

Fordham Urban Law Journal

Volume 10, Issue 1

1981

Article 1

The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits

Joseph DeGiuseppe, Jr.*

*jdeguseppe@bpslaw.com

Copyright ©1981 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*

Joseph DeGiuseppe, Jr.

Abstract

Traditional concepts concerning the law regarding employment relationships of an indefinite duration have been the object of much criticism in recent years. The source of this controversy stems from the application of the so-called employment-at-will rule which provides that employment relationships of this nature may be terminated by either party at any time with or without notice or cause. The at-will rule, however, is not about to be abandoned. The overwhelming majority of jurisdictions continue to adhere to the view that employment relationships of an indefinite duration may be terminated at any time without notice "for good cause, for no cause, or even for cause morally wrong" Even those jurisdictions which have recognized exceptions to the at-will rule are limiting the application of those exceptions to clearly articulated public policy as expressed in federal or state law. Courts have also examined the effect of statements of personnel policy, whether oral or written, on an employer's ability to discharge at-will employees. This article discusses the various approaches of law regarding at-will employment relationships. The rationale for the employment-at-will rule, its exceptions and recent limitations on these exceptions are examined. In addition, this Article analyzes the effect of personnel policies on the at-will rule, and reviews the law concerning employee rights to personnel benefits. Finally, this Article proposes the adoption of a uniform approach to recognizing public policy exceptions to the at-will rule.

*Associate, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. Member of the New York Bar. B.A. 1974, J.D. 1977 Fordham University. The author was the Editor-in-Chief of the Fordham Urban Law Journal, Volume V, 1976-77.

THE EFFECT OF THE EMPLOYMENT-AT-WILL RULE ON EMPLOYEE RIGHTS TO JOB SECURITY AND FRINGE BENEFITS

Joseph DeGiuseppe, Jr. *

TABLE OF CONTENTS

I. INTRODUCTION	2
II. EMPLOYMENT-AT-WILL RULE	3
A. Historical Background	3
1. <i>The English Rule</i>	3
2. <i>Development of the American Rule</i>	5
3. <i>Rationale for the American Rule</i>	7
B. Application of the Employment-At-Will Rule	8
1. <i>Permanent Employment Contracts</i>	10
2. <i>Contracts for a Definite Term</i>	14
III. STATUTORY LIMITATIONS ON THE EMPLOYMENT-AT-WILL RULE	16
IV. EXCEPTIONS TO THE EMPLOYMENT-AT-WILL RULE	23
A. Breach of Implied Covenant of Good Faith and Fair Dealing: Recovery in Contract	24
1. <i>Monge v. Beebe Rubber Co.</i>	24
2. <i>Application of Monge</i>	26
3. <i>Fortune v. National Cash Register Co.</i>	27
4. <i>California Cases</i>	28
B. The Public Policy Exception: Recovery in Tort	30
1. <i>Retaliatory Discharges</i>	32
2. <i>Recent Cases</i>	33
V. ADHERENCE TO THE AT-WILL RULE	34
A. Rejection of <i>Monge</i>	35
B. Limitations on the Public Policy Exception	36
C. Existence of Other Remedies	39
VI. OTHER THEORIES OF RECOVERY	40
A. Intentional Infliction of Severe Emotional Distress ...	40
B. <i>Prima Facie</i> Tort	42
C. Promissory Estoppel	44

* Associate, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. Member of the New York Bar. B.A. 1974, J.D. 1977, Fordham University. The author was the Editor-in-Chief of the Fordham Urban Law Journal, Volume V, 1976-77.

VII. THE EFFECT OF PERSONNEL POLICY MANUALS ON THE ABILITY TO DISCHARGE EMPLOYEES-AT-WILL	44
A. Contractual Nature of Personnel Policy Manuals	45
B. "Just Cause" Requirements in Personnel Policy Manuals	46
VIII. PERSONNEL POLICY BENEFITS AND THE EMPLOYMENT-AT-WILL RULE	50
A. Company Personnel Policies May Create an Implied in Fact Contract Liability for Benefits Set Forth Therein	51
B. Disclaimers May Clearly Evince an Intent Not to Create a Contractual Offer	53
C. Modification of Benefit Plans	54
D. Promissory Estoppel May Entitle At-Will Employees to Receive Personnel Policy Benefits	55
E. Severance Pay as an Enforceable Contract Right	56
1. <i>Nature of Severance Pay</i>	56
2. <i>Eligibility of Employees to Receive Severance Pay</i>	58
F. Contractual Rights to Bonuses	61
G. Commissions	65
IX. CONCLUSION	69

I. Introduction

Traditional concepts concerning the law regarding employment relationships of an indefinite duration have been the object of much criticism in recent years. The source of this controversy stems from the application of the so-called employment-at-will rule which provides that employment relationships of this nature may be terminated by either party at any time with or without notice or cause. To mitigate the somewhat harsh effects of this rule, certain jurisdictions have fashioned exceptions which allow suits for wrongful discharge based on public policy considerations as well as implied contractual rights. In addition, a number of commentaries on the subject have proposed the adoption, either by statute or through case law, of various "just cause" standards for discharge in lieu of the at-will rule to prevent arbitrary and unjust dismissals.¹

1. See generally Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Glendon and Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Stat-*

The at-will rule, however, is not about to be abandoned. The overwhelming majority of jurisdictions continue to adhere to the view that employment relationships of an indefinite duration may be terminated at any time without notice "for good cause, for no cause, or even for cause morally wrong" ² Even those jurisdictions which have recognized exceptions to the at-will rule are limiting the application of these exceptions to clearly articulated public policy as expressed in federal or state law.

Courts also have examined the effect of statements of personnel policy, whether oral or written, on an employer's ability to discharge at-will employees. In some cases, courts have held that company assurances of continued employment, absent "just cause" for termination, gave rise to a contractually enforceable right, even though the employment was for an indefinite term. Similarly, company assurances of personnel policy benefits such as severance pay, bonuses and commissions have been held to constitute contractual offers capable of acceptance by at-will employees.

This Article discusses the various approaches to the law regarding at-will employment relationships. The rationale for the employment-at-will rule, its exceptions and recent limitations on these exceptions are examined. In addition, this Article analyzes the effect of personnel policies on the at-will rule, and reviews the law concerning employee rights to personnel benefits. Finally, this Article proposes the adoption of a uniform approach to recognizing public policy exceptions to the at-will rule.

II. Employment-At-Will Rule

A. Historical Background

1. *The English Rule*

The law regarding employment relationships of an indefinite duration has its origins in the feudal doctrine of master and servant, a

ute, 62 VA. L. REV. 481 (1976); Comment, *Employment at Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1973) [hereinafter cited as *Employment at Will*]; Comment, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter cited as *Protecting at Will Employees*]; Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438-39 (1975) [hereinafter cited as *Abusively Discharged Employees*]; *At-Will Employment and the Problem of Unjust Dismissal*, 36 N.Y.C.B.A. Rep. 170 (April 1981) [hereinafter cited as *At-Will Employment*]; Feerick, *Erosion of Rule On Employment at Will*, N.Y.L.J., November 7, 1980, at 1, col. 1; Feerick, *Employment at Will*, N.Y.L.J., November 2, 1979, at 1, col. 1.

2. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).

doctrine which viewed the master-servant relationship as one primarily based on status rather than contract.³ Under this doctrine, the mutual rights and obligations of the parties were determined, for the most part, by custom and public policy rather than by the will of the parties.⁴ The enactment in 1562 of the English Statute of Laborers⁵ reinforced the doctrine of master and servant by requiring certain classes of persons to accept employment.⁶ Nevertheless, the statute also introduced the concept that terminations of employment had to be effectuated by notice and that apprentices could be discharged only "on reasonable cause."⁷

During the nineteenth century, contractual concepts began to redefine the law of master and servant. The rule emerged under the English common law that a general hiring for an unspecified duration was presumed to be a hiring for a one-year period.⁸ As the rule

3. For an historical discussion of the employment-at-will rule, see generally Feinman, *supra* note 1, at 119-22; Glendon and Lev, *supra* note 1, at 458; Summers, *supra* note 1, at 484-85; *Employment at Will*, *supra* note 1, at 212-13; *Protecting at Will Employees*, *supra* note 1, at 1824-28; *Abusively Discharged Employee*, *supra* note 1, at 1438-39; *At-Will Employment*, *supra* note 1, at 171-73; Feerick, *Employment at Will*, N.Y.L.J., October 5, 1979, at 1, col. 1.

4. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, ___, 171 Cal. Rptr. 917, 920, modified, 117 Cal. App. 3d 520a (1981), citing P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 123 (1969). The feudal doctrine of master and servant extended into the nineteenth century. Under this essentially paternalistic doctrine, the servant was obligated to work for and obey his master's authority, while the master, in return, was responsible for the servant's general welfare. 116 Cal. App. 3d at ___, 171 Cal. Rptr. at 920-21, citing SELZNICK at 124-25, 128. See also 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 251 (2d ed. 1913).

5. 5 Eliz., c. 4 (1562). Even though the statute was finally repealed in 1875 by the Conspiracy and Protection of Property Act 38 and 39 Vict. c. 86, § 17, its influence continues to be of importance with respect to the English common law principles of termination by notice and dismissal for cause. See *Employment at Will*, *supra* note 1, at 213 n.11.

6. Summers, *supra* note 1, at 485.

7. 1 W. BLACKSTONE, COMMENTARIES 131 (1878).

8. Feerick, *supra* note 3, at 1; LABATT, *supra* note 4, § 156; see, e.g., *Fawcett v. Cash*, 110 Eng. Rep. 1026 (K.B. 1834). Where an individual continued to work for an employer after the expiration of the one year period, the employment relationship was then terminable only at the end of an additional year. See also *Beeston v. Collyer*, 130 Eng. Rep. 786, 787 (C.P. 1827) ("If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties: such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it."); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 (1974) [hereinafter cited as *Implied Contract Rights to Job Security*]. Moreover, a showing of just cause was required for dismissal before the end of the implied one-year term. LABATT, *supra* note 4, § 183; C. SMITH, LAW OF MASTER AND SERVANT 37, 112 (7th ed. C. Knowles 1922). See generally Annot., 93 A.L.R.3d 659, 662 (1979).

evolved, an employment relationship, unless otherwise specified, could be terminated only by notice according to the custom in the trade or, in the absence of such custom, by reasonable notice. Summary dismissals for cause, however, were excepted from these notice requirements.⁹

2. *Development of the American Rule*

Although the English rule found some acceptance in American jurisdictions,¹⁰ certain courts in this country often looked to the circumstances surrounding the employment relationship in deciding whether to assign a definite contract term to that relationship while others applied the traditional employment-at-will rule.¹¹ By the lat-

9. Summers, *supra* note 1, at 485.

10. See generally *Implied Contract Rights to Job Security*, *supra* note 8, at 340 n.48. Through the years, some American courts have continued to adhere to the English rule that an employment agreement specifying an employee's compensation for a specific period of time amounts to a hiring for that time period. See, e.g., *Chas. S. Stiff Co. v. Florsheim*, 203 Ark. 1043, 159 S.W.2d 748 (1942) (court held that where the duration of an employment contract is not specified, a hiring at a specific rate or sum per year will be construed as a hiring for the entire year); *Putnam v. Producers' Live Stock Marketing Ass'n*, 256 Ky. 196, 75 S.W.2d 1075 (1934) (plaintiff's hiring at yearly salary implied employment for one year); *Dallas Hotel Co. v. Lackey*, 203 S.W.2d 557 (Tex. Civ. App. 1947) (Texas rule was that, in the absence of special circumstances, an employment at a named sum per week, per month or per year was a definite hiring for that pay period); *accord*, *Culkin v. Neiman-Marcus Co.*, 354 S.W.2d 397 (Tex. Civ. App. 1962); *San Antonio v. Condie*, 329 S.W.2d 947 (Tex. Civ. App. 1959). See also *Moline Lumber Co. v. Harrison*, 128 Ark. 260, 194 S.W. 25 (1917); *Rosenberger v. Pacific Coast Ry.*, 111 Cal. 313, 43 P. 963 (1896).

In Tennessee the courts are split as to whether the English rule should be applied to employment relationships of an indefinite duration. Compare *Delzell v. Pope*, 200 Tenn. 641, 294 S.W.2d 690 (1956) (hiring at a specified sum per week, per month or per year is a hiring for such period in the absence of contrary circumstances) with *Garrison v. Lannom Mfg. Co.*, 55 Tenn. App. 419, 402 S.W.2d 462 (1965) (hiring at a particular sum per week, per month or per year does not raise presumption that employment was for such a term). See also *O'Neill v. ARA Serv., Inc.*, 457 F. Supp. 182, 185 (E.D. Pa. 1978), citing *Slonaker v. P. G. Publishing Co.*, 338 Pa. 292, 13 A.2d 48 (1940) (a reasonable or definite period may be inferred by proof of the intent of the parties, the surrounding circumstances, the situation of the parties, the objects they had in view, and the nature of the subject-matter of the agreement); *Russell & Axon v. Handshoe*, 176 So. 2d 909 (Fla. Dist. Ct. App. 1965), *cert. denied*, 188 So. 2d 317 (Fla. 1966) (although contract specifying amount of salary per month and per year does not imply a definite term of employment, an employer can terminate the employee only at the end of a monthly pay period); *Shenn v. Fair-Tex Mills, Inc.*, 26 A.D.2d 282, 273 N.Y.S.2d 876 (1st Dep't 1966) (stipulation of wages for a time period indicated a hiring for that period).

11. *Implied Contract Rights to Job Security*, *supra* note 8, at 341. See, e.g., *Truesdale v. Young*, 24 F. Cas. 246 (S.D.N.Y. 1849) (riverboat pilot's employment was for an indefinite period and either party could freely withdraw from it); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884), *overruled on other grounds*, *Hutton v.*

ter part of the nineteenth century, the employment-at-will rule emerged as the predominant American rule in wrongful discharge cases as a direct result of H.G. Wood's treatise on master-servant relationships.¹² Offering only scant authority of questionable value to support his assertions,¹³ Wood stated without further analysis the following rule:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.¹⁴

Despite the apparent lack of authority and analysis, Wood's rule was incorporated into the American common law in *Martin v. New York Life Insurance Co.*,¹⁵ a case involving the termination of an employee hired at an annual salary.¹⁶ Indeed, by the beginning of

Watters, 132 Tenn. 527, 179 S.W. 134 (1915) (defendant-railroad could discharge its employees at-will for buying goods from a certain merchant).

12. H.G. WOOD, *MASTER AND SERVANT* (2d ed. 1886).

13. *Id.* § 136. Wood cited the following cases as authority for his rule on indefinite hirings: *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd*, 80 U.S. 254 (1871) (statute of limitations barred creditor's claim against debtor for payment of a larger sum than agreed upon by debtor); *De Briar v. Minturn*, 1 Cal. 450 (1851) (new trial granted on issue of whether defendant-innkeeper had right to eject forcefully plaintiff-barkeeper after notifying him of his discharge); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870) (court held that whether an oral employment contract was for a year or for a quarter of a year was to be a question of fact for the jury and that the statute of frauds did not bar an action by the employee for payment of wages during the second year of employment); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871) (court affirmed jury verdict for plaintiff-employee where jury found that parties intended hiring to be for a definite period of one year and plaintiff was fired after only eight months). These cases appear to have been decided entirely on their facts and none stand squarely for the general proposition that an indefinite hiring is terminable at-will.

14. Wood, *supra* note 12, § 136.

15. 148 N.Y. 117, 42 N.E. 416 (1895). The court established that a hiring at an annual salary does not make the employment for a year; rather, an employee hired at such a salary was an employee-at-will and the employer was at liberty to terminate him at any time.

16. In adopting Wood's rule, the court in *Martin* stated:

The decisions on this point in the lower courts have not been uniform, but we think the rule is correctly stated by Mr. Wood and it has been adopted in a number of states

It follows, therefore, that the hiring of the plaintiff was a hiring at will and the defendant was at liberty to terminate the same at any time.

148 N.Y. at 121, 42 N.E. at 417 (citation omitted).

the twentieth century, Wood's rule had become the primary authority with respect to the termination of employment relationships of an indefinite duration.¹⁷

3. *Rationale for the American Rule*

The underlying rationale for the employment-at-will rule has been attributed to the principles of freedom of contract, freedom of enterprise, and mutuality of obligation. Concerning the principles of freedom of contract and freedom of enterprise, the United States Supreme Court in *Adair v. United States*¹⁸ stated:

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, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . .¹⁹

Accordingly, the Court in *Adair* held that the right to discharge employees at will cannot be limited by federal legislation, because such legislation would be repugnant to the fifth amendment guarantees of personal liberty and liberty of contract.²⁰ The Court reasoned that by increasing the freedom of the employer to hire and fire employees and restricting its liability, the employment-at-will rule furthered economic growth and entrepreneurship.²¹

17. *Implied Contract Rights to Job Security*, *supra* note 8, at 342.

18. 208 U.S. 161 (1908). In *Adair* the Supreme Court declared unconstitutional § 10 of the Erdman Act of June 1, 1898, ch. 370, 30 Stat. 424, a statute which imposed criminal penalties for the discharge or threatened discharge of interstate railroad employees because of union membership. The Court held that the statute was repugnant to the fifth amendment mandate that no person shall be deprived of liberty or property without due process of law.

Subsequently, in *Coppage v. Kansas*, 236 U.S. 1 (1915), state legislation similar to the Erdman Act met the same fate under the Court's construction of the fourteenth amendment. In *Coppage* the state statute provided that it was a misdemeanor, punishable by fine or imprisonment, for an employer to require any of its employees to agree not to become or remain a member of any labor organization during the course of his employment. *Id.* at 6-7.

19. 208 U.S. at 174-75.

20. *Id.* Indeed, the Court stated: "In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Id.*

21. See generally Feinman, *supra* note 1, at 131-35; Vernon and Gray, *Termination at Will—The Employer's Right to Fire*, 6 EMP. REL. L.J. 25, 26-27 (1980); *Protecting at Will Employees*, *supra* note 1, at 1826; *Abusively Discharged Em-*

The contractual doctrine of mutuality of obligation also has been cited as support for the at-will rule.²² Under this doctrine, courts have reasoned that the right of an employee to quit his employment at any time, for whatever reason, is the same as the right of the employer to discharge the employee at any time, for whatever reason. As such, these courts have recognized that the employee's right to quit provides the consideration for the employer's right to fire the employee.²³

A policy consideration which supports the American rule is the belief that an employee should not be bound to a position to the extent that he would be precluded from obtaining a better job elsewhere. In adhering to this rationale, one court stated:

An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself. . . .²⁴

B. Application of the Employment-At-Will Rule

In the overwhelming majority of jurisdictions, the American rule has come to provide that a hiring for an indefinite term amounts to an employment-at-will which may be terminated at any time with or without cause by either party.²⁵ Under this rule, the specification of

ployee, *supra* note 1, at 1440; Comment, *McKinney v. National Dairy Council: The Employee at Will Relationship in Massachusetts*, 16 NEW ENG. L. REV. 285, 286-88 (1980-81).

22. See generally *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Summers*, *supra* note 1.

23. See, e.g., *Adair v. United States*, 208 U.S. 161, 174-78 (1908); *Meadows v. Radio Indus.*, 222 F.2d 347 (7th Cir. 1955); *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Watters*, 137 Tenn. 527, 179 S.W. 134 (1915).

24. *Pitcher v. United Oil & Gas Syndicate Inc.*, 174 La. 66, 67, 139 So. 760, 761 (1932). See also Note, *Contracts—Employee's Discharge Motivated by Bad Faith, Malice, or Retaliation Constitutes a Breach of an Employment Contract Terminable at Will*, 43 FORDHAM L. REV. 300, 302 (1974) (suggesting that an employment contract is merely an offer looking to a series of unilateral contracts which the employee accepts when he performs the requested services and that when the employer discharges an employee, it is simply withdrawing a revocable offer).

25. The American rule that an employment for an indefinite term may be terminated at any time with or without cause by either an employer or employee is well settled in the following jurisdictions: Alabama: *Summers v. Ralston Purina Co.*, 260 Ala. 166, 69 So. 2d 858 (1954); Arkansas: *Miller v. Missouri Pacific Transp. Co.*, 225 Ark. 475, 283 S.W.2d 158 (1955); California: *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); Connecticut: *Somers v. Cooley Chevrolet Co.*, 146

an employee's pay for a specific time period, unlike the English rule, does *not* raise a presumption of employment for that period. In the absence of a written agreement to the contrary, an employer may discharge an employee hired for an indefinite term at any time without cause and without notice. Conversely, an employee may quit his employment at any time without cause or notice, unless a written agreement provides otherwise.²⁶

The employment-at-will rule has withstood numerous challenges since its inception. Dismissals have been upheld under the at-will rule where employees have reported employer kickbacks,²⁷ refused the sexual advances of their employer,²⁸ refused to take psychological

Conn. 627, 153 A.2d 426 (1959); Delaware: Haney v. Laub, 312 A.2d 330 (Del. 1973); District of Columbia: Sullivan v. Heritage Foundation, 399 A.2d 856 (D.C. 1979); Florida: Wynne v. Ludman Corp., 79 So. 2d 690 (Fla. 1955); Georgia: Wilkinson v. Trust Co. of Georgia Associates, 128 Ga. App. 473, 197 S.E.2d 146 (1973); Illinois: Atwood v. Curtiss Candy Co., 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959); Indiana: Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Iowa: Stauter v. Walnut Grove Products, 188 N.W.2d 305 (Iowa 1971); Kansas: Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 (1974); Kentucky: Production Oil Co. v. Johnson, 313 S.W.2d 411 (Ky. 1958); Louisiana: Pechon v. National Corp. Serv., Inc., 234 La. 397, 100 So. 2d 213 (1958); Maryland: Chesapeake & Potomac Tel. Co. v. Murray, 198 Md. 526, 84 A.2d 870 (1951); Massachusetts: Askinas v. Westinghouse Elec. Corp., 330 Mass. 103, 111 N.E.2d 740 (1953); Michigan: McLaughlin v. Ford Motor Co., 269 F.2d 120 (6th Cir. 1959) (applying Michigan law); Missouri: Maddock v. Lewis, 386 S.W.2d 406, *cert. denied*, 381 U.S. 929 (1965); New Jersey: Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958); New York: Parker v. Borock, 5 N.Y.2d 156, 182 N.Y.S.2d 577, 156 N.E.2d 297 (1959); North Carolina: Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); New Mexico: Garza v. United Child Care, Inc., 88 N.M. 30, 536 P.2d 1086 (Ct. App. 1975); Ohio: Henkel v. Educational Research Council of Am., 45 Ohio St. 2d 249, 74 Ohio Ops. 2d 415, 344 N.E.2d 118 (1976); Oklahoma: Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457 (Okla. 1955); Pennsylvania: Fawcett v. Monongahela R.R., 391 Pa. 134, 137 A.2d 768 (1958); Rhode Island: School Comm. of Providence v. Board of Regents for Educ., 112 R.I. 288, 308 A.2d 788 (1973); Tennessee: McCall v. Oldenburg, 53 Tenn. App. 300, 382 S.W.2d 537 (1964); Texas: NHA, Inc. v. Jones, 500 S.W.2d 940 (Tex. Civ. App. 1973); Utah: Bullock v. Deseret Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960); Virginia: Plaskitt v. Black Diamond Trailer Co., 209 Va. 460, 164 S.E.2d 645 (1968); Washington: Webster v. Schauble, 65 Wash. 2d 849, 400 P.2d 292 (1965); West Virginia: State *ex rel.* Lippert v. Sims, 143 W. Va. 542, 103 S.E.2d 533 (1958); Wisconsin: Kovachik v. American Auto Ass'n, 5 Wis. 2d 188, 92 N.W.2d 254 (1958); Wyoming: Lukens v. Goit, 430 P.2d 607 (Wyo. 1967).

26. See generally 1 A. CORBIN, CONTRACTS § 684 (1961); 9 S. WILLISTON, CONTRACTS § 1017 (3d ed. 1967); RESTATEMENT (SECOND) OF AGENCY § 442 (1958).

27. Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979).

28. Fletcher v. Greiner, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (Sup. Ct. Nassau County 1980). The New York court found that plaintiff had failed to prove that her discharge violated a state public policy as required by Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979), see notes 172-73 and 255-57 *infra*

stress tests,²⁹ filed workmen compensation claims,³⁰ indicated their availability for jury duty,³¹ refused to support political candidates favored by their employer,³² filed unemployment insurance claims,³³ expressed concern about the safety of the employer's product,³⁴ and filed complaints with governmental regulatory agencies concerning allegedly improper conduct by their employers.³⁵ Courts also have applied the at-will rule to employment contracts alleged to be for a permanent³⁶ or otherwise definite duration³⁷ where such contracts were not supported by sufficient consideration³⁸ or were unenforceable under the statute of frauds.³⁹

1. *Permanent Employment Contracts*

Most courts agree that, in the absence of sufficient consideration, contracts for permanent employment are terminable at-will. An employee's continued services generally are not considered sufficient to support a contract for permanent employment.⁴⁰ Nevertheless, some

and accompanying text. Although plaintiff alleged that defendant had discharged her in violation of New York's public policy regarding sex discrimination, the court found that she had failed to establish a viable cause of action under the applicable state or federal statutes prohibiting such discrimination. 106 Misc. 2d at 570, 435 N.Y.S.2d at 1011. *Compare* Fletcher v. Greiner, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (Sup. Ct. Nassau County 1980) *with* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1979).

29. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977).

30. *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977).

31. *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

32. *Bell v. Faulkner*, 75 S.W.2d 612 (Mo. Ct. App. 1934).

33. *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956).

34. *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

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

36. *See, e.g., Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 164 N.E. 342 (1928); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

37. *Atwood v. Curtiss Candy Co.*, 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959).

38. *Buian v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970).

39. *See* notes 42, 46 *infra* and accompanying text.

40. *See, e.g., Ryan v. J.C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980) (employee's continued services did not support contract for permanent or otherwise definite duration terminable only for "just cause"); *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 164 N.E. 342 (1928) ("permanent employment" is not lifetime employment but is in fact indefinite employment); *Greenberg v. Jerome H. Resnick & Co.*, 230 N.Y. 70, 129 N.E. 211 (1920) (where contract for permanent employment creates a confidential relationship, such as attorney-client, courts will sometimes allow an employer to terminate an employee at any time without cause); *Carfizzi v. United Transp. Co.*, 20 A.D.2d 707, 247 N.Y.S.2d 162 (2d Dep't 1964) (no cause of action allowed for breach of alleged contract for lifetime employment); *Justice v. Stanley Aviation Corp.*, 35 Colo. App. 1, 530 P.2d 984 (1974) (court held that even if a contract specifying a starting salary of \$12,000 per year was deemed to be an agreement for "permanent employment," such agreement would not establish a term

courts have found that an employer's right to terminate may be limited by consideration given by an employee in addition to the services to be rendered under the contract. An employment-at-will coupled with such consideration, or interest, may support a contract for permanent employment.⁴¹ Oral contracts for permanent employment, however, may be unenforceable under the statute of frauds.⁴²

Recent decisions illustrate the approaches courts have taken to determine whether sufficient consideration was given to support a contract for permanent employment. In *Rowe v. Noren Pattern & Foundry Co.*,⁴³ for example, plaintiff-employee, who was within one and one-half years of having his pension vest at his prior job, was induced to take on new employment with the defendant-employer.

of employment for one year in the absence of special circumstances or an express stipulation as to the duration of employment); *Campion v. Boston & Main R.R.*, 269 Mass. 579, 169 N.E. 499 (1930) (where employee worked for two years and then was fired, court held that despite the advertisement for "permanent employment" the employer could discharge the employee at any time it no longer desired the employee's services); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967) (no contract for permanent employment where the employee furnishes no additional consideration and consents to an indefinite hiring at will). See also *Implied Contract Rights to Job Security*, *supra* note 8, at 345; Annot., 60 A.L.R.3d 226 (1974).

41. See, e.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (presumption that a contract for indefinite period is terminable at will may be rebutted by proof that employee gave additional consideration); *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (employment-at-will coupled with an interest for consideration other than services to be rendered is intended to continue for a reasonable time and cannot be terminated at-will); *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 149, 124 Cal. Rptr. 845, 852 (1975) ("a detriment, in the form of removal of a family and foregoing of other business and contacts, if bargained for, will constitute sufficient consideration to support a contract for permanent employment"). But see *Vernon and Gray*, *supra* note 21, at 38 (discussing the difficulty in proving that consideration requires enforcement of an at-will agreement).

42. See, e.g., *Lauter v. W & J Sloane, Inc.*, 417 F. Supp. 252 (S.D.N.Y. 1976) (where three-year contract was unenforceable under statute of frauds, employee was terminable at-will and had no cause of action for tortious interference with employment by inducing termination); *Vassallo v. Texaco, Inc.*, 73 A.D.2d 642, 422 N.Y.S.2d 747 (2d Dep't 1979) (an oral commitment to employ a person so long as his work was satisfactory was unenforceable under statute of frauds because it could not be performed within one year); *Chase v. United States Hosp.*, 60 A.D.2d 558, 400 N.Y.S.2d 343 (1st Dep't 1977) (where plaintiff attempted to prove by parol evidence that his employment contract was intended to be for two years, the court held that statute of frauds rendered any oral promises void and unenforceable); *Supplee v. Hallanan*, 14 Misc. 2d 658, 179 N.Y.S.2d 725 (Sup. Ct. N.Y. County 1958), *aff'd*, 8 A.D.2d 708, 185 N.Y.S.2d 747 (1st Dep't 1959); *Harris v. Home Indem. Co.*, 16 Misc. 2d 586, 190 N.Y.S.2d 157 (Sup. Ct. N.Y. County 1957), *aff'd*, 6 A.D.2d 861, 175 N.Y.S.2d 603 (1st Dep't 1958); *Houston v. American Surety Co.*, 57 N.Y.S.2d 290 (Sup. Ct. N.Y. County 1945).

43. 91 Mich. App. 254, 283 N.W.2d 713 (1979).

Plaintiff was promised that after forty-five days of service he would become a union member after which he could be fired only for "just cause" and that, in any event, he would be laid-off only if the company closed down.⁴⁴ After forty-three days of employment with the defendant, plaintiff's employment was summarily terminated. The trial court granted a directed verdict for the defendant after the close of the plaintiff's case on the grounds that the employment "contract (1) was for more than one year and therefore was in violation of the statute of frauds, and (2) was a contract for permanent employment which, under Michigan law, is a contract at will terminable with or without cause by either party at any time."⁴⁵

On appeal, the appellate court reversed the trial court's directed verdict and remanded the action. The court held that the statute of frauds was not violated, because plaintiff's contract of employment could have been for less than one year as a result of either the plant closing or his discharge for just cause.⁴⁶ In any event, the court reasoned that plaintiff's relinquishment of his soon-to-vest pension benefits "constituted a reliance sufficient to circumvent the statute of frauds, at least by raising a question of fact to be resolved by the jury."⁴⁷

In rendering its decision, the appellate court affirmed the general rule in Michigan that contracts for permanent employment are termi-

44. *Id.* at 256-57, 283 N.W.2d at 715.

45. *Id.* at 256, 283 N.W.2d at 714. The trial court relied on *Toussaint v. Blue Cross & Blue Shield*, 79 Mich. App. 429, 262 N.W.2d 848 (1977). For a discussion of *Toussaint*, see notes 263-66 *infra* and accompanying text.

46. 91 Mich. App. at 257, 283 N.W.2d at 715. With respect to the statute of frauds issue, the court stated:

Where an oral contract may be completed in less than a year, even though it is clear that in all probability the contract will extend for a period of years, the statute of frauds is not violated. *Fothergill v. McKay Press*, 361 Mich. 666, 668; 106 N.W.2d 215 (1960), quoted with approval the following language from *Smalley v. Mitchell*, 110 Mich. 650, 652; 68 N.W. 978 (1896):

"The mere fact that the contract may or may not be performed within the year does not bring it within the statute. The rule is that *if, by any possibility, it is capable of being completed within a year, it is not within the statute*, though the parties may have intended and thought it probable that it would extend over a longer period, and though it does so extend." (Emphasis added.)

Id.

47. *Id.*, citing *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich. App. 416, 419-20, 205 N.W.2d 504, 506 (1973); *Conel Dev., Inc. v. River Rouge Sav. Bank*, 84 Mich. App. 415, 423, 269 N.W.2d 621, 625 (1978).

nable at will, but also noted that "because the rule is sometimes harsh and offers opportunities for arbitrary dismissal, the courts have been quick to find exceptions."⁴⁸ Accordingly, the appellate court found that plaintiff would not have left his prior job without the promise of obtaining the protection of a union contract and that this was "a meaningful and significant factor" absent in those Michigan cases which adhered to the general rule.⁴⁹ The court also relied on an exception to the general rule, recognized by another jurisdiction, that the at-will doctrine should not be followed when a tenured or secured position is surrendered.⁵⁰ Because the court found that plaintiff had relinquished his assured pension and position with his former employer to accept a job with the defendant, it applied the exception.⁵¹

A different result was reached in *Gonzales v. United Southwest National Bank of Santa Fe*,⁵² in which the Supreme Court of New Mexico held that the performance of duties and payment of wages was not sufficient consideration to support a contract for lifetime employment. In that case, plaintiff-employee claimed that he could be discharged only for "good cause" because his original written employment agreement with the defendant provided for lifetime or permanent employment on the condition that he competently perform his duties.⁵³ The court rejected plaintiff's contentions finding

48. 91 Mich. App. at 258, 283 N.W.2d at 715. With respect to permanent employment contracts, the court stated:

In Michigan, as well as in a majority of states, the rule is well established that, in the absence of some special consideration passing from the employee to the employer, other than the services to be performed by the employee, a contract for employment for an indefinite term is a contract which may be terminated at any time by either party for any reason or for no reason at all. . . . Further, in a majority of jurisdictions, relinquishment by the employee of a job, business or profession in order to accept the new position of permanent employment does not constitute special consideration sufficient to support the contract.

Id. (citations omitted). But see *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975) (consideration for permanent employment was supplied by employee's removal of his family from Minnesota to California as bargained for by the parties).

49. 91 Mich. App. at 262, 283 N.W.2d at 717. See *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976); *McLaughlin v. Ford Motor Co.*, 269 F.2d 120 (6th Cir. 1959); *Adolph v. Cookware Co. of America*, 283 Mich. 561, 278 N.W. 687 (1938); *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937); *Milligan v. Union Corp.*, 87 Mich. App. 179, 274 N.W.2d 10 (1978).

50. See *Collins v. Parsons College*, 203 N.W.2d 594 (Iowa 1973).

51. 91 Mich. App. at 263, 283 N.W.2d at 717.

52. 93 N.M. 522, 602 P.2d 619 (1979).

53. *Id.* at 524, 602 P.2d at 621. Plaintiff had a written contract of employment for a three-year term with an option to renew which the court determined had expired

that there was no consideration for a promise of permanent employment. The contract, therefore, was for an indefinite duration, terminable at the will of either party with or without cause.⁵⁴ The court interpreted the word "permanent" in plaintiff's contract to mean that his employment was steady as opposed to temporary or part-time.⁵⁵

2. *Contracts for a Definite Term*

Whether an employment relationship constitutes a hiring for a definite term and is thus exempt from the application of the employment-at-will rule also may depend on the existence of sufficient consideration and the facts of the case. Where an employment contract is for a stated term, "just cause" is generally required for termination prior to the expiration date of the contract.⁵⁶ A "just cause" requirement removes the right of an employer to discharge employees arbitrarily.⁵⁷ Some courts, however, have construed "just cause" require-

prior to his termination. Based on this fact, the court also determined that the plaintiff did not have an arbitrable dispute. *Id.* at 524, 602 P.2d at 620-21.

54. *Id.* at 524, 602 P.2d at 621. With respect to the law of "permanent employment" in New Mexico, the court quoted the following:

"The rule is uniform that a contract for permanent employment, not supported by any consideration other than performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without cause does not constitute a breach of such contract justifying recovery of damages. (Citations omitted.)"

"Where a contract for permanent employment provides additional consideration, the employee can recover damages for his discharge when made without just cause. (Citations omitted.)"

"In the instant case, there is no evidence that any consideration, other than employment and payment of wages, was given by defendant to plaintiffs."

Id. at 524, 602 P.2d at 621, *quoting* Garza v. United Child Care, Inc., 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct. App. 1975).

55. 93 N.M. at 524, 602 P.2d at 621. The court also rejected plaintiff's argument that the statute of frauds was inapplicable to the instant case or that, in the alternative, the defendant should be estopped from asserting it as a defense.

56. *See, e.g.,* Alan N. Alpern v. Lawrence N. Hurwitz, Civ. No. 80-7722, 80-7732 (2d Cir., Mar. 19, 1981) (court held that "just cause" was required to relieve defendant of liability for payments where defendant hired plaintiff-attorney for a definite term to serve as a financial consultant and defendant stopped payment before the end of the term but plaintiff kept sending bills to defendant); *Crane v. Perfect Film & Chem. Corp.*, 38 A.D.2d 288, 329 N.Y.S.2d 32 (1st Dep't 1972) ("just cause" required for an employer to discharge an employee under an employment contract for stated term).

57. *Levine v. Zeffuss Offset Plate Serv. Co.*, 492 F. Supp. 946 (S.D.N.Y. 1980); *In re Brooks*, 135 Vt. 563, 382 A.2d 204 (1977).

ments quite liberally in favor of the employer in situations of extreme economic necessity.⁵⁸

In *Garcia v. Aetna Finance Co.*⁵⁹ plaintiff-employee claimed that he was wrongfully terminated from his employment by the defendant based on a personnel manual termination policy which plaintiff alleged created an employment contract for a definite period of at least one year. Under the policy in question, the defendant made annual performance appraisals of its employees. Plaintiff asserted that the defendant's failure to follow the provisions of its termination policy in discharging him was a breach of the alleged one-year contract.⁶⁰

In granting summary judgment for the defendant, the court reasoned that "the termination policy at issue was a unilateral expression of defendant's policy and procedure, was issued and revised after plaintiff's employment, its terms were not bargained for between parties, and thus no employment contract was created thereby."⁶¹ Accordingly, the court held that the annual performance review policy did not create an employment contract for a definite term.⁶²

In *Mann v. Ben Tire Distributors, Ltd.*⁶³ plaintiff-employee claimed that certain documents given to employees and promises made by the defendant created a contract for a one-year period and, as such, plaintiff's summary discharge violated that agreement. The documents in question provided for a bonus calculated on an annual basis and the promises made by the defendant's general manager concerned an annual review of employees.⁶⁴

58. Under New York law, extreme economic necessity has been held to be a "just cause" for termination in public sector cases. See, e.g., *Schwab v. Bowen*, 41 N.Y.2d 907, 363 N.E.2d 341, 394 N.Y.S.2d 616 (1977) (collective bargaining agreement did not bar discharge because of extreme economic necessity); accord, *Osoba v. City of Beacon*, 57 A.D.2d 588, 393 N.Y.S.2d 596 (2d Dep't 1977); *Delury v. City of New York*, 51 A.D.2d 288, 381 N.Y.S.2d 236 (1st Dep't 1976) (city can discharge sanitationmen in fiscal crisis despite collective bargaining agreement). See also *Fairview School Dist. v. Fairview Educ. Ass'n*, 28 Pa. Commw. Ct. 366, 368 A.2d 842 (1977) (termination without using efficiency ratings to determine employee's efficiency did not lack just cause under collective bargaining agreement).

59. Civ. No. 80-A-1002 (D. Colo., Feb. 5, 1981).

60. *Id.*, slip op. at 1.

61. *Id.*, slip op. at 2-3, citing *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976). For a discussion of employee contractual rights under personnel policy manuals, see notes 250-89 *infra* and accompanying text.

62. Civ. No. 80-A-1002, slip op. at 3; accord, *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979) (employer's "code of conduct" manual did not constitute an employment contract for a definite term).

63. 89 Ill. App. 3d 695, 411 N.E.2d 1235 (1980).

64. *Id.* at 696, 411 N.E.2d at 1236. The document essential to plaintiff's case was an in-house memorandum which commenced as follows: "This letter is to set forth

In affirming the trial court's directed verdict for the defendant, the court in *Mann* stated that the date used for calculating bonuses was merely a "rational basis" for determining whether a bonus was due at all and that the promise of the annual review was but one factor to be considered in deciding whether a contract for a definite period existed.⁶⁵ The *Mann* court distinguished *Grauer v. Valve & Primer Corp.*,⁶⁶ where it was held that a guaranteed minimum salary of \$22,500 coupled with a promise of an annual review created a one-year contract, on the grounds that no such guaranty existed in the instant case.⁶⁷ Accordingly, plaintiff's employment was deemed to be at-will.

III. Statutory Limitations on the Employment-At-Will Rule

As a result of the various statutory limitations placed on the employment-at-will rule, the principle of "freedom of contract" no longer justifies an employer's *absolute* right to terminate employees hired for an indefinite duration with or without cause and at any time. The first major break with the common law doctrine of the at-will rule occurred with the passage of the Railway Labor Act ("RLA")⁶⁸ in 1926. The provisions of the RLA were designed to prevent employer interference with the right of employees to select bargaining representatives of their own choosing without the threat of discharge or other punitive action being taken against them.⁶⁹ The

forth the details of salary and bonus arrangement for you for the period 1-1-75 through 12-31-75." *Id.*

65. *Id.* at 697, 411 N.E.2d at 1237.

66. 47 Ill. App. 3d 152, 361 N.E.2d 863 (1977).

67. 89 Ill. App. 3d at 698, 411 N.E.2d at 1237.

68. 45 U.S.C. §§ 151-188 (1976). In 1936 the RLA was amended to "cover every common carriers by air engaged in interstate or foreign commerce . . ." Act of April 10, 1936, ch. 166, 49 Stat. 1189 (codified at 45 U.S.C. § 181 (1976)).

69. 45 U.S.C. § 152 Fourth (1976). The concepts of interference, influence and coercion under the RLA were explained by the Supreme Court in *Texas v. New Orleans R.R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548 (1930), as follows:

The intent of Congress is clear with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" refer to well understood concepts of the law. The meaning of the word "influence" in this clause may be gathered from the context. *Noscitur a sociis*. *Virginia v. Tennessee*, 148 U.S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. "*Influence*" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization". The phrase covers the abuse of

1930 United States Supreme Court decision in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*⁷⁰ in effect rejected *Adair v. United States* by recognizing the congressional power under the Commerce Clause to guarantee workers the right to organize and bargain collectively without the threat of discharge or coercion. *Texas & New Orleans Railroad* thus cleared the way for future legislation designed to protect the rights of employees.

In 1935 the National Labor Relations Act ("NLRA")⁷¹ was enacted to provide other employees with the right to organize, bargain collectively and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"⁷² Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining or coercing employees in the exercise of these rights.⁷³ The "mutual aid or protection" language of section 7 of the NLRA protects employees in both organized and unorganized shops irrespective of whether union activity is involved or collective bargaining is contemplated.⁷⁴

relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purpose of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence.

Id. at 568 (emphasis added). See also *Virginia Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 543 (1937) ("The prohibition against such interference was continued and made more explicit by the amendment of 1934.").

70. 281 U.S. 548 (1930). In *Texas & New Orleans R.R.* the carrier decided to discharge its unionized employees and deal only with a newly-created company union. The carrier justified its actions on the grounds that the RLA was unconstitutional in that the statute violated its rights under the first and fifth amendments to manage its property, including the selection and discharge of employees, as it saw fit. *Id.* at 558.

71. Act of July 5, 1935, ch. 372, 49 Stat. 449. In 1947 the NLRA, or the Wagner Act, was significantly amended by the Taft-Hartley Act, Act of June 23, 1947, ch. 120, § 101, 61 Stat. 136-52. In adopting the NLRA, Congress found "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association. . . ." National Labor Relations Act § 1, 29 U.S.C. § 151 (1976). The Supreme Court, in upholding the constitutionality of the NLRA in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937), rejected the holdings of *Adair v. United States* and *Coppage v. Kansas* that legislation cannot constitutionally limit the principle of freedom of contract.

72. National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).

73. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

74. The "mutual aid or protection" language of § 7, 29 U.S.C. § 157 (1976), has been held to cover employee protests concerning wages, *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325 (9th Cir. 1953); supervisory policies, *NLRB v. Columbia Univ.*, 541 F.2d 922 (2d Cir. 1976); working conditions, *Pleasant View*

The provisions of the NLRA also protect employees from discriminatory discharges based on union animus. Under section 8(a)(3) of the NLRA,⁷⁵ it is unlawful for an employer to discriminate in regard to hiring, tenure of employment, or any term or condition of employment in order to encourage or discourage union membership.⁷⁶ Nevertheless, discriminatory conduct will violate section 8(a)(3) only when it is motivated by union animus and has "the foreseeable effect of either encouraging or discouraging union membership."⁷⁷ An em-

Rest Home, 194 N.L.R.B. 426 (1971); and health and safety violations, Detroit Forming, Inc., 204 N.L.R.B. 205 (1973). Even concerted employee activity of a political nature is protected by § 7 of the NLRA. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Despite the statutory exclusion of supervisors from the protection of the NLRA, § 2(a), 29 U.S.C. § 152(3) (1976), the National Labor Relations Board has held that the discharge of a supervisor will be unlawful where it is "part of a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights. . . ." *DRW Corp. d/b/a Brothers Three Cabinets*, 248 N.L.R.B. 828, 829 (1980); *accord*, *Empire Gas, Inc. of Denver*, 254 N.L.R.B. 76 (1981); *see generally* Feerick, *Supervisory Discharges*, N.Y.L.J., May 5, 1981, at 1, col. 1.

75. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

76. *See, e.g.*, *Republic Die & Tool Co.*, 252 N.L.R.B. 92, 105 L.R.R.M. 1644 (1980) (employer violated § 8(a)(3) by discharging employee who won arbitration case which reinstated the employee with 10 months back pay); *Reinaver v. Fuel Transp. Corp.*, 251 N.L.R.B. 210, 105 L.R.R.M. 1355 (1980) (employer unlawfully discharged an employee who allegedly refused overtime work where employer knew of the employee's union activities prior to the discharge and had never disciplined any other employee for refusing such work); *Carbonex Coal Co.*, 248 N.L.R.B. 779 (1980) (employer unlawfully laid-off 18 employees allegedly for economic reasons where evidence showed that employer had kept track of which employees were union supporters).

Similar protection against discriminatory discharges of employees for union support is also afforded by state law. In New York State, for example, it is an unfair labor practice for an employer: "To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or conditions of employment. . . ." N.Y. LAB. LAW § 704(5) (McKinney 1976). Other states affording such protection include Connecticut, CONN. GEN. STAT. § 31-105(5) (1972); Massachusetts, MASS. GEN. LAWS ANN. Ch. 150A, § 4(3) (West 1976); Michigan, MICH. COMP. LAWS § 423.16 (1978); and Pennsylvania, PA. STAT. ANN. tit. 43, § 211.6(1)(c) (Purdon 1964).

77. *Retail Clerks Union, Local 770* (Carl A. Palmer), 208 N.L.R.B. 356, 356 (1974). Concerning unlawful discrimination in violation of § 8(a)(3), the United States Supreme Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1954), stated:

The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

ployer's discriminatory conduct, however, may violate the provisions of section 8(a)(1) of the NLRA without a showing of unlawful motivation where that conduct is considered to be "inherently destructive" of its employees' rights.⁷⁸ Otherwise, "[i]n the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, for a bad reason, or for no reason at all."⁷⁹

Another major statutory break with the employment-at-will rule occurred with the passage of various equal employment laws.⁸⁰ With

In *Wright Line*, 251 N.L.R.B. 150, 105 L.R.R.M. 1169 (1980), *enforced*, 92 Lab. Cas. (CCH) ¶ 12,987 (1st Cir. 1981), the National Labor Relations Board ("NLRB"), set forth the causation test it will use in determining whether employer conduct violates § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1976). Based on the Supreme Court's holding in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the NLRB will apply the following test in § 8(a)(3) cases:

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

251 N.L.R.B. at ___, 105 L.R.R.M. at 1175 (footnote omitted). Despite its enforcement of the NLRB's order, the First Circuit disagreed with the Board over the exact nature of the burden which an employer acquires once a *prima facie* case is established by General Counsel. In contrast to the NLRB, the court reasoned that the ultimate burden of persuasion should always remain with the General Counsel. 92 Lab. Cas. at 18,590-91. Where a violation of § 8(a)(3) is established, the NLRB may provide for reinstatement with back pay for an unlawfully discharged employee. *See, e.g., J.P. Stevens & Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980) (NLRB did not abuse its wide-discretion by ordering the reinstatement with back pay of an employee).

78. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963). The National Labor Relations Board has characterized an employer's conduct as "inherently destructive" in a number of cases. *See, e.g., Moore Business Forms, Inc.*, 224 N.L.R.B. 393, 408, *modified on other grounds*, 226 N.L.R.B. 688 (1976), *enforced in part*, 574 F.2d 835 (5th Cir. 1978) (characterization of returning strikers as new employees for insurance purposes); *Cutten Supermarket*, 220 N.L.R.B. 507, 510 (1975) (withholding accrued vacation benefits from strikers); *Ross Sand Co.*, 219 N.L.R.B. 915 (1975) (withholding "bonus" payment from strikers).

79. *Borin Packing Co.*, 208 N.L.R.B. 280, 281 (1974). Nevertheless, 80% of the collective bargaining agreements subject to the provisions of the NLRA contain provisions that employees may be discharged only for "cause" or "just cause," while specific grounds for discharge are found in 65% of these agreements. Many collective bargaining agreements contain both general and specific provisions relating to discharge. COLLECTIVE BARGAINING—NEGOTIATIONS AND CONTRACTS § 40:1 (BNA 1978). Examples of specific grounds for discharge include violations of leave provisions, dishonesty and theft, insubordination, unauthorized absence and failure to obey safety rules. *Id.*

80. *See generally* Feerick, *supra* note 3, at 2; Summers, *supra* note 1, at 491-99; *Employment at Will*, *supra* note 1, at 230-31.

the enactment of Title VII of the Civil Rights Act of 1964,⁸¹ Congress provided protection against discharges based on race, color, religion, sex or national origin. Subsequent federal legislation prohibited discrimination in employment based on age⁸² or physical handicap.⁸³ Similar protection against discrimination in employment is found in various state statutes and local ordinances.⁸⁴ Nevertheless, even under the provisions of federal and state equal employment laws, an employer may discharge employees for "good reason, bad reason or no reason at all absent discrimination. . . ."⁸⁵

Employees are statutorily protected from discharge under several so-called "whistle blower" statutes containing reinstatement and back-pay provisions designed to encourage employees to report employer violations of the environmental or safety hazard standards provided for in these laws. The federal statutes in question include the Energy Reorganization Act of 1974,⁸⁶ the Air Pollution Prevention

81. 42 U.S.C. § 2000-e (1976). The Act makes it an unlawful employment practice for employees "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Exceptions to this mandate, however, are made for bona fide occupational requirements tied to religion, sex or national origin. *Id.* § 2000-e-2(a)(1). Title VII is administered by a five-member Equal Employment Opportunity Commission which may initiate court action if a complaint is not disposed of at the state level or through voluntary compliance. *Id.* §§ 2000e-4, 2000e-5. The provisions of Title VII provide that aggrieved employees may be reinstated with back pay if they have been the object of an unlawful employment practice. *Id.* § 2000e-5(g).

82. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. II 1978), (prohibiting age based discrimination against persons between the ages of 40 and 70).

83. Vocational Rehabilitation Act, 29 U.S.C. § 793 (1976).

84. The following state statutes prohibit discriminatory discharge on the basis of race, color, religion, national origin, or sex: *see, e.g.*, ALASKA STAT. § 18.80.220 (1974); CAL. LAB. CODE § 1420(a) (West Supp. 1975); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1980); OHIO REV. CODE ANN. § 4-12.02(A) (Page 1973); PA. STAT. ANN. tit. 43, § 955 (Supp. 1974). The following state statutes prohibit discriminatory discharge because of physical handicap: *see, e.g.*, MASS. ANN. LAWS ch. 149, § 24K (Supp. 1975); MINN. STAT. ANN. § 363.03(2) (Supp. 1974); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1976 & Supp. 1980-81); R.I. GEN. LAWS ANN. § 28-5-7 (Supp. 1973); WASH. REV. CODE ANN. § 49.60.180 (Supp. 1973).

85. *Harper v. Trans World Airlines, Inc.*, 385 F. Supp. 1001, 1004 (E.D. Mo. 1974), *aff'd*, 525 F.2d 409 (8th Cir. 1975) (citation omitted).

86. 42 U.S.C. § 5851 (Supp. II 1978), 29 C.F.R. Part 24 (1980). The Act provides that no employer shall discharge or otherwise discriminate against an employee who has "assisted or participated, or is about to assist or participate in any manner in . . . a proceeding [under the Act] or, in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 5851(a)-(3) (1976). Remedies available to a discharged employee include reinstatement, back pay and compensatory damages. In a recent action brought under the Energy Reorganization Act, *Cotter v. Con Edison*, Case No. 81-ERA-6 (Dep't of Labor, July 7, 1981)

and Control Act,⁸⁷ the Federal Water Pollution Control Act,⁸⁸ and the Railroad Safety Act.⁸⁹ Similarly, under the Occupational Safety and Health Act of 1970,⁹⁰ employers are prohibited from discharging employees who refuse to work under conditions which they reasonably believe to be dangerous to their safety.⁹¹

(unpublished decision of Administrative Law Judge Leonard N. Lawrence), a Consolidated Edison employee alleged that he was discharged because he complained repeatedly about safety hazards at the utility's Indian Point 2 nuclear plant. After a hearing, the Administrative Law Judge (ALJ) held that the Act protected employees engaged in steps preliminary to filing a complaint with a governmental agency and that the employee had been discharged for taking such steps. The ALJ recommended that Consolidated Edison reinstate the employee to his former position or a "substantially equivalent position as well as compensate him for back pay." *See also* Hudson, *Man Discharged By Con Ed Wins Backing of Judge*, N.Y. Times, July 14, 1981, § B, at 2, col. 6.

87. 42 U.S.C. § 7622 (Supp. II 1978). The Act provides that an employer may not discharge or otherwise discriminate against any employee because the employee commenced, caused to commence or testified at a proceeding against the employer for violation of the Air Pollution Prevention and Control Act. Reinstatement and compensatory damages, including back pay, are available.

88. 33 U.S.C. § 1367 (1976), provides that no employer may discharge or discriminate against an employee for instituting or testifying at a proceeding against the employer for a violation of the Act. Reinstatement and compensatory damages may be awarded.

89. 45 U.S.C. § 441(a) (1976), provides that a railroad company engaged in interstate or foreign commerce may not discharge or discriminate against an employee because the employee has filed a complaint, instituted or caused to be instituted any proceedings under or related to the enforcement of the federal railroad safety laws or has testified or is about to testify at such a proceeding. Additionally, 45 U.S.C. § 441(b) prohibits a discharge or discrimination against an employee for refusing to work under hazardous conditions. Reinstatement and back pay may be awarded.

90. 29 U.S.C. § 660(c) (1976), prohibits employers from discharging or discriminating against employees who have filed a complaint or instituted a proceeding against the employer for violations of the Act. Reinstatement and back pay may be awarded.

91. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). In *Whirlpool* two employees of a household appliance manufacturer refused to perform their regular duties in a factory, claiming that a wire-mesh screen installed to prevent objects from falling from an overhead conveyor was unsafe. The employees were immediately removed from their shift, without pay for the remainder of that shift, and received written reprimands which were placed in their employment files. The employees' refusal followed a series of accidents and several meetings with plant supervisors and representatives of the Occupational Safety and Health Administration.

The Secretary of Labor brought suit, alleging that the employer's action constituted discrimination under § 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1976). Specifically, the Secretary relied on 29 C.F.R. § 1977.12 (1979), which provides that under the Act, an employee has an implied right to refuse to work under conditions which he reasonably believes to be hazardous to his safety:

The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circum-

A number of other federal laws have been enacted to limit the right of employers to discharge employees. For example, the Consumer Credit Protection Act⁹² prohibits employers from terminating employees because of garnishment of wages for any one indebtedness; the Fair Labor Standards Act⁹³ prohibits employers from discharging or otherwise discriminating against employees for asserting their rights under the minimum wage and overtime provisions of the Act; the Vietnam Veterans Act of 1973⁹⁴ prohibits discrimination on the basis of an individual's status as a veteran of the Vietnam War; and the Selective Service Act⁹⁵ provides that veterans discharged from the armed services can return to the jobs they held prior to such service. In addition, various state laws prohibit employers from discharging or taking other punitive action against employees to influence or control their votes, political activities or opinions,⁹⁶ for refusing to take lie detector tests⁹⁷ or for serving as jurors.⁹⁸ Federal civil service em-

stances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

29 C.F.R. § 1977.12(b)(2) (1979).

The district court denied relief on the grounds that although the employee's refusal to work was justified under 29 C.F.R. § 1977.12, the regulation was inconsistent with the Act and therefore invalid. The court of appeals reversed and remanded, concluding that the regulation was valid. The Supreme Court unanimously upheld the validity of the regulation, finding it consistent with the Act's language and objective of preventing job-related deaths and injuries. The Court emphasized, however, that the regulation neither authorizes employees to order their employer to correct the hazardous condition nor insulates them from discharge or reprimand in the event a court subsequently finds that they acted unreasonably or in bad faith. 445 U.S. at 21.

92. 15 U.S.C. § 1674(a) (1976).

93. 29 U.S.C. §§ 215(a)(3), 216(b) (1976).

94. 38 U.S.C. § 2021 (1976) (returning veterans cannot be discharged for one year except for "cause"); *see, e.g.*, *Carter v. United States*, 407 F.2d 1238 (D.C. Cir. 1968).

95. 38 U.S.C. § 2021(a)(2)(A) (1976).

96. *See, e.g.*, CAL. LAB. CODE § 1102 (West 1971); COLO. REV. STAT. § 8-2-108 (1973); MASS. GEN. LAWS ANN., ch. 56, § 33 (West 1975); NEV. REV. STAT. § 613.040 (1973); Human Rights Law, D.C. CODE ANN. § 34-11.1 (Supp. IV 1977).

97. *See, e.g.*, CAL. LAB. CODE § 432.2 (West 1971); CONN. GEN. STAT. § 31-51g (1977); MD. ANN. CODE, art. 100, § 95 (1957); MICH. COMP. LAWS § 388.1726 (1970); 18 PA. CONS. STAT. ANN. § 7321(a) (Purdon 1973). *See also* Summers, *supra* note 1, at 495 n.84.

98. *See, e.g.*, IDAHO CODE § 2-218 (1979); MASS. GEN. LAWS ANN. ch. 268, § 14A (1980). *See also* Summers, *supra* note 1, at 495 n.83. Termination of an employee for serving as a grand or petit juror in a federal court is prohibited by 28 U.S.C. § 1875 (Supp. III 1980).

employees and certain state and local public employees also are statutorily protected from unfair discharges.⁹⁹

IV. Exceptions to the Employment-At-Will Rule

Certain common law exceptions to the employment-at-will rule have developed in recent years in a number of jurisdictions. Courts have allowed employees to sue for wrongful discharges¹⁰⁰ under contract, tort and other theories of recovery.¹⁰¹ Contract recovery has

99. With respect to federal civil service employees, see Civil Service Reform Act of 1978, 5 U.S.C. §§ 7503, 7513(a) (Supp. II 1978) (discharge of federal civil employees is permitted only "for such cause as will promote the efficiency of the service"). Federal civil service employees receive greater protection from discrimination and unjust discharge than state and local government employees. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, ___, 171 Cal. Rptr. 917, 922 nn.10-11, modified, 117 Cal. App. 3d 520a (1981); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 21-22 (1979). With respect to state and local public employees, see *Perry v. Sinderman*, 408 U.S. 593 (1972) (where a public employee's "liberty" or property interests are at stake, he is entitled to due process protections of notice and hearing). See generally J. WEISBERGER, *JOB SECURITY AND PUBLIC EMPLOYEES* (2d ed. 1973); Chaturverdi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV. 287 (1968); Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976).

100. The term "wrongful discharge" is a generic term which includes all discharges for other than "just cause." The term "abusive discharge" has been used interchangeably by courts which have considered both contract and tort causes of action. "Retaliatory discharge" has been used by courts to describe tort claims for dismissals in retaliation for such employee actions as filing worker's compensation claims and reporting illegal employer behavior. See notes 106-74 *infra* and accompanying text.

101. Courts in the following jurisdictions have allowed an at-will employee to sue an employer for a wrongful discharge on tort or contract theories—California: *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Illinois: *Kelsay v. Motorala, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Indiana: *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); Maryland: *Adler v. American Standard Corp.*, Misc. No. 12 (Md. Ct. App., July 16, 1981), reprinted in DAILY LAB. REP. (BNA) No. 144, at D-1 (July 28, 1981); Massachusetts: *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); Michigan: *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); New Hampshire: *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); New Jersey: *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Super. Ct. Law Div. 1978); Oregon: *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); Pennsylvania: *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law); West Virginia: *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

Courts in the following jurisdictions have recognized causes of action for wrongful discharge based on other theories of recovery—Massachusetts: *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (intentional infliction of severe emotional distress); Minnesota: *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981) (promissory estoppel); New York: *McCullough v. Certain Teed Products Corp.*, 70 A.D.2d 771, 417 N.Y.S.2d 353 (4th Dep't 1979) (*prima facie* tort).

been granted where a discharge constitutes a breach of the "implied covenant of good faith and fair dealing,"¹⁰² whereas tort recovery has been granted for discharges in violation of express public policy.¹⁰³ In addition, courts have recognized causes of action for the intentional infliction of severe emotional distress, for *prima facie* tort, and based on promissory estoppel.¹⁰⁴ Despite these developments, other jurisdictions have continued to adhere to the rule that an employment-at-will relationship may be terminated by either party with or without cause at any time.¹⁰⁵

A. Breach of Implied Covenant of Good Faith and Fair Dealing: Recovery in Contract

Perhaps the most drastic departure from the at-will rule found its justification in the general principle that an obligation of "good faith and fair dealing" is implied by law in every contract.¹⁰⁶ Until the decision of the New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*¹⁰⁷ in 1974, the notion of good faith had not been viewed as a limitation on an employer's freedom to discharge at-will employees. Other jurisdictions such as Massachusetts and California have subsequently recognized the obligation of good faith and fair dealing without explicitly adopting the rationale of *Monge*.¹⁰⁸

1. *Monge v. Beebe Rubber Co.*

In *Monge* plaintiff-employee had been hired by the defendant for an indefinite period of time as a conversion machine operator. Plaintiff shortly thereafter applied for a higher paying job on a press machine whereupon she was told by her foreman that she would have to be "nice" in order to get that job. Soon after plaintiff had been awarded the higher paying job, the same foreman invited her out on a date. Plaintiff declined to accept the foreman's invitation because she was married and had three children. The press machine was subse-

102. See notes 106-41 *infra* and accompanying text. For a discussion of the "good faith and fair dealing" approach, see Madison, *The Employee's Emerging Right to Sue for Arbitrary or Unfair Discharge*, 6 EMP. REL. L.J. 422, 426-35 (Winter 1980-81).

103. See notes 142-74 *infra* and accompanying text.

104. See notes 222-49 *infra* and accompanying text.

105. See notes 175-221 *infra* and accompanying text.

106. For the general principle that an obligation of "good faith and fair dealing" is implied by law in all contracts, see 3 A. CORBIN, CONTRACTS § 568, at 331 (1961); 5 S. WILLISTON, CONTRACTS § 670, at 159 (3d ed. 1961).

107. 114 N.H. 130, 316 A.2d 549 (1974).

108. See notes 126-41 *infra* and accompanying text.

quently shut down after being in operation for only three weeks and plaintiff was demoted to a lower paying job. For months thereafter, plaintiff alleged that she was harassed and ultimately fired because she had refused to date her foreman. Plaintiff sued on the grounds that she had been terminated as a result of this unjustifiable hostility towards her by the defendant through its agents in breach of her employment-at-will contract.¹⁰⁹

In affirming the jury verdict in favor of plaintiff with respect to the contract claim for twenty weeks of lost wages, the New Hampshire Supreme Court stated:

In all employment contracts, 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 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. . . . Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.¹¹⁰

The court relied on two prior cases, *Frampton v. Central Indiana Gas Co.*¹¹¹ and *Petermann v. International Brotherhood of Teamsters*,¹¹² the former of which granted tort recovery for a retaliatory discharge in violation of express public policy embodied in state law.¹¹³ Nevertheless, it reversed the jury's award of tort damages for mental suffering, holding that the cause of action sounded in contract only and not in tort.¹¹⁴ In contrast to *Frampton* and *Petermann*, the public policy to which the *Monge* court addressed itself was a *general* public interest—the “best interest of the economic system or the public good. . . .”¹¹⁵ This inconsistency in the *Monge* decision has been partially resolved in later cases which have limited its holding and created exceptions under other theories of recovery.

109. *Id.* at 130-32, 316 A.2d at 550-51.

110. *Id.* at 133, 316 A.2d at 551-52 (citations omitted).

111. 260 Ind. 249, 297 N.E.2d 425 (1973).

112. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

113. For a discussion of the public policy exception, see notes 142-74 *infra* and accompanying text.

114. *Id.* at 134, 316 A.2d at 552.

115. *Id.* at 133, 316 A.2d at 551-52.

2. *Application of Monge*

Although *Monge* has been cited by a number of other jurisdictions in cases concerning the concept of wrongful or abusive discharges,¹¹⁶ the rationale is of questionable value to such cases. Unlike *Monge*, the majority of jurisdictions which have applied the concept of abusive discharge have relied on violations of articulated public policy in finding that employees had valid causes of action for wrongful terminations.¹¹⁷ The few decisions explicitly following *Monge*, however, have implied a right against "bad faith" discharges in so-called employment-at-will contracts to allow recovery for terminations in violation of that right.¹¹⁸ For example, in *Pstragowski v. Metropolitan Life Insurance Co.*,¹¹⁹ a federal court, applying New Hampshire law, held that there was sufficient evidence to support the jury's verdict that the discharge of the plaintiff as a local sales manager was motivated by malice on the part of the defendant and thus constituted a breach of contract under New Hampshire law. The *Pstragowski* court cited *Monge* for the broad proposition that "an employee who is discharged by reason of the bad faith, malice, or retaliatory motives of his employer has a right of action for breach of contract, notwithstanding the fact that he was an employee at will."¹²⁰

Recently, however, the Supreme Court of New Hampshire in *Howard v. Dorr Woolen Co.*¹²¹ limited *Monge* by stating that that decision only applies "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."¹²² The

116. See cases cited in note 101 *supra*; see also DAILY LAB. REP. (BNA) No. 144, at A-7 (July 28, 1981).

117. See notes 142-74 *infra* and accompanying text.

118. For cases that have explicitly followed *Monge*, see *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977); *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974).

119. 553 F.2d 1 (1st Cir. 1977).

120. *Id.* at 2.

121. 120 N.H. 295, 414 A.2d 1273 (1980).

122. *Id.* at 297, 414 A.2d at 1274. In *Howard* the court considered whether decedent-employee had been discharged in violation of *Monge* based on his age, his illness and for the purpose of denying him accrued retirement benefits. Concerning the last allegation, the court held that the discharge of the decedent, who was 50 years old, was not for the purpose of denying him retirement benefits because such benefits would not have accrued until the decedent had reached age 55. *Id.* Nevertheless, it should be noted that under the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1144 (1976), employers may not discharge or otherwise discipline employees in order to prevent them from attaining vested rights in pension plans covered by that Act. *Id.* § 1140; *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979) (employee who alleged that his

court held that a discharge based on sickness or because of age does not fall within this "narrow category."¹²³ In reaching this conclusion, the court noted that discharges due to illness are "generally remedied by medical insurance or disability provisions in an employment contract," while the "proper remedy" for discharges because of age are found in applicable federal and state statutes.¹²⁴ On the same day that *Howard* was decided, the Supreme Court of New Hampshire, in *Tice v. Thomson*,¹²⁵ refused to extend *Monge* to cover a public employee employed by the state governor.

3. *Fortune v. National Cash Register Co.*

In *Fortune v. National Cash Register Co.*¹²⁶ plaintiff, a sixty-one year old salesman with forty years of service, alleged that he was terminated so that the defendant-employer could avoid paying him certain commissions otherwise due to him on a five million dollar sale. Although plaintiff was employed by the defendant under a written "salesman's contract," that contract specified that his employment could be terminated at-will without cause by either party on written notice.¹²⁷

Citing *Monge*, the *Fortune* court affirmed the jury verdict in favor of plaintiff stating:

We believe that the holding in the *Monge* case merely extends to employment contracts the rule that "in *every* contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party

employer discharged him after nine years of satisfactory service in order to prevent him from attaining vested rights stated a cause of action under ERISA, irrespective of whether the employee's rights were vested at the time of his discharge).

123. 120 N.H. at 297, 414 A.2d at 1274. *But see* McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980), note 131 *infra*.

124. 120 N.H. at 297, 414 A.2d at 1274. Other jurisdictions have denied common law recovery for discharges where statutory remedies existed. *See* notes 214-21 *infra* and accompanying text.

125. 120 N.H. 313, 414 A.2d 1284 (1980). In *Tice* plaintiff was employed by defendant-Governor of New Hampshire as Coordinator for Drug Abuse. During an investigation of alleged misuse of federal funds provided to the state for drug abuse prevention, the attorney general seized plaintiff's records at defendant's request. After plaintiff filed suit against defendant alleging that the seizures were unconstitutional, he was discharged by defendant and then commenced another suit for wrongful discharge. Plaintiff had no employment contract, and was subject to removal by the Governor without cause. In affirming the dismissal of plaintiff's suit for wrongful discharge, the court held that *Monge*, which involved a breach of a *private* contract, did not apply to public employees such as plaintiff.

126. 373 Mass. 96, 364 N.E.2d 1251 (1977).

127. *Id.* at 97, 364 N.E.2d at 1253.

to receive the fruits of the contract, which means that in *every* contract there exists an implied covenant of good faith and fair dealing. . . ."¹²⁸

Despite its reference to *Monge*, the *Fortune* court declined to pronounce its adherence to such a "broad policy" or to speculate "whether the good faith requirement is implicit in every contract for employment at will."¹²⁹ The court merely held that the contract in question contained "an implied covenant of good faith and fair dealing" which the defendant had breached.¹³⁰ The rationale of *Fortune* has been extended under Massachusetts law to cover discharges where age is the determining factor¹³¹ and terminations which cause the forfeiture of benefits almost accrued.¹³²

4. California Cases

California courts are willing to find an "implied covenant of good faith and fair dealing" in employment-at-will contracts based on the

128. *Id.* at 104, 364 N.E.2d at 1257 (citations omitted), *quoting* *Druker v. Roland Wm. Jutras Assocs.*, 370 Mass. 383, 385, 348 N.E.2d 763, 765 (1976).

129. 373 Mass. at 104, 364 N.E.2d at 1257.

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

131. See *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980), where the court, applying Massachusetts law, held that the *Fortune* rule applies to discharges where age is the determining factor. In *McKinney* plaintiff-employee alleged that defendant indicated that his job would last until his normal retirement date. Nineteen years after accepting the job, plaintiff was fired. The court found that plaintiff's age was the reason for the termination. Although the court held that the discharge was a breach of the implied covenant of good faith and fair dealing as enunciated in *Fortune*, it also held that the discharge, because of plaintiff's age, violated a public policy against age discrimination in employment. For a discussion of *McKinney*, see Comment, *McKinney v. National Dairy Council: The Employee at Will Relationship in Massachusetts*, 16 NEW ENG. L. REV. 285 (1980-81). See also *Maddaloni v. Western Mass. Bus Lines, Inc.*, Mass. App. Ct. Adv. Sh. 1357 (July 10, 1981), in which the court held that *Fortune* applied to a case concerning a general manager of a bus company who was discharged to prevent his receipt of an earned commission. Plaintiff's employment contract provided that in addition to his weekly salary he would receive compensation based on revenue from Interstate Commerce Commission (ICC) charter rights which he obtained for the company. The court found that, like the employment agreement in *Fortune*, plaintiff's contract contained an implied covenant of good faith and fair dealing which defendant breached when it discharged him to frustrate his accrual of an earned benefit. The court added that plaintiff had a reasonable expectation of receiving earned compensation even though he knew that he could be discharged without cause at any time.

132. See *Horrigan v. General Motors Corp.*, No. 77-3302-Z, slip. op. at 3 (D. Mass., July 23, 1980) (where employee was discharged to prevent imminent accrual of retirement benefits, the court held under *Fortune* that plaintiff stated a claim upon which relief could be granted because "termination which causes 'forfeiture . . . of benefits almost earned' equally constituted breach of contract . . .").

totality of the parties' relationship. In *Cleary v. American Airlines, Inc.*,¹³³ for example, an employee was summarily discharged for an alleged theft after eighteen years of "satisfactory" employment. The employee claimed that he was wrongfully terminated based on an express company policy requiring a "fair, impartial and objective hearing" in such cases, and on the "implied-in-law covenant of good faith and fair dealing."¹³⁴ In holding that the employee had stated a cause of action on both of these grounds, the court found two factors to be of "paramount importance": the longevity of plaintiff's services (eighteen years) and the expressed policy of the employer to adopt specific procedures for adjudicating employee disputes.¹³⁵ The court held "that the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause."¹³⁶

The rationale of *Cleary* was subsequently applied in *Pugh v. See's Candies, Inc.*,¹³⁷ where an employee was allegedly discharged after thirty-two years of service for his opposition to the negotiation of a "sweetheart contract" with a union after he had been selected by the company to be part of its negotiating team for such a contract.¹³⁸

133. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

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

135. *Id.* at 455-56, 168 Cal. Rptr. at 729. In reaching its decision, the court stated:

Two factors are of paramount importance in reaching our result. . . . One is the longevity of service by plaintiff—18 years of apparently satisfactory performance. Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. . . .

The second factor of considerable significance is the expressed policy of the employer . . . set forth in [the] regulation [referred to in the pleadings]. This policy involves the adoption of specific procedures for adjudicating employee disputes such as this one. While the contents of the regulation are not before us, its existence compels the conclusion that this employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to all of its employees.

Id.

136. *Id.*

137. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, *modified*, 117 Cal. App. 3d 520a (1981). California has codified the employment-at-will rule in CAL. LAB. CODE § 2922 (West 1971), which provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. . . . Employment for a specified term means no employment for a period greater than one month."

138. 116 Cal. App. 3d at 313, 171 Cal. Rptr. at 919-20. Plaintiff testified at trial that his opposition was based on his concern that "if [the company and union] in fact had a sweetheart contract that it wouldn't be fair to any female employees to be

Relying in substantial part on *Cleary*, the *Pugh* court found that plaintiff had stated a cause of action based on the "totality of the parties' relationship. . . ." ¹³⁹ *Pugh* thus held that an implied covenant of good faith could exist under the facts of the instant case based on "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." ¹⁴⁰ As such, the court held that plaintiff had "demonstrated a *prima facie* case of wrongful termination in violation of his contract of employment." ¹⁴¹

B. The Public Policy Exception: Recovery in Tort

A number of jurisdictions have recognized the concept of abusive discharge as an exception to the employment-at-will rule in order to allow recovery for wrongful terminations which violate an express public policy. Most claims arising under the public policy exception are founded on tort rather than on contractual theories of recovery. ¹⁴² In order to recover damages in tort under the abusive discharge concept, the burden has been placed on the aggrieved employee to prove that his employer violated the public policy of a particular state in effectuating his discharge. ¹⁴³

Claims for wrongful discharge based on violations of clearly articulated state interests were the first causes of action to be recognized

getting less money than someone would get working in the same industry under the same manager." *Id.* at ___, 171 Cal. Rptr. at 920.

139. *Id.* at ___, 171 Cal. Rptr. at 927.

140. *Id.* at ___, 171 Cal. Rptr. at 927. The *Pugh* court also noted that the California Supreme Court in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980), had recognized that a cause of action could exist based on the implied covenant of good faith but had not ruled on it. 116 Cal. App. 3d at ___, 171 Cal. Rptr. at 926.

141. 116 Cal. App. 3d at ___, 171 Cal. Rptr. at 927. Having found that the employee had made out a *prima facie* case, the court held that the employer had the burden of proving that it had "just cause" or "good cause" for the termination. The court stated that "just cause" and "good cause" connote "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power," *id.*, citing *R.J. Cardinal Co. v. Ritchie*, 218 Cal. App. 2d 124, 145, 32 Cal. Rptr. 545 (1963), while noting that in construing those terms, "[c]are must be taken, . . . not to interfere with the legitimate exercise of managerial discretion." 116 Cal. App. 3d at ___, 171 Cal. Rptr. at 926.

142. See cases cited in *Adler v. American Standard Corp.*, Misc. No. 12 (Md. Ct. App. July 16, 1981), reprinted in DAILY LAB. REP. (BNA) No. 144, at D-1, D-2 to D-3 (July 28, 1981). In *Monge* although the court referred to general public policy, recovery was found in contract on a "bad faith" theory rather than in tort on a public policy theory. See notes 110-15 *supra* and accompanying text.

143. See, e.g., *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980).

under the public policy exception. One of the leading decisions in establishing this exception was the California case of *Petermann v. International Brotherhood of Teamsters*.¹⁴⁴ In that case, plaintiff-employee was fired because he refused to commit perjury before a legislative committee. The court held that plaintiff had stated a cause of action for wrongful discharge, reasoning 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."¹⁴⁵ Accordingly, the court created an exception to the employment-at-will rule in order to effectuate the declared policy of the State of California against perjury. *Petermann*, however, addressed itself only to claims for contract damages.

The *Petermann* rule was extended in *Tameny v. Atlantic Richfield Co.*¹⁴⁶ to encompass tort actions for damages arising out of abusive discharges. In *Tameny* plaintiff-employee was allegedly terminated for refusing to participate in an illegal gas price-fixing scheme. Plaintiff sought to recover compensatory and punitive damages based on what the court considered to be three separate tort causes of action.¹⁴⁷

Citing cases from California¹⁴⁸ and other jurisdictions¹⁴⁹ which had previously recognized the propriety of a tort remedy for discharges in contravention of public policy, the *Tameny* court held that "a wrongful discharge suit exhibits the classic elements of a tort cause of action."¹⁵⁰ In reaching this conclusion, the court relied on *Petermann*, stating:

an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied " 'promises set forth in the [employment] contract' ". . . , but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.¹⁵¹

144. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

145. *Id.* at 188-89, 344 P.2d at 27.

146. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

147. *Id.* at 174-75, 610 P.2d at 1333-34, 164 Cal. Rptr. at 842-43.

148. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

149. *Id.* at 177, 610 P.2d at 1335, 164 Cal. Rptr. at 845, citing *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

150. 27 Cal. 3d at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

151. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844, quoting *Eads v. Marks*, 39 Cal. 2d 807, 811, 249 P.2d 257, 260 (1952).

Accordingly, the judgment of the trial court was reversed and the matter remanded for further proceedings.

1. *Retaliatory Discharges*

Another leading decision in the development of the public policy exception was the Indiana case of *Frampton v. Central Indiana Gas Co.* which recognized a cause of action for what the court termed a "retaliatory discharge."¹⁵² In that case, plaintiff-employee was discharged for filing a workmen's compensation claim under a state statute. The Supreme Court of Indiana, in reversing the decision of the appellate court, held "that an employee who alleges he or she was retaliatorily discharged for filing a claim pursuant to the Indiana Workmen's Compensation Act . . . or the Indiana Workmen's Occupational Diseases Act . . . has stated a claim upon which relief can be granted."¹⁵³

Other jurisdictions also have applied the public policy exception where employees were discharged in retaliation for filing workmen's compensation claims under applicable state law.¹⁵⁴ In *Kelsay v. Motorola, Inc.*,¹⁵⁵ for example, the Supreme Court of Illinois, relying in part on *Frampton* and the decision of a Michigan appellate court in *Sventko v. Kroger Co.*,¹⁵⁶ held that the defendant-employer's retaliatory discharge of plaintiff was "offensive to the public policy of [Illinois] as stated in the Workmen's Compensation Act."¹⁵⁷ In reaching its decision, the *Kelsay* court rejected the rationale of the Seventh Circuit in *Loucks v. Star City Glass Co.*,¹⁵⁸ where a contrary conclusion on similar facts was reached, on the grounds that the construction of the Workmen's Compensation Act in that case contravened the public policy of the State of Illinois.¹⁵⁹ The *Kelsay* court thus charac-

152. 260 Ind. 249, 297 N.E.2d 425 (1973).

153. *Id.* at 253, 297 N.E.2d at 428 (citations omitted) ("We further hold that such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages.").

154. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178 (W. Va. 1980).

155. 74 Ill. 2d 172, 384 N.E.2d 353 (1978); see Note, *Kelsay v. Motorola, Inc. - Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act*, 1980 U. ILL. L.F. 839 (1980).

156. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

157. 74 Ill. 2d at 185, 384 N.E.2d at 358.

158. 551 F.2d 745 (7th Cir. 1977).

159. 74 Ill. 2d at 182, 384 N.E.2d at 357.

terized "retaliatory discharge" as a separate and independent tort for which both compensatory and punitive damages could be awarded.

The concept of retaliatory discharge under the public policy exception has been applied in a number of jurisdictions under a variety of circumstances. These include situations where an employee had been fired—for serving on a jury against an employer's wishes,¹⁶⁰ for refusing to take a lie detector test where the state in question had an anti-polygraph statute,¹⁶¹ for supplying information to the police about the suspected wrongdoings of another employee,¹⁶² for refusing to participate in a price-fixing scheme,¹⁶³ for refusing to administer improper medical treatment in violation of state law,¹⁶⁴ and for attempting to have an employer comply with state and federal consumer credit protection laws.¹⁶⁵

2. Recent Cases

Recent cases demonstrate a limited trend toward recognizing the public policy exception, especially where the policy involved is express. For example, in *Adler v. American Standard Corp.*,¹⁶⁶ the Court of Appeals of Maryland, in adopting this exception, concluded

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

161. *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law).

162. *Palmateer v. International Harvester Co.*, Index No. 53780 (Ill. Sup. Ct. April 17, 1981). The court in *Palmateer* held that the discharge would be a violation of public policy even in the absence of any constitutional or statutory provisions, because "the foundation of the tort of retaliatory discharge lies in the protection of public policy" and "public policy . . . favors citizen crime-fighters." The *Palmateer* court construed public policy broadly to include interests that are not explicitly protected by federal or state law. This *general* public policy approach is similar to that articulated in *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), notes 109-15 *supra* and accompanying text, but appears to have been rejected by the majority of jurisdictions which have considered the public policy exception in favor of an *express* public policy. See notes 183-213 *infra* and accompanying text.

163. *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979).

164. *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Super. Ct. Law Div. 1978).

165. *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978). See also *Sheets v. Teddy's Frosted Foods Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (Employee was discharged because he told employer that his products deviated from the standards promulgated by Connecticut Uniform Food, Drug and Cosmetics Act. The court held that if the allegations were proved, employer could be liable for tort damages because its conduct clearly violated a statutory public policy.).

166. Misc. No. 12 (Md. Ct. App., July 16, 1981), reprinted in DAILY LAB. REP. (BNA) No. 144, at D-1 (July 28, 1981).

that the employment-at-will rule should be modified in situations where "the motivation for the discharge contravenes some clear mandate of public policy. . . ." ¹⁶⁷ Nevertheless, the court held that the allegations of plaintiff-employee were "too general, too conclusory, too vague, and lacking in specifics," to justify an abusive discharge claim against the defendant-employer. ¹⁶⁸ Although plaintiff alleged that he was wrongfully discharged in order to prevent him from revealing certain improprieties and illegal activities at the company, ¹⁶⁹ the court found that he had failed to prove a specific violation of federal or state law.

Similarly, it has been suggested that New York also may be willing to adopt the public exception under "propitious" circumstances. In *Savodnick v. Korvettes, Inc.* ¹⁷⁰ a federal court stated, "[w]hile no case in New York has yet recognized the tort of abusive discharge, precedent does suggest New York courts will do so when presented with the proper case." ¹⁷¹ In support of its contention, the *Savodnick* court cited the New York case of *Chin v. American Telephone & Telegraph Co.*, ¹⁷² which recognized that a new cause of action based on the doctrine of abusive discharge could exist if a plaintiff-employee established that a public policy of the state had been violated by the defendant-employer. ¹⁷³ Because the plaintiff in *Savodnick* had allegedly been discharged after thirteen years of service in order to deprive him of his pension rights which were to vest after fifteen years, the court concluded that in light of the strong public policy in New York favoring the integrity of pension plans "if ever there was a case to invoke the doctrine of abusive discharge, this is it." ¹⁷⁴

V. Adherence to the At-Will Rule

The majority of jurisdictions have continued to resist the limited trend toward creating exceptions to the employment-at-will rule. The

167. *Id.*, slip op. at D-5.

168. *Id.*, slip op. at D-4.

169. *Id.*, slip op. at D-1. These illegal activities included, "the payment of commercial bribes and falsification of corporate records and financial statistics."

170. 488 F. Supp. 822 (E.D.N.Y. 1980).

171. *Id.* at 826. *Accord*, *Placos v. Cosmair, Inc.*, 517 F. Supp. 1287 (S.D.N.Y. 1981) (claim of abusive discharge based on age discrimination could be "cognizable" under New York law); *but see* *Fletcher v. Greiner*, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (Sup. Ct. Nassau County 1980) (New York does not presently recognize tort of abusive discharge).

172. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979). For a further discussion of *Chin*, see notes 255-57 *infra* and accompanying text.

173. 96 Misc. 2d at 1075, 410 N.Y.S.2d at 741.

174. 488 F. Supp. at 826.

"bad faith" termination exception recognized in *Monge v. Beebe Rubber Co.*¹⁷⁵ has been directly rejected by a number of courts, while others have declined to apply the rationale of that case to the facts before them.¹⁷⁶ The concept of retaliatory discharge in violation of public policy has met a similar fate. Even in jurisdictions which have recognized the public policy exception to the employment-at-will rule, recent decisions in these jurisdictions demonstrate a trend toward limiting such an exception to discharges which violate a clear statutory mandate or express public policy.¹⁷⁷

A. Rejection of *Monge*

Courts have either avoided or rejected the attempts of discharged employees to utilize the rationale of *Monge* in order to establish a wrongful termination in violation of the "implied covenant of good faith and fair dealing."¹⁷⁸ For example, in *Catania v. Eastern Airlines, Inc.*,¹⁷⁹ a Florida appellate court declined to find either a "bad faith" discharge or public policy violation in discharges allegedly due to the plaintiffs' criticism of the defendant's employment policies. The court avoided applying either exception to the at-will rule by refusing to follow cases such as *Monge*, *Fortune* and *Petermann*.¹⁸⁰

Other courts have explicitly rejected *Monge*. In *Larsen v. Motor Supply Co.*,¹⁸¹ plaintiff-employees attempted to utilize the *Monge* rule to argue that they were terminated in "bad faith" for refusing to sign a "psychological stress evaluation test" consent form which contained certain misleading statements.¹⁸² In rejecting plaintiffs' claim, the Arizona appellate court declared that *Monge* was not the law of that state and that, in any event, plaintiffs' failure to submit to a new company policy was not sufficient to show "bad faith" on the part of the defendant.¹⁸³ The court thus declined "to circumscribe an employer's right to terminate an employee for his refusal to follow company policy."¹⁸⁴

175. 114 N.H. 130, 316 A.2d 549 (1974); for a discussion of *Monge*, see notes 109-15 *supra* and accompanying text.

176. See notes 178-84 *infra* and accompanying text.

177. See notes 185-213 *infra* and accompanying text.

178. See, e.g., *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265 (Fla. Dist. Ct. App. 1980).

179. 381 So. 2d 265 (Fla. Dist. Ct. App. 1980).

180. *Id.* at 267. The court rejected "plaintiff's invitation to be a 'law giver.'" *Id.*

181. 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977).

182. *Id.* at 508, 573 P.2d at 908.

183. *Id.* at 509, 573 P.2d at 909.

184. *Id.*

B. Limitations on the Public Policy Exception

It is becoming increasingly clear that courts will not create a public policy in order to sustain claims for abusive discharge. In fact, certain courts have dismissed such claims where no evidence was proffered to establish that an applicable statute specifically prohibited the type of discharge in question. Other courts have not inferred such a prohibition even when confronted with statutes clearly designed to promote a public interest. Moreover, the abusive discharge concept has been rejected where other statutory remedies are available to discharged employees.

In the absence of a clear mandate of public policy, courts appear to be unwilling to sustain claims of abusive discharge.¹⁸⁵ In *Abrisz v. Pulley Freight Lines, Inc.*,¹⁸⁶ for example, the court held that a plaintiff-employee did not establish that her discharge was in violation of public policy where she alleged that she was terminated for aiding a fellow employee's unemployment benefit claim by making false statements. Other courts have declined to recognize a public policy where an employee was discharged for announcing his intention to attend law school at night;¹⁸⁷ for seeking to work on the same shift with another employee where the two employees were living together at the time and the company had a rule against relatives working on the same shift;¹⁸⁸ for reporting the alleged misconduct of superiors;¹⁸⁹ for questioning the safety of an employer's products;¹⁹⁰ for filing for bankruptcy;¹⁹¹ and for refusing to get a haircut as required by company policy.¹⁹²

Courts have refused to read into broad statements of statutory policy a cause of action for wrongful or retaliatory discharge.¹⁹³ In

185. See, e.g., *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

186. 270 N.W.2d 454 (Iowa 1978).

187. *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. 1977). The court apparently rejected *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), see notes 126-132 *supra* and accompanying text, in denying recovery for a violation of a private interest, namely higher education.

188. *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

189. *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980); *Martin v. Platt*, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

190. *Yaindl v. Ingersoll-Rand Co.*, ___ Pa. Super. Ct. ___, 422 A.2d 611 (1980); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

191. *West v. First Nat'l Bank of Atlanta*, 145 Ga. App. 808, 245 S.E.2d 46 (1978).

192. *Page Airways of Albany, Inc. v. New York State Div. of Human Rights*, 50 A.D.2d 83, 376 N.Y.S.2d 32 (3d Dep't 1975), *aff'd*, 39 N.Y.2d 877, 352 N.E.2d 140, 386 N.Y.S.2d 223 (1976).

193. See, e.g., *Lampe v. Presbyterian Med. Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

*Lampe v. Presbyterian Medical Center*¹⁹⁴ no cause of action was held to exist on behalf of a nurse who alleged that she had been discharged for failing to comply with her employer's order to reduce her staff in the intensive care ward of a hospital.¹⁹⁵ The nurse disobeyed the directive of her employer, because she believed that such a reduction would have jeopardized patient care in that ward. In support of her claim, the nurse relied on general policy statements contained in state statutes creating and authorizing a State Board of Nursing to discipline a nurse who " 'has negligently or willfully acted in a manner inconsistent with the health or safety of persons under her care. . . . ' " ¹⁹⁶ The Colorado appellate court, in affirming the dismissal of plaintiff's claim, held that the broad policy statements contained in these statutes did not alter the at-will relationship between the nurse and her employer based on the mere possibility of disciplinary action under the statutes in question.¹⁹⁷

Similarly, in *Pierce v. Ortho Pharmaceutical Corp.*,¹⁹⁸ the Supreme Court of New Jersey held that a doctor who was discharged for refusing to perform research on a controversial drug had no cause of action because there was no specific expression of public policy prohibiting such research. Although the doctor alleged that the Hippocratic Oath prevented her from continuing the research, the court found no clear mandate in the Oath preventing the doctor from performing her assignment. As a result of its decision in *Pierce*, the New Jersey Supreme Court limited a prior ruling in *O'Sullivan v. Mallon*.¹⁹⁹ That decision had upheld a breach of contract claim by an x-ray technician discharged for refusing to perform catheterizations, which only doctors and nurses were authorized to administer under state law. The court in *Pierce* thus restricted *O'Sullivan* to cases concerning a "clear mandate of public policy."²⁰⁰

The public policy exception has been similarly limited in other jurisdictions. In *Rozier v. St. Mary's Hospital*²⁰¹ an Illinois appellate court held that the public policy exception recognized in *Kelsay v. Motorola, Inc.*²⁰² for discharges in retaliation for the filing of work-

194. 41 Colo. App. 465, 590 P.2d 513 (1978).

195. *Id.* at 466, 590 P.2d at 514.

196. *Id.* at 467, 590 P.2d at 515, quoting COL. REV. STAT. § 12-38-217 (1973).

197. 41 Colo. App. 465, 590 P.2d 513 (1978).

198. 84 N.J. 58, 417 A.2d 505 (1980).

199. 160 N.J. Super. 416, 390 A.2d 149 (Super. Ct. Law Div. 1978).

200. 84 N.J. at 67, 417 A.2d at 514. It should be noted that in *O'Sullivan* state law authorized only doctors and nurses to perform catheterizations.

201. 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980).

202. 74 Ill. 2d 172, 384 N.E.2d 353 (1978); see notes 155-59 *supra* for a discussion of *Kelsay*.

men's compensation claims was limited to the facts of that case. The *Rozier* court found that plaintiff-employee, who was discharged for leaking alleged incidences of patient abuse and other improprieties at a hospital to newspapers, had not stated a claim for retaliatory discharge even if *Kelsay* were extended beyond its facts.²⁰³

Courts also have refused to infer a cause of action for retaliatory discharge from statutes promoting a public interest. In *Bender Ship Repair, Inc. v. Stevens*²⁰⁴ the Supreme Court of Alabama held that an employee fired for serving on a grand jury did not have a cause of action for abusive discharge under a state law which only protected employees from the loss of compensation for such service. In *Dockery v. Lampart Table Co.*²⁰⁵ a North Carolina appellate court similarly rejected a claim for wrongful termination where an employee was discharged for filing a workmen's compensation claim, reasoning that the public policy questions raised by such a discharge were for the state legislature to decide.²⁰⁶

Because *Bender* and *Dockery* considered statutes which were virtually identical to those held to evince an express public policy in other jurisdictions, their holdings to the contrary represent an outright refusal to read public policy into state legislation.²⁰⁷ Federal courts also may be unwilling to predict whether state courts will apply the public policy exception. The recent case of *Phillips v. Goodyear Tire & Rubber Co.*²⁰⁸ demonstrates this point. In that case, the Court of Appeals for the Fifth Circuit found that an employee who was discharged for testifying truthfully at court proceedings had not been wrongfully discharged under either the laws of Georgia or Texas. Noting that the at-will rule had been codified in Georgia²⁰⁹ and recognized by the common law of Texas,²¹⁰ the Fifth Circuit stated:

203. 88 Ill. App. 3d at 999, 411 N.E.2d at 54.

204. 379 So. 2d 594 (Ala. 1980).

205. 36 N.C. App. 293, 244 S.E.2d 272 (1978).

206. *Id.* at 299, 244 S.E.2d at 276 ("Remedies for claims resulting from alleged violations of the spirit of the act are best left to the legislature.").

207. *Bender* in effect rejects *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), in which an Oregon court held that a discharge for jury service was in violation of public policy expressed in a state law requiring such service. Similarly, *Dockery* rejects cases such as *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), and *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), which held that discharges for filing workers compensation claims violated the public policy expressed, respectively, in Indiana and Illinois statutes.

208. Civ. No. 79-2011 (5th Cir., July 27, 1981).

209. GA. CODE ANN. § 66-101 (1979).

210. See, e.g., *Bowen v. Wohl Shoe Co.*, 389 F. Supp. 572 (S.D. Tex. 1975); *St. Louis S.W. Ry. Co. v. Griffin*, 106 Tex. 477, 171 S.W. 703 (1914).

While the "public policy" exception may well be "wise and progressive social policy," recognition of our rule as a federal court sitting in diversity precludes us from creating a "public policy" exception to the at will rule in the absence of any indication that the courts of Georgia or Texas might recognize such an exception.²¹¹

The Fifth Circuit did indicate, however, that it was "mindful of the strong public policy in favor of protecting those who fulfill their duty to testify truthfully in court proceedings."²¹² Nevertheless, it declined to "predict" that the Supreme Courts of Georgia and Texas would apply the public policy exception to the facts of the case, particularly in light of the equally important consideration of preserving the at-will rule itself.²¹³

C. Existence of Other Remedies

The existence of other remedies has enabled jurisdictions to avoid applying the public policy exception even where the jurisdiction recognizes its existence. For instance, in *Paret v. Eaton Corp.*²¹⁴ a federal district court, applying Michigan law, held that the alleged discharge of an employee based on his national origin did not warrant an exception to the employment-at-will rule, because the employee in question had available to him adequate remedies under both federal and state civil rights law. In reaching this holding, the *Paret* court noted that its decision in *Schroeder v. Dayton-Hudson Corp.*²¹⁵ had "declined to extend the public policy exceptions to instances where Michigan law provided other full and adequate remedies."²¹⁶ Similarly, in *Hoopes v. Equifax, Inc.*,²¹⁷ the Sixth Circuit held that individuals handicapped within the meaning of the Vocational Rehabilitation Act of 1973²¹⁸ are limited to the administrative remedies provided for by that statute and may not commence a private cause of action for wrongful discharge. And in *McCluney v. Jos. Schlitz Brewing Co.*,²¹⁹ it was held that the remedies available under the Wiscon-

211. Civ. No. 79-2011, slip op. at 9623.

212. *Id.* slip op. at 9622.

213. *Id.* slip op. at 9621-23.

214. 479 F. Supp. 512 (E.D. Mich. 1979).

215. 448 F. Supp. 910 (E.D. Mich. 1977), *modified*, 456 F. Supp. 650 (E.D. Mich. 1978).

216. 479 F. Supp. at 518.

217. 611 F.2d 134 (6th Cir. 1979).

218. 29 U.S.C. § 701 (1976).

219. 489 F. Supp. 24 (E.D. Wis. 1980).

sin Employment Peace Act and the Fair Employment Act²²⁰ precluded recovery for wrongful discharge at common law. Thus, these cases represent a rejection of case law in other jurisdictions which have allowed common law recovery notwithstanding the existence of statutory remedies.²²¹

VI. Other Theories of Recovery

Courts have been confronted with other theories of recovery in determining whether discharged employees are entitled to be redressed for damages allegedly sustained as a result of a "wrongful" termination. These theories include recovery in tort for the intentional infliction of severe emotional distress, recovery for *prima facie* tort, and recovery based on promissory estoppel. Certain courts have recognized employee claims for defamation²²² and false imprisonment²²³ as well.

A. Intentional Infliction of Severe Emotional Distress

Employees may be allowed to recover damages for the intentional infliction of severe emotional distress where their termination of employment was effectuated by the "outrageous" conduct of an employer. The underlying basis for this cause of action is found in Section 46 of the Second Restatement of Torts, entitled "Outrageous

220. WIS. STAT. ANN. §§ 111.01 -111.19 (West 1974 & Supp. 1981-82) ("The Employment Peace Act"); WIS. STAT. ANN. §§ 111.31 -111.64 (West 1974 & Supp. 1981-82) ("The Fair Employment Act").

221. See *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980), note 131 *supra*; *Savodnick v. Korvettes, Inc.*, 488 F. Supp. 822, 826 (E.D.N.Y. 1980), notes 170-74 *supra* and accompanying text.

222. If actual malice is found, an employer loses its qualified privilege to publish defamatory material about an employee. See, e.g., *Pirre v. Printing Dev., Inc.*, 468 F. Supp. 1028 (S.D.N.Y.), *aff'd*, 614 F.2d 1290 (2d Cir. 1979) (actual malice found where employee sued employer for defamatory statements about employee's work performance even though such statements were communicated only to a few people in the defendant's corporation); *Tumbarella v. Kroger Co.*, 85 Mich. App. 482, 271 N.W.2d 284 (1978) (employer's qualified privilege to publish defamatory material about employee does not extend to communications circulated to other employees who have no interest in the matter; only those who are concerned with an employee's performance should be privy to such a communication).

223. See, e.g., *General Motors Corp. v. Piskor*, 27 Md. App. 95, 340 A.2d 767 (1975), *rev'd & remanded in part*, 277 Md. 165, 352 A.2d 810 (1976), *aff'd after remand*, 281 Md. 627, 381 A.2d 16 (1977) (employee recovered for slander, false imprisonment and assault where employer's security guards shoved him into an office and detained him for a period of time on suspicion of stealing); *Black v. Kroger Co.*, 527 S.W.2d 794 (Tex. Civ. App. 1975) (employee successfully sued for false imprisonment when employer unreasonably detained employee for questioning of alleged thefts).

Conduct Causing Severe Emotional Distress,"²²⁴ which states in pertinent part:

- (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.²²⁵

Based on Section 46 of the Restatement, the Supreme Judicial Court of Massachusetts in *Agis v. Howard Johnson Co.*²²⁶ recognized a cause of action for the infliction of severe emotional distress on behalf of a waitress who was the first employee to be discharged as part of a plan to fire waitresses in alphabetical order until the persons responsible for certain thefts were discovered. In reaching this decision, however, the court held that before plaintiff could recover under such a theory, she had to establish the presence of four factors.²²⁷ With respect to plaintiff's complaint, the court found that it alleged sufficient facts to show that the employer's "conduct was extreme and outrageous, having a severe and traumatic effect upon plaintiff's emotional tranquility."²²⁸ Accordingly, the judgment of the trial court dismissing the complaint was reversed.²²⁹

Subsequently, in *Richey v. American Automobile Association, Inc.*,²³⁰ the same court held that a probationary employee had failed

224. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

225. *Id.*

226. 371 Mass. 140, 355 N.E.2d 315 (1976).

227. *Id.* at 144-45, 355 N.E.2d at 318-19. The following four factors were delineated by the court:

- (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct, Restatement (Second) of Torts § 46, comment i (1965); . . .
- (2) that the conduct was "extreme and outrageous," was "beyond all possible bounds of decency" and was "utterly intolerable in a civilized community," Restatement (Second) of Torts § 46, comment d (1965); . . .
- (3) that the actions of the defendant were the cause of the plaintiff's distress. . . ; and (4) that the emotional distress sustained by the plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46, comment j (1965). . . .

Id. (citations omitted).

228. *Id.* at 145, 355 N.E.2d at 319, quoting *Alcorn v. Anbro Eng'r, Inc.*, 2 Cal. 3d 493, 498, 468 P.2d 216, 218, 86 Cal. Rptr. 88, 90 (1970). The *Agis* court also held that plaintiff's husband had a cause of action for loss of consortium arising out of her severe emotional distress caused by the defendant's intentional or reckless conduct. 371 Mass. at 146, 355 N.E.2d at 319-20.

229. 371 Mass. at 147, 355 N.E.2d at 320.

230. ___ Mass. ___, 406 N.E.2d 675 (1980).

to allege a sufficient case of "outrage" where his discharge was based on a supervisor's determination that he was not a "good risk for long term employment" because of continued absences without notice and his inability to withstand the pressures of the job.²³¹ The *Richey* court also stated in dicta that the rationale of *Fortune v. National Cash Register Co.*²³² would not even be "remotely applicable in the circumstances of the discharge of this probationary employee."²³³

Other courts also have strictly construed the requirement of "outrage" for a cause of action based on the intentional infliction of severe emotional distress. In *Novosel v. Sears, Roebuck & Co.*,²³⁴ for example, a federal district court, applying Michigan law, held that such a cause of action will not lie without a finding that the conduct surrounding the discharge was so outrageous "as to go beyond all possible bounds of decency."²³⁵ The court held that plaintiff's discharge for failing to respond to the directives of a security guard did not even suffice to make a minimal showing of emotional distress.²³⁶

B. *Prima Facie* Tort

A *prima facie* tort ("disinterested malevolence") has been defined as "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful."²³⁷ A cause of action in *prima facie* tort must be pleaded as an alternative theory of recovery and must include the element of special damages.²³⁸ Until recently, most courts had declined to hold that a wrongful discharge constituted a *prima facie* tort.²³⁹

231. *Id.* at 677; see Annot., 86 A.L.R.3d 454 (1978).

232. 373 Mass. 96, 364 N.E.2d 1251 (1977); for a discussion of *Fortune*, see notes 126-32 *supra* and accompanying text.

233. — Mass. at —, 406 N.E.2d at 678.

234. 495 F. Supp. 344 (E.D. Mich. 1980).

235. *Id.* at 347, quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).

236. *Id.*, quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965). The court emphasized the language of Comment j to § 46 of the Restatement which provides, in pertinent part, that the law "intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." For a further discussion of *Novosel*, see notes 267-69 *infra* and accompanying text.

237. *Ruza v. Ruza*, 286 A.D. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955), quoted with approval in *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 866 (1977).

238. *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 368 N.E.2d 1230, 398 N.Y.S.2d 864 (1977); *Nichols v. Item Publishers*, 309 N.Y. 596, 132 N.E.2d 860 (1956).

239. See, e.g., *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234 (S.D.N.Y. 1979) (under Texas law, wrongful discharge is not a *prima facie* tort); *Keating v. BBDO*

Recent cases in New York suggest that a cause of action in *prima facie* tort arising out of an alleged wrongful discharge of an employee will at least survive a motion to dismiss. In *McCullough v. Certain Teed Products Corp.*²⁴⁰ the Appellate Division, Fourth Department, held that a complaint alleging that plaintiff was wrongfully discharged for refusing to participate in allegedly unlawful conduct with certain fellow employees and superiors was sufficient to state a cause of action in *prima facie* tort. Similarly, in *Balancio v. American Optical Corp.*,²⁴¹ the court held that the elements of *prima facie* tort were present where an employee alleged he was discharged suddenly after several years of faithful and exemplary service because he asked too many questions about a company "Regional Sales Manager Incentive Compensation Plan." The court noted that plaintiff's significant loss of wages and benefits was imposed as a punishment for asking questions his superiors did not want to answer and denied the employer's motion for summary judgment.²⁴²

In *Shaitelman v. Phoenix Mutual Life Insurance Co.*,²⁴³ however, a case cause of action in *prima facie* tort was dismissed by a federal court, applying New York law, where a terminated employee alleged only that the defendant had "maliciously and unjustifiably refused, subsequent to his termination, to accept business from him on the same terms as it does from other non-Phoenix agents."²⁴⁴ The court found that his general estimate of \$250,000 in losses was not sufficient to satisfy the pleading requirement for special damages and noted that the defendant was under no duty to deal with plaintiff under New York law.²⁴⁵

Int'l Inc., 438 F. Supp. 676 (S.D.N.Y. 1977) (for a *prima facie* tort, employee must allege and prove employer's specific intention to harm him); *Kushner v. Ciba-Geigy Corp.*, 76 A.D.2d 950, 428 N.Y.S.2d 745 (3d Dep't 1980) (employer's right to discharge employee-at-will does not give rise to *prima facie* tort); *Wolpert v. First Nat'l Bank of East Islip*, 60 A.D.2d 577, 400 N.Y.S.2d 10 (2d Dep't 1977), *aff'd*, 46 N.Y.2d 798 (1978) (no cause of action in *prima facie* tort for wrongful discharge); *Cartwright v. Golub Corp.*, 51 A.D.2d 407, 381 N.Y.S.2d 901 (3d Dep't 1976) (no *prima facie* tort damages arising from wrongful discharge); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979) (discharge of employee in connection with employee's arrest at a political rally was not a *prima facie* tort).

240. 70 A.D.2d 771, 417 N.Y.S.2d 353 (4th Dep't 1979).

241. Index No. 13229/80 (N.Y. Sup. Ct. Westchester County, May 21, 1981).

242. *Id.*, slip op. at 8-9.

243. Civ. No. 79-4488 (S.D.N.Y., Dec. 3, 1980).

244. *Id.*, slip op. at 7.

245. *Id.*, slip op. at 9. The court cited *Locker v. American Tobacco Co.*, 121 A.D. 443, 106 N.Y.S. 115 (2d Dep't 1907), *aff'd*, 195 N.Y. 565, 88 N.E. 289 (1909), for the

C. Promissory Estoppel

The principle of promissory estoppel may provide a basis for recovery for wrongful terminations of employment-at-will relationships. Section 90 of the Second Restatement of Contracts defines promissory estoppel as follows:

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. The remedy granted for breach may be limited as justice requires.²⁴⁶

Nevertheless, courts have applied promissory estoppel to wrongful discharge cases sparingly.²⁴⁷

In *Grouse v. Group Health Plan, Inc.*²⁴⁸ the Supreme Court of Minnesota found an employer liable on a theory of promissory estoppel. Plaintiff-employee had left his former position in reliance on defendant's promise of employment and sought damages when it was subsequently revoked. Under these circumstances, the court held that plaintiff "had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [defendant] once he was on the job."²⁴⁹ The Minnesota Supreme Court, however, refused to extend its decision to all employment-at-will relationships.

VII. The Effect of Personnel Policy Manuals on the Ability to Discharge Employees-At-Will

Consistent with the limited trend toward creating exceptions to the employment-at-will rule, courts recently have held that provisions in personnel policy manuals which imply a right to continued employment, absent "just cause" for termination, may become part of the employment contract, thereby limiting an employer's right to dis-

principle under well settled law in New York that all persons have an inherent right to refuse to maintain trade relations with any individual for any reason or for no reason at all. With respect to the issue of special damages, the court stated that the pleading of such damages "requires a 'particularized statement of the reasonably identifiable and reasonable losses suffered.'" Civ. No. 79-4488, slip op. at 9, *quoting* Skouras v. Brut Prod., Inc., 45 A.D.2d 646, 648, 360 N.Y.S.2d 811, 813 (1st Dep't 1974).

246. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

247. See generally Fuchs, *Promissory Estoppel and Employment Agreements*, 49 N.Y.S. B. J. 386 (1977).

248. 306 N.W.2d 114 (Minn. 1981).

249. *Id.* at 116 ("[Plaintiff] was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which [defendant] tendered him.").

charge its employees summarily. Nevertheless, most courts still do not regard personnel policy manuals as employment contracts for definite terms of employment where such documents are merely unilateral expressions of company policy.²⁵⁰ Moreover, employers may be able to ensure their ability to discharge at-will by explicitly providing in a written agreement that an employee relationship is terminable at any time without notice or cause.

A. Contractual Nature of Personnel Policy Manuals

Absent a showing of mutuality of obligation, personnel policy manuals are not generally regarded as employment contracts setting forth the exclusive terms and conditions of employment.²⁵¹ The rationale for this principle was succinctly stated by the Supreme Court of Kansas in *Johnson v. National Beef Packing Co.*²⁵² The court held that a personnel policy manual does not create an employment contract where:

the manual was not published until long after plaintiff's employment. It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy.²⁵³

Relying on the principles set forth in *Johnson*, other courts also have held that mere statements of company policy do not create contracts for definite employment which may be terminated only for cause.²⁵⁴

250. For a related discussion on permanent employment contracts and contracts for definite term, see notes 40-67 *supra* and accompanying text.

251. See, e.g., *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775, 779 (1975); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55, 551 P.2d 779, 782 (1976); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979).

252. 220 Kan. 52, 551 P.2d 779 (1976). In *Johnson* plaintiff was employed by defendant as a "beef lugger" for over a year when he injured his shoulder. After receiving workmen's compensation benefits, plaintiff returned to work but was no longer able to lug beef. As a result of his inability to perform his duties, plaintiff was discharged. He then brought suit alleging that defendant's "company policy manual" which was distributed to employees during plaintiff's employment constituted an employment contract. Specifically, plaintiff claimed that provisions in the manual gave rise to a "just cause" requirement and an employment for life or until an employee reached retirement age.

253. *Id.* at 55, 551 P.2d at 782.

254. See, e.g., *Garcia v. Aetna Finance Co.*, Civ. No. 80-A-1002 (D. Colo., Feb. 5, 1981); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979).

One of the leading decisions to recognize that personnel policy manuals do not *per se* create employment contracts limiting the right of employers to discharge at-will is the New York case of *Chin v. American Telephone & Telegraph Co.*²⁵⁵ In *Chin* plaintiff-employee, who was discharged after he was arrested and charged with driving a van into police during a political demonstration, claimed that his employer's "code of conduct" manual created the only grounds upon which his employment could be terminated. Citing *Johnson v. National Beef Packing Co.*,²⁵⁶ the Supreme Court, New York County, dismissed plaintiff's breach of contract claim, because the manual did not "describe or define the duties and responsibilities of the particular position, the length of employment or the terms of compensation—all essential elements in an employment agreement."²⁵⁷ Accordingly, the court held that plaintiff's employment was terminable at-will.

A similar result was reached by the Supreme Court, New York County, in *Edwards v. Citibank, N.A.*,²⁵⁸ where plaintiff-employee alleged that he was discharged in retaliation for having discovered evidence of unlawful foreign currency manipulation. Plaintiff claimed that he could be discharged only for cause based on various company staff handbooks and manuals or other literature containing employment policy guidelines.²⁵⁹ In dismissing plaintiff's breach of contract claim, the court held that there was no mutuality of obligation and, as an employment for an indefinite duration, it was terminable at-will. Relying on *Chin*, the court dismissed plaintiff's claim that the various documents in question constituted an employment contract because it found that "these documents [were] no more than broad internal policy guidelines which cannot be held to embody the exclusive procedures for termination."²⁶⁰

B. "Just Cause" Requirements in Personnel Policy Manuals

Although personnel policy manuals generally have not been construed as creating employment contracts containing the exclusive grounds for termination, an employer's right to discharge at-will may

255. 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. N.Y. County 1978), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (1st Dep't 1979).

256. 220 Kan. 52, 551 P.2d 779 (1976).

257. 96 Misc. 2d at 1073, 410 N.Y.S.2d at 739.

258. 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1979), *aff'd*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (1st Dep't), *appeal dismissed*, 51 N.Y.2d 875 (1980).

259. It should be noted that in *Edwards* plaintiff did not allege that the discharge violated any public policy.

260. 100 Misc. 2d at 60, 418 N.Y.S.2d at 270.

be limited where a policy contains a "just cause" standard but does not otherwise constitute an agreement for a definite term.²⁶¹ Whether such a standard gives rise to an enforceable contract right has been determined according to the facts and circumstances of the parties' employment relationship.²⁶² Where employees have signed written disclaimers indicating that their employment is at-will, a "just cause" provision may not be recognized as a contractual right.

Recent cases arising under Michigan law concerning an employer's obligations under a personnel policy manual demonstrate these principles. In *Toussaint v. Blue Cross & Blue Shield of Michigan*²⁶³ the Supreme Court of Michigan held that (1) a company personnel policy providing that an employee shall not be discharged except for cause is legally enforceable even though the employment is for an indefinite period of time; (2) such a provision may become part of the employment contract either by express written or oral agreement or as a result of the employee's "legitimate expectations" under the employer's policy statements; and (3) statements in a hiring interview that the employee would be retained "as long as he did his job" or "was doing the job" are sufficient evidence of an express agreement not to discharge except for good cause.²⁶⁴ The court stated that

261. Although a personnel policy manual may give rise to a requirement of "just cause" termination, it has not been held to give rise to a contract for permanent or definite employment. See notes 252-60 *supra* and accompanying text.

262. See, e.g., *Wernham v. Moore*, 77 A.D.2d 262, 432 N.Y.S.2d 711 (1st Dep't 1980) (court denied motion to dismiss complaint for wrongful discharge where employee alleged that a Mission Society manual gave rise to a bilateral agreement to discharge only for cause and that the complaint did not clearly and specifically allege that the manual represented a bilateral agreement); *Weiner v. McGraw-Hill*, ___ A.D.2d ___, 442 N.Y.S.2d 11 (1st Dep't 1981) (court held that a personnel manual provision that employer could discharge an employee for "just and sufficient cause only" gave rise to a cause of action for breach of contract where the employee and a representative of the employer signed a statement declaring that his employment was subject to the provisions of the manual).

263. 408 Mich. 579, 292 N.W.2d 880 (1980). This case consolidates two appeals. In the first action, plaintiff-Toussaint was employed by Blue Cross for five years and thereafter was discharged without cause. In the second action, plaintiff-Ebling was similarly discharged without cause after two years of employment with Mesco Corporation. In both cases, plaintiffs were given company assurances that they would not be discharged as long as they did their job. In Toussaint's case, he also was given a Blue Cross personnel policy manual which reinforced the oral assurances and specified that it was company policy to discharge "for just cause only." *Id.* at 597, 292 N.W.2d at 884.

264. In referring to the employment-at-will rule, the *Toussaint* court stated that the rule "is not a substantive limitation on the enforceability of employment contracts but merely a rule of 'construction.'" *Id.* at 597, 292 N.W.2d at 884. Concerning an employee's acceptance of employment for an indefinite term, the court added: "We see no reason why an employment contract which does not have a definite term—the term is 'indefinite'—cannot legally provide job security." *Id.* at 610, 292 N.W.2d at 890.

established personnel policies and procedures can give rise to a right to continued employment, which can be enforced contractually absent cause for termination, "just as are rights so derived to bonuses, pensions and other forms of compensation as previously held by Michigan courts."²⁶⁵ It did note, however, that an exception to its holding could exist where an employer who has not agreed to job security protects "itself by entering into a written contract which explicitly provides that the employee serves at the pleasure or at the will of the employer or as long as his services are satisfactory to the employer."²⁶⁶

Relying on the exception set forth in *Toussaint*, a federal court in *Novosel v. Sears, Roebuck & Co.*²⁶⁷ held that under Michigan law a discharged employee did not have a right to a "just cause" determination prior to his severance where the employment application signed by the employee stated that he could "be terminated, with or without cause, and with or without notice, at any time, at the option of either the company or [the employee]."²⁶⁸ Based on this statement, the court reasoned that there was "no way that the plaintiff could reasonably have had a legitimate expectation of a right to a just cause determination prior to termination."²⁶⁹ Accordingly, the court dismissed the cause of action based on wrongful discharge.

It has been since recognized, however, that a disclaimer will not automatically absolve an employer from liability for representations of company policy. In *Schipani v. Ford Motor Co.*²⁷⁰ the Michigan

265. *Id.* at 618-19, 292 N.W.2d at 894.

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

267. 495 F. Supp. 344 (E.D. Mich. 1980).

268. *Id.* at 346.

The application stated in full:

I certify that the information contained in this application is correct to the best of my knowledge and understand that falsification of this information is grounds for dismissal in accordance with Sears, Roebuck and Co. policy. I authorize the references listed above to give you any and all information concerning my previous employment and any pertinent information they may have, personal or otherwise, and release all parties from all liability for any damage that may result from furnishing same to you. *In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.*

Id. (emphasis in original).

269. *Id.*

270. 102 Mich. App. 606, 302 N.W.2d 307 (1981).

Court of Appeals recognized that written or oral assurances of continued employment may negate the effect of a disclaimer for a "just cause" discharge and thereby limited the exception noted in *Toussaint*. Plaintiff in *Schipani* had signed a written employment contract which stated:

I understand that my employment is not for any definite time, and may be terminated at any time, without advance notice by either myself or Ford Motor Company.²⁷¹

Nevertheless, the employee claimed that he had a cause of action for breach of contract based on certain written and oral company assurances which he alleged constituted an implied contract to employ him until he reached age sixty-five.

In affirming the lower court denial of summary judgment for the defendant, the court held that whether the written contract was *not* terminable at-will because of the company's written and oral assurances was a question for the trier of fact. While the court acknowledged that the oral contract might have been unenforceable under the statute of frauds, it concluded that the principle of promissory estoppel could negate that defense. Moreover, because the employee alleged that he had surrendered his union membership to take a management position prior to his discharge, the court reasoned that this was another factor for the trier of fact to consider in determining whether the enforcement of the company's written and oral assurances would be required to avoid injustice.²⁷² With respect to the disclaimer signed by plaintiff, the *Schipani* court stated that the decision of the Michigan Supreme Court in *Kari v. General Motors Corp.*²⁷³ may indicate that "under appropriate circumstances, oral

271. *Id.* at 610, 302 N.W.2d at 309.

272. *Id.* at 615, 302 N.W.2d at 312.

273. 402 Mich. 926, 282 N.W.2d 925 (1978), *rev'g* 79 Mich. App. 93, 261 N.W.2d 222 (1977). In *Kari* the provisions of the employer's personnel policy handbook relating to severance pay contained the following disclaimer: "The inclusion of a schedule of separation allowances in this booklet, together with the conditions governing their payment, . . . is not intended nor is it to be interpreted to establish a *contractual relationship* with the employee [sic]." 79 Mich. App. at 95, 261 N.W.2d at 223 (emphasis added). In addition to this statement, the handbook in question also contained the following general disclaimer on the last page of that book printed in italics and outlined in red:

The contents of this handbook are presented as a matter of information only. While General Motors believes wholeheartedly in the plans, policies and procedures described here, they are not conditions of employment. General Motors reserves the right to modify, revoke, suspend, terminate, or change any or all such plans, policies, or procedures, in whole or in

promises may negate the effect of disclaimers which are intended to absolve employers from liability for policies presented in handbooks or other employer literature."²⁷⁴

VIII. Personnel Policy Benefits and the Employment-At-Will Rule

The discharge of at-will employees in order to cause the forfeiture of accrued or almost accrued benefits has provided the basis in certain jurisdictions for establishing an exception to the at-will rule under both contractual and tort theories of recovery.²⁷⁵ In contract causes of action courts have found a breach of the "implied covenant of good faith and fair dealing,"²⁷⁶ while in tort actions courts have looked to public policy to grant the benefit in question.²⁷⁷ In applying either theory of recovery, courts often fail to analyze whether there is in fact a contractual right on the part of the discharged employee to the denied benefit or whether the employer's policy was a mere gratuity.

part, at any time, with or without notice. The language used in this handbook is not intended to create, nor is it to be construed to constitute, a contract between General Motors and any one or all of its employees [sic].

79 Mich. App. at 95, 261 N.W.2d at 223.

Based on the foregoing disclaimers, the court of appeals in *Kari* held that the handbook description of the employer's severance pay policy "clearly evinced an intention *not* to create an offer capable of acceptance." 79 Mich. App. at 98, 261 N.W.2d at 224 (emphasis in original). The court reasoned that it was "difficult to imagine what [the employer] could have done, short of not mentioning the plan, to prevent the reading of its statement as an offer." 79 Mich. App. at 98, 261 N.W.2d at 224. The action in *Kari*, however, was remanded by the Michigan Supreme Court to the trial court on the grounds that summary judgment was improperly granted because triable issues of fact existed regarding, among other things, whether oral promises to provide severance pay were made to the plaintiff. 402 Mich. at 926, 282 N.W.2d at 925. On remand, the trial court found that General Motors had complied with the provisions of its handbook.

In *Wittcock v. General Motors Inst.*, Civ. No. 75-540062 (S.D. Mich., April 18, 1977), a federal court, in applying Michigan law, held that the same General Motors handbook represented a unilateral offer to contract which plaintiff accepted by remaining in the employ of that company, notwithstanding the presence of a disclaimer as to the employer's contractual obligations. The employee's continued service, the court found, was sufficient evidence of reliance and made the offer irrevocable. Thus, the court held that the employee had a claim for breach of the lay-off and recall guidelines in the handbook and denied the employer's motion for summary judgment.

274. 102 Mich. App. at 614, 302 N.W.2d at 311.

275. See notes 126-32 *supra* and accompanying text.

276. See, e.g., *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977); see notes 126-32 *supra* and accompanying text.

277. See, e.g., *Savodnik v. Korvettes*, 488 F. Supp. 822 (E.D.N.Y. 1980); see notes 170-74 *supra* and accompanying text.

The following sections discuss the various principles upon which courts have relied in determining whether at-will employees have a contractual right to benefits set forth in personnel policies.²⁷⁸ Although this discussion focuses on certain benefits, it has equal application to severance pay, bonuses, commissions, vacation pay, sick leave and other fringe benefits.²⁷⁹

A. Company Personnel Policies May Create an Implied in Fact Contract Liability for Benefits Set Forth Therein

A company's adoption of a personnel policy relating to benefits for employees may constitute an offer to make a unilateral contract in employment-at-will situations provided that the offer is communicated to the employees. An offer will be treated as being accepted by the employees in question if they remain in the employ of a company after they have received notice of the benefit policy.

Notice of a company's benefit policy may be disseminated to its employees in a number of ways. Employees need not have examined

278. It has been held that benefit provisions contained in personnel policies may be given the same interpretation as benefit provisions in collective bargaining agreements. *See Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 197, 107 Cal. Rptr. 111, 114 (1973) ("termination pay provisions are identically construed whether contained in formal written agreements, such as collective bargaining agreements, or a corporate personnel policy that becomes a part of the understood employment agreement" (citations omitted)). It should be noted, however, that benefit provisions appear to represent an exception to the general rule that collective bargaining agreements are not governed strictly by the common law contract principles which govern private employment contracts. In the landmark case of *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), the Supreme Court recognized that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." Towards that end, the Court stated that an interpretation of a collective bargaining agreement "is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

279. New York Labor Law § 198-C, places upon an employer certain time limits within which earned "benefits or wage supplements" must be provided to an employee. N.Y. LAB. LAW § 198-C (McKinney Supp. 1980-81). Before the provisions of § 198-C become applicable, it must be established that the employer in question is a party to an "agreement" to pay or provide such a benefit. *Id.* Section 195 of the Labor Law, *as amended*, requires employers to notify all employees, in writing or by publicly posting, "the employer's policy on sick leave, vacation, personal leave, holidays and hours." N.Y. LAB. LAW § 195 (McKinney Supp. 1980-81). Under § 198-C, it is a misdemeanor if an employer who agrees to pay any fringe benefits fails to do so. N.Y. LAB. LAW § 198-C (McKinney Supp. 1980-81). Proof of the employer's agreement is vital. Therefore, the requirement of § 195, that an employer publicize an agreement or policy with regard to fringe benefits, prevents the denial of such agreement as a defense.

the actual policy in a personnel manual or some other employee handbook prior to or during their employment with an employer in order for there to be an offer capable of acceptance. Aside from actually reading the policy, employees also may learn of a benefit policy from company notices, from talking to other employees, or from prior occasions where the benefits in question had been given to eligible employees under similar circumstances.²⁸⁰

Once the offer is made and communicated to the employees, their continued employment is considered to be sufficient consideration for the offer.²⁸¹ It has been held to be immaterial whether the employees would have continued their employment with a company even without the offer of the benefit in question.²⁸² As long as the benefit policy contains language which creates an offer capable of acceptance, it will not be viewed as a mere gratuity payable at the discretion of the employer.

An employer may, however, set the terms and conditions upon which employees are entitled to receive personnel policy benefits.²⁸³

280. *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494, 502 (Mo. 1971). *See also* *Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221 (1976) (as long as employees were aware of employer's written policy statement regarding severance pay, it was irrelevant whether employees actually saw the statements). *But cf.* *Alfaro v. Stauffer Chem. Co.*, 173 Ind. App. 89, 362 N.E.2d 500 (1977) (court held that there was no offer capable of acceptance where employer's written severance pay policy was *confidential* and employer neither discussed policy with prospective employees nor published it). *See* text accompanying notes 317-18 *infra*.

281. *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 78 N.W.2d 296 (1956); *accord*, *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 291 P.2d 91 (1955); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949). Although continued employment may be sufficient consideration for an offer of personnel policy benefits, it may not be sufficient to support a contract for permanent employment. *See* note 40 *supra* and accompanying text. Forms of consideration other than continued employment may support a promise for a benefit. In *Griffith v. Melbourn*, 245 Ark. 40, 430 S.W.2d 862 (1968), the court found that where an employee accepted the offer of severance pay in return for his promise not to protest in the event he was discharged, there was sufficient consideration and the employee was entitled to severance pay. Thus, an offer of severance pay merely requires an employee to give up or forbear to exercise some legal right. *Kolka v. Atlas Chem. Indus.*, 13 Mich. App. 580, 164 N.W.2d 755 (1968).

282. *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958) (immaterial whether employees would have continued to work for employer even without offer of severance pay); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949) (the legal requirements of a contract are satisfied as long as there is a promise of severance pay which is accepted by performance of the service); *Martin v. Mann Merchandising, Inc.*, 570 S.W.2d 208 (Tex. Civ. App. 1978) (severance pay was an implied in fact contract between the parties so that question of reliance was not significant).

283. *See* 5 A. CORBIN, CONTRACTS, § 1058 (1964):

[a]n agent's right to compensation can be made expressly conditional upon the rendition of a specified performance by him. If the performance is not

Courts have enforced provisions in personnel policies that employees will lose their right to benefits if they are discharged for cause or quit before the end of a specified time period.²⁸⁴ Nevertheless, ambiguities concerning the eligibility of employees to receive personnel policy benefits usually are resolved against the employer.²⁸⁵

B. Disclaimers May Clearly Evince an Intent Not to Create a Contractual Offer

Once it is established that employees have had notice of a benefit policy, it must be determined whether the policy is an offer to contract or a mere gratuity. A benefit policy will not be viewed as a mere gratuity unless the description of the policy contains language which clearly evinces an intention *not* to create an offer capable of acceptance. For example, the following disclaimers have been held to evince a clear intent not to create an offer capable of acceptance under the facts of a particular case:

1. A booklet entitled "Know Your Company" which provided—

It has been customary, since 1937, for the company to make a year end payment to employees. The amount of such payment, to employees if any, depends upon the earnings available from operations, and is entirely at the discretion of the Board of Directors.²⁸⁶

2. A staff bulletin outlining a plan of renewal bonuses which stated—

This renewal bonus is a *voluntary contribution* on the part of the Company. It is agreed by you and by us that *it may be withheld*,

rendered, his right to the compensation never arises. Such a provision is not regarded as one that fixes a penalty for breach of duty; neither is it a provision for liquidated damages. It is not impossible that in an extreme case the court might be convinced that a provision seeming to create a condition precedent to a primary right is put in that form as a camouflage for a penalty clause; but the writer has seen no case of this sort.

See also *Walker v. American Optical Corp.*, 265 Or. 327, 332, 509 P.2d 439, 441 (1973).

284. *Brydges v. Coast Wide Land, Inc.*, 2 Wash. App. 223, 467 P.2d 209 (1970). See also *Phillips v. Memphis Furniture Mfg.*, 573 S.W.2d 493 (Tenn. Ct. App. 1978) (discharged employee was not entitled to vacation pay under company policy requiring employees to take vacation time in order to obtain benefit and prohibiting payment of cash bonus in lieu of vacation).

285. See note 306 *infra* and accompanying text.

286. *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 188, 150 A.2d 607, 609 (1958). See also *Douglass v. Panama, Inc.*, 504 S.W.2d 776 (Tex. 1974) (employer's statement, "do a good job and you will get a good bonus," did not create an enforceable contract where the granting of the bonus was clearly within the employer's discretion).

increased, *decreased* or discontinued, individually or collectively, with or *without notice*.²⁸⁷

and

3. A listing of "Suggestion System Rules" which contained the following—

Each suggestion is submitted with the understanding that the Company shall have the right to publish, use or refuse it and that if it is published or used, the decision of the Company shall be final and conclusive as to the amount of a cash award, if any, and the person or persons entitled thereto, and all other matters concerning the suggestion.²⁸⁸

The crucial language in all of the foregoing disclaimers clearly indicates that the employer in question was not making an offer to contract, that the terms of the policies in question could be changed at any time and for any reason with or without notice at management's discretion, and that the employees under these policies did not have any vested rights. Nevertheless, oral assurances of a term or condition of employment may negate the effect of a disclaimer, thus creating a contractually enforceable right.²⁸⁹

C. Modification of Benefit Plans

It has been held that implied in fact contracts arising from employment-at-will relations may be modified, other than as to accrued benefits, by either party at any time.²⁹⁰ In *Gebhard v. Royce Aluminum Corp.*,²⁹¹ for example, a salesman sued his former employer for certain commissions allegedly owed to him. The salesman who was employed at-will received a specific commission for all accounts which he obtained or serviced. During the course of employment, the defendant modified the commission rates at which the salesman was compensated, and the salesman continued to work for the defendant

287. *Spooner v. Reserve Life Ins. Co.*, 47 Wash. 2d 454, 457, 287 P.2d 735, 737 (1955) (emphasis in original).

288. *Calkins v. Boeing Co.*, 8 Wash. App. 347, 349, 506 P.2d 329, 330 (1973).

289. See *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981); *Wittcock v. General Motors Inst.*, Civ. No. 75-540062 (S.D. Mich., April 18, 1977). See notes 270-74 *supra* and accompanying text.

290. *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961); *Swalley v. Addressograph Multigraph Corp.*, 158 F.2d 51 (7th Cir. 1946), *cert. denied*, 330 U.S. 845 (1947); *Flint v. Youngstown Sheet & Tube Co.*, 143 F.2d 923 (2d Cir. 1944).

291. 296 F.2d 17 (1st Cir. 1961).

with knowledge of the lower rates. Subsequently, the defendant terminated the salesman's employment.

The court disposed of the salesman's claims, holding that he was not entitled to commissions on accounts which he neither obtained nor serviced.²⁹² In addition, the court found that the salesman had accepted the lower commission rates as a condition of his employment even though he claimed that he had never agreed to them. The court reasoned that the defendant could modify its agreement with him at any time except as to accrued matters, because it had the right to discharge the salesman at any time. The court noted: "Plaintiff's only alternatives were to accept the new conditions or quit. . . . By continuing to work, plaintiff, knowing the newly proposed terms, accepted them as a matter of law."²⁹³ Finally, the court held that the termination of the salesman's employment did not affect his right to receive commissions on those accounts for which he obtained orders but which were not filled until after the termination.²⁹⁴

Although an employer may modify a personnel policy, an employment contract cannot be changed to the detriment of an employee without his knowledge. In *Reading & Bates, Inc. v. Wittington*,²⁹⁵ for example, the defendant-employer arbitrarily and without notice changed a term and condition of employment in order to avoid an employee's workmen's compensation claim. Because the change was made without notice and to the employee's detriment, the court held that the defendant could not prevent the employee from recovering workmen's compensation for his injury.²⁹⁶

D. Promissory Estoppel May Entitle At-Will Employees to Receive Personnel Policy Benefits

Courts have considered whether employees are entitled to receive benefits set forth in personnel policies under the principle of promis-

292. *Id.* at 19.

293. *Id.*

294. Similarly, in *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949), the court recognized the right of a defendant-employer to discontinue a severance pay plan for at-will employees but noted that the employer could not deprive employees of severance pay "already earned as of the date of its discontinuance." *Id.* at 543, 53 S.E.2d at 809. The court stated that such a result "would constitute not mere discontinuance of the plan, but forfeiture of plaintiff's contractual rights amounting to a breach of the contract." *Id.* See also *Berteau v. Wiener Corp.*, 362 So. 2d 806 (La. Ct. App. 1978) (employer could not cause forfeiture of vested vacation pay rights to former employee under unpublished policy of denying the payment of benefits to non-employees).

295. 208 So. 2d 437 (Miss. 1968).

296. *Id.* at 439.

sory estoppel. In *Feinberg v. Pfeiffer Co.*²⁹⁷ plaintiff retired from a lucrative employment position in reliance upon the defendant-company's promise to pay her a pension of \$200 a month for life. The defendant subsequently stopped the pension payments claiming that the resolution of its board of directors to make such payments was only a mere promise to make a gift because there was no legal consideration. The court held, however, that plaintiff's retirement from the lucrative position in reliance upon the defendant's resolution, created an enforceable promise which the defendant was estopped from denying.²⁹⁸

In *Hilton v. Alexander & Baldwin, Inc.*²⁹⁹ plaintiff sought to recover severance pay on the theory of promissory estoppel even though the defendant-employer's company manual made no mention of such a benefit. Plaintiff knew that severance pay had been given to several employees terminated when the company closed its Seattle office, but the court concluded that other evidence negated plaintiff's contentions that she was entitled to such pay under a theory of promissory estoppel. This evidence showed that company superiors had told plaintiff that severance pay would not be paid to employees who were retained after the closing of the Seattle office. Because plaintiff had been retained by the defendant after the closing, she failed to establish any basis for concluding that the company had promised its employees severance pay under other circumstances. Accordingly, the principle of promissory estoppel was not applied.³⁰⁰

E. Severance Pay as an Enforceable Contract Right

1. Nature of Severance Pay

Severance pay is a prime example of a benefit which may induce an at-will employee to continue his service with a particular employer. Severance pay is neither analogous to nor a form of unemployment compensation.³⁰¹ Rather, it has been characterized as "a kind of

297. 322 S.W.2d 163 (Mo. 1959).

298. *Id.* at 168.

299. 66 Wash. 2d 30, 400 P.2d 772 (1965).

300. *Id.* at 31-32, 400 P.2d at 773-74.

301. Although severance pay has not generally been regarded as a form of unemployment compensation, a number of states either have passed or are considering the passage of legislation containing severance pay provisions designed to minimize the impact on employees of plant closings and relocations. See generally Feerick, *Developments in Employee Rights*, N.Y.L.J., June 5, 1981, at 1, col. 1. For example, Maine has passed a law providing for 60 days pre-notification of a plant closing as well as the payment of severance pay, at the rate of one week's pay for each year of service, to affected employees. 26 ME. REV. STAT. ANN. § 625-13 (1980). Other states

accumulated compensation for past services and a material recognition of their past value. . . . It concerns the past, not the future, and once it is earned, it becomes payable no matter what may thereafter happen.”³⁰² The rule has evolved that severance pay is not a mere gratuity, but a unilateral contract offer which is accepted if an employee continues his employment with notice of the offer.³⁰³ The continued employment constitutes sufficient consideration for the offer.³⁰⁴ Under this view, severance pay is an accrued or vested right payable to eligible employees upon their termination of employment with the employer in question.³⁰⁵

are considering the passage of laws containing provisions providing, in addition to pre-notification and severance pay, for pensions, health care benefits, transfer rights, job training and relocation expenses. *See generally Advance Notice of Plant Closings: Toward National Legislation*, 14 J. OF L. REFORM 283 (1981).

302. *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 198-99, 107 Cal. Rptr. 111, 116 (1973); *accord*, *Willets v. Emhart Mfg. Co.*, 152 Conn. 487, 490-91, 208 A.2d 546, 548 (1965); *Adams v. Jersey Cent. Power & Light Co.*, 21 N.J. 8, 120 A.2d 737 (1956). Where severance pay policies qualify as “employee welfare benefit plan[s]” within the meaning of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1002(1) (1976), employers have the following fiduciary obligations under that Act:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan; . . .

Id. § 1104(a)(1). In *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979), the court stated that an amendment of a severance pay plan by employers “[s]o as to make employees otherwise eligible now ineligible, at a time when [the employers] were contemplating a large layoff of otherwise eligible employees” would be in violation of this fiduciary duty. *Id.* at 360-61.

303. *See Chinn v. China Nat’l Aviation Corp.*, 138 Cal. App. 2d 98, 99-100, 291 P.2d 91, 92 (1955); *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P.2d 807 (1948); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967); *Gaydos v. White Motors Corp.*, 54 Mich. App. 143, 200 N.W.2d 697 (1974); *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, 579, 78 N.W.2d 296, 301 (1956); *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949).

304. *See Dulaney Foods, Inc. v. Ayers*, 220 Va. 502, 260 S.E.2d 196 (1979), which held that employees who continued to work for the employer after being advised of the severance pay plan were entitled to severance pay after being terminated when the employer’s plant closed. The court recognized that severance pay is not a gratuity but a matter of contract. It also found that there had been an offer by the employer which the employees accepted by continuing to work and that the continued employment was sufficient consideration for the offer. This rationale was adopted from a line of prior cases. *See cases cited in note 303 supra. See also notes 281-82 supra* for a discussion of other forms of consideration to support offer of severance pay.

305. The court in *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956), reached the same conclusion in interpreting a collective bargaining agreement by reasoning that the *right* to severance pay can only arise during the life of

2. *Eligibility of Employees to Receive Severance Pay*

Even where a severance pay policy is found to be an offer capable of acceptance, it still must be determined whether the employees in question are eligible to receive severance pay under the express provisions of the plan and the specific facts of the case. Because the employer is usually the draftsman of the severance pay policy, courts routinely resolve any ambiguities in favor of the employee.³⁰⁶ Most severance pay policies designate the employees who are eligible under the plan (for example, full-time salaried employees), and the conditions which give rise to severance pay liability. The courts focus on these conditions in determining whether employees are entitled to receive severance pay.

Personnel manuals vary in their statement of the conditions under which employees are entitled to severance pay. "Involuntary termination of employees due to lack of work,"³⁰⁷ "permanent reduction of staff,"³⁰⁸ and "termination for reasons outside the control of the em-

such an agreement, but that "once the right thus comes into being it will survive the termination of the agreement. Discharge from service during the term of the contract is not a condition *sine qua non* to the enforcement of the accrued right." 20 N.J. at 548, 120 A.2d at 448.

In certain states an employer's failure to pay severance benefits also may result in criminal liability. For example, the Labor and Industrial Relations Law of Missouri provides:

Any employer who promises in writing to make payments to an employee retirement or welfare plan, either by contract with an individual employee, by a collective bargaining agreement, or by agreement with the employee retirement or welfare plan, and who willfully fails to make the payment within sixty days after they become due and payable is guilty of a misdemeanor.

MO. ANN. STAT. § 285.100 (Vernon Supp. 1979). The definition of "employee retirement or welfare plan" includes severance pay plans within the meaning of the Missouri statute. *Id.* § 285.105; see note 279 *supra* for a discussion of New York law.

306. *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494, 500 (Mo. 1971); *Langdon v. Saga Corp.*, 569 P.2d 524, 528 (Okl. App. 1976). Ambiguous provisions regarding the payment of bonuses have been similarly construed in favor of the employee. *See, e.g., Fujimoto v. Rio Grande Pickle Co.*, 414 F.2d 648 (5th Cir. 1969). *See also* J. CALAMARI AND J. PERILLO, *CONTRACTS* § 2-25 (2d ed. 1977). *But cf. Ridenhour v. Mollinan Pub.*, 66 Ill. App. 3d 1049, 383 N.E.2d 803 (1978) (provision in severance pay plan that "in event of suspension all employees shall receive severance pay" construed to mean that only employees who did not commit acts of wrongdoing or dishonesty were eligible to receive severance pay); *Bravin v. Fashion Week, Inc.*, 75 Misc. 2d 753, 348 N.Y.S.2d 681 (Sup. Ct. N.Y. County 1973) (court interpreted severance pay provision to mean that an employee would not be entitled to severance pay if discharged for a material breach of the employment contract).

307. *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 195, 107 Cal. Rptr. 111, 113 (1973).

308. *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967).

ployee,"³⁰⁹ are several examples of the key phrases used in severance pay policies. Although these phrases have been interpreted in light of a variety of factual situations, their meaning has been most clearly construed in asset divestment cases.

A number of jurisdictions have considered the issue of whether employees have been involuntarily terminated within the meaning of a severance pay policy when their employer has sold its assets to another company and the employees "continue" in the employ of the purchasing company.³¹⁰ The courts in these jurisdictions uniformly agree that the sale of an employer's business constitutes a termination of the employment relationship between the seller-employer and its employees. It is immaterial, therefore, whether these employees continue to work at their *same* jobs for the purchasing employer without sustaining loss of employment or income.³¹¹ Moreover, even when severance pay eligibility depends on the requirement that no "other suitable opening" be available to an employee seeking severance pay, such an opening has been held to refer to job vacancies with the seller-employer and not to openings with any other employer.³¹² Accordingly, the significant factor in these cases is whether there has

309. *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 211 N.W.2d 101 (1973).

310. See *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111 (1973); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967); *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 211 N.W.2d 101 (1973); *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494 (Mo. 1971); *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 143 A.2d 762 (App. Div. 1958).

311. See, e.g., *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111 (1973); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967).

Although there is a dearth of case law in this area, it appears that a transfer of a corporation's stock may not be considered a "termination" of employment within the meaning of a severance pay plan where the only effect of such a transfer is a change in the ownership of the corporation's stock. Based on circumstances similar to the foregoing, a federal court in *Hover v. IBM Corp.*, Civ. No. 6-71730 (E.D. Mich. Nov. 30, 1977), granted the defendant-stockholder's motion for a summary judgment against two employees of one of its former subsidiaries. The employees in question had claimed that the sale of the subsidiary stock by the defendant-stockholder (*i.e.*, IBM) to Control Data Corporation constituted a termination of their employment with the defendant and thus entitled them to receive lost benefits, severance pay and other damages. In rejecting the plaintiffs' claims, the court stated, "The frivolity of plaintiffs' lawsuit is highlighted by their continued status as employees of S.D.C. [*i.e.*, the former subsidiary of IBM]." The court noted that the employees were employed by S.D.C. prior to the sale of stock and that they were *still* in the employ of that company at the time of trial; thus, the employees' employment with S.D.C. had never been terminated. The court also rejected the claims that IBM had somehow adopted a policy of granting severance pay in similar situations.

312. *Clarke v. Brunswick Corp.*, 48 Mich. App. 667, 211 N.W.2d 101 (1973).

been an involuntary termination of employment *with the seller* and not whether there is an actual loss of employment or income.³¹³

An agreement between the seller-employer and a purchaser whereby the purchaser assumes the seller's severance pay liability to its employees is often viewed as an ineffective attempt at making a novation.³¹⁴ In order to establish an effective novation, it must be shown that the employees claiming severance pay had accepted the purchaser as their new debtor and that they had discharged the seller's obligation of severance pay.³¹⁵ Accordingly, a novation has not been found even where employees remained on the same job, received substantially the same terms and conditions of employment from the purchaser, and had their accrued severance pay rights recognized by the purchaser. In *Mace v. Conde Nast Publications, Inc.*,³¹⁶ a Connecticut court concluded that a novation had not been created, where there was no evidence presented to show that the employees involved had given their consent either to accept their new employer as the new debtor for their severance pay obligations or to discharge their former employer from these obligations.

Seller-employers have not, however, been obligated to provide severance pay to their former employees in sale of asset divestments where their severance pay policies were not considered to be contractual offers capable of acceptance and the employees did not suffer any loss of employment as a result of the sale. For example, in *Alfaro v. Stauffer Chemical Co.*,³¹⁷ an Indiana appellate court held that the defendant-seller's severance pay policy "was a voluntary gratuitous benefit," because it was contained in a confidential manual which was not disseminated to its employees. Moreover, the court noted that the defendant had only granted severance pay in the past where employees, unlike the plaintiffs, had been terminated following the sale of a plant. Accordingly, the court found that the severance pay policy was not part of the contractual relationship between the defendant and the plaintiffs.³¹⁸

313. *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111 (1973).

314. *See, e.g.*, *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 107 Cal. Rptr. 111 (1973); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967).

315. *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360 (1967).

316. *Id.*

317. 173 Ind. App. 89, 362 N.E.2d 500 (1977).

318. *Id.* at 92-93, 362 N.E.2d at 503-04. The defendant's policy regarding severance pay was set forth in a manual which was only distributed to managerial personnel. In its application of the severance pay policy, the defendant had previously granted such pay in cases "where there were plant shut downs and no continua-

F. Contractual Rights to Bonuses

Courts have differed over the requisite consideration needed to support a promise to pay a bonus, because receipt of this benefit is often made contingent upon the satisfaction of certain conditions. Most courts agree that where bonuses are offered as an inducement for continued employment, an employee's continued services in reliance upon such an offer constitutes sufficient consideration to enforce the promise.³¹⁹ Under other circumstances, however, courts have held that bonus plans or the regular payment of bonuses to employees must be supported by additional and separate consideration in order to be

tion of employment. However, where there was a sale of a plant as a going concern with no break in the continuity of employment, severance pay was deemed inapplicable." *Id.* at 93, 352 N.E.2d at 503-04. Moreover, none of the plaintiffs testified at trial that they had continued their employment with the defendant in reliance on a promise of severance pay. *Id.* at 93-94, 362 N.E.2d at 504.

Similarly, in *Albertson v. Ralston Purina Co.*, 586 S.W.2d 776 (Mo. App. 1979), plaintiff-employees who continued in the purchaser's employ did not have a claim for severance pay where the defendant's severance pay policy was determined on a case-by-case basis and "paid only in *limited* and *exceptional* cases" involving an actual loss of employment. 586 S.W.2d at 779 (emphasis in original). The severance pay policy of the defendant provided, in pertinent part, as follows:

It is the policy of Ralston Purina Company to grant, in *limited* and *exceptional* cases, a gratuity to a separated employee. The purpose of this gratuity is to assist the former employee during a period of financial need as he bridges the gap between his former employment and his future employment.

Id. at 777 (emphasis in original).

Plaintiffs also alleged that, in addition to severance pay, they had been granted the right to purchase stock after their termination. The defendant's stock purchase policy provided that employees would receive one additional share of stock for every four they purchased. Based on the defendant's mandatory retirement age of 65, plaintiffs' claimed that they had a right to purchase stock until they reached that age. *Id.* at 778. In dismissing this claim, the court noted that provisions of the defendant's stock purchase policy were limited to employees of Purina and there were no provisions allowing former employees to avail themselves of this right. *Id.* at 780.

319. See, e.g., *Gustafson v. Lindquist*, 40 Ill. App. 3d 152, 351 N.E.2d 280 (1976) (bonus for continued employment is enforceable if employee is not already bound by contract for the extended period, i.e., employment was at-will); *Newberger v. Rifkind*, 28 Cal. App. 3d 1070, 104 Cal. Rptr. 663 (1972) (bonus is offer of unilateral contract which is accepted if employee continues in employment); *Brydges v. Coast Wide Land, Inc.*, 2 Wash. App. 223, 467 P.2d 209 (1970) (employee's continued employment was sufficient consideration to support bonus offer); *Thatcher v. Wasatch Chem. Co.*, 29 Utah 2d 189, 507 P.2d 365 (1973) (where employer had a policy to pay conservative salary and augment it with annual bonuses determined by employer's profits, employee's continued employment with expectation of annual bonuses was sufficient consideration to receive bonus in year that employer had large net profits).

an enforceable contract right.³²⁰ Without such consideration, these courts have held that a promise to pay a bonus is a mere gratuity to which an at-will employee is not entitled upon discharge.³²¹

In *Leone v. Precision Plumbing & Heating of Southern Arizona, Inc.*³²² plaintiff-employee brought a breach of contract action based on an alleged oral promise that he "would receive a bonus of one-half of the difference between the estimated and actual cost of a construction project."³²³ In affirming the judgment for plaintiff, the court held that the defendant's alleged promise of the bonus was supported by sufficient consideration. Although the court found that the defendant had bargained for plaintiff's "extra efforts" in order to receive the bonus, it concluded that plaintiff's "staying on the job attempting to gain the bonus constituted consideration supporting the bonus agreement."³²⁴

The regular payment of bonuses by an employer may constitute a past practice giving rise to an implied contractual obligation to continue the payment of the bonuses. In *Simon v. Riblet Tramway*

320. See, e.g., *Hobson v. Eaton*, 399 F.2d 781 (6th Cir. 1968), cert. denied, 394 U.S. 928 (1969) (in absence of contract or agreement, bonus without return promise by employees is a gratuity); *Church v. Harnit*, 35 F.2d 499 (6th Cir. 1929), cert. denied, 281 U.S. 732 (1930) (for employee to receive additional compensation or bonus, he must supply valuable services as consideration); *Mutual Sav. Life Ins. Co. v. Montgomery*, 347 So. 2d 1327 (Ala. 1977) (employer's promise to pay bonus upon a condition is not enforceable unless the condition is performed); *Meyerson v. New Idea Hosiery Co.*, 217 Ala. 153, 115 So. 94 (1927) (to be enforceable, employer's promise to pay bonus must be conditioned upon the doing of an act, the act must be performed and there must be sufficient consideration); *Management Search, Inc. v. Morgan*, 136 Ga. App. 651, 222 S.E.2d 154 (1975) (promise to pay bonus after parties had entered into a written contract establishing compensation was unenforceable where no change in hours, extra services, additional consideration was given). See generally Annot., 66 A.L.R.3d 1075 (1975); Annot., 43 A.L.R.3d 503 (1972).

321. See, e.g., *Cactus Feeders, Inc. v. Wittler*, 509 S.W.2d 934 (Tex. Civ. App. 1974) (employer frustrated employee's eligibility for bonus by discharging him 27 days before employee would have been entitled to such bonus); cf. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (employer discharged employee in bad faith to prevent him from obtaining certain commissions). See also *Sarama v. John Mee, Inc.*, 102 Misc. 2d 132, 422 N.Y.S.2d 582 (N.Y.C. Civ. Ct. N.Y. County 1979) (past consideration sufficient to support employer's promise of Christmas bonus).

322. 121 Ariz. 514, 591 P.2d 1002 (Ct. App. 1979).

323. *Id.* at 515, 591 P.2d at 1003.

324. *Id.* at 515-16, 591 P.2d at 1003-04. In addition to the oral bonus agreement, plaintiff's employment with the defendant was governed by a collective bargaining agreement. The defendant claimed that a private contract, such as the bonus agreement, between an employer and employee subject to a collective bargaining act violated the public policy underlying the NLRA. The court found that the defendant had waived this defense by not affirmatively pleading it as a defense and because the bonus agreement was not illegal on its face. *Id.* at 516, 591 P.2d at 1004.

Co.,³²⁵ for example, a Washington court found that the payment of a bonus over a ten-year period created an implied contractual obligation where the bonus constituted a substantial part of plaintiff's total compensation, even though the amount of the bonus was discretionary, not bargained for, and contingent upon the defendant's profits.³²⁶ Similarly, in *Thatcher v. Wasatch Chemical Co.*,³²⁷ the Supreme Court of Utah held that an employer's past practice of paying an annual bonus to deserving employees based on the company's annual income and profits created implied contractual rights where plaintiffs continued their employment with the understanding that their salaries would be augmented by such a bonus.³²⁸

As with other benefits, a written disclaimer may relieve an employer of its obligation to pay a bonus otherwise earned, if it clearly evinces an intention not to create an offer capable of acceptance. In the absence of an effective disclaimer, however, an employer cannot unilaterally revoke a bonus plan once an employee begins performance with knowledge of that plan.³²⁹ Courts have upheld provisions in bonus plans or employment contracts providing that an employee will lose an earned bonus if he quits, is discharged with cause or otherwise fails to satisfy a required condition for that benefit.³³⁰ An employer also may provide that an employee will lose his right to a

325. 8 Wash. App. 289, 505 P.2d 1291, *cert. denied*, 414 U.S. 975 (1973).

326. 8 Wash. App. at 293, 505 P.2d at 1293. In reaching its decision, the court noted that plaintiff-employee's salary was \$8,858.28, while the bonus was \$6,000. It relied on *Powell v. Republic Creosoting Co.*, 172 Wash. 155, 19 P.2d 919 (1933), where the bonus constituted up to 63% of the employee's stated salary. *See also* *SCOA Industries, Inc. v. Branchen*, 374 A.2d 263 (Del. 1977) (court specifically held that a year-end bonus amounted to "wages" under a Delaware statute—DEL. CODE ANN. tit. 19 § 1101(a)(2) (1974)—which defined "wages" as including commissions or other forms of compensation).

327. 29 Utah 2d 189, 507 P.2d 365 (1973).

328. *Id.* at 191, 507 P.2d at 366.

329. *See, e.g.*, *Calkins v. Boeing Co.*, 8 Wash. App. 347, 349, 506 P.2d 329, 330 (1973); *see generally* *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 150 A.2d 607 (1958).

330. *See, e.g.*, *Hainline v. General Motors Corp.*, 444 F.2d 1250 (6th Cir. 1971) (employee who quit lost undistributed portion of previously awarded bonuses, but employee who is involuntarily terminated without cause is entitled to bonus); *Keefner v. Super X Drugs of Ill. Inc.*, 21 Ill. App. 3d 394, 315 N.E.2d 35 (1974) (provision in employment contract that employee would lose bonus if discharged with cause or quits); *Tobin v. General Motors Corp.*, 17 Mich. App. 475, 169 N.W.2d 644 (1969) (employee who quit to work for rival auto manufacturer lost bonus where employer's stock option and bonus plan provided that employee would lose bonus if he engaged in competitive activities); *Walker v. American Optical Corp.*, 265 Or. 327, 509 P.2d 439 (1973) (employee who quit was not entitled to semi-annual bonus under employer's "sales incentive plan").

bonus if he quits or is discharged for cause before the specific date on which the bonus is fully accrued or is otherwise payable.³³¹

In *Lucian v. All States Trucking Co.*³³² plaintiff-employees who were voluntarily retired executives of the defendant-company sought to receive a pro-rata share of the defendant's profits under company bonus "incentive plans." For certain employees, this bonus was payable in full at the end of the calendar year and subject to the following provision:

An employee who voluntarily leaves the Company will not be entitled to any further or year end payments under the Plan.³³³

The plans also provided that employees discharged by the company or transferred to another location before the bonus calculation date would receive a pro-rata share of the incentive bonus. The court rejected plaintiffs' claims that the provisions of the incentive plans were ambiguous and held that it was "the prevailing view that where a definite bonus or profit-sharing plan has been established and forms part of the employment contract, the employee is not entitled to share in the proceeds where he leaves the employment voluntarily. . ."³³⁴ prior to the date on which the bonus becomes payable. The court concluded that the incentive plans were not offered as an inducement for continued employment and, as such, did not fall within an exception to this general rule.³³⁵

A similar result was reached in *Compton v. Shopko Stores Inc.*,³³⁶ where an executive employee was deprived of a bonus because he had been *discharged* for good cause prior to the eligibility date for the

331. See, e.g., *Lucian v. All States Trucking Co.*, 116 Cal. App. 3d 972, 171 Cal. Rptr. 262 (1981) (employer not liable where employee quit before date on which bonus was payable); *Brydges v. Coast Wide Land, Inc.*, 2 Wash. App. 223, 467 P.2d 209 (1970) (employment contract may provide that bonus is lost if employee quits or is discharged before the end of specific time period in which bonus is payable).

332. 116 Cal. App. 3d 972, 171 Cal. Rptr. 262 (1981).

333. *Id.* at 974, 171 Cal. Rptr. at 263. Other employees were subject to the following provision: "An employee who voluntarily leaves the Company will receive his incentive check providing he works the entire accounting period following the period in which his check was earned." *Id.* Bonuses subject to this provision were partially payable at the end of the quarter with the balance due at the end of the year.

334. *Id.* at 975-76, 171 Cal. Rptr. at 264, citing *Peterson v. California Shipbuilding Corp.*, 80 Cal. App. 2d 827, 183 P.2d 56 (1947) and *Kassab v. Ragnar Benson, Inc.*, 254 F. Supp. 830 (W.D. Pa. 1966).

335. 116 Cal. App. 3d at 976, 171 Cal. Rptr. at 264, citing *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 291 P.2d 91 (1955) (benefits create enforceable rights where they are part of the inducement offered to an employee for his initial or continued employment).

336. 93 Wis. 2d 613, 287 N.W.2d 720 (1980).

bonus.³³⁷ Under the employer's non-contributory "executive bonus plan," qualified executives were required to be employed at the end of the fiscal year in order to share in the company's profits. The Supreme Court of Wisconsin held that the executive was not entitled to the bonus because his employment was terminated for good cause, he performed no services for the employer after the date of his discharge, and his receipt of severance pay on the last day of the fiscal year did not extend his employment to that date for the purposes of the bonus plan.³³⁸

G. Commissions

As a general rule, commissions are considered to be earned when a sales order is accepted or otherwise placed with an employer.³³⁹ An employee's right to an earned commission is not affected by a deferral in the payment of the commission until the date of shipment of the sales order³⁴⁰ or by the employee's termination of employment prior to the consummation of the transaction in question.³⁴¹ Nevertheless, the parties to an at-will relationship may alter the general rule that a commission is earned when an order is placed, by agreeing either in writing or by conduct, to a different compensation scheme.³⁴²

Commission rates may be unilaterally modified by employers in at-will situations, provided that notice of the changed rates is given to the affected employees. Where employees have received notice of a modification in their commission rates, their only alternatives are to

337. The executive was discharged because "his performance was substandard," he "[l]acked leadership qualities," and the sales of his department were below the company's budget. *Id.* at 618, 287 N.W.2d at 722.

338. *Id.* at 619-21, 287 N.W.2d at 723-24. The *Compton* court, in support of its holding, cited several other cases which also have held that employees discharged for cause prior to the eligibility date for a bonus are not entitled to receive that benefit. *Id.* at 627, 287 N.W.2d at 727, citing *Croskey v. Kroger Co.*, 259 S.W.2d 408 (Mo. App. 1953); *Molburg v. Hunter Hosiery, Inc.*, 102 N.H. 422, 158 A.2d 288 (1960); *Watwood v. Potomac Chem. Co.*, 57 N.J. 631, 42 A.2d 728 (1945).

339. *See, e.g.*, *Oken v. National Chain Co.*, ___ R.I. ___, 424 A.2d 234, 235 (1981).

340. *See, e.g.*, *Richer v. Khoury Bros., Inc.*, 341 F.2d 34 (7th Cir. 1965) (applying Illinois law); *Weick v. Rickenbaugh Cadillac Co.*, 134 Colo. 283, 303 P.2d 685 (1956); *Oken v. National Chain Co.*, ___ R.I. ___, 424 A.2d 234 (1981). *See generally* 9 S. WILLISTON, CONTRACTS, § 1017C (3d ed. 1967).

341. *See, e.g.*, *Calvo v. Calhoon*, 559 P.2d 111 (Alas. 1977); *Peach State Ford Truck Sales, Inc. v. Davis*, 151 Ga. App. 7, 258 S.E.2d 678 (1979); *Lundeen v. Cozy Cab Mfg. Co.*, 288 Minn. 98, 179 N.W.2d 73 (1970).

342. *Keneally v. Orgain*, ___ Mont. ___, 606 P.2d 127 (1980); *Oken v. National Chain Co.*, ___ R.I. ___, 424 A.2d 234 (1981).

accept the new rates or quit.³⁴³ Employees who continue their employment with notice of a modification are deemed to have accepted the changed rates.³⁴⁴ The employee's continued services constitute the requisite consideration needed to support the modification.³⁴⁵

In *Oken v. National Chain Co.*³⁴⁶ the Supreme Court of Rhode Island held that an at-will salesman's continued employment after receiving notice of a modification in his commission rates on May 8, 1974 constituted an acceptance of the changed rates, even where the changes in question were made effective retroactive to January 1, 1974. Citing *Fortune v. National Cash Register Co.*,³⁴⁷ the court found that there was no evidence of bad faith or coercion by the defendant in effectuating the modification, because the defendant's decision was "a business judgment based upon a dramatic increase in the price of metals."³⁴⁸ The *Oken* court did hold, however, that the salesman was entitled to commissions for sale orders made prior to his departure from the defendant's company, even though the goods were shipped and paid for after his last date of employment.³⁴⁹

The right to commissions also may be made subject to "forfeiture for competition" clauses. This type of provision, unlike anti-competitive covenants, provides for the forfeiture of a benefit should the employee decide to work for a competitor of his employer and is, in effect, a condition precedent to an employee's entitlement to a commission.³⁵⁰ Anti-competitive covenants, on the other hand, seek to

343. See, e.g., *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961); *Oken v. National Chain Co.*, ___ R.I. ___, 424 A.2d 234 (1981); but see *Simpson v. Norwesco, Inc.*, 442 F. Supp. 1102 (D.S.D. 1977) (modification of written commission schedule required mutual consent).

344. *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17 (1st Cir. 1961); *Oken v. National Chain Co.*, ___ R.I. ___, 424 A.2d 234 (1981).

345. See generally 1 A. CORBIN, CONTRACTS § 136 (1963); 1 S. WILLISTON, CONTRACTS § 135A (3d ed. 1957).

346. ___ R.I. ___, 424 A.2d 234 (1981).

347. 373 Mass. 96, 364 N.E.2d 1251 (1977); for a discussion of *Fortune*, see notes 126-32 *supra* and accompanying text.

348. ___ R.I. at ___, 424 A.2d at 237.

349. 424 A.2d at 235-36. The court stated that if the defendant wanted to make plaintiff's right to commissions contingent upon the shipment of goods, "it could have provided for such a contingency in clear and unambiguous language." *Id.* Moreover, the court noted that the defendant's practice of paying plaintiff his commissions at the time of shipment was merely a manifestation of its accounting procedures. *Id.* at 236, citing *Weick v. Rickenbaugh*, 134 Colo. 283, 288-89, 303 P.2d 685, 688 (1956).

350. See, e.g., *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *Shandor v. Wells Nat'l Serv. Corp.*, 478 F. Supp. 12 (N.D. Ga. 1979); *Sheppard v. Columbus Packaging Co.*, 146 Ga. App. 202, 245 S.E.2d 887 (1978); *Kristt v. Whelan*, 4 A.D.2d 195, 164 N.Y.S.2d 239 (1st Dep't 1957), *aff'd*, 5 N.Y.2d 807, 155 N.E.2d 116, 181 N.Y.S.2d 205 (1958).

prevent employees from directly competing with their employers both during and after the term of employment within a specified time period and area.³⁵¹ Courts have not enforced either type of provision, however, where it constituted an unreasonable restraint on trade.³⁵²

The distinction between forfeiture for competition clauses and anti-competitive covenants was relied on by the court in *Shandor v. Wells National Service Corp.*,³⁵³ where plaintiff-salesman's claims for commissions for sales made prior to his resignation were denied. Under the terms of his employment with the defendant, plaintiff was subject to the following "Ground Rules" provision:

In the event of early retirement, Resignation or Termination and subsequent employment by a competitor, no further compensations will be paid after the date of such employment.³⁵⁴

Plaintiff, who had voluntarily left the employ of the defendant to work for a competitor, claimed that this provision was an unlawful restrictive covenant not to compete, because it was "too general as to time and territory and . . . impose[d] too great a restriction in that the plaintiff [was] forbidden to work in *any* capacity for a competitor." ³⁵⁵ In rejecting plaintiff's claims, the *Shandor* court characterized the "Ground Rules" provision as a valid forfeiture clause and not as an unduly restrictive anti-competitive covenant. Citing cases which recognized the distinction between the two types of provisions,³⁵⁶ the court upheld the "Ground Rules" provision as a lawful condition precedent to plaintiff's right to receive commissions.

Various standards have been used by courts in determining whether forfeiture clauses were unreasonable restraints on trade.³⁵⁷ Aside

351. See, e.g., *Shandor v. Wells Nat'l Serv. Corp.*, 478 F. Supp. 12 (N.D. Ga. 1979); *Cheney v. Automatic Sprinkler Corp. of Am.*, ___ Mass. ___, 385 N.E.2d 961 (1979); *Chemical Fireproofing Corp. v. Bronska*, 542 S.W.2d 74 (Mo. 1976).

352. See notes 353-65 *infra* and accompanying text for a discussion of the validity of forfeiture clauses. Most jurisdictions will uphold anti-competitive covenants if they are reasonable as to time and area limitations. Nevertheless, such covenants are generally disfavored in the law because they tend to restrict competition. See generally *Shandor v. Wells Nat'l Serv. Corp.*, 478 F. Supp. 12, 14 (N.D. Ga. 1979).

353. 478 F. Supp. 12 (N.D. Ga. 1979).

354. *Id.* at 13. (emphasis in original).

355. *Id.* at 14.

356. *Id.* at 14-15, citing *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *Sheppard v. Columbus Packaging Co.*, 146 Ga. App. 202, 245 S.E.2d 887 (1978); *Brown Stove Works, Inc. v. Kimsey*, 119 Ga. App. 453, 167 S.E.2d 693 (1969).

357. See generally Comment, *Forfeiture of Pension Benefits for Violation of Covenants Not to Compete*, 61 NW. U. L. REV. 290 (1966); 6 A. CORBIN, CONTRACTS § 1396 (1962); 14 S. WILLISTON, CONTRACTS § 1643 (3d ed. 1972).

from the statutory limitations on these clauses,³⁵⁸ the majority view appears to be that forfeiture clauses are enforceable without regard to the reasonableness of the restraint on the affected employee.³⁵⁹ Some courts, however, have utilized a reasonableness test based on the circumstances of the parties' relationship to enforce forfeiture clauses only to the extent that they are reasonable,³⁶⁰ while others have held that unreasonably broad clauses are invalid and not subject to judicial modification.³⁶¹

In *Cheney v. Automatic Sprinkler Corp. of America*³⁶² the Supreme Judicial Court of Massachusetts adopted the reasonableness test to determine the validity of forfeiture clauses by stating that it "would enforce a forfeiture of deferred compensation only to the extent the restraint is reasonable."³⁶³ Among the factors which the court said it would consider in making such a determination are the "amount and nature of the forfeiture and the nature of the employee's duties and responsibilities in his former and current employment. . . ."³⁶⁴ The court noted that it had previously used the same standards to enforce anti-competitive covenants "only to the extent that the restraint is reasonable in time and place and necessary to protect the former employer's trade secrets, confidential information, or good will."³⁶⁵

358. The provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1053(a) (1976), for example, have been interpreted to prohibit the forfeiture of accrued retirement benefits where an employee goes to work for a competitor. *See, e.g.,* *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977); *Cheney v. Automatic Sprinkler Corp. of Am.*, ___ Mass. ___, 385 N.E.2d 961, 964 n.5 (1979).

359. *See, e.g.,* *Rochester Corp. v. Rochester*, 450 F.2d 118 (4th Cir. 1971); *Woodward v. Cadillac Overall Supply Co.*, 396 Mich. 379, 240 N.W.2d 710 (1976); *see generally* Annot., 18 A.L.R.3d 1246 (1968).

360. *See, e.g.,* *Food Fair Stores, Inc. v. Greeley*, 264 Md. 105, 285 A.2d 632 (1972); *Cheney v. Automatic Sprinkler Corp. of Am.*, ___ Mass. ___, 385 N.E.2d 961 (1979); *Lavey v. Edwards*, 264 Or. 331, 505 P.2d 342 (1973).

361. *See, e.g.,* *Almers v. South Carolina Nat'l Bank of Charleston*, 265 S.C. 48, 217 S.E.2d 135 (1975); *Union Cent. Life Ins. Co. v. Balistreri*, 19 Wis. 2d 265, 120 N.W.2d 126 (1963).

362. ___ Mass. ___, 385 N.E.2d 961 (1979).

363. ___ Mass. at ___, 385 N.E.2d at 965 (footnote omitted).

364. *Id.* In *Cheney* plaintiff-salesman claimed that he was entitled to certain incentive payments and bonuses under his compensation agreement with the defendant. The agreement in question provided in pertinent part:

One who is discharged for cause, terminates his employment, *joins a competitor*, or engages in activities which are harmful to the Corporation, *will forfeit all installments which remain unpaid on the date of the occurrence of any of such events.*

Id. at 963 (emphasis added). Based on its adoption of the reasonableness test, the *Cheney* court allowed plaintiff to amend his complaint to allege facts establishing that the provision in question was an unreasonable restraint on him. *Id.* at 966.

365. *Id.* at 965, *citing* *New England Canteen Serv. Inc. v. Ashley*, 372 Mass. 671, 363 N.E.2d 526 (1977).

IX. Conclusion

Despite the continued adherence to the at-will rule, considerations of public policy appear to warrant the recognition of exceptions to that rule where employees are discharged for promoting a public interest to the disadvantage of their employers. The difficulties, however, in adopting a well defined exception based on such considerations are readily apparent. Courts, in an attempt to establish the parameters of the public policy exception, have examined various criteria without reaching an accord on a standard definition. Some courts, for example, have sought to limit the application of this exception to violations of clear mandates of public policy as expressed in federal or state law, while others have decided on a case-by-case basis whether general considerations of public policy were somehow offended by a particular discharge. On the other hand, the majority of jurisdictions have either rejected or declined to adopt such limitations on the at-will rule irrespective of the public interests involved.

The divergent views of the courts with respect to the limitations on the at-will rule have failed to establish a uniform approach toward balancing the interests of parties to employment relationships with considerations of public policy. This failure in itself contravenes the public policy expressed in federal and state law of promoting harmonious labor relations in the best interests of the economic system as well as the public welfare. The establishment, however, of a public policy exception does not require the abandonment, in whole or substantial part, of the at-will rule. As certain courts have recognized, there are equally important considerations for preserving that rule in order to allow employers to operate their businesses *efficiently* and *profitably*. Discharges of employees in retaliation for promoting public interests or availing themselves of statutory rights would *not* be among these considerations.

Moreover, the adoption of a public policy exception should not be in effect the creation of a "just cause" standard. Such a standard has invariably been a contractual right and not an expression of public policy. Indeed, the provisions of the NLRA and Title VII have been interpreted to allow employers to discharge without cause, provided that the mandates of these laws were not somehow violated. Although most collective bargaining agreements contain "just cause" limitations on the right of employers to discharge summarily, the adoption of these limitations has been the result of collective bargaining rather than statutory mandate. In any event, at-will employees also may have a contractual right to a "just cause" termination where they have continued their employment in reliance upon an assurance of job security.

In adopting a uniform approach to wrongful discharge cases, courts should first examine the terms and conditions of the at-will relationship as defined by the agreement of the parties to determine if the matter can be resolved without resort to considerations of public policy. Courts should, therefore, decide whether an at-will employee is entitled to a "just cause" termination under his employer's personnel policies or, where deprivation of a benefit is claimed, whether the employee has a contractual right to the benefit in question. Where employees do have contractual rights to job security or benefits, courts should not allow employers to deprive employees of these rights in bad faith. In the absence of such contractual obligations, however, the at-will rule should remain intact.

In cases which cannot be resolved by the agreement of the parties, the courts should look to federal or state statutes to see whether they provide adequate remedies for the discharged employee. Where statutory remedies are available, courts should not usurp the legislative function by allowing a private cause of action. In this regard, courts should be wary of employees who seek to avoid an available statutory cause of action by suing at common law after the relevant statute of limitations has expired.

In the absence of statutory remedies, the courts should utilize the public policy exception to determine whether a particular discharge was in contravention of the public welfare. In adopting the public policy exception, however, courts should recognize overriding public interests which warrant the limitation of the ability of *all* employers, not just those in at-will relationships, to discharge employees summarily in contravention of the public welfare. Based on the apparent difficulties in defining public policy, courts should limit such an exception to clearly articulated public interests as expressed in federal or state law. Courts should not formulate public policy on an *ad hoc* basis, thereby unduly restricting both employers and employees in the exercise of their respective rights. Rather, the establishment of public policy limitations on the right of employers to discharge employees summarily should be a function of federal and state legislatures.

A uniform approach to wrongful discharge cases would accomplish a dual purpose: it would preserve the at-will rule and give employers the freedom to control their businesses, while affording employees a measure of protection against wrongful discharges. Moreover, the recognition of an express public policy exception would reconcile the interests of the public with the interests of the parties in employment relationships.