰ Where the employee was no longer employed, however, he would no longer give any consideration for his wages. Thus, to have compelled an employer to pay wages for a definite period of time without

⁴⁸ See generally A. CORBIN, 1 CORBIN ON CONTRACTS § 96 (1950 & Supp. 1971); J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 950 (1973). However, courts are permitted to enjoin an employee from working for a competitor. See *Pepe*, *supra* note 20, at 58. This doctrine has been utilized in rare circumstances when the employee has unique abilities, such as an artist or sports celebrity.

⁴⁹ The doctrines of consideration and mutuality of obligation are at the foundation of the employment-at-will rule. *Blades*, *supra* note 2, at 1419; *Cleary v. American Airlines*, 111 Cal. App.3d 443, 448, 168 Cal. Rptr. 722, 725 (1980). These doctrines have undergone major modification over the past several decades. See generally A. CORBIN, 1 CORBIN ON CONTRACTS §§ 109-52 (1950 & Supp. 1971). Adequacy of consideration is not subject to judicial scrutiny except where the bargain is unconscionable. See *Dawson, Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253, 281-82 (1947); see also RESTATEMENT (SECOND) OF CONTRACTS § 234, comment c (Tent. Draft Nos. 1-7, 1973): "Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable . . .," *id.*; U.C.C. § 2-302 (broad discretion in court with respect to reforming unconscionable contracts).

Mutuality of obligation and mutuality of remedy are no longer important principles of contract law. See RESTATEMENT (SECOND) OF CONTRACTS § 81 (Tent. Drafts Nos. 1-7, 1973); A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1950 & Supp. 1971). There are so many exceptions to the doctrines that they have been discredited. See J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 950 (1973); A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1950 & Supp. 1971). The modern analysis focuses upon the objective manifestations of the parties' intentions. See *Braucher, Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 599-602 (1969); Note, *Implied Contract Rights*, *supra* note 2, at 367 n.209. See also U.C.C. § 2-309(3), which states: "Termination of a contract by one party except on an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable." *Id.*

Although Article 2 of the Uniform Commercial Code is not applicable to the employment contract because its application, in general, is limited to the sale of goods, U.C.C. § 2-102, the justifications for its provisions may be viewed as equally if not more functionally appropriate to the employment context.

Mutuality of remedy is similarly an outmoded doctrine of contract law. A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1950 & Supp. 1971). Both employers and employees have a damage remedy for breach of contract. *Id.* Although specific performance may not be used to force an employee to work against his will because this would constitute involuntary servitude, see RESTATEMENT (SECOND) OF CONTRACTS § 367, comment a (1981), where an employee has special or unique abilities a damage action may be available to the employer for breach of contract. See *id.*, comment c.

⁵⁰ See generally A. CORBIN, 5 CORBIN ON CONTRACTS §§ 1181, 1184 (1951 & Supp. 1971).

the concomitant receipt of services, would have violated the principle of mutuality of consideration. In the absence of some special consideration flowing from the employee, the courts found that the employee provided no consideration for his employer's promise of future employment,⁵¹ and a court will not enforce the promise under general principles of contract law.⁵²

C. *Decline of the Policies Behind the Traditional Rule*

Several factors have led to the decline of these traditional justifications for the employment-at-will rule. One such factor is the growth of statutory regulation of the employment relationship. This governmental regulation began in the 1930's, with the enactment of the National Labor Relations Act⁵³ and has proceeded with increasing force during the past two decades.⁵⁴ This retreat by the legislature from a laissez faire approach to employment practices has curtailed much of the discretion which the traditional employment-at-will rule conferred upon the employer. As a result of these developments, the free labor market is no longer completely dependent upon competitive market forces.⁵⁵

In addition to the governmental regulation of the employment relationship, an example of these governmental enactments was the adoption of unemployment insurance statutes. These statutes place part of the economic burden of the business cycle on the employer.⁵⁶ Under these statutes, an employee who is discharged or placed on layoff is guaranteed a percentage of

⁵¹ *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 770, 259 S.E.2d 812, 814 (1979); *Forrer v. Sears, Roebuck & Co.*, 36 Wis.2d 388, 391, 153 S.W.2d 587, 589 (1967); *Rasnick v. W.M. Ritter Lumber Co.*, 187 Ky. 523, 526, 219 S.W. 801, 804 (1920).

⁵² See Note, *Implied Contract Rights*, *supra* note 2, at 351-53.

⁵³ 29 U.S.C. § 151 *et seq.* (1976).

⁵⁴ See, e.g., *Railway Labor Act*, 45 U.S.C. § 152 (1976) (protects union activity); *Consumer Credit Protection Act*, 15 U.S.C. § 1674(a) (1976) (prohibits discharge of employees who have wages garnished); *Occupational Health and Safety Act*; 29 U.S.C. § 215(a)(3) (1976) (prohibits discharge for exercising rights guaranteed by the Act).

State statutes prohibit discharge for a variety of protected activity, including the rights protected in the above statutes. See CAL. LAB. CODE § 1102 (West 1971) (prohibits discharge for exercising political rights); MICH. COMP. LAWS § 418.125 (1967) (prohibits discharge for filing claim for workmen's compensation); CONN. GEN. STAT. ANN. § 31-379 (West Supp. 1981) (prohibits discharge for filing safety code claim); FLA. STAT. ANN. § 448.03 (West 1981) (penal sanctions for threatening employee with discharge for trading with particular firms). The above list is only representative of state statutes which protect against discharge for engaging in activity protected by a statute.

⁵⁵ Compare *Adair v. United States*, 208 U.S. 161 (1908), where the Court stated that: The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, to dispense with the services of such employee.

Id. at 174-75; with *Coppage v. Kansas*, 236 U.S. 1, 9-13 (1915) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

⁵⁶ Although the level of benefits varies among the states the length of protection has been extended by the federal government. See *Federal-State Extended Unemployment Act of 1970*, 26 U.S.C. § 3304 (1976 & Supp. III 1979). In certain circumstances the system will provide as much as 39 weeks of protection under the federal extended unemployment insurance program. See *id.*

his former wages or salary unless the employee's conduct prompted the discharge.⁵⁷ The business cycle and intermittent recessions are not considered to be the type of good cause for a layoff which would defeat the employee's right to collect unemployment insurance payments.⁵⁸ Thus, the harsh results of the employment-at-will rule are ameliorated partially in those circumstances where there is no cause for a discharge or layoff. To the contrary, the economic recessions inherent in the business cycle were the precise reason for enactment of unemployment insurance statutes.⁵⁹

A different kind of governmental intervention in the employment relationship is represented by state and federal statutes which prohibit the discharge of an employee because of his status or because he has engaged in certain activities.⁶⁰ These statutes express a legislative intent to provide special protection for certain groups of people and for certain activities. Discharging an employee because of his status or because he has engaged in such specified activities is deemed by the statute to be for a bad cause and is prohibited.⁶¹

A number of additional factors have prompted a change in the hands-off approach to the employment relationship which has predominated in the American courts. One factor is the changed nature of the requirement of consideration in employment contracts.⁶² The decline in the number of blue collar jobs throughout society and a concomitant reduction in union membership as a percentage of the work force, have resulted in a decreasing percentage of employees protected by the grievance procedure that is incorporated in most collective bargaining agreements.⁶³ An analogous judicial trend protects the job rights of public employees and may encourage similar protections for private sector employees.⁶⁴

Some courts have perceived a need to enforce and effectuate a public

⁵⁷ See, e.g., MICH. COMP. LAWS § 421.29 (1967).

⁵⁸ *Id.*

⁵⁹ See, e.g., MICH. COMP. LAWS § 421.2 (1967), which states the rationale that prompted enactment of the statute in the following terms: "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state." *Id.*

⁶⁰ E.g., Title VII of the Civil Rights Act of 1964 §§ 703(a), 704(a), 42 U.S.C. § 2000e-2(a), 3(a) (1976 & Supp. III 1979); The Age Discrimination in Employment Act, 29 U.S.C. § 623 (1976 & Supp. III 1979); Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III 1979); Vietnam Era Veterans Readjustment Act, 5 U.S.C. § 7513(a) (Supp. III 1979).

⁶¹ See statutes cited at note 54 *supra*.

⁶² See note 49 *supra*.

⁶³ Union membership has declined from 35% to less than 25% of the workforce. See U.S. Bureau of Labor Statistics, *Directory of National Unions and Employee Associations* at 72 (1973). This statistic is more important because a significant number of union members are public employees who already receive constitutional job protection. See section II *infra*. The decline in union membership is significant to this discussion because most collective bargaining agreements require that an employee be discharged only for cause or good cause. COLLECTIVE BARGAINING § 40:1 (BNA). The grievance procedures which frequently culminate in arbitration provide an enforcement procedure for the good cause requirement. *Id.* at § 51:1, 51:5. Thus, with the decline in the number of employees protected by the grievance procedure there may be a perceived need to protect employees through judicial cognizance of a cause of action for wrongful discharge. See Blades, *supra* note 2, at 1410-11.

⁶⁴ The Supreme Court has conferred a number of procedural guarantees on public employees who are discharged. See section II *infra*.

policy of the state through a tort cause of action for the discharged employee, despite the difficulty courts have faced in defining the public policy they seek to protect.⁶⁵ Furthermore, there has been a growing judicial dissatisfaction with the harsh consequences of the employment-at-will rule, particularly when an employee relies upon an employer's promise of job security.⁶⁶ The judicial intervention may stem from a recognition of the importance of the job as an integral part of an individual's life in the modern industrial society.

Such governmental intervention in the employment relationship demonstrates the erosion of the traditional laissez-faire policy behind the employment-at-will rule. Employers no longer can reduce the size of their work forces with impunity. In various enactments, both the state and federal legislatures have determined that employers must share with their employees the economic costs of fluctuations in the business cycle. Thus, one of the policies behind the employment-at-will rule — to provide the employer with the unfettered ability to determine the size and composition of his work force — has been undercut.

The decline in the policies which supported the traditional rule has led courts to create new exceptions to the application of the rule. The purpose of these exceptions is to provide protection for employees who are discharged for bad cause, or without good cause. Principles for protecting employees from bad cause discharge were developed first in cases involving the discharge of public sector employees. The exceptions developed in the public sector may form an additional basis for protecting the private sector employee's expectations to a lifetime employment in the absence of cause for discharge. These issues are addressed in the next section.

II. THE ESTABLISHMENT OF A PROPERTY RIGHT IN EMPLOYMENT FOR PUBLIC SECTOR EMPLOYEES

There have been several judicial exceptions to the employment-at-will rule, including the added consideration doctrine and the contract of employment for a fixed duration. Before proceeding to discuss these judicial exceptions to the employment-at-will rule, however, it is necessary to review the leading cases involving the discharge of public sector employees. It was these cases that developed certain principles for protecting employees from a bad cause discharge. Therefore, in addition to providing a historical perspective for the more recent private sector cases, those decisions provide a theoretical framework in which to determine the appropriate measure of job protection for private sector employees.

During the past fifteen years the Supreme Court has decided several cases⁶⁷ in favor of providing certain procedural safeguards of job security for

⁶⁵ See section III *infra*.

⁶⁶ See *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 613-15 292 N.W.2d 880, 891-92 (1980).

⁶⁷ *Mount Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 284-87 (1977);

public sector employees. It is suggested that the development of these protections in the public sector may be the precursor to procedural protections for the job rights of private sector employees at the expense of the traditional concept of employment-at-will.

A measure of protection for the job security of public sector employees has been provided by the establishment of procedural rights to a hearing prior to a discharge. In *Perry v. Sinderman*,⁶⁸ the Supreme Court held that the summary discharge of a college professor may have violated his due process rights guaranteed by the fourteenth amendment.⁶⁹ The Court ruled that due process rights attach to prevent the discharge of a public employee, who has established an identifiable property right in his continued employment or an infringement upon the employee's liberty interest.⁷⁰ The Court concluded that the professor may have had such a property right in his teaching position, based upon a *de facto* tenure system which existed at the university.⁷¹ According to the Court, the university's faculty guide, which guaranteed continued employment for faculty members as long as their services were satisfactory, may have given the professor a legitimate expectancy that he would not be discharged without just cause.⁷² The Court held that if the professor could establish such an expectancy, then he could not be discharged without a prior hearing to determine whether just cause was present.⁷³

Thus, when a public employee can establish a property or liberty interest in continued employment, the public employer cannot discharge the employee for no cause or for bad cause and must explain the reasons for the action at a hearing.⁷⁴ The crucial inquiry is whether the employee has a legitimate expectancy to continued employment.⁷⁵ This expectancy, which establishes the existence of a property right in employment, is determined by examining the state law governing employment relations.⁷⁶ Where state law does not confer a

Board of Regents v. Roth, 408 U.S. 564, 573-78 (1972); *Perry v. Sindermann*, 408 U.S. 593, 596-603 (1972); *Connell v. Higginbotham*, 403 U.S. 207, 208-09 (1971) (*per curiam*); *Pickering v. Board of Ed.*, 391 U.S. 563, 569-73 (1968); *see also* *Slochower v. Board of Ed.*, 350 U.S. 551, 558-59 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 190-92 (1952).

⁶⁸ 408 U.S. 593 (1972).

⁶⁹ *Id.* at 603.

⁷⁰ *Id.* at 599.

⁷¹ *Id.* at 600, 602.

⁷² *Id.* The faculty guide stated:

Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

Id. at 600.

⁷³ *Id.* at 603.

⁷⁴ *See id.* at 602-03.

⁷⁵ *Funn v. Winston*, 612 F.2d 880, 881 (4th Cir. 1980); *Huntley v. Community School Bd. of Brooklyn*, 543 F.2d 979, 984 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1976).

⁷⁶ In *Board of Regents v. Roth*, the Court stated:

Property interests, of course, are not created by the Constitution. Rather

property right or would hold the expectancy unreasonable there cannot be a protected property interest.⁷⁷

The Supreme Court has held that the expectancy in continued employment may be established from the conditions and circumstances surrounding the employment relationship.⁷⁸ In *Perry*, the Court found that an explicit contractual provision protecting the employee's job was not necessary to establish a property right.⁷⁹ The employee could rely on statements contained in an employment policy handbook or similar documents that promised continued employment in the absence of cause for discharge, where the state law permits the existence of a property interest based upon expectations created by such documents or statements.⁸⁰

Private sector employees may receive similar promises of continued employment in employment manuals or oral statements made by the employer's representatives.⁸¹ Thus, cases such as *Perry* may form the basis for a claim that private sector employees have legitimate expectancies to continued employment which should also be recognized under contract law. Therefore, further analysis of the public employee cases in various jurisdictions is necessary to define the scope of protection these cases may give private sector

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577; *Bishop v. Wood*, 426 U.S. 341, 344-47 n.8 (1976).

⁷⁷ See *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976). State law also is applied to determine the extent and formalities of the hearing which is required to comply with the employee's due process rights. See *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

Due process requires that the employee be given an opportunity to be heard. *Id.* at 570 nn.7-8. It does not require that a full impartial or judicial hearing be accorded to all terminated employees. See *id.* Furthermore, an employee may voluntarily waive his constitutional right to a hearing. See *Stewart v. Bailey*, 556 F.2d 281, 285-86, *rev'd on other grounds*, 561 F.2d 1195 (5th Cir. 1977); *Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974); *Hayes v. Cape Henlopen School Dist.*, 341 F. Supp. 823, 834 (D. Del. 1972).

Due process rights also attach to identifiable liberty interests. See *Board of Regents v. Roth*, 408 U.S. 564, 572-75 (1972). The liberty interest protects an employee's right to his good name, reputation, and integrity from stigmatizing actions of the governmental employer. See *id.* at 573. The purpose of the liberty interest hearing is to provide an employee the opportunity to clear his reputation of the stigma of false accusations. *Id.* at 573 n.12; *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971).

⁷⁸ *Perry v. Sindermann*, 408 U.S. 593-602 (1972).

⁷⁹ *Id.*

⁸⁰ *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976); *Ashton v. Civiletti*, 613 F.2d 923, 928 (D.C. Cir. 1979); *Paige v. Harris*, 584 F.2d 178, 181-82 (7th Cir. 1978); *Thomas v. Ward*, 529 F.2d 916, 919 (4th Cir. 1975). But see *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980).

The property right must be determined by reference to state law. However, heretofore state law did not recognize the existence of a legitimate expectancy of continued employment. Thus, there appears to be an internal inconsistency in the decisions interpreting the public sector employee's rights.

⁸¹ See, e.g., *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 597-99, 292 N.W.2d 880, 884-85 (1980).

employees.⁸² In the absence of an express contractual promise or statutory grant, it is suggested that the public employee in a jurisdiction adhering to the at-will doctrine should have no greater protection of job security than the private employee. Indeed, it has been held that a state's adherence to the traditional employment-at-will rule can deprive even public employees from asserting a property right in their continued employment.⁸³

Because an expectancy to continued employment can be limited by state law, there would seem to be no basis other than a specific statute or civil service rule for finding a property right to continued employment in jurisdictions adhering to the traditional rule. Therefore, in those states that adhere strictly to the at-will employment doctrine, a policy handbook or oral promise of continued employment should be insufficient grounds for claiming a due process property right to continued employment or a hearing. The right would not attach because the relevant state law would negate any expectancy of such a property right.⁸⁴

The above analysis has not been considered by the Supreme Court.⁸⁵ Thus, constitutional protection is granted to a public employee even though a private sector employee would have no contractual right to a job under the employment-at-will rule or other provisions of state law. Yet private sector employees may have expectations of continued employment based upon sources similar to those giving rise to property rights for public sector employees. The principles contained in the public employee cases may form the basis for recognizing the legitimacy of a private employee's expectations to continued employment and for requiring an employer to explain the reasons for a discharge in those jurisdictions which are inclined to recognize employee expectancies that create a contract of employment.⁸⁶ Courts willing to make inroads on the employment-at-will rule could draw on the principles of the public employee cases in achieving that end.

III. THE TORT OF WRONGFUL DISCHARGE AS A LIMITATION UPON THE EMPLOYMENT-AT-WILL RULE

Some courts have created an exception to the employment-at-will rule by recognizing a tort action for wrongful discharge. This tort provides a cause of

⁸² See Note, *Implied Contract Rights*, *supra* note 2, at 348-51.

⁸³ See, e.g., *United Steelworkers of America v. University of Ala.*, 599 F.2d 56, 60 (5th Cir. 1979). In *Bishop v. Wood*, 426 U.S. 341 (1976), the Court declined to find the existence of a property interest where the employee was employed "at the will of the city." See *id.* at 345 n.8.

⁸⁴ See *id.*

⁸⁵ See *Burns v. Gulf Oil Corp.*, 619 F.2d 81, 83 (5th Cir. 1980) (*per curiam*), *cert. denied*, 449 U.S. 1078 (1981). The Supreme Court denied certiorari on a number of issues, one of which was whether there is a substantive difference between a public and a private employer's discharge of an at-will or non-tenured employee. *Daily Labor Report* A-13 (Jan. 12, 1981). In *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Bishop v. Wood*, 426 U.S. 341 (1976) the Court did not consider this issue.

⁸⁶ See, e.g., *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 618-19, 292 N.W.2d 880, 894-95 (1980).

action for employees who are discharged for engaging in certain activities which are protected as a matter of public policy.⁸⁷ The cause of action attempts to eliminate the bad cause discharge or retaliatory discharge, when an employee exercises a statutory right⁸⁸ or engages in "whistle-blowing" activities which advance the recognized interests of society.⁸⁹

The cause of action was first recognized in the California case, *Peterman v. Teamsters Local 396*.⁹⁰ In *Peterman*, an employee was discharged when he declined to commit perjury during an investigation of illegal acts which were alleged to have been engaged in by a union.⁹¹ The court found that the perjury laws reflected an important public policy upon which the viability of the

⁸⁷ See, e.g., *Petermann v. Teamsters Local 396*, 174 Cal. App. 184, 188-90, 344 P.2d 25, 27-28 (1959). See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 172-75, 610 P.2d 1330, 1332-34, 164 Cal. Rptr. 839, 841-43 (1980). During the past two decades a growing number of states have granted employees recovery under this cause of action. See *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471, 480, 427 A.2d 385, 388-89 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181-86, 384 N.E.2d 353, 357-59 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 252-53, 297 N.E.2d 425, 428 (1973); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Services*, No. 51,843 (Kan. App. 1981); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 646-49, 245 N.W.2d 151, 153-54 (1976); *Lally v. Copygraphics*, 173 N.J. Super. 162, 179-82, 413 A.2d 960, 968-69 (1980); *Nees v. Hocks*, 272 Or. 210, 218-19, 536 P.2d 512, 515-16 (1975); *Brown v. Transcon Lines*, 284 Or. 597, 612-13, 588 P.2d 1087, 1094-95 (1978); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 32-33, 386 A.2d 119, 120-21 (1978); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270, 275 (W. Va. 1978).

A number of state courts have implied the existence of a cause of action for wrongful discharge but have refused to apply the theory to the case in question. See, e.g., *Adler v. American Standard Corp.*, 432 A.2d 464, 472 (Md. Ct. of App. 1981); *Geary v. United States Steel Corp.*, 456 Pa. 171, 177-79, 319 A.2d 174, 177 (1974); *Ward v. Frito-Lay, Inc.*, 290 N.W.2d 536, 537-38 (Wis. App. 1980). In addition, a number of federal courts have recognized the existence of a cause of action for wrongful discharge when interpreting state law in diversity suits. *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826-27 (E.D.N.Y. 1980) (applying New York law); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979) (applying Pennsylvania law). But see *Green v. Amerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir. 1980) (applying Mississippi law); *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234, 1239 (S.D.N.Y. 1979) (applying New York law); *Parets v. Eaton Corp.*, 479 F. Supp. 512, 515-18 (E.D. Mich. 1979) (applying Michigan law).

⁸⁸ Recognizing this cause of action is analogous to recognizing an implied cause of action under a statute. See RESTATEMENT (SECOND) OF TORTS § 874A (Tentative Draft No. 23, 1977). For example, the filing of a worker's compensation claim is a right created by the legislature, and is to be protected as a matter of public policy. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973). The statute, however, may not protect explicitly against a retaliatory discharge. See *Tamney v. Atlantic Richfield Co.*, 27 Cal.3d 167, 177-78, 610 P.2d 1330, 1336; 164 Cal. Rptr. 839, 845 (1980). Nevertheless, courts have ruled that the discharge, if allowed to stand, would violate the spirit if not the letter of the law and thus would violate an expressed public policy. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844. To advance the interests protected by the statute, the courts have provided a tort action for wrongful discharge and thereby have avoided the potential emasculatation of the statutory safeguards. *Id.* at 173-77, 610 P.2d at 1333-35, 164 Cal. Rptr. at 842-44.

⁸⁹ "Whistle-blowing" is a term which refers to the actions of employees who report criminal activity to the governmental authorities. See generally Comment, *Whistle Blowing*, *supra* note 2, at 777 n.4.

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

⁹¹ *Id.* at 187, 344 P.2d at 26.

judicial process depended.⁹² Based on this finding, the court determined that the employer's actions were tortious. The court reasoned that

[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.⁹³

Therefore, the court granted the employee a cause of action in tort to remedy the unjust discharge.⁹⁴

Following the *Peterman* decision in 1959, several state courts have recognized a cause of action for the tort of wrongful discharge.⁹⁵ Even those decisions adopting the tort, however, have been cautious in applying the theory and have limited the circumstances in which it will be applied.

For example, in *Geary v. United States Steel Corp.*,⁹⁶ the Pennsylvania Supreme Court affirmed the dismissal of an employee who claimed that his discharge was wrongful after he had worked for over fourteen years. The court, however, recognized the potential for a tort cause of action in such circumstances where a clear public policy was violated by the discharge.⁹⁷ In *Geary*, the employee was discharged after he had complained to his superiors that a certain product had not been tested adequately and posed a health and safety risk to the public.⁹⁸ The employee argued that his conduct should have been protected by a cause of action because his intentions were good and because he acted in the best interests of society.⁹⁹ The court refused to grant the employee a cause of action for the tort of wrongful discharge. The court's refusal was based in part on the employee's failure to use the procedural channels maintained by the employer which would have permitted the employee to complain to his employer about the product.¹⁰⁰ The case left open the question of whether a cause of action would have been recognized had the termination resulted in a violation of a clear mandate of public policy.¹⁰¹

⁹² *Id.* at 188-89, 344 P.2d at 27.

⁹³ *Id.* at 191, 344 P.2d at 28.

⁹⁴ *Id.* at 188-89, 344 P.2d at 27.

⁹⁵ See cases at note 87 *supra*.

⁹⁶ 456 Pa. 171, 319 A.2d 174 (1974).

⁹⁷ *Id.* at 173, 319 A.2d at 175.

⁹⁸ *Id.* at 173-74, 319 A.2d at 175.

⁹⁹ *Id.* at 181, 319 A.2d at 178-79.

¹⁰⁰ *Id.* at 181-83, 319 A.2d at 179-80.

¹⁰¹ *Id.* at 184, 319 A.2d at 180. This statement has prompted the Pennsylvania Superior Court to recognize a tort cause of action where an employee was discharged for activity protected by statute. See *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 32, 386 A.2d 119, 120 (1978) (at-will employee fired for taking time off from work for jury duty). See also *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1364 (3d Cir. 1979) (court applied Pennsylvania law to permit a tort action by employee who was discharged for refusing to take a polygraph test when the right to refuse to take the test was protected by state law).

A recent decision by the Maryland court reflects an equally restrictive view of the requirements of the tort action. In *Adler v. American Standard Corp.*,¹⁰² the court recognized a cause of action to recover general, special and punitive damages for abusive discharge but refused to grant the plaintiff in that case a recovery.¹⁰³ The plaintiff in *Adler* had been discharged after uncovering numerous improper corporate activities, including payment of bribes, alteration of sales and income information, attempts to treat capital expenditures as expenses, and misuse of corporate funds.¹⁰⁴ The plaintiff had reported his discoveries to his superiors who refused to act upon his recommendations and charges.¹⁰⁵ After his supervisors requested that he resign, the employee was terminated allegedly for unsatisfactory performance.¹⁰⁶ In responding to the plaintiff's claims, the court recognized the competing interests of the employee and employer. The court asserted that an employee needs protection when a discharge is caused:

not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily proscribed duty. . . . Equally to be considered is that the employer has an important interest in being able to discharge an at-will employee whenever it would be beneficial to his business.¹⁰⁷

The court held that the cause of action would be recognized only where the discharge contravened some clear mandate of public policy.¹⁰⁸ Under the facts of the case, the court found that the plaintiff's claim failed to recite specifically which statute had been offended in a manner which violated public policy.¹⁰⁹

In developing the tort action for wrongful discharge, courts have grappled with the difficult task of determining which activities should be protected under the public policy exception to the employment-at-will rule. Public policy is a nebulous concept, having no clear and definite boundaries.¹¹⁰ The vagueness of the concept has resulted in frequent litigation concerning which activities should be protected by the tort action.¹¹¹ The courts have used three basic ap-

¹⁰² 432 A.2d 464 (Md. App. 1981).

¹⁰³ *Id.* at 472.

¹⁰⁴ *Id.* at 466.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 470.

¹⁰⁸ *Id.* at 473.

¹⁰⁹ *Id.* at 472.

¹¹⁰ See *Hinrichs v. Tranquillaire Hospital*, 352 So.2d 1130 (Ala. 1977). In *Hinrichs*, an employee was discharged because she refused to falsify medical records. *Id.* at 1131. The court found the concept of public policy too vague a basis for the creation of a new tort and therefore held that the issue was best left to the legislature. *Id.* See also *Martin v. Tapley*, 360 So.2d 708, 709 (Ala. 1978).

¹¹¹ Public policy has been loosely defined as the interests of society. See *Petermann v. Teamsters*, 174 Cal. App. 2d 184, 188, 334 P.2d 25, 27 (1959). This definition is far too broad, however, to provide meaningful parameters for the tort cause of action. In *Nees v. Hocks*, 272

proaches to defining the term "public policy" and the activities protected under that policy. In some jurisdictions, the courts have attempted to define public policy on their own, without legislative guidance. These courts have recognized the tort in instances of extreme violations of a clear and definite public policy. For example, in *Palmateer v. International Harvester*,¹¹² the court awarded damages for wrongful discharge to an employee who was discharged in retaliation for his reporting to the police authorities that a co-employee was engaging in criminal activities.¹¹³ The court found that this discharge violated an important public policy, and granted the requested relief.¹¹⁴ Some judicial definitions of public policy, such as that contained in *Palmateer*, provide guidelines for drawing the outer limits of the tort action for wrongful discharge. Thus, it is the rare circumstances involving important matters of well-defined public policy, that will support a cause of action for wrongful discharge.¹¹⁵

Or. 210, 536 P.2d 512 (1975), the court also offered a definition of the concept by asking, "are there instances in which the employer's reason or motive for discharging harms or a definition of the concept by asking, "are there instances in which the employer's reason or motive for discharging harms or interferes with an important interest of the community. . . ." *Id.* at 216, 588 P.2d at 515.

In *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. App. 1981), the court acknowledged the vague quality of the concept of public policy, and urged caution when using the concept as a basis for judicial determination:

We have always been aware . . . that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.

* * *

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, *only with the utmost circumspection*. The public policy of one generation may not, under changed conditions, be the public policy of another. *Id.* at 472 (emphasis added).

Schroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977) is an example of the type of issue which will be faced by courts when defining public policy. Therein, an employee sued for wrongful discharge, alleging that he had been discharged because he was attending law school at night. *Id.* at 812. He claimed that a discharge for that reason violated the public policy of the state favoring education. *Id.* Although the court rejected the employee's claim, *id.*, this case illustrates the difficulty courts will face in defining what employee activities deserve protection as a matter of public policy. The court stated that it would defer to the legislature to define the policies that should be protected by the cause of action. *Id.*

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

¹¹³ *Id.* at 129-31, 421 N.E.2d at 879-80.

¹¹⁴ *Id.*

¹¹⁵ *Id.* See also *Harless v. First Nat'l Bank In Fairmont*, 246 S.E.2d 270, 275 (W. Va. 1978) (Cause of action exists whenever an employee can show that the firing was motivated by an intention to "contraven[e] some substantial public policy principle."); *Nees v. Hocks*, 272 Or. 210, 219, 536 P.2d 512, 516 (1975) (serving on jury duty found to be of fundamental importance to society). But see *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594, 595 (Ala. 1980) (traditional employment-at-will rule reaffirmed when an employee was terminated allegedly for serving on a jury); *Abriz v. Pulley Freight Lines, Inc.* 270 N.W.2d 454, 456 (Iowa 1978) (court refused to extend tort cause of action to discharge employee who had supported co-worker's claim for unemployment benefits).

An alternative approach to defining public policy is to require a legislative definition of the protected employee activities prior to recognizing a cause of action for wrongful discharge.¹¹⁶ These courts presumably would refuse to permit the tort action unless a public policy favoring an activity is discernible within a statute that protects the activity. For example, in *Martin v. Platt*,¹¹⁷ the

¹¹⁶ *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980). The public policy exception was applied to a professional employee who was demoted when she refused to test a drug which was proscribed by FDA regulations. *Id.* at 62-64, 417 A.2d at 507. The lower court had held:

[I]t cannot change the present rule which holds that just or good cause for the discharge of an employee at will or the giving of reasons therefore are not required. In addition, the exception must guard against a potential flood of unwarranted disputes and litigation that might result from such a doctrine, based on vague notions of public policy. . . . If there is to be such an exception to the employment-at-will rule, it must be tightly circumscribed so as to apply only in cases involving truly significant matters of clear and well-defined public policy and substantial violations thereof. If it is to be established at all, its development must be on a case-to-case basis.

166 N.J. Super. 335, 341-42, 399 A.2d 1023, 1026 (1979).

The New Jersey Supreme Court found that the public policy exception would not be applied in this case because the plaintiff failed to allege that the drug was harmful to the public but merely that it was the subject of controversy. The court found this insufficient to state a cause of action based on the public policy exception. 84 N.J. at 76, 417 A.2d at 514 (1980). The Court looked to legislation, administrative rules, regulations, and decisions, and judicial decisions for the sources of public policy. *Id.* at 72, 417 A.2d at 512.

See also *Sadovnik v. Korvettes, Inc.*, 488 F. Supp. 822, 824-26 (E.D.N.Y. 1980) (protecting integrity of pension plans is an important public policy); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (court did not dismiss employee's claims of wrongful discharge when he was terminated for refusing to partake in an illegal pricing scheme); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 495-98, 265 N.W.2d 385, 388-90 (1978) (court granted cause of action but denied remedy for employee who refused to alter pollution controls in contravention of state criminal code); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 33, 386 A.2d 119, 121 (1978) (cause of action granted to employee who was discharged after responding to jury service notice).

¹¹⁷ 386 N.E.2d 1026 (Ind. App. 1979). See also *Green v. Amerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir. 1980); *Percival v. General Motors Corp.*, 400 F. Supp. 1322, 1324 (E.D. Mo. 1975); *aff'd*, 539 F.2d 1126 (6th Cir. 1976) (denying claims of employee who filed legitimate complaints to the government about employer's deceptive trade practice and who was discharged after he refused to give perjured testimony); *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178, 180 (Tex. Civ. App. 1979); *Schroghan v. Kraftco Corp.*, 551 S.W.2d 811, 812 (Ky. App. 1977); *Becket v. Welton Becket & Assocs.*, 39 Cal. App. 3d 815, 821-22, 114 Cal. Rptr. 531, 534 (1974). Courts are more willing to create a cause of action where the legislature has acted to protect a certain employee activity. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3d Cir. 1979) (cause of action granted employee who refused to take polygraph test when the right to refuse the test was protected by statute); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 75-76, 86 Cal. Rptr. 401, 404-05 (1970) (court recognized cause of action for asserting rights under the minimum wage laws). But see *Goodroc v. Georgia Power Co.*, 148 Ga. App. 193, 194, 251 S.E.2d 51, 52 (1978) (no cause of action for employee who uncovered and reported criminal activities committed by his supervisor).

In *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980), the court protected an employee who refused to engage in a price fixing scheme which violated the criminal code. The court held that the wrongful discharge cause of action would be applied wherever the employee was discharged for refusing to commit an act in violation of a criminal code provision. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846. The court analogized this rationale to the contract doctrine under which employment-at-will contracts are not enforced if they are predicated upon an illegal act. *Id.* at 172, 610 P.2d at 1332-33, 164 Cal. Rptr. at 841-42.

Indiana Court of Appeals found that an employee was discharged in retaliation for reporting that his employer had received illegal kickbacks and granted a cause of action because the employer activity violated a criminal statute.¹¹⁸ The Indiana court ruled that "the determination of what constitutes public policy, or which of competing public policies should be given precedence, is a function of the legislature."¹¹⁹ Similarly, in *Lampe v. Presbyterian Medical Center*,¹²⁰ the plaintiff claimed that her discharge for refusing to obey the instructions of her superiors violated public policy.¹²¹ The employer had discharged the plaintiff, a supervising nurse, when she resisted instructions from higher management because those orders conflicted with the plaintiff's ethical and professional judgment.¹²² The Colorado Court of Appeals rejected the claim that this discharge based upon a conflict in professional judgment would violate a public policy because no statute protected the employee's right to assert her professional judgment.¹²³ Under the rationale of these cases, a cause of action for wrongful discharge will not be recognized unless and until the legislature has modified the employment-at-will doctrine by enacting a statute protecting the activity for which the employee was discharged.

The most frequent application of this statutorily-defined public policy exception occurs where employees are discharged in retaliation for filing a worker's compensation claim.¹²⁴ The courts' concern in these cases is that the statute would not be enforced if employees feared the consequence of their filing a compensation claim would be discharge.¹²⁵ The strength of the policy recognized by the courts has prompted several legislatures to include non-retaliation provisions in the workers' compensation statutes.¹²⁶

The decision to defer to the legislature in defining the state's public policy and the employee activities protected under that policy is consistent with the view that an action in tort must be based upon the violation of a duty owed to

¹¹⁸ 386 N.E.2d at 1028 (Ind. App.). The whistle-blower protection accorded employees in *Martin* is similar to the doctrine arising in landlord-tenant law prohibiting the retaliatory eviction of a tenant who reports his landlord for a violation of the public health code. See *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968), cert. denied, 393 U.S. 1019 (1969); *Schweiger v. Superior Court*, 3 Cal. 3d 507, 517, 476 P.2d 97, 103, 90 Cal. Rptr. 729, 735 (1970).

¹¹⁹ 386 N.E.2d at 1028 (Ind. App.).

¹²⁰ 41 Colo. App. 465, 590 P.2d 513 (1978).

¹²¹ *Id.* at 468, 590 P.2d at 515.

¹²² *Id.* at 467, 590 P.2d at 514.

¹²³ *Id.* at 469-72, 515-16. See also *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 71-72, 417 A.2d 505, 512 (1980).

¹²⁴ See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181-82, 384 N.E.2d 353, 357 (1979); *Brown v. Transcon Lines*, 284 Or. 597, 611-12, 588 P.2d 1087, 1094 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973); *Lally v. Copygraphics*, 173 N.J. Super. 162, 179-82, 413 A.2d 960, 968-69 (1980); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 646-49, 245 N.W.2d 151, 153 (1976). But see *Loucks v. Star City Glass Co.*, 551 F.2d 745, 747 (7th Cir. 1977); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 770, 259 S.E.2d 812, 814 (1979); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 299-301, 244 S.E.2d 272, 276-77, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

¹²⁵ See, e.g., *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 251-52, 297 N.E.2d 425, 427 (1973).

¹²⁶ See, e.g., TEX. REV. CIV. STAT. ANN. Art. 8307c (West Supp. 1980).

the plaintiff.¹²⁷ In the absence of a statute protecting certain employee activities, an employer owes no specific duties to its employees or to the public.¹²⁸ The enactment of such a statute, however, imposes specific duties upon employers to respect the defined activities. That duty is violated when a discharge would impede an employee from exercising lawful rights which are protected by the statute.¹²⁹

A statute recently enacted in Michigan may serve as an example for creating a legislative definition of protected activity upon which an employee's cause of action may be based. The statute protects an employee who engages in whistle-blowing activity by prohibiting the discharge of or discrimination against an employee who reports or contemplates reporting a possible violation by his employer of federal or state laws or regulations.¹³⁰ This method of establishing the public policy exception to the employment-at-will rule is superior to the *ad hoc* approach currently used by most courts for protecting certain employee activities. The Michigan statute specifically delineates the employer's potential liability,¹³¹ the burden of proof required to establish a

¹²⁷ See, e.g., *Tamney v. Atlantic Richfield Co.*, 27 Cal. Rptr. 3d 172, 176, 610 P.2d 1330, 1335, 164 Cal. Rptr. 839, 844.

¹²⁸ An analogous doctrine in the tort law of personal injury holds that a defendant who violates a statute is liable for negligence per se when: (1) the violation is causally connected to the injury; (2) the plaintiff is within the class intended to be protected by the statute; and (3) the harm which resulted was the kind sought to be avoided by the statute. See generally W. PROSSER, *LAW OF TORTS*, 188-204 (4th ed. 1971).

Alternatively, a contract analysis may be applied once a statute has been enacted protecting certain employee activity. A contract permitting discharge for engaging in the protected activity might be deemed an illegal contract. A contract which is illegal is unenforceable. See generally A. CORBIN, 6 CORBIN ON CONTRACTS §§ 1373-1378 (1962). Therefore, the discharge provision of the employment-at-will contract cannot be enforced when the employer requires an employee to engage in illegal activity.

¹²⁹ See, e.g., *Howard v. Door Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (N.H. 1980), where the court stated: "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Id.* at 297, 414 A.2d at 1274. See note 136 *infra* for the holding in *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

¹³⁰ 1980 Mich. Pub. Acts 469 became effective on April 1, 1981, and prohibits discrimination against employee whistle-blowers. The statute provides for specific remedies which may be sought in a civil action brought under the statute. The civil claim must be filed within 90 days of the alleged employer violation. MICH. COMP. LAWS § 15.363 (1970). An employer's potential liability for a violation of this Act is substantial. Liability may include a reinstatement with back pay and lost fringe benefits, actual damages, attorney's fees, other litigation costs, and assessment of a \$500 fine. *Id.* § 15.365. Employees are protected when they report a violation or suspected violation by their employer of federal or state laws and regulations. *Id.* § 15.362. Furthermore, an employee is protected when he is contemplating the filing of a report to an authority. *Id.* If contemplation is the basis of the lawsuit, the employee is required to establish, by clear and convincing evidence, that he did contemplate reporting a violation. *Id.* § 15.363. In addition, discrimination is prohibited when an employee is requested by a public agency to participate in an investigation, hearing, inquiry or trial. *Id.* § 15.362. There is, however, no protection accorded to an employee when the employee knows that his report is false. *Id.*

¹³¹ MICH. COMP. LAWS §§ 15.364, 15.365 (1970).

claim,¹³² and the specific instances in which a public policy is deemed to have been violated.¹³³

It is uncertain whether the courts will find that a legislative enactment protecting certain employee activities will, by negative implication, preclude a cause of action for wrongful discharge arising from other employee activities.¹³⁴ To avoid this uncertainty, the legislature should state explicitly in such statutes whether the enumerated list of protected activities is intended to be exclusive. In cases where the legislature has not stated its intent specifically, however, there should be no presumption in favor of preemption. As a general matter, it would seem reasonable to expect the legislature to incorporate all relevant public policies into a single act. A doctrine of limited preemption could be employed when the legislature acts in a specific area within the legislation. A court could legitimately conclude that once the legislature has provided protection in a certain area, but has failed to protect against related or subsidiary matters, by negative inference these matters do not give rise to a tort action in that state.¹³⁵

The *ad hoc* protection provided by the public policy exception to the employment-at-will rule serves to shield certain employee activities from the harshness of the rule. The case-by-case development of exceptions to the rule, however, may result in substantial difficulties for employers in their personnel decisions.¹³⁶ Employers will be unable to determine, before the fact, whether

¹³² *Id.* § 15.363.

¹³³ MICH. COMP. LAWS §§ 15.361 *et seq.* (1970).

¹³⁴ See *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (1980), where the court permitted a tort claim for wrongful discharge based upon the employee's filing of a workmen's compensation claim despite the existence of a statute prohibiting such retaliatory discharges. *Id.* at 179-80, 413 A.2d at 968-69. The court reasoned that the tort remedies may be the most effective deterrent in those situations where the employee does not seek reinstatement and therefore the statutory cause of action did not preclude a tort claim for wrongful discharge. See *id.* at 181, 413 A.2d at 969.

¹³⁵ It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy, a court must be chary of reading others into it. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). *Expressio unius est exclusio alterius*. The express provision of specified powers may imply an intention to withhold those left unmentioned. 2A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1973). "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979), citing, *Botany Mills v. United States*, 278 U.S. 282, 289 (1929); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *TIME, Inc. v. United States*, 359 U.S. 464, 471 (1959).

¹³⁶ The competing policies embodied in the employment-at-will doctrine and the public policy exception to this doctrine were best described by the court in *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974):

In all employment contract, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad

certain discharges are justifiable. Moreover, the potential liability of employers for the tort of wrongful discharge is substantial.¹³⁷

Consequently, wrongful discharge claims will be filed by plaintiffs in the hope that a court will recognize a new public policy. Spurious claims which waste scarce judicial resources and which must be defended by an employer might ensue during this period of judicial definition of the tort of wrongful discharge. The resultant instability in the employment relationship would impose substantial burdens on the employers who could never be sure whether their personnel decisions were justifiable and not a violation of public policy.

As noted above, some courts have responded to this problem by refusing to fashion an exception to the employment-at-will rule unless the legislature has already acted to protect the particular employee activity.¹³⁸ An alternative response would be to refuse to recognize a tort action for wrongful discharge where the employee activity is protected by a different statute or remedy.

The court in *Schroeder v. Dayton-Hudson Corp.*¹³⁹ followed this approach in an action for wrongful discharge allegedly due to the employee's age and sex.¹⁴⁰ The court found that it was inappropriate to analyze the employee's claim under the public policy exception to the employment-at-will rule. The court noted that the employee was not discharged "because of an affirmative act on her part taken in an effort to claim a legal entitlement or for her refusal to perform an act from which she would be protected by public policy."¹⁴¹ Rather, the gravamen of her claim was that she had been discharged on the basis of her age and/or sex.¹⁴² The court stated:

While it would be against public policy if either of these reasons were the basis for her termination, statutory remedies have been provided

faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.
(citation omitted)

Id. at 133, 316 A.2d at 551.

The balancing of interests is an important function of the court. Unfortunately, however, it results in confusion for the parties, who may never be able to discern what is an important public policy before a personnel action is taken.

¹³⁷ In suits for wrongful or abusive discharge, courts have awarded the traditional tort remedies of compensatory, exemplary, and punitive damages. Punitive damages may be recovered where the employer knows that his activity would violate an employee's rights. *Tameny v. Atlantic Richfield Co.* 27 Cal. 3d 167, 176 n.10, 610 P.2d 1330, 1337 n.10, 164 Cal. Rptr. 839, 844 n.10 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186-87, 384 N.E.2d 353, 359 (1979) (based upon statutory remedies for retaliation for filing compensation claim); *Lally v. Copygraphics*, 172 N.J. Super. 162, 181, 413 A.2d 960, 969 (1980); *Montalno v. Zamora*, 7 Cal. App. 3d 69, 77, 86 Cal. Rptr. 401, 405 (1970). See also *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145-46, 355 N.E.2d 315, 319 (1976) (court recognized a claim of damages for emotional distress).

¹³⁸ See text and notes at notes 116-27 *supra*.

¹³⁹ 448 F. Supp. 910 (E.D. Mich. 1977), *modified*, 456 F. Supp. 650 (E.D. Mich. 1978).

¹⁴⁰ 448 F. Supp. at 912.

¹⁴¹ *Id.* at 917.

¹⁴² *Id.*

to protect employees from discharge on the basis of sex or age, and it is not necessary to expand the public policy exception to provide protection for employees for discharges based on status rather than affirmative conduct.¹⁴³

Thus, where the activity or claimed status is provided independent protection by statute, a court may decline to recognize a tort remedy under the public policy exception to the employment-at-will rule.

The court in *Wehr v. Burroughs Corp.*¹⁴⁴ discussed this limitation on the public policy exception in the context of a breach of contract action.¹⁴⁵ The court reasoned that the public policy exception protects certain activities or classes of employees because of certain strongly held policies of the community.¹⁴⁶ When these activities or employees are protected by other remedies, however, then the public policy is adequately served.¹⁴⁷ Based on this reasoning, the court formulated a two-part test for applying the public policy exception to the employment-at-will rule: "(1) . . . the discharge [must] violate some well-established public policy; and (2) . . . there must be no remedy to protect the interest of the aggrieved employee or society."¹⁴⁸ Where a statutory cause of action exists, it is submitted that there is no demand for a judicially-created cause of action.

This limitation on the public policy exception to the employment-at-will rule is consistent with certain decisions that addressed the issue of whether a private cause of action should be implied under a federal statute. Under these decisions, one requirement for the implication of a private cause of action was that the action be consistent with the underlying statutory policy.¹⁴⁹ The implication of a private cause of action is not consistent with the statutory policy

¹⁴³ *Id.*

¹⁴⁴ 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd*, 619 F.2d 276 (3d Cir. 1979).

¹⁴⁵ 438 F. Supp. at 1053.

¹⁴⁶ *Id.* at 1055.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Although the claim was for an alleged breach of contract, *see id.* at 1053, the rationale should be equally applicable to a tort claim. *See Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 917 (E.D. Mich. 1977).

¹⁴⁹ *Cort v. Ash*, 422 U.S. 66, 77, 78 (1975); *Cannon v. University of Chicago*, 441 U.S. 677, 688-709 (1979). In *Cort v. Ash* the Supreme Court recognized four factors relevant to the determination of whether a federal statute should give rise to an implied cause of action: (1) is the plaintiff one of the class for whose special benefit the statute was enacted; (2) is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action. *Cort v. Ash*, 422 U.S. 66, 78 (1975). More recently, the Supreme Court seems to have moved away from the four-factor *Cort v. Ash* test to a test which focuses almost entirely on legislative intent. *See, e.g.*, *Middlesex City Sewerage Auth. v. National Sea Clammers*, 101 S.Ct. 2615, 2622 (1981). In *Sea Clammers* the Court also indicated that where a statute includes an elaborate enforcement scheme, a court should conclude that the remedies provided were intended to be exclusive "in the absence of strong indicia of a contrary congressional intent." *Id.* at 2623.

when it would conflict with express statutory enforcement provisions.¹⁵⁰ These decisions would support a contention that when the legislature specifically provides for a method of enforcement, the legislative policy would be circumvented if an individual was provided with an independent remedy and thereby allowed to bypass the statutory and administrative procedure established by the statute. Thus, litigants have been denied the alternative remedy when the statutory enforcement scheme would be undermined by implying a private action.¹⁵¹

Similarly, a tort remedy for a discharged employee should not be permitted where a specific statutory method has been provided for enforcing the right infringed. The legislature frequently provides for administrative investigation prior to litigation under a variety of statutes, most notably under statutes which prohibit discrimination. To create a tort action would permit an employee to bypass the administrative investigation and conciliation and undermine the legislative policy supporting this stage of the proceeding. Furthermore, the legislative policy of encouraging speedy resolution of disputes through the use of a short statute of limitations¹⁵² would be emasculated by providing a tort remedy under a two- or three-year statute of limitations.¹⁵³

In addition to those situations in which a statute would provide a remedy for the wrongful discharge, courts should dismiss tort actions alleging violation of public policy when an employee has a full remedy under contract law. This approach was followed by the New York Supreme Court in *Wegman v. Dairylea, Inc.*¹⁵⁴ In *Wegman*, the court dismissed a tort action brought by an employee who had refused to participate in activities which would have been illegal under a milk standardization statute.¹⁵⁵ After examining the employee's employment contract, the court found that the contract contained a just cause discharge provision.¹⁵⁶ Because the employee had a remedy under those contract provisions, the court held that this limited remedy was more appropriate than a tort remedy.¹⁵⁷

¹⁵⁰ See, e.g., *Rogers v. Frito-Lay*, 611 F.2d 1074, 1084-85 (5th Cir. 1980) (no private cause of action under §§ 503, 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*); *Taylor v. Brighton Corp.*, 616 F.2d 256, 262 (6th Cir. 1980) (court denied an individual a cause of action for an employee who claimed discrimination for self help in enforcing § 660(c) of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*).

¹⁵¹ See, e.g., *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1055-56 (E.D. Pa. 1977).

¹⁵² See, e.g., *Mohasco Corp. v. Silvers*, 447 U.S. 807 (1980), where the Court narrowly construed the Title VII time limits found in 42 U.S.C. §§ 2000e-5(c) and (e), to require a claimant to file suit within 240 days of the alleged violation. *Id.* at 824-26.

¹⁵³ See, e.g., the Michigan three-year statute of limitations for injuries to persons or property, MICH. COMP. LAWS § 600.5805(7) (1970).

¹⁵⁴ 50 A.D.2d 108, 376 N.Y.S.2d 728 (1975).

¹⁵⁵ *Id.* at 110, 376 N.Y.S.2d at 732.

¹⁵⁶ *Id.* at 112, 376 N.Y.S.2d at 734.

¹⁵⁷ *Id.* One other issue that remains unresolved is the burden of proof which must be met by a discharged employee in a tort action for wrongful discharge. The issue of whether a discharge was in part motivated by the activity which involved a public policy or was instead primarily motivated by a permissible reason for discharge has not been fully discussed by the

The tort action for wrongful discharge attempts to protect certain employee activities which are favored as a matter of public policy. It thus is a means for providing greater job security for private sector employees. The protection afforded by this tort action, however, is limited in several respects. Courts may be unwilling to fashion exceptions to the traditional employment-at-will rule unless the legislature has stated explicitly that the public policy favors the particular employee activity. More fundamentally, this tort remedy only protects against bad cause discharges. It stops short of providing that good cause be shown in order to discharge private sector employees. Some courts, however, have moved in the direction of such a good cause requirement under a contract analysis that re-examines the nature of the employment relationship and the employment-at-will contract.

IV. CHANGING CONTRACT LAW GOVERNING THE EMPLOYMENT-AT-WILL CONTRACT

The recognition of a tort action for wrongful discharge represents a significant departure from the traditional employment-at-will rule. The tort action serves to protect employees from certain bad cause discharges where the employee has engaged in activity which is protected as a matter of public policy. Perhaps an even more significant departure from the traditional rule, however, is the recent trend to find in the contract of employment an express or implied condition that an employee can only be discharged in good faith or with good cause. This trend may provide private sector, non-unionized employees the same job protection achieved by union employees through lengthy and often bitter strikes.¹⁵⁸

courts which have considered the tort of wrongful discharge. The cases do provide some guidance on the issue, however. For example, in *Chin v. American Tel. & Tel. Co.*, 96 Misc.2d 1070, 410 N.Y.S.2d 737 (1978), the court held that in order to establish a prima facie case, the plaintiff employee must file pleadings demonstrating that his employer's actions were based upon "an exclusive malicious motivation for the acts of defendant." *Id.* at 1073, 410 N.Y.S.2d at 739. In *Chin*, the employer asserted reasons for discharging the plaintiff which the court found legitimate and which therefore required the court to dismiss the claim. *Id.* at 1073-74, 410 N.Y.S.2d at 739-40. The court did not discuss what constituted a legitimate reason. The court in *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law), adopted a position favorable to employers when it stated "even when an important public policy is involved, 'an employer may discharge an employee if he has a separate, plausible and legitimate reason for doing so.'" *Id.* at 1366. See also *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 456 (Iowa 1978). In spite of this statement by the Third Circuit, the Pennsylvania Superior Court has held that where the facts permit an inference that the true reason for the discharge implicated the public policy, the jury's determination that the plaintiff's discharge was based on an improper motive will not be disturbed. See *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 34-35, 386 A.2d 119, 122 (1978). The mixed motive discharge has troubled courts under labor legislation at the federal level. See *Wright Line, Inc.*, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169, 1170-71 (1980), *aff'd*, *NLRB v. Wright Line, A Div. of Wright Line, Inc.*, 662 F.2d 899, 108 L.R.R.M. 2513 (1st Cir. 1981); *NLRB v. Eastern Smelting & Ref. Corp.*, 598 F.2d 666, 670-71 (1st Cir. 1979); *Texas Instruments, Inc. v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979).

¹⁵⁸ See D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 342-60

The employment-at-will rule has traditionally been an implied term of most employment contracts.¹⁵⁹ Under this rule the contract could be terminated by either party at any time and for any reason.¹⁶⁰ This general rule governed all employment contracts in the absence of three limited exceptions. First, the rule would not apply where the employer explicitly contracted to employ the employee for a definite duration.¹⁶¹ In these circumstances, the employee could be discharged only for cause during the specified term.¹⁶² Second, courts on occasion refused to apply the rule where the discharge violated public policy.¹⁶³ A final exception to the employment-at-will rule was recognized in those circumstances where the employee had provided consideration in addition to the normal incidents of accepting employment.¹⁶⁴ Such consideration might include the relinquishment of a tort claim against the employer, the gift of an invention to the employer, a substantial move by the employee, or the foregoing of a vested pension or union security to accept the new employment.¹⁶⁵ Thus, the courts deviated from the implied employment-at-will provision of employment contracts in only a limited number of circumstances.

These exceptions in contract law to the application of the employment-at-will rule have been expanded in recent years. This development has moved the law of contracts governing the employment relationship in the direction of requiring the employer to demonstrate good cause for the discharge of an employee. The traditional exception to the at-will rule of employment predicated upon additional consideration has gained new vitality.¹⁶⁶ In addition, courts have begun to include an implied provision of good faith and fair dealing into employment contracts.¹⁶⁷ These two developments, together with

(1970); T. BROOKS, *TOIL AND TROUBLE* ch. XV (2d ed. 1971) (discussing the strike as a process to achieve union goals). Ninety percent of a sample of collective bargaining agreements require that a discharge be for cause or just cause. See *COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS* § 40:1 (BNA).

¹⁵⁹ See cases cited at note 2 *supra*.

¹⁶⁰ See text and notes at notes 28-34 *supra*.

¹⁶¹ *Henkel v. Educational Research Council of America*, 45 Ohio St. 2d 249, 251, 344 N.E.2d 118, 119 (1976). See generally A. CORBIN, 1 *CORBIN ON CONTRACTS* § 96 (1950 & Supp. 1971).

¹⁶² *Cloverleaf Farms, Inc. v. Surratt*, 169 Ind. App. 554, 349 N.E.2d 731 (Ind. App. 1976).

¹⁶³ See text and notes at notes 87-89 *supra*. In *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), the court analyzed the claim that a discharge violated public policy in terms of contract law rather than tort law. *Id.* at 132-33, 316 A.2d at 551. A similar analysis was used in *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978). The court declined to dismiss a breach of contract action where the employee was discharged for refusing to take illegal action as directed by his supervisor. *Id.* at 417-18, 390 A.2d at 150. The court held: "an employment-at-will [contract] may not be terminated by an employer in retaliation for an employee's refusal to perform an illegal act." *Id.* at 418, 390 A.2d at 150.

¹⁶⁴ See text and notes at notes 172-94 *infra*.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See section IV.B. *infra*.

the emerging doctrines of reliance and estoppel, have led courts to conclude that the parties to an employment contract do not necessarily intend to include an at-will discharge provision in their contract.¹⁶⁸ Finally, and perhaps most significantly, courts have begun to construe certain promises of continued employment, which previously had been viewed as having no binding effect, as giving rise to a contractual provision requiring good cause for the discharge of an employee.¹⁶⁹ In recognizing these implied provisions to employment contracts and express promises of job security, courts have relied less on traditional contract concepts,¹⁷⁰ which previously had been used to defeat the claims of employees, and more on emerging doctrines of reliance, estoppel and additional consideration in an effort to determine the true intent of the parties.¹⁷¹

¹⁶⁸ See text and notes at notes 172-269 *infra*.

¹⁶⁹ See text and notes at notes 236-70 *supra*.

¹⁷⁰ Courts have relied on a variety of theories to defeat breach of contract claims by employees even where employers expressly promised continued employment. See, e.g., *Lynas v. Maxwell Farms*, 279 Mich. 684, 687-89, 273 N.W. 315, 316-17 (1937). In *Seco Chemicals, Inc. v. Stewart*, 169 Ind. App. 624, 628-34, 349 N.E.2d 733, 736-39 (1976), the court rejected several attacks on the enforceability of a contract promising continued employment. Citing A. CORBIN, 1 CORBIN ON CONTRACTS § 31 (1963), the court first held that the contracts, although not signed by the employer, would be valid if the parties had intended that the agreement be enforceable without signatures. 169 Ind. App. at 628-29, 349 N.E.2d at 736. The court next rejected the employer's argument that the agreement was unenforceable for lack of mutuality of obligation because the employee could quit at any time. *Id.* at 630-32, 349 N.E.2d at 737-38. The court concluded that "where one party to an agreement acts upon the promises of the other party and performs his part of the agreement," mutuality will exist because the other party becomes bound by performance. *Id.* at 632, 349 N.E.2d at 738. The *Seco* decision is distinguishable from the indefinite employment contract situation because the court ruled that there was an ascertainable expiration date. *Id.* The case is revealing, however, in its treatment of traditional defenses asserted to defeat an oral contract of employment for a period in excess of one year. See also *Vassallo v. Texaco, Inc.*, 73 A.D.2d 642, 643, 422 N.Y.S.2d 747 (1979).

¹⁷¹ This doctrine of examining the true intent of the parties has been applied in several cases arising in California. The California Supreme Court has stated:

It is fundamental that when construing contracts involving substantial employment rights, courts should avoid mechanical and arbitrary tests if at all possible; employment contracts, like other agreements, should be construed to give effect to the intention of the parties as demonstrated by the language used, the purpose to be accomplished and the circumstances under which the agreement was made.

* * *

We embrace the prevailing viewpoint that the general rule requiring independent consideration is a rule of construction, not of substance, and that a contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary.

Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 174 (1972) (emphasis added). In *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976), the plaintiff, employed by a former employer for 16 years, agreed to accept new employment pursuant to an oral understanding that her new employment would be permanent if her performance was satisfactory. *Id.* at 94-95, 127 Cal. Rptr. at 223-24. The plaintiff was discharged, however, allegedly without good cause. *Id.* at 95, 127 Cal. Rptr. at 224. The court upheld an award of damages to the plaintiff, explaining:

It is settled that contracts of employment in California are terminable only for

A. Additional Consideration and Estoppel Theories

Separate or additional consideration traditionally has been one exception to the employment-at-will doctrine.¹⁷² Additional consideration has been held sufficient to make a contract for continued employment binding upon both parties because theoretically it establishes the intent of the parties that the employee is not to be discharged without good cause.¹⁷³ Under this theory, the contract for permanent employment becomes enforceable through the employee's sacrifice of a tangible or intangible right in consideration for the employer's promise of continued employment.¹⁷⁴ Examples of such additional consideration are the employee's surrender of a tort claim against the employer,¹⁷⁵ or the employee's contribution of capital to the employer's business enterprise.¹⁷⁶

The traditional formulation of this exception to the employment-at-will rule recognized only a limited number of employee activities which could provide the requisite additional consideration. For example, an employee did not provide additional consideration by moving short distances to accept new employment. Under the recognized analysis, an employee was expected to move to his employer's location and, by accepting the job, an employee

good cause if either of two conditions exist: (1) the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer; or (2) *the parties agreed, expressly or impliedly, that the employee could be terminated only for good cause.*

Id. at 96, 127 Cal. Rptr. at 225 (emphasis added). *See also* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455-56, 168 Cal. Rptr. 722, 729 (1980); Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 719, 150 Cal. Rptr. 408, 411 (1978).

In *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the court held that the duration of employment, commendations made by the employer and promotions received by the employee, lack of criticism, and oral promises of continued employment resulted in an implied promise of cause for discharge. *Id.* at 329, 171 Cal. Rptr. at 927.

See Note, Implied Contract Rights, *supra* note 2, at 351-55.

¹⁷² If an executed consideration is given by the promisee, a promise of employment on stated terms is not rendered unenforceable by the fact that the employment is to continue permanently, or for an indefinite period or as long as the employee wishes to stay. The employee is not bound; but the employer is bound. There is no mutuality of obligation; but there was other sufficient consideration.

A. CORBIN, 1 CORBIN ON CONTRACTS § 152, at 14 n.11.15 (1963). *See* Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 91, 96, 127 Cal. Rptr. 222, 225 (1976).

¹⁷³ *See* Piechowski v. Matarese, 54 N.J. Super. 333, 148 A.2d 872 (1959); *Roxana Petroleum Co. v. Rice*, 109 Okla. 161, 235 P. 502 (1924).

¹⁷⁴ The classic example of the "additional consideration exception" is an employee's surrender of a tort claim against his employer. Courts determined that the surrender of a tort claim was sufficient for enforcement of the employer's promise for continued employment because it avoided highly inequitable results and established the employer's sincerity when it made the promise. *See* *Pierce v. Tennessee Coke, Iron & R.R. Co.*, 173 U.S. 1, 8-9 (1899); *East Line & Red River R.R. Co. v. Scott*, 72 Tex. 70, 75-78, 10 S.W. 99, 102-04 (1888).

¹⁷⁵ 72 Tex. at 77, 10 S.W. at 103.

¹⁷⁶ *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305 (Iowa 1971).

necessarily gave up alternative job opportunities.¹⁷⁷ Therefore, such actions did not result in an enforceable good cause for discharge provision in an employment contract.

Recently, however, some courts have attempted to broaden the definition of additional consideration. Now, for example, an employee who foregoes lucrative employment opportunities may supply sufficient additional consideration to bind his employer to a promise of continued employment. For example, in *Hackett v. Foodmaker, Inc.*,¹⁷⁸ the employee moved his family from California to Michigan in reliance upon the employer's promise that he would be made the manager of a retail food outlet.¹⁷⁹ Plaintiff was denied the position because he filed an anti-trust action against the employer.¹⁸⁰ The court ruled that the promise was enforceable because of the employee's reliance upon it.¹⁸¹ This reliance was established by objective evidence consisting of the long move which had been undertaken and the fact that plaintiff had begun to perform other services for the employer.¹⁸² The court held that the employer's total repudiation of the employment contract would not be tolerated after the employee's substantial detrimental reliance.¹⁸³

Thus, by broadening the concept of additional consideration, courts have enforced with greater regularity promises by employers of continued employment. An alternative means of enforcing such promises is found in the contract theories of reliance or promissory estoppel. Indeed, in some cases, it is difficult to determine which of the two theories courts have used to support a claim for breach of contract. Promissory estoppel protects the promisee where there are no mutual promises made which would give rise to contractual obligations but one party relies upon the singular promise of the other party.¹⁸⁴ In essence, it serves as a substitute for consideration.¹⁸⁵ To enforce a contract on grounds of promissory estoppel the court must find the existence of four factors: (1) a clear and definite promise by the employer; (2) which the employer should reasonably expect to induce reliance by the employee; (3) which induces an act

¹⁷⁷ As the court stated in *Milligan v. Union Corp.*, 87 Mich. App. 179, 183, 274 N.W.2d 10, 12 (1978), "Passing up other employment opportunities was merely preparatory to commencement of plaintiff's new position with defendant." See also *McLaughlin v. Ford Motor Co.*, 269 F.2d 120, 124-25 (6th Cir. 1959); *Rowe v. Noren Pattern and Foundry*, 91 Mich. App. 254, 258, 283 N.W.2d 713, 715 (1979). But see *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 95, 127 Cal. Rptr. 222, 224 (1976).

¹⁷⁸ 69 Mich. App. 591, 245 N.W.2d 140 (1976).

¹⁷⁹ *Id.* at 593, 245 N.W.2d at 141.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*, 245 N.W.2d at 141-42.

¹⁸² *Id.* at 593-94, 245 N.W.2d at 141.

¹⁸³ *Id.* at 595, 245 N.W.2d at 141-42. See also *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981), where the court granted the employee a remedy after the employer revoked a job offer relied upon by the employee who quit his former job and based upon this reliance he refused to accept an alternative job opportunity.

¹⁸⁴ *Huhtala v. Travelers Ins. Co.*, 401 Mich. 118, 133, 257 N.W.2d 640, 647 (1977).

¹⁸⁵ See *id.*

which is prejudicial to the employee's interests; (4) which action is based in reliance upon the aforementioned promise.¹⁸⁶ Under this theory, the employee would possess a right to enforce the promise because of his detrimental reliance. Thus, the offer of employment may be enforced where it is revoked after the employee resigns his former position. Whether the employer should be prohibited from discharging the employee unless he has cause is a different question which has not been addressed.

In addition to promissory estoppel, some courts have recognized the employee's arguments of equitable estoppel where additional consideration was found to be present.¹⁸⁷ Under this approach, the court finds that where an oral promise of continued employment has been made, traditional contract defenses, such as the statute of frauds or the lack of mutuality of obligation, are no longer available to the employer. The employer is equitably estopped from asserting his defenses because of the oral assurances of continued employment¹⁸⁸ that induced the employee to accept the position.

It should be noted that oral promises of continued employment are not always sufficient to establish a claim based upon estoppel. In *McMath v. Ford Motor Co.*,¹⁸⁹ for example, the court found that such promises were too indefinite and unclear to support a claim under either promissory or equitable estoppel principles.¹⁹⁰ The oral promise of continued employment was found to be unenforceable.¹⁹¹ Hence, the employer was not equitably estopped from asserting the statute of frauds defense to defeat the oral promise.¹⁹²

¹⁸⁶ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981), defines promissory estoppel in the following manner:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

¹⁸⁷ See, e.g., *Pursell v. Wolverine Pentronix, Inc.*, 91 Mich. App. 700, 702-04, 283 N.W.2d 833, 834-35 (1979).

¹⁸⁸ See *American Electrical Steel Co. v. Scarpace*, 399 Mich. 306, 249 N.W.2d 70 (1976). The court held in a non-employment case that the acts of plaintiff which resulted in a possible loss of a right were based upon the defendant's assertion of the existence of a certain state of facts. *Id.* at 308-09, 249 N.W.2d at 71. The court stated:

Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself, expressed or implied. If one's conduct induces another to believe in the existence of certain facts, and the other acts thereon to his prejudice, the former is estopped to deny that the state of facts does in truth exist.

Id. at 308, 249 N.W.2d at 71 (citing *Detroit Sav. Bank v. Loveland*, 168 Mich. 163, 172, 130 N.W. 678, 682 (1911)). Under this reasoning, when an employer asserts that his employee has a lifetime job, and the employee relies on this presumed state of facts to his detriment, then the employer may be estopped from denying the truth of his statements. But see *Crownover v. Sears, Roebuck & Co.*, 594 F.2d 565, 566 (6th Cir. 1979), where the court rejected claims of reliance because of an employee's unreasonable interpretation of the profit sharing plan.

¹⁸⁹ 77 Mich. App. 721, 259 N.W.2d 140 (1977).

¹⁹⁰ *Id.* at 725-27, 259 N.W.2d at 142-43.

¹⁹¹ *Id.*

¹⁹² *Id.*

When estoppel theories are applied, it is a question of fact whether the employee's acts of detrimental reliance were reasonable and were induced by a clear and definite promise by the employer.¹⁹³ Where the plaintiff employee desires a jury trial, however, the extent of the detriment suffered would seem to override the other elements required to be proved in a promissory estoppel action. The greater the detriment suffered by the employee, the greater the likelihood that the employer's promise will give rise to a breach of contract action because the evidence is more persuasive that the parties intended that the promise would be enforced.¹⁹⁴ Use of estoppel theories to broaden the additional consideration exception to the employment-at-will rule, however, may upset an employer's customary manner of managing his workforce. A jury may defeat the expectations of an employer regarding his labor-management affairs by concluding that customary practices of the employer induced acts of employee reliance which it believes are sufficient for the application of an estoppel theory. Thus, there are risks inherent in applying these theories.

In summary, the emerging trend toward expanding the additional consideration doctrine may lead to increased judicial enforcement of oral promises of continued employment. The presence of some element of additional consideration flowing from the employee to the employer may give rise to equitable estoppel preventing the employer from asserting traditional contract defenses. Thus, the detrimental reliance of the employee, if reasonable, will render enforceable the employer's express promise of continued employment in the absence of good cause for discharge.

*B. An Implied Covenant of Good Faith and Fair Dealing
in Employment Contracts*

Another recent development in contract law governing the employment relationship is the implication of a covenant of good faith and fair dealing into the employment contract. A small number of courts have found that, as a matter of law, there exists a right to fair dealing which is implied into all contracts including those for employment.¹⁹⁵

¹⁹³ See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 454-55, 168 Cal. Rptr. 722, 729 (1980); *Pursell v. Wolverine-Pentronix Co.*, 91 Mich. App. 700, 710, 283 N.W.2d 833, 838-39 (1979).

¹⁹⁴ The theory of intent, however, is only valid if the employer is aware of the detriment suffered by the employee. If the employee can assert his detriment in all contracts of employment, regardless of the employer's knowledge of the burdens suffered by the employee, the contract would be predicated upon the unilateral intent of the employee rather than the mutual intent of the parties. The elements of a promissory estoppel action require that the employer reasonably expect his promises to be relied upon by his employee to his detriment. See *RESTATEMENT (SECOND) OF CONTRACTS* § 90 (1981).

¹⁹⁵ *Rees v. Bank Bldg. and Equip. Corp.*, 332 F.2d 548, 551-52 (7th Cir.), cert. denied, 379 U.S. 932 (1964); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 727-28 (1980); *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 101, 364 N.E.2d 1251, 1255-56 (1977). See also *de Treville v. Outboard Marine Corp.*, 439 F.2d 1099, 1100 (4th Cir. 1971).

The implication of a condition of good faith and fair dealing into the employment contract has its origins in traditional contract law which protected employees who had earned certain benefits in the course of their employment. Contract law recognized a distinction between such employees who had earned or almost earned a benefit through their past service and employees who were paid for their current services.¹⁹⁶ To protect the vested or almost vested property right of employees who have prior earned benefits, the courts implied into their employment contracts something similar to an implied covenant of good faith and fair dealing. *Coleman v. Graybar Electric Co.*¹⁹⁷ is representative of the protection accorded such employees. In *Coleman*, the court recognized an employer's obligation not to deprive an at-will employee of his previously earned benefits by discharging the employee without good cause. The plaintiff in *Coleman* was a salesman whose compensation was determined in part by commissions which were to be paid annually and which were based upon the previous year's sales record.¹⁹⁸ The express purpose of the compensation plan was to provide "an incentive to continuous service with the company."¹⁹⁹ The plaintiff was discharged forty-four days before his annual commissions were to become payable.²⁰⁰ The employer asserted that the employee's incompetence was sufficient cause for discharge and relied, in the alternative, upon the employment-at-will doctrine.²⁰¹ The court refused to permit the employer to exercise unilateral control over the payment of the promised higher wage scale based upon the previously earned commission. The court implied a good cause requirement into the discharge provision of the employment contract, thereby enforcing what it construed to be the intent of the parties.²⁰²

The rationale of these decisions protecting earned employee benefits is analogous to that underlying the equitable theory of quantum meruit.²⁰³ Under

¹⁹⁶ *Coleman v. Graybar Elec. Co.*, 195 F.2d 374, 378 (5th Cir. 1952) (applying Texas law).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 376 n.1.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 375.

²⁰¹ *Id.* at 375-76.

²⁰² *See id.* at 378. The court reasoned:

[A] construction of the language . . . which would permit the employer to terminate the continuity of service without any cause and as a matter of arbitrary choice, or because of a desire to evade the payment of additional compensation would be entirely inconsistent with the purpose of the plan and, in the absence of clear and compelling language, should not be adopted. . . . We do not think that the language of the employment application which granted the employer the right to terminate the employment in its discretion at any time can be so imported into the language of the compensation plan as to authorize a construction of its provisions to mean also that a discharge, even if otherwise authorized without cause, would bring such a cessation of employment within the terms of the forfeiture provision.

Id. at 377.

²⁰³ D. DOBBS, LAW OF REMEDIES 237-38 (1973); A. CORBIN, 5 CORBIN ON CONTRACTS § 1109 (1963).

this common law theory a master may not deprive his servant of pay which has been earned for past services by merely rescinding the contract.²⁰⁴ A discharge immediately prior to the scheduled payment of a past earned benefit will create a jury question on the issue of whether the employee was discharged in bad faith to avoid payment of the vested benefit.²⁰⁵ Alternatively, the court may construe the benefit as one which has already vested but is subject to defeasance only upon a showing of good cause.²⁰⁶

The *Coleman* court appeared to distinguish between a contract for compensation and a contract of employment.²⁰⁷ Although this is a subtle difference, the distinction between the two contracts is important. A contract for compensation defines the conditions and circumstances under which an employee will be paid, whereas the contract of employment establishes the terms and conditions governing the employment relationship. Under the *Coleman* court's approach, the traditional employment-at-will rule would remain applicable to all employment situations where compensation has not previously been earned by an employee, while a good cause requirement would be applied to prevent an employer's revocation of a previously earned commission.²⁰⁸

The recent decision by the Massachusetts Supreme Judicial Court in *Fortune v. National Cash Register Co.*²⁰⁹ also implied a duty of good faith and fair dealing into an employment contract. Because the facts of the case involved an attempt to deprive an employee of a vested benefit, the court's holding falls in the mainstream of such cases. The court's reasoning, however, may provide a basis for implying a covenant of good faith into all employment contracts. In

²⁰⁴ *Id.*

²⁰⁵ *See, e.g., Fortune v. National Cash Register Co.*, 373 Mass. 96, 103, 364 N.E.2d 1251, 1257 (1977).

²⁰⁶ *See Buysse v. Paine, Webber, Jackson & Curtis, Inc.*, 623 F.2d 1244, 1249-50 (8th Cir. 1980); *Atkinson v. Equitable Life Assurance Soc'y of the United States*, 519 F.2d 1112 (5th Cir. 1975).

²⁰⁷ *See Coleman v. Graybar Elec. Co.*, 195 F.2d 374, 378 (5th Cir. 1952), where the court held: "[W]e conclude that in this case the contract did not authorize a forfeiture of additional compensation provided in the plan of compensation if the services of the employee were terminated arbitrarily and without just cause."

²⁰⁸ *See Gaines v. Monroe Calculating Mach. Co.*, 78 N.J. Super. 168, 188 A.2d 179 (1963), where the court clearly distinguished a contract of employment from a contract for a benefit. Under the terms of an oral contract of employment, the employee was to be the beneficiary of a stock option agreement. *Id.* at 174, 188 A.2d at 182. The option was subject to defeasance if within five years the employee was voluntarily or involuntarily separated from his employment. *Id.* at 176, 188 A.2d at 183-84. The employee was discharged without a stated cause close to the end of the five year period. *Id.* at 176-77, 188 A.2d at 184. The court permitted the employee to maintain an action to recover the stock option, *id.* at 179, 188 A.2d at 185, but rejected the employee's claim for lost salary. *Id.* at 181, 188 A.2d at 186-87. The court stated: "[T]he word 'involuntary' was not meant to, and therefore does not, include a discharge without cause, especially one made in bad faith for the purpose of destroying plaintiff's option." *Id.* at 179, 188 A.2d at 185. In refusing to construe the plan as conferring a contract right to continued employment, however, the court stated: "[E]ven if 'involuntarily' is construed as excluding discharge not for cause, and the option is preserved, it still does not give the plaintiff the right to employment or salary for the balance of the five years." *Id.* at 181, 188 A.2d at 186-87.

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

Fortune it was alleged that the employer's purpose in discharging the employee was to avoid the payment of a commission bonus.²¹⁰ The plaintiff was a salesman who brought suit after his discharge for the recovery of commissions to which he was entitled under an express employment contract.²¹¹ The contract provided for the payment of a cash bonus for all deliveries on a sale.²¹² In this case, certain deliveries were made over an extended period of time on a contract that had been formed as a result of plaintiff's efforts.²¹³ However, the plaintiff was paid a commission only on those deliveries which were accepted during the previous month.²¹⁴ His discharge was alleged to have deprived him of commissions on future deliveries for a sale that had been previously credited to his account.²¹⁵ The employee was discharged after he refused to retire upon the employer's request.²¹⁶ The plaintiff alleged that as a result of his discharge, he had been denied a bonus to which he was entitled under the express employment contract.²¹⁷ The court stated that it was for the jury to determine the employer's real motive in terminating the employment relationship.²¹⁸ The court instructed the jury that if it found that the reason for the discharge had been to avoid the payment of a bonus, the express contract would have been breached and the termination would have been made in bad faith.²¹⁹ The court held that the written contract contained an implied covenant of good faith and fair dealing, and a termination not made in good faith would constitute a breach of that contract.²²⁰ The court stated that it merely was recognizing the implied condition of good faith and fair dealing that generally is present in all commercial contracts.²²¹

²¹⁰ *Id.* at 97-99, 364 N.E.2d at 1253-54.

²¹¹ *See id.* at 97-98, 364 N.E.2d at 1253.

²¹² *See id.*

²¹³ *See id.* at 98-100, 364 N.E.2d at 1253-54.

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ *Id.* at 100, 364 N.E.2d at 1254.

²¹⁷ *See id.*

²¹⁸ *Id.* at 103, 364 N.E.2d at 1257.

²¹⁹ *Id.* at 105, 364 N.E.2d at 1258. *See also* RLM Associates v. Carter Mfg. Corp., 356 Mass. 718, 248 N.E.2d 646 (1969), where the court held that it was for the jury to determine whether the employer discharged a salesman to avoid paying a commission.

²²⁰ 373 Mass. at 104, 364 N.E.2d at 1256.

²²¹ *Id.* at 103-04, 364 N.E.2d at 1257. The court cited MASS. GEN. LAWS ch. 106, § 1-203 (U.C.C.); The Motor Vehicle Franchise Termination Statute, MASS. GEN. LAWS ch 93B, § 4(3)(c); Kerrigan v. Boston, 361 Mass. 24, 33, 278 N.E.2d 387 (1972) (collective bargaining agreements); Murach v. Massachusetts Bonding and Ins. Co., 339 Mass. 184, 187, 158 N.E.2d 338 (1959) (insurance contracts); Chandler, Gardner & Williams, Inc. v. Reynolds, 145 N.E.2d 476 (1924) (contracts to be performed to the satisfaction of one party). 373 Mass. at 102-03, 364 N.E.2d at 1256. The *Fortune* court granted the remedy under an implied covenant which was deemed to have been contained in the express contract. *See id.* at 104-05, 364 N.E.2d at 1257. The decision contains language which limits its holding to the facts of the case. *See id.* The court refused to extend the implied covenant to all employment contracts but stated that where an agent is on the brink of completing a successful sale, and his principal seeks to deprive the agent of his compensation for that sale by terminating the relationship, the termination is in bad faith. *See id.* The court cited numerous cases which prevent an employer from eliminating an employee

Although the court in *Fortune* purported to limit its holding to the facts of the case, the decision nevertheless may lay the foundation for implying a covenant of good faith and fair dealing into all employment contracts.²²² Before using the rationale of *Fortune*, however, courts should recognize the difference between a contract of employment under which wages are to be determined on a commission basis and one in which wages are to be paid on a continual and periodic basis because the discharged employee has a significant interest in his vested or previously earned compensation.²²³

Courts will not permit a bad faith discharge to defeat an earned benefit.²²⁴

benefit which is almost earned by the rendering of substantial service. *See id.* Thus, the decision relied upon principles embodied in the RESTATEMENT (SECOND) OF AGENCY § 454 (1958):

An agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of the agent's prior efforts.

Id. See Fortune v. National Cash Register Co., 373 Mass. at 105, 364 N.E.2d at 1257.

According to the RESTATEMENT (SECOND) OF AGENCY:

The typical situation for the application of the rule is that in which a broker or other intermediary has so nearly succeeded in procuring a customer or completing a transaction that the principal believes that he can perform the rest of the transaction without further assistance or expense. If, in this case, the principal terminates the agency, either to save for himself the broker's commission or to let the buyer, if, in this case, the principal terminates the agency, either to save for himself the broker's commission or to let the buyer or another agent have it, the broker is entitled to the agreed compensation.

RESTATEMENT (SECOND) OF AGENCY § 454, comment b (1958). The traditional employment contract is based on the principle that wages constitute the consideration for the work which is actually performed. *See Note, Implied Contract Rights, supra* note 2, at 352. Thus, by terminating an employee there is no lost consideration due to an employee for work which has not yet been performed and for which the employer receives no other additional consideration. *Id.*

²²² *See McKirney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980), where the court ruled that a discharge based upon a violation of the ban against age discrimination violated public policy and therefore clearly breached a covenant of good faith which was implied into the at-will employment contract. *See id.* at 1118, 1121. *See also Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 825 (E.D.N.Y. 1980); *Zimmer v. Wells Management Corp.*, 348 F. Supp. 590 (S.D.N.Y. 1972). *But see Moore v. Home Ins. Co.*, 601 F.2d 1072 (9th Cir. 1979). In *Moore*, the court held that although all employment contracts contain an implied obligation of good faith, under Arizona law an employer need not show good cause for discharge and no liability was incurred where the employer discharged a long-term employee seven and a half months prior to the vesting of his pension. *Id.* at 1074-75.

²²³ *But see Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980). In *Cleary*, the court held that the duty to act in good faith and fair dealing applies to all contracts. *Id.* at 453, 168 Cal. Rptr. at 727-28. The court stated:

The duty which arises from the covenant of good faith and fair dealing is *unconditional* and *independent* in nature; it is not controlled by events in the same manner as conditions precedent or subsequent. . . . It is equally well settled that the employer must act in good faith; and where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury.

Id. at 543, 168 Cal. Rptr. at 728. (citations omitted) (emphasis in original).

²²⁴ *See, e.g., Hainline v. General Motors Corp.*, 444 F.2d 1250, 1257 (6th Cir. 1971) (court protects a stock option plan); *Lemmon v. Cedar Point, Inc.*, 406 F.2d 94 (6th Cir. 1969) (court protects a stock option plan); *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875, 887-88

It is not completely appropriate to move from that principle, however, to the proposition that *all* employment contracts contain an implied covenant of good faith and fair dealing. This would deny the employer control and discretion in determining his work force composition which has become expected under the employment-at-will rule. This development may also result in a tort cause of action with tort recoveries for a claim that appears to be a breach of the employment contract. Recently, however, some courts have made this analytical inference by implying a good faith requirement in cases that do not involve attempts to deprive an employee of a vested benefit.

In *Cleary v. American Airlines, Inc.*,²²⁵ for example, the California Supreme Court refused to recognize the distinction between bad faith discharges to defeat an earned benefit and other kinds of employee discharges. The court stated, in dicta, that a duty of good faith and fair dealing was to be implied in all employment contracts.²²⁶ According to the court, a breach of this duty might lead to liability for breach of an at-will employment contract.²²⁷ In *Cleary*, the plaintiff employee alleged that he was discharged for his union activities.²²⁸ Although the jurisdiction had a statute preventing discrimination for engaging in union activity, the employee elected to sue under tort and contract theories.²²⁹ The court recognized a cause of action in favor of the employee, based upon a combination of legal theories, including the tort of wrongful discharge.²³⁰

Similarly, in *Savodnik v. Korvettes, Inc.*,²³¹ a federal district court interpreting New York law, granted a remedy for the tort of abusive discharge based upon the existence of an implied covenant of good faith and fair dealing

(S.D.N.Y. 1975) (court enforces separation pay provision); *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 579-80, 78 N.W.2d 296, 301-02 (1956) (court protects termination pay benefit); *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 670, 211 N.W.2d 101, 103 (1973) (court protects separation pay). *See also* *Gram v. Liberty Mut. Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 2300, 429 N.E.2d 21, 29 (court protects future compensation clearly related to past service of at-will employee who was discharged without good cause).

No separate contractual rights originate from a pension benefit because the benefit is calculated from actuarial formulae which take account of the risk of an eleventh hour discharge. *Schneider v. McKesson Robbins, Inc.*, 254 F.2d 827, 830 (2d Cir. 1958); *Hardy v. H.K. Porter Co.*, 417 F. Supp. 1175, 1182 (E.D. Pa. 1976). An employee recognizes the contingency risk involved in an unvested pension. The unilateral contract for a pension benefit is not accepted until all requirements have been fulfilled. *See generally* *Craig v. Bemis Co.*, 517 F.2d 677, 684-85 (5th Cir. 1975); *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 532-33 (3d Cir. 1970); *Schneider v. McKesson & Robbins, Inc.*, 254 F.2d 827, 829-30 (2d Cir. 1958).

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

²²⁶ *Id.* at 453, 168 Cal. Rptr. at 727-28.

²²⁷ *Id.*

²²⁸ *Id.* at 447, 168 Cal. Rptr. at 724.

²²⁹ *See id.* at 447-48, 168 Cal. Rptr. at 724-25.

²³⁰ These theories included: the tort of wrongful discharge, and estoppel theory predicated upon the eighteen years of service provided by the employee, an oral contract guaranteeing continued employment, and the employer's duty to act in good faith. *Id.* at 456, 168 Cal. Rptr. at 729-30.

²³¹ 488 F. Supp. 822 (E.D.N.Y. 1980).

in the contract of employment.²³² The court found that the unexplained discharge of a thirteen-year employee within two years of the vesting of his pension benefit may have violated this covenant.²³³ The court permitted the employee to pursue a remedy in tort, reasoning that the integrity of a pension plan was a strong public policy.²³⁴ In refusing to dismiss the claim, the court also relied on the good faith obligation of the employer.²³⁵

Cleary v. American Airlines, Inc. and *Savodnik v. Korvettes, Inc.* may have set the stage for the demise of the employment-at-will doctrine. The logical extension of the holding in those cases would protect many salaried at-will employees because they have some form of deferred compensation such as a pension plan. To imply a just cause provision in the contracts of such employees, thereby prohibiting their discharge in the absence of cause rather than protecting their earned benefit, would abolish the employment-at-will doctrine. Such an approach would fail to recognize the significant distinction between enforcing the employee's right to an earned or almost vested benefit by implying a good cause for discharge requirement to defeat the benefit, and enforcing the developing right of job security through implication of the good cause term in the contract of employment. This distinction should not be ignored by courts.

C. A Contract of Continued Employment

Perhaps the most significant recent development in the law governing the employment relationship involves the enforcing of certain explicit promises of continued employment made by an employer which traditionally were regarded as having no legal effect. Recent decisions have provided a cause of action for breach of contract in what had previously been construed as at-will-employment relationships.²³⁶ The implications of these decisions are extensive and may radically alter the traditional employer-employee relationship.

Examples of documents which, under these recent decisions, may create enforceable contract rights include employee manuals, personnel policy handbooks, and employee brochures which explain certain employee benefits, such as pension plans. These documents often contain representations about the conditions of employment and may be construed as a promise that the employee will remain with the employer in the absence of good cause for discharge.²³⁷ Such representations of continued employment also may be made

²³² See *id.* at 825-27.

²³³ See *id.*

²³⁴ *Id.* at 826.

²³⁵ See *id.* at 825-27. Thus, the court permitted the plaintiff to sue under a tort theory, with the full panoply of tort remedies, but determined that the tort duty stems from a contractual obligation which was implied into the contract of employment.

²³⁶ *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 614-15, 292 N.W.2d 880, 892 (1980).

²³⁷ See Note, *Implied Contract Rights*, *supra* note 2, at 357.

to employees through oral promises at an employment interview or during the course of an employee's tenure.

Courts traditionally have enforced a variety of the promises contained in such personnel policy manuals. Courts have held that employers must abide by promises to provide certain benefits such as pensions,²³⁸ severance pay,²³⁹ compensation bonuses,²⁴⁰ and seniority systems for layoffs and promotions.²⁴¹ The promise of continued employment, however, traditionally had been held unenforceable. Some courts now have determined that these statements and promises are inducements for acceptance of employment and therefore should be enforced.²⁴²

A recent Michigan decision finding a good cause requirement for discharge arising from employer representations of continued employment is *Toussaint v. Blue Cross & Blue Shield of Michigan*.²⁴³ In *Toussaint*, the court recognized a cause of action for the employee based upon an alleged breach of the employer's oral promises and written statements contained in an employee policy handbook which guaranteed continued employment in the absence of just cause for discharge.²⁴⁴ The employee stated that at his initial employment interview, he was told that he would remain with the company "as long as [he] did [his] job."²⁴⁵ In addition to this oral promise, the company's personnel policy manual represented that it was the employer's policy, applicable to all non-probationary employees, to require good cause for discharge.²⁴⁶ The court held that oral or written statements, such as those in the instant case, or the employee's legitimate expectations founded upon those statements could give rise to an enforceable contractual provision requiring good cause for discharge.²⁴⁷ According to the court, refusing to enforce such express promises

²³⁸ *Hainline v. General Motors Corp.*, 444 F.2d 1250, 1253 (6th Cir. 1971); *Bird v. Connecticut Power Co.*, 144 Conn. 456, 463, 133 A.2d 894, 897 (1957); *Schofield v. Zion's Co-op. Mercantile Inst.*, 85 Utah 281, 293, 39 P.2d 342, 347 (1934).

²³⁹ *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875, 887-88 (S.D.N.Y. 1975); *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 579-80, 78 N.W.2d 296, 301-02 (1956); *Clarke v. Brunswick Corp.*, 48 Mich. 667, 670, 211 N.W.2d 101, 103 (1973); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 542-43, 53 S.E.2d 804, 809 (1949).

²⁴⁰ *Raybestos-Manhattan, Inc. v. Rowland*, 460 F.2d 697, 700 (4th Cir. 1972) (bonus promised for producing trade secret); *Hobson v. Eaton*, 399 F.2d 781, 785 (6th Cir. 1968), cert. denied, 394 U.S. 928 (1969); *Coleman v. Graybar Elec. Co.*, 195 F.2d 374, 378 (5th Cir. 1952).

²⁴¹ See *Wagner v. Sperry Univac*, 458 F. Supp. 505, 520-21 (E.D. Pa. 1978); *Hepp v. Lockheed-California Co.*, 86 Cal. App. 3d 714, 718-19, 150 Cal. Rptr. 408, 410-11 (1978) (enforcing recall policy). But see *Murphine v. Hospital Auth. of Floyd County*, 151 Ga. App. 722, 723, 261 S.E.2d 457, 458 (1979) (court does not enforce policy of promotion based upon seniority).

²⁴² *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 614-15, 292 N.W.2d 880, 892 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722, 729 (1980).

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

²⁴⁴ *Id.* at 614-15, 292 N.W.2d at 892.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 597-98, 292 N.W.2d at 884.

²⁴⁷ *Id.* at 614-15, 292 N.W.2d at 892.

is tantamount to concluding that an express contract for continued employment is condemned to remain terminable at will.²⁴⁸ The court concluded that there was no strong public policy or other reason to prohibit the formation of a good cause discharge employment contract.²⁴⁹ Therefore, the court decided that the employer should be bound by such promises.²⁵⁰

Several other decisions also have concluded that it is both unfair and illogical for the courts to fail to enforce express representations which limit the employer's power to discharge his employees.²⁵¹ These courts have determined that the employment-at-will rule is one of construction, not substance, and that the failure to enforce the promise of a good cause for discharge would render that promise illusory.²⁵² In an attempt to enforce the intentions and expectations of the parties, these courts give preference to the substance of the express promise of continued employment, rather than to the form of the at-will employment contract.²⁵³

The widespread acceptance of the reasoning of these decisions would have a dramatic effect on the employment-at-will rule and the employment relationship in general. Most non-unionized private sector employees receive promises of continued employment from their employers. According to the theory of *Toussaint* and similar cases, these promises can give rise to an enforceable right of good cause for discharge if relied upon by the employee. Thus, for the first time, the more than eighty million non-unionized employees in this country may be accorded the protection of job security which the unionized sector of the workforce traditionally has enjoyed.

Indeed, in its practical application, providing for the enforcement of such promises could afford non-unionized employees greater job security than unionized employees. Under most collective bargaining agreements, disputes over whether good cause existed for a discharge are determined by an arbitrator.²⁵⁴ The arbitrator normally will have the experience and expertise necessary to unravel the issues presented by such disputes.²⁵⁵ A civil suit by a

²⁴⁸ See *id.* at 610, 292 N.W.2d at 890.

²⁴⁹ *Id.* at 611, 292 N.W.2d at 891.

²⁵⁰ See *id.*

²⁵¹ *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980); *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d 695, 703-05, 101 Cal. Rptr. 169, 174-75 (1972).

²⁵² See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 619, 292 N.W.2d 880, 895 (1980).

²⁵³ See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 613-15, 292 N.W.2d 880, 892 (1980).

²⁵⁴ The collective bargaining agreement supercedes an individual employment contract. Therefore, a unionized employee may not assert rights in court under a theory of an individual contract of employment. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944). Moreover, the unionized employee protected by a grievance procedure is required to exhaust the grievance procedure before initiating litigation for breach of contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

²⁵⁵ The national labor policy which favors arbitration as the preferred method of resolv-

private employee for breach of contract, however, carries with it the right to a jury trial.²⁵⁶ In *Toussaint*, the court recognized that the legitimacy of the employee's expectations regarding promises of continued employment were for the jury to determine.²⁵⁷ Because the jury probably will lack an arbitrator's expertise in this field,²⁵⁸ and because it probably will be more sympathetic to the claims of the employee than an arbitrator, juries may render verdicts which accord non-unionized employees greater protection than unionized employees have achieved.²⁵⁹

In *Toussaint*, the court held that the issue of what promises could lead to an employee's "legitimate expectation of job security," was one for the jury to determine.²⁶⁰ The subjective opinion or interpretation of the employee might suffice to create an enforceable job right.²⁶¹ At the extreme, the holding of the court in *Toussaint* could result in an enforceable contract requiring good cause for discharge in each instance in which a probationary period is established. The employee could argue that he expected some form of job security upon the expiration of the probationary period.²⁶² However, whether it is the employee's reliance and expectation or the actual existence of a promise that is necessary to establish a contract is currently an unresolved issue.

Under the *Toussaint* approach, the benefits promised by the employer's policies are considered inducements to employment.²⁶³ The promises are part of the employment offer which the employee accepts. This approach is an extension of the analysis applied in *Cain v. Allen Electric & Equipment Co.*,²⁶⁴ where the court enforced a termination pay provision of the at-will employment contract. The court found that the consideration provided by the employee to enforce the promise was efficient work and spirited cooperation with others

ing labor disputes relies upon the policy that arbitrators are trained and experienced neutral decision-makers. See *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960).

²⁵⁶ See text and notes at notes 301-12 *infra*.

²⁵⁷ See text and notes at notes 271-300 *infra*.

²⁵⁸ Arbitrators perform the function that otherwise would be performed by the courts. In fact, the courts have been cautioned not to second-guess or replace their judgment for that of the arbitrators precisely because they lack the expertise required to make such decisions. This policy has been consistently applied following its adoption by the Supreme Court in the *Steelworkers Trilogy*. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 785-807 (1965).

²⁵⁹ In addition, because of their lack of experience with labor-management relations, jurors may not define just cause as would an arbitrator or as an employer.

²⁶⁰ See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 614, 292 N.W.2d 880, 892 (1980).

²⁶¹ See *id.* at 617-19, 292 N.W.2d at 893-94.

²⁶² See, e.g., *Forrester v. Parker*, 93 N.M. 781, 782, 606 P.2d 191, 192 (1980).

²⁶³ In *Toussaint* the court reasoned that the promise could result in increased employee morale and peace of mind. 408 Mich. at 613, 292 N.W.2d at 892.

²⁶⁴ 346 Mich. 568, 577-78, 78 N.W.2d 296, 300-01 (1956).

among the work force.²⁶⁵ The employer benefits from an increase in employee morale and productivity. Thus, courts following this approach recognize the employee's legitimate reliance on these promises, and enforce those expectations by concluding that the employee has given sufficient consideration to make the promises of the employer binding.²⁶⁶

There are several defects in the reasoning of the cases following this approach, however. The first such flaw is that a promise of continued employment is not an inducement to employment unless it is in fact relied upon by the employee.²⁶⁷ Absent reliance by the employee, the employer receives no equivalent consideration for his promise of good cause for discharge because employees do not work more efficiently if they do not rely upon such promises. The promise does not induce greater productivity because the employee already receives compensation for the work which he performs. The compensation, rather than the promise for continued employment in the absence of good cause, is the employer's consideration for the work performed.²⁶⁸

Moreover, the rationale of these decisions is not supportable insofar as it is predicated upon the mutual intentions of the parties. An employer may reasonably expect that his promise of good cause for discharge is unenforceable because the courts traditionally have refused to enforce such promises under the employment-at-will doctrine to defeat such claims. Thus, an employer's intent when making such promises may be significantly different from the intent of the employee when he receives the promise. *Toussaint* and similar cases fail to consider the true intentions of the employer when entering an employment contract. The contractual intent may be completely unilateral.

In light of reliance by employers on the employment-at-will rule, promises of continued employment should be enforced prospectively, if at all. A prospective decision in the employer's jurisdiction would forewarn the employer that his promises will be enforced and thereby allow him to enter employment contracts which reflect the true intent of both parties. If an employer continues to make assurances of continued employment, then there would be no good reason to prevent the enforcement of such promises.²⁶⁹ Retrospective enforcement of promises of continued employment would impose enormous financial

²⁶⁵ *Id.* at 575, 78 N.W.2d at 299.

²⁶⁶ *Id.* at 579, 78 N.W.2d at 301.

²⁶⁷ See *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 96-97, 127 Cal. Rptr. 222, 225 (1976).

²⁶⁸ See Note, *Implied Contract Rights*, *supra* note 2, at 352.

²⁶⁹ For example, the court could render a declaratory judgment informing employers that their promises will be enforced. The employer would then have the option of informing his employees that it will honor its original promises if those promises have resulted or will result in some tangible benefit to him. In the alternative, the employer could retract its original promises, and require his employees to sign a new employment agreement acknowledging the employer's right to discharge the employee at will. This new contract would supercede all prior oral and written representations of job security. Under this new contract, the employee would have no legitimate expectation of job security and a good cause discharge unless he provided additional consideration at the time his employer made representations of continued employment.

burdens on the employers and in most cases would not accurately reflect the intentions of the employer in making assurances of continued employment.

In summary, *Toussaint* and similar cases dramatically undercut the traditional employment-at-will rule. If the approach followed in these cases gains widespread acceptance, the relationship between employers and employees will be altered significantly. Unless employers were willing to endanger the morale of their workforce by refusing to assure their employees of continued employment, most at-will employees could claim that they could not be discharged without good cause. The prospective application of this approach might mitigate some of its impact upon an employer's personnel practices, but would not prevent the disruption in the employment relationship which would result from submitting these contract claims to a jury.²⁷⁰

D. Issues to be Determined by the Jury in a "Good Cause" Claim

In *Toussaint*, the court held that the issue of whether an employee was discharged for good cause should properly be determined by the jury.²⁷¹ The opinion did not make clear, however, whether it was for the court or for the jury to determine what constitutes good cause for discharge. In addition, *Toussaint* left open the question of who carries the burden of proof in breach of contract actions. These unresolved issues are of great consequence to the employment relationship. A jury should not be entitled to second guess an employer's policy or practices to determine that they are insufficient justifications for a discharge. Such an approach would leave virtually all personnel practices open to communal comment. A personnel practice that is justifiable to one jury may be found pernicious to another. The likely result would then be to subject employers to the threat of suit in every instance of a discharge as the employee attempts to find a jury sympathetic to his cause. Thus, the only issue that should be posed to the jury is whether the personnel practice was applied equally to all employees. It is submitted that if an employer's promise of continued employment is to be given contractual force courts must limit the discretion of the jury in determining what constitutes good cause.

To understand better the problems which may result from submitting to the jury the issue of whether there was good cause for discharge, it is necessary to distinguish between two issues which a jury might be called upon to resolve. When an employer claims that he discharged an employee for a certain reason,

²⁷⁰ Under prospective enforcement, an employer may ask employees to sign a waiver of their contractual right to job protection or a new contract of employment explicitly adopting the employment-at-will rule as the discharge provision. However, this might reduce employee morale and, as a practical matter, may be considered a bad personnel practice. Furthermore, it is uncertain whether such subsequent waivers would be enforceable. The employee could claim that he entered into the agreement under the duress of the threat of discharge. Alternatively, employees could claim that a waiver is part of a contract of adhesion because they had no choice but to agree to the provision or lose their job.

²⁷¹ *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 620-23, 292 N.W.2d 880, 896-97 (1980).

the employee may respond in two ways. He may claim that he was discharged for a reason other than that stated by the employer, and argue the second reason did not constitute good cause.²⁷² Alternatively, the employee may admit that he was discharged for the stated reason, but argue that the reason itself was not good cause for the discharge. Thus, there are two distinct issues which a jury might face: (1) was reason X the true reason for discharge, and, (2) does reason X amount to good cause.²⁷³ The first issue may present complicated factual disputes; yet it remains a pure question of fact which is within the competence of the jury to resolve. The second question presents a question of law as to whether the law of employment relations should recognize reason X as good cause for discharge.²⁷⁴ It is submitted that if the proper burden of proof model is applied to claims raising the first issue,²⁷⁵ then that issue can be left to a jury. The second issue, however, is beyond the competence of a jury.²⁷⁶ Therefore, this issue should be decided by the court, as a matter of law. It is not appropriate for the jury to determine the second issue of what constitutes good cause for discharge. If this determination were entrusted to the jury, then an employer's sound judgment of how best to conduct his business always would be subject to review by a panel of the employee's peers. The potential for a jury to second guess the employer's judgment contains ominous overtones for personnel managers and labor relations officials.

Analogous issues have frequently confronted courts in cases involving employment discrimination statutes.²⁷⁷ Thus, in a claim alleging disparate impact, the employer's policy is reviewed to determine whether the mere existence of the policy affects a greater percentage of the protected class. The legitimacy of the policy, however, is not subject to question unless the disparate

²⁷² This assertion is similar to the claim in employment discrimination cases that an employer's practice was a mere subterfuge for impermissible discrimination. See text and notes at notes 277-91 *infra*.

²⁷³ This dichotomy was recognized by the *Toussaint* court. See 408 Mich. at 622, 292 N.W.2d at 896.

²⁷⁴ If the employer articulates an un rebutted legitimate reason for discharge the court must direct a verdict in its favor. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). What constitutes a legitimate practice is necessarily a determination for the court. Several courts have held that in an employee's action for breach of the collective bargaining agreement under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1976), the issue of whether just cause for discharge exists is one of law. *Scott v. Riley Co.*, 645 F.2d 565, 567 (7th Cir. 1981); *S.J. Groves & Sons Co. v. International Bhd. of Teamsters*, 581 F.2d 1241, 1244 (7th Cir. 1978).

²⁷⁵ See text and notes at notes 277-91 *infra*.

²⁷⁶ But see *Local 205, United Elec. Radio & Mach. Workers v. General Elec. Co.*, 172 F. Supp. 53, 56 (D. Mass. 1959). The court defined the standard of good cause as "... what a reasonable person would find sufficient; the phrase creates an objective rather than a personal, subjective test." *Id.* Under this legal standard a jury might be instructed to resolve the legal issue under a reasonable man theory, as in tort cases.

²⁷⁷ These statutes include: 42 U.S.C. §§ 2000e-2000e-17 (1976); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1976); The Vietnam Era Veterans' Readjustment Assistance Act of 1972, 38 U.S.C. §§ 2011-14 (1976); The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-94 (1976).

impact is first established. In a breach of contract claim there are no statistics to help determine whether the employer's policy is a good cause to discharge an employee. Therefore, this determination can only be made on the basis of the subjective opinion of each particular juror.

What is a good cause for an employer may not necessarily be a good cause in the subjective opinion of the jury. If the sole issue to be resolved is the employer's true motive for the personnel action, the claim will resemble one for discrimination. This model was used in *Rabazo-Alvarez v. Dart Industries, Inc.*,²⁷⁸ where the factfinder found that the employer was not in "good faith dissatisfied with plaintiff's performance."²⁷⁹ The trial court determined that the discharge was predicated upon a bad faith motive.²⁸⁰ Permitting a jury to question the legitimacy of an employment policy would significantly expand upon traditional legal analysis and have broad ramifications for all employment practices. It would thoroughly interfere with managerial discretion.²⁸¹ Taken to its extreme, a jury could determine that layoff for economic reasons is not good cause and should be remediable.²⁸²

An appropriate burden of proof model for the breach of contract action would be one similar to that used in claims of disparate treatment arising under employment discrimination statutes.²⁸³ In these cases, the courts are concerned with the true motive for the employer's actions in an individual personnel decision but they do not permit a determination of whether the employer's policies should be undermined.²⁸⁴

The traditional analysis employed by the courts in a claim of discrimination predicated upon disparate treatment was established by the Supreme Court in *McDonnell-Douglas Corp. v. Green*.²⁸⁵ Under this analysis, an employee

²⁷⁸ 50 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976).

²⁷⁹ *Id.* at 97, 127 Cal. Rptr. at 225.

²⁸⁰ *See id.*

²⁸¹ The potential danger inherent in this analysis was recognized in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 311, 171 Cal. Rptr. 917 (1981), where the court stated: "Essentially, [good cause and just cause] connote 'a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.' Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion." *Id.* at 330, 171 Cal. Rptr. at 928.

²⁸² Where an economic layoff has been the subject of litigation, the issue for the jury is whether the employer's action is applied in a discriminatory fashion. The employer is permitted to rebut an inference of discrimination by providing economic data to support the decision to place employees on layoff. *Stone & Webster Eng'r Corp. v. NLRB*, 536 F.2d 461, 465-66 (1st Cir. 1976); *J.A. Hackney & Sons, Inc. v. NLRB*, 426 F.2d 943, 944-45 (4th Cir. 1970). *See also* *Goodwin v. Board of Educ. of the School Dist. of the City of Kalamazoo*, 82 Mich. App. 559, 572-73, 267 N.W.2d 142, 149 (1978); *Michigan Employment Relations Comm'n v. Cafana Cleaners, Inc.*, 73 Mich. App. 752, 757-58, 252 N.W.2d 536, 538 (1977).

It is unlikely that a reasonable juror could reach this decision. In fact, if this is the basis for a breach of contract action, the court should dismiss the claim as a matter of law because the NLRB and arbitrators have determined that an economic layoff is a justifiable employment practice.

²⁸³ *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁸⁴ *See, e.g., Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

²⁸⁵ 411 U.S. 792 (1973).

must initially establish a prima facie showing of a discriminatory purpose for the discharge.²⁸⁶ If the employee establishes a prima facie case, the burden of production is transferred to the employer who must rebut the presumption of discriminatory purpose.²⁸⁷ In order to meet his burden of production, the employer must articulate a legitimate non-discriminatory reason for the personnel action.²⁸⁸ The plaintiff then is required to establish that the employer's articulated justifications were a mere pretext for discrimination.²⁸⁹ Unless a plaintiff ultimately can establish the employer's discriminatory motive in a claim of discrimination under a theory of disparate treatment, the employer's action will be vindicated.²⁹⁰ Thus, in a claim predicated upon a civil rights statute, the burden of proving that a decision to discharge an employee was made in bad faith or for a bad cause always remains with the plaintiff. In a claim for breach of contract, however, it is unclear whether the employer must

²⁸⁶ *Id.* at 802. The elements of the prima facie case vary depending upon the personnel action in question. To establish a prima facie case of discrimination under the standards established in *McDonnell-Douglas*, the employee in most instances must prove that: (1) he was a member of the protected class; (2) he was performing the job; (3) he was discharged; and (4) the job continued to be performed by another employee or that similarly situated employees from outside the class were not discharged. *See id.* at 802 n.13. *See also* *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980); *Hicks v. Sears, Roebuck & Co.*, 503 F. Supp. 930, 934, 24 FEP Cas. 1207, 1213 (E.D. Pa. 1980); *Daniel v. Marcal Paper Mills*, 24 FEP Cas. 823 (D.N.J. 1980); *Pettus v. Dow Badische Chemical Co.*, 23 FEP Cas. 615, 619 (S.D. Tex. 1980).

²⁸⁷ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981).

²⁸⁸ *Id.*

²⁸⁹ *See id.* *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576-78 (1978); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978).

This proof model was adopted by a California state court in a breach of contract claim. *See Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). Under the *Pugh* approach, the plaintiff establishes a prima facie claim by proving the existence of an express or implied promise of discharge for cause or reliance sufficient to state an estoppel claim. *See id.* at 329, 171 Cal. Rptr. at 927. The burden then shifts to the employer to produce evidence of a reason for the employee's termination. *See id.* The employee may then attack the employer's explanation on the ground that it is a mere pretext or is insufficient to meet the employer's obligations under the contract. *Id.* at 329-30, 171 Cal. Rptr. at 927. The employee, however, "bears the ultimate burden of proving that he was terminated wrongfully." *Id.* at 330, 171 Cal. Rptr. at 927.

²⁹⁰ *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), where the Court stated:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical*, although it can in some situations be inferred from the mere fact of differences in treatment.

* * *

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. at 336 n.15 (citations omitted) (emphasis added).

merely articulate a legitimate reason for his actions or whether he must prove that good cause existed to terminate the employee.²⁹¹

Imposing on the employer the burden of proving good cause would comport with the proof model applied in cases involving breach of an employment contract for a definite duration.²⁹² In such cases, employees have the initial burden of establishing a *prima facie* case by demonstrating the existence of a contract and a discharge prior to the expressed expiration date.²⁹³ The employer must then prove that good cause existed for the discharge.²⁹⁴ A more rational method for dividing the burden of proof in these cases, however, would be the three-tiered analysis currently used in claims predicated on a civil

²⁹¹ The court in *Toussaint v. Blue Cross & Blue Shield of Mich.* stated:

Where an employee is discharged for stated reasons which he contends are not "good cause" for discharge, the role of the jury is more difficult to resolve. If the jury is permitted to decide whether there was good cause for discharge, there is the danger that it will substitute its judgment for the employer's. If the jurors would not have fired the employee for doing what he admittedly did, or for what they find he did, the employer may be held liable in damages although the employee was discharged in good faith and the employer's decision was not unreasonable.

While the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include a right to be discharged only with the concurrence of the communal judgment of the jury. Nevertheless, we have considered and rejected the alternative of instructing the jury that it may not find a breach if it finds the employer's decision to discharge the employee was not unreasonable under the circumstances.

Such an instruction would transform a good cause contract into a satisfaction contract. The employer may discharge under a satisfaction contract as long as he is in good faith dissatisfied with the employee's performance or behavior. The instruction under consideration would permit the employer to discharge as long as his dissatisfaction (cause) is not unreasonable. The difference is minute.

Where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable. An instruction which permits the jury to review only for reasonableness inadequately enforces that promise.

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

* * *

[Employers that enter into implied contracts of employment], we agree must be permitted to establish their own standards for job performance and to dismiss for non-adherence to those standards although another employer or the jury might have established lower standards.

408 Mich. 579, 622-23, 292 N.W.2d 880, 896-97 (1980) (footnotes omitted).

²⁹² W.P. RICHARDSON, EVIDENCE § 110 (8th ed. 1955).

²⁹³ See *Williams v. Action for a Better Community, Inc.*, 51 A.D.2d 876, 877, 380 N.Y.S.2d 138, 140 (1976).

²⁹⁴ *Felsen v. Sol Mfg. Corp.*, 24 N.Y.2d 682, 685, 301 N.Y.S.2d 610, 612 (1969); *Williams v. Action for a Better Community, Inc.*, 51 A.D.2d 876, 877, 380 N.Y.S.2d 138, 140 (1976); *Wegman v. Dairylea Coop., Inc.*, 50 A.D.2d 108, 111, 376 N.Y.S.2d 728, 733 (1975); W.P. RICHARDSON, EVIDENCE § 110 (8th ed. 1955).

rights statute.²⁹⁵ Under this proof model, the burden of establishing that bad cause or that no cause existed for the discharge would always remain with the employee. Adopting this model of proof would provide for symmetry among employee remedies; if the employee fails to establish an impermissible motive for the termination, he should lose his claim regardless of whether it is brought under a theory of discrimination, breach of the employment contract, or the tort of wrongful discharge.

Allocating the burden of proof in breach of contract claims in this fashion, and reserving the question of good cause as one of law, would be appropriate to a jury's capability and an employer's needs and would not alter significantly an employee's legitimate expectations. Once a personnel policy has been adopted, and it is determined by the employer to be a reasonable ground for discharge, the employee can expect this policy to be part of the good cause employment contract. Therefore, the factfinder would not be permitted to question the personnel practice or policy. Under this approach, for example, a judge should instruct the jury in the following manner:

The plaintiff in this case claims that he was discharged for X reason. The defendant claims to have discharged the plaintiff for Y reason. You are to determine whether the plaintiff was discharged for X reason or for Y reason. If you determine that the plaintiff was discharged for Y reason, then I instruct you to find for the defendant. If you determine that the reason was X reason, then I instruct you to find for the plaintiff.

As in traditional employment discrimination claims, the issue submitted to the factfinder in a breach of contract action should be limited to whether the policy is motivated by bad faith or applied to individuals in an unequal fashion.²⁹⁶

The difficulty in determining whether the employer discharged an employee for good cause is exacerbated in the case of upper-level managerial employees. The standards for determining whether to retain these employees are substantially different from those used in evaluating the performance of entry-level employees. Because production may be measured or quantified for many entry-level employees, their performance may be determined by objective standards. An objective standard providing for a comparison among employees may serve to legitimize a decision to discharge the employee.

The managerial employee, in contrast, frequently is evaluated by substantially different criteria, many of which are subjective. For example, lack of confidence among superiors, co-workers, and subordinates often is an important factor in determining whether to discharge a manager.²⁹⁷ This determination is

²⁹⁵ See text and notes at notes 285-91 *supra*.

²⁹⁶ *Pughs v. See's Candies Store, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981).

²⁹⁷ In *Pughs v. See's Candies Store, Inc.*, the court stated: "[W]here as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity

completely subjective, not readily definable by quantitative measures. It may not be possible to compare the work product of two managers. Furthermore, a change in operations may require managerial employees who possess special skills or abilities. Similarly, other factors relied on in evaluating managerial employees, such as the ability to plan and organize or the ability to work well with others in a leadership capacity, are subjective in nature. If the question of whether there was just cause for the discharge of a managerial employee were submitted to a jury, the jury would have no objective criteria with which to evaluate the employer's decision.

Protecting the employee's good faith expectations of job security may be a fair societal objective. This goal, however, must be balanced against the employer's ability to operate his business under a theory of managerial discretion whereby the employer and not the jury determine what is a legitimate personnel practice. Allowing the jury to determine what constitutes good cause for discharge would place employers in a quandary when making personnel decisions. If a jury can eliminate an employer's practice, no policy or procedure will be immune from the communal re-evaluation.²⁹⁸ Given the choice between the potential contractual liability from discharging an employee for what the employer, in good faith believes to be good cause, and accepting open defiance to an employment policy, the employer may simply amend the policy or tolerate the defiance.²⁹⁹ To avoid these potential problems, the determination of whether certain personnel policies provide a good cause for discharge should be made by the court as a matter of law. Several courts have determined that where an employee openly defies a policy or is insubordinate any contract protection which he might have had will be forfeited.³⁰⁰ Thus, the courts should

be allowed substantial scope for the exercise of subjective judgment." *Id.* at 330, 171 Cal. Rptr. at 928. *See also* Note, *At Will Employees*, *supra* note 2, at 1840.

²⁹⁸ *See, e.g.,* Lake Shore & W.R. Co. v. Tierney, 8-Ohio C.C. (n.s.) 521, *aff'd*, 75 Ohio St. 565, 80 N.E. 1128 (1905), where the court held that the good faith beliefs of the employer did not in all circumstances constitute good cause beyond the purview of a judicial determination. 8 Ohio C.C. (n.s.) at 523.

²⁹⁹ For example, in *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (1980), the plaintiff sued for wrongful discharge. *Id.* at 373, 290 N.W.2d at 536. The employer had discharged the employee when the employee, in violation of company policy, attempted to bid for the same shift as that occupied by his female roommate. *Id.* at 376, 29 N.W.2d at 538. The court found that the policy was fair and that there was no evidence of malice in the treatment accorded the plaintiff. *Id.* at 377, 290 N.W.2d at 538. Therefore, the court refused to permit an action in tort, finding that the employer's policy did not violate the state's public policy in favor of peaceful labor relations. *See id.*

³⁰⁰ *See, e.g.,* Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976) (employee discharged for insubordination); Vincent Allen & Assocs., Inc. v. Weis, 63 Ill. App. 3d 285 (1978) (court looks to those policies delineated by the employer to determine what constitutes good cause); Grozek v. Ragu Foods, 63 A.D.2d 858, 859, 406 N.Y.S.2d 213, 214 (1978) (employee discharged for fighting); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975) (employee discharged for absenteeism); Maxwell v. Cardinal Petroleum Corp., 460 S.W.2d 436 (Tex. Civ. App. 1970), *rev'd on other grounds*, 471 S.W.2d 785 (Tex. 1971). In *Maxwell*, the court stated: "What constitutes a good and sufficient cause for the discharge of the employee is a question of law, and, where the facts are undisputed, it is for the court to say

consider the implications of the issues to be resolved by the jury and permit an employer to continue to implement the personnel practices of his choice without the spectre of liability for breach of the employment contract.

These issues take on greater significance when it is considered that a breach of contract action often may be brought by an employee who also alleges that his discharge was discriminatory. The combination of these distinct causes of action poses several difficult issues for the courts. The burden of proof model which has been carefully developed in cases involving discrimination may be undermined if courts fail to apply the same standard of proof to claims asserting breach of the employment contract.

V. BREACH OF CONTRACT AND TITLE VII CLAIMS

A. Judge or Jury

The emergence of new exceptions to the traditional employment-at-will rule under both tort and contract law becomes more important given the possibility that discharged employees may attempt to join these claims to claims brought under employment discrimination statutes. Such joinder would raise problems concerning the respective roles of the judge and the jury, the application of inconsistent statutes of limitation, and the type of damages which might be awarded in such cases.

For example, in an effort to obtain the right to a jury trial, an employee might join a claim based on one of the emerging exceptions to the employment-at-will rule to a claim arising under an employment discrimination statute. Claims brought pursuant to these statutes may or may not carry this right. An action brought under Title VII is equitable³⁰¹ in nature and therefore will not entitle the employee to a jury trial. There is no uniform authority on the issue whether a claim brought under section 1981 of the Civil Rights Act of 1866 is to be determined by a judge or a jury.³⁰² Therefore, in some cases brought under this statute, the judge will be the finder of fact. Under the emerging exceptions to the employment-at-will rule, however, a claim for compensatory damages

whether the discharge was justified." *Id.* at 440. *See also* *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1978), where the court dismissed a claim of age discrimination where there existed legitimate independent grounds for dismissal of the employee. *Id.* at 1019.

³⁰¹ The courts have uniformly held that Title VII authorizes only equitable relief, such as back pay. There is no constitutional guarantee of a jury trial for equitable claims and therefore neither party has a right to a jury trial. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 n.19 (1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979); *Grayson v. The Wicks Corp.*, 607 F.2d 1194 (7th Cir. 1979); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Harmon v. May Broadcasting Co.*, 583 F.2d 411 (8th Cir. 1978); *Richerson v. Jones*, 551 F.2d 918, 926 (3d Cir. 1977); *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151 (10th Cir. 1976); *Russell v. American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

³⁰² *Compare* *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977) *with* *Setser v. Novak Indus.*, 638 F.2d 1137, 24 FEP Cas. 1793 (8th Cir. 1981); *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980); *Moore v. Sun Oil Co.*, 636 F.2d 154, 24 FEP Cas. 1072 (6th Cir. 1980).

may be construed as a claim for legal damages.³⁰³ A claim for legal relief always accords the plaintiff a right to a jury trial.³⁰⁴ Thus, under the doctrine of pendent jurisdiction,³⁰⁵ a discharged employee may attempt to join a claim for breach of contract or wrongful discharge with a Title VII action and thereby demand that a jury hear all his claims at once. If successful, such joinder would alter substantially the trial procedure and increase the cost to the employer of defending his personnel decision. Such joinder also would defeat the intent of Congress that Title VII claims should be heard by the judge and not the jury. Furthermore, Congress enacted a comprehensive plan for enforcing Title VII rights which employs both state agencies and the EEOC in investigatory and conciliatory roles.³⁰⁶ This process might be frustrated if an employee believes he has the right to a jury trial and two alternative theories of recovery.

In the alternative, a court could deny joinder of the common law claim with the Title VII claim in order to avoid this conflict over the right to a jury trial. Under the doctrine of pendent jurisdiction, the joinder of state claims to federal claims is discretionary.³⁰⁷ For example, where state claims accord remedies not available under the federal statute, or involve procedures and substantive questions which are yet to be resolved by the state courts, pendent jurisdiction may be denied.³⁰⁸ Although the two claims contain a common

³⁰³ See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980), where the court submitted claims for compensatory damages arising under the employment contract to the jury.

³⁰⁴ *Curtis v. Loether*, 415 U.S. 189, 192 (1974).

³⁰⁵ See, e.g., *Freeman v. Kelvinator, Inc.*, 22 FEP Cas. 1139 (E.D. Mich. 1979). Pendent jurisdiction of the federal courts is invoked when the same common nucleus of facts gives rise to both a federal and a state cause of action. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Under the doctrine, a federal court has discretion to resolve both claims in a single proceeding. *Id.* at 726.

³⁰⁶ *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). The Supreme Court has held:

Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress . . . established a procedure whereby existing state and local employment agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner Denver Co., 415 U.S. 36, 44 (1974).

³⁰⁷ *United Mineworkers v. Gibbs*, 383 U.S. at 725-26.

³⁰⁸ *Id.* at 726-27; *Mazzare v. Burroughs Corp.*, 473 F. Supp. 234, 241 (E.D. Pa. 1979); *Douglas v. Am. Cyanamid Co.*, 472 F. Supp. 298, 304-06 (D. Conn. 1979); *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008, 1011 (D. Colo. 1978); *Hannon v. Continental Nat'l Bank*, 427 F. Supp. 215, 218 (D. Colo. 1977); *Silverman v. Lehigh Univ.*, 19 FEP Cas. 983, 990 (E.D. Pa. 1976). See *Jong-Yul Lim v. The Int'l Inst. of Metropolitan Detroit, Inc.*, 510 F. Supp. 722 (E.D. Mich. 1981), where the court discussed the issue of whether to join a breach of contract action to a claim for violation of Title VII. In denying joinder, the court held that the damages recoverable, the administrative procedure involved (specifically the statutory time limits), and the congressional policy requiring trial by judge or master, made joinder of the claims impractical. *But see Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (court permitted a claim for breach of contract to be joined to a claim for age discrimination); *Freeman v. Kelvinator, Inc.*, 22 FEP Cas. 1139 (E.D. Mich. 1979); *Reichsteiner v. Madison Fund, Inc.*, 75 F.R.D. 499, 505-06 (D. Del. 1977).

nucleus of facts, they derive from fundamentally different rights, a factor which provides the court with a justification to deny joinder.³⁰⁹ In addition, the court may determine that when the relief which can be awarded in both actions is equal,³¹⁰ procedural differences outweigh other considerations of judicial economy and equity.³¹¹ Therefore, it seems well within the discretion of a federal court to deny joinder in these circumstances. The consequence of a denial of joinder is that an employer may be forced to defend similar claims in different forums based upon a single discharge which is alleged to be both discriminatory and without good cause. Unless the principle of collateral estoppel is applied,³¹² the possibility exists that in a federal action, a judge may determine that an employer's motive was legitimate, while in the state action a jury may find that a personnel practice was not good cause for discharge. The possibility of inconsistent outcomes at different trials, and the cost incurred in conducting separate trials on similar issues clearly is undesirable.

The issues identified above cannot be resolved simply. A possible solution would be to require the joinder of the claims in one trial. This alternative, however, would appear to violate the intent of Congress in enacting Title VII by granting a jury trial to all litigants who allege a breach of their employment contract in addition to their claim under the statute. A more radical approach would be to establish a system of labor courts with the expertise of labor-management neutrals. Although this alternative would deprive the litigant of his right to a jury trial on his contract and tort claims, it would guarantee a hearing before an experienced neutral party trained to resolve such disputes.

B. *Statute of Limitations Issues*

Joinder of statutory claims with those based upon the emerging exceptions to the employment-at-will rule also may present problems arising from the application of inconsistent statutes of limitations. A claim for a violation of Title VII must be brought within 240 days of the discharge.³¹³ A court lacks jurisdiction to hear the claim unless the plaintiff abides by the statute of limitations.³¹⁴ A claim of discrimination arising under section 1981 must be brought within the time limit established by the state statute of limitations for tort actions.³¹⁵

³⁰⁹ *Jong-Yul Lim v. The Int'l Inst. of Metropolitan Detroit, Inc.*, 510 F. Supp. 722 (E.D. Mich. 1981).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² See RESTATEMENT OF JUDGMENTS § 68(1) (1942). Section 68(1) states: "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . ."

³¹³ See *Mohasco Corp. v. Silvers*, 447 U.S. 807 (1980); 42 U.S.C. § 2000e-5(c) & (e) (1976).

³¹⁴ Failure to bring timely charges with the appropriate agency is fatal to the Title VII action. *Mohasco Corp. v. Silvers*, 447 U.S. 807 (1980).

³¹⁵ *Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6th Cir. 1973). See also *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975).

This period varies, but is usually one to three years.³¹⁶ A claim for breach of the employment contract should be limited by the state statute governing breach of contract actions. Although these statutes vary among the jurisdictions, they generally afford the plaintiff more time to bring his claim than the statute of limitations governing discrimination suits.³¹⁷ Thus, a claimant who alleges discrimination as the basis for a breach of contract action may have significantly more time to bring his lawsuit than a claimant alleging discrimination under a civil rights statute.

C. Damages

The joinder of statutory, tort and contract claims for wrongful discharge also raises a problem relating to the type of damages that may be recovered. Back pay is the traditional equitable remedy awarded to a plaintiff in a Title VII action.³¹⁸ The measure of damages should be the same where the claim is predicated on breach of contract.

Historically, damages arising from the breach of a commercial contract have been limited to those which were foreseeable to the parties at the time they entered into the contract.³¹⁹ An employment contract is commercial in nature and should not be treated in a different fashion from any other commercial contract.³²⁰ Therefore, damages in a breach of contract claim which arises from a discharge should be limited to back pay reduced by any interim earnings received by the discharged employee.³²¹ Loss of compensation is the only adverse consequence that is reasonably foreseeable to the parties at the time they enter into the contract. Thus, the amount of damages recoverable in a

³¹⁶ MICH. COMP. LAWS § 600.5805(7) (1970) (three-year Michigan statute of limitations for injuries to person or property).

³¹⁷ See, e.g., N.Y. CIV. PRAC. § 213(2) (McKinney 1972) (six-year statute of limitations for breach of contract actions). The length of time during which an employee can sue for breach of contract of continued employment usually will be greater than the time allotted under the discrimination statutes regardless of whether the courts characterize the contents of the personnel policy handbook as creating an express or implied contract. This distinction is significant in those jurisdictions which have different statutes of limitations for the two different forms of contracts. See, e.g., MICH. COMP. LAWS § 600.5805(8) (1970) (three-year statute of limitations applicable to actions based upon implied contracts). *Huhtala v. Travelers Ins. Co.*, 401 Mich. 118, 126-29, 257 N.W.2d 640, 644-45 (1977). The six-year statute of limitations, however, is applied to claims based upon express contract. MICH. COMP. LAWS § 600.5807(8) (1970). The issue of whether a policy handbook creates an express or an implied contract has not been answered definitively by the recent decisions. See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 598-99, 292 N.W.2d 880, 885 (1980). See also *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 924 (1981) where the court recognized that the employment contract may be express or implied.

³¹⁸ *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975).

³¹⁹ *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 417, 295 N.W.2d 50, 66 (1980) (citing *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

³²⁰ *Isagholian v. Carnegie Inst. of Detroit, Inc.*, 51 Mich. App. 220, 227, 214 N.W.2d 864, 865 (1974).

³²¹ See *Edgecomb v. Traverse City School Dist.*, 341 Mich. 106, 116, 67 N.W.2d 87, 91 (1954).

breach of contract action should be equivalent to the amount of damages recoverable for a violation of Title VII.

A plaintiff who asserts a claim for the tort of wrongful discharge, however, may be entitled to significantly greater damages than those which are recoverable in a Title VII action. An employee suing in tort may seek to recover punitive damages, or damages for mental anguish if the action complained of is an intentional tort.³²² This difference in the amount of damages recoverable may encourage the addition of a tort cause of action for wrongful discharge in all Title VII claims. A possible solution to this problem is for the court to refuse to recognize tort claims based upon violations of a discrimination statute.³²³

CONCLUSION

The recent modifications in the employment-at-will rule are of great importance to both non-unionized employees and their employers alike. The recognition of the tort of wrongful discharge has provided employees necessary protection against the discharges for bad cause which violate public policy. The development of a good cause for discharge requirement under contract law, however, would fundamentally alter the principles embodied within the employment-at-will rule. Union employees fought ardently for the right to good cause for their discharge, frequently sacrificing economic rewards to attain this protection. Now the courts may be on the verge of extending this right to all employees. Recognizing this right would accord private sector employees an important measure of job security and would eliminate the harsh consequences of bad faith employment practices. Despite the desirability of these developments, courts nevertheless should avoid overzealousness and haste in their correction of perceived inequities. Employers have relied upon the employment-at-will rule for a century and have formulated policies based upon this rule. The harsh consequences to employees of discharges made in bad faith could be equalled by the enormous burden which may befall an employer who is forced to justify to a jury each and every employee discharge. The financial burden of this potential consequence is ominous.

In light of the developing exceptions to the employment-at-will rule, employers would be well advised to create procedures which assure that discharges are based upon objective factors and made in good faith. To insure fairness and objectivity in decisions to terminate employees, an internal grievance procedure could be adopted by the employer. Such a grievance procedure would provide aggrieved employees an opportunity to be heard. It would also provide an opportunity for the employer to reinstate employees who were discharged in bad faith. Such a grievance procedure might also produce

³²² See text and notes at note 137 *supra*.

³²³ See *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 917-18 (E.D. Mich. 1977). See also text and notes at notes 138-48 *supra*.

objective and persuasive evidence that the decision to discharge was made in good faith and based upon objective criteria. Moreover, an employee's failure to use this procedure might provide an employer with a procedural defense to the breach of contract or tort action. In analogous circumstances, courts have required union employees to exhaust internal grievance procedures prior to bringing a civil action.³²⁴

The changing nature of the employment relationship will undoubtedly continue to develop. Critics of, as well as adherents to, the employment-at-will doctrine must be prepared to scrutinize closely the decisions of courts.

³²⁴ Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).