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Charles A. Brake, Jr.

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Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?

I. INTRODUCTION

Employees in this country fall into two basic categories: those who are employed in the public sector and those who are employed in the private sector. Workers in the private sector may be further divided according to whether or not they work under a collective bargaining agreement. These distinctions are especially important when determining the protections available to discharged employees. Discharges of public employees are governed by civil service provisions, which generally allow dismissal of a public employee only for "just cause."¹ Public employees also enjoy constitutional protection from unjust dismissals.² Employees in the private sector who are covered by collective bargaining agreements also usually are protected from termination by "just cause" provisions in their union negotiated contracts.³ Workers in the private sector who are not covered by these agreements are not guaranteed any protection comparable to that afforded public employees or unionized employees. Instead they must negotiate their employment contracts individually if they wish to obtain protection from arbitrary dismissals. Absent such protection, the employee risks that a court will characterize his contract as terminable at will.

Contracts terminable at will can arise in two situations. The contract may expressly state that it is terminable at will, or the contract may fail to state that it is for a definite duration. In the latter case the employment at will doctrine may be applied.⁴ The

1. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 & n.1 (1980).

2. *Id.*

3. *Id.*

4. American courts have adopted at least three different approaches to interpret contracts for an indefinite duration. The majority of courts will apply the doctrine of at will employment and find the contracts terminable at will. See note 5 *infra* and accompanying text. For a discussion of the other approaches, see note 30 *infra*.

This Note follows the common practice of referring to this doctrine as the employment at will doctrine, the terminable at will doctrine, and the at will doctrine. The employment contract in this context is referred to as a contract terminable at will, an at will contract, and an employment at will contract. Similarly, this Note refers to the employee under such an arrangement as a terminable at will employee and an at will employee. In all instances, these characterizations refer to the employment at will doctrine and its role in defining the

doctrine states that an employment contract for an indefinite term is considered a contract terminable at will by either party unless some other provision in the contract limits the right of either party to terminate.⁵

The number of employees in this country who could be fired at will is enormous. In 1976 approximately sixty to sixty-five percent of a nonagricultural workforce of eighty million was employed under employment contracts terminable at will.⁶ Based on figures released by the Federal Mediation and Conciliation Service, one commentator has estimated that between 6000 and 7500 employees under contracts terminable at will are discharged each year for reasons that arbitrators would find unjustifiable.⁷

Although the employment at will doctrine has been a part of employment relationships since the late nineteenth century,⁸ it has received much criticism in recent years⁹ and exceptions to this rule

rights of employers and employees as first articulated by H.G. Wood in 1877. See text accompanying note 28 *infra*.

5. The RESTATEMENT (SECOND) OF AGENCY § 442 (1958) defines the doctrine of at will employment: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events."

9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. W. Jaeger 1967) (footnotes omitted) states,

Where the contract is not for a fixed term, and is, therefore, terminable at will, though such notice as the nature of the contract made reasonable might be necessary, there seems no general principle analogous to that in the law of tenancies at will requiring notice of a certain length of time.

See RESTATEMENT OF CONTRACTS § 32, Illustration 1 (1932). See also, 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1960); RESTATEMENT OF CONTRACTS § 246 (1932).

For cases holding that an employment contract is terminable at will, see Annot., 62 A.L.R.3d 271 (1975).

6. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-9 (1979).

7. *Id.* at 9-10.

8. H.G. Wood articulated the rule in his treatise on master-servant relationships. H. WOOD, MASTER AND SERVANT § 134 (2d ed. 1886); see text accompanying note 28 *infra*.

9. See, e.g., Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *supra* note 6; Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481 (1976); Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22d ANNUAL CONFERENCE ON LABOR 171 (1970); Comment, *Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981) [hereinafter cited as *Wrongful Discharge*]; Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.-KENT L. REV. 697 (1981) [hereinafter cited as *Job Security*]; Note, *supra* note 1; Comment, *Limiting the Employer's Absolute Right of Discharge: Can Kansas Courts Meet the Challenge?*, 29 KAN. L. REV. 267 (1981) [hereinafter cited as *Absolute Right*]; Note, *Implied Contract Rights to Job Security*, 26

have developed. For example, legislatures have passed numerous laws that protect employees from discharge.¹⁰ Beyond specific statutory exceptions to the terminable at will rule, many state courts have developed a public policy exception that restricts the employer's common-law right to dismiss his employees at will.¹¹ By

STAN. L. REV. 335 (1974) [hereinafter cited as *Implied Contract*].

10. For example, the National Labor Relations Act of 1935, 29 U.S.C. §§ 157, 158(a)(3) (1976), prohibits discharges in retaliation for union organizing activity. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976), prohibits employee terminations which discriminate on the basis of race, color, religion, sex, or national origin. Specific federal protections against retaliatory discharges include the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (prohibiting discharges of those whose wages are garnished for indebtedness); the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1976) (discharge of those exercising rights under the Act is illegal); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1976) (protecting older workers from retaliatory discharge); the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1976) (illegal to discharge anyone exercising rights under the Act); 38 U.S.C. § 2021 (1976) (granting returning veterans the right to return to former job and prohibiting discharge for one year).

State legislatures have also provided some protection for at will employees. Several states have statutes prohibiting discharges based upon political activity. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1975). For a collection of state laws regarding firing for political activity, see [1980] LAB. L. REP. (CCH) (State Laws) ¶ 43,045. Some states prohibit discharges because of physical handicaps. *See, e.g.*, CAL. LAB. CODE § 1420(a) (West Supp. 1981); MASS. ANN. LAWS ch. 149, § 24K (Michie/Law. Co-op 1976); MINN. STAT. ANN. § 363.03, Subd. 1(2) (West Supp. 1981). A few states do not permit employers to take action against employees for serving as jurors or for indicating their availability as jurors—*e.g.*, Idaho, Massachusetts, Michigan, North Dakota, Vermont. For a collection of state laws regarding dismissal for serving on a jury, see [1980] LAB. L. REP. (CCH) (State Laws) ¶¶ 43,035, 43,055. Other states prohibit discharges for refusal to take a lie detector test—*e.g.*, Connecticut, Hawaii, Idaho, Maryland, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington. For a collection of relevant state laws, see [1980] LAB. L. REP. (CCH) (State Laws) ¶ 43,055. Another common provision in state laws is a prohibition against retaliatory discharge for filing a workers' compensation claim. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980). *See also* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 3 (1966); Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U.L. REV. 907 (1967).

11. Courts in at least 12 states have adopted the public policy exception to the at will doctrine. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. App. 1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

Courts in at least 13 states have indicated that they might adopt the public policy exception to the at will doctrine under appropriate facts. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978);

creating a public policy exception to this doctrine, these courts have recognized causes of action for wrongful discharge¹² by workers formerly employed under terminable at will contracts.¹³ Discharges that these courts have subjected to the public policy exception are of four types:¹⁴ (1) discharges for refusing to violate a criminal statute;¹⁵ (2) discharges for exercising a statutory right;¹⁶ (3) discharges for fulfilling a statutory duty;¹⁷ and (4) discharges in violation of a general public policy.¹⁸ Most critics of the employment at will doctrine have praised these exceptions to the common-law rule and have encouraged the courts to abolish the rule. One of the justifications for these exceptions most often asserted by critics of the doctrine is the need to protect the employee who does not have bargaining power equal to that of his employer.¹⁹ Terminable at will employees in the private sector are undoubtedly vulnerable to unredressed wrongful discharges. Nevertheless, courts should avoid further expansion of the public policy exception to the employment at will doctrine because of the adverse ef-

Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Scrogan v. Kraftco Corp., 551 S.W.2d 811 (Ky. App. 1977); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

Courts in only four states have specifically rejected the public policy exception to the at will doctrine. Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980); Catania v. Eastern Airlines, Inc., 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).

12. While some courts state that a cause of action in this situation is for "wrongful discharge," other courts use the terms "unfair discharge" or "retaliatory discharge." Throughout this Note these terms are used interchangeably.

13. See part III *infra*. This Note does not differentiate between whether an employee's cause of action for his discharge lies in contract or in tort. The distinction can be important because under a tort theory the employer could be liable for punitive damages. For a discussion of the different natures of the employee's claims, see *Wrongful Discharge, supra* note 9, at 740-42 and cases cited therein; Note, *supra* note 1, at 1843-44.

14. The public policy exception cases were first broken down into these four categories in *Wrongful Discharge, supra* note 9, at 730.

15. See notes 45-47 *infra* and accompanying text.

16. See notes 48-57 *infra* and accompanying text.

17. See notes 58-69 *infra* and accompanying text.

18. See notes 70-110 *infra* and accompanying text.

19. See, e.g., Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). See also Blackburn, *Restricted Employer Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Blades, *supra* note 9; Job Security, *supra* note 9; Note, *supra* note 1; *Absolute Right, supra* note 9; *Implied Contract, supra* note 9.

fects that such expansion may have on the employer-employee relationship, productive efficiency, and the judicial process.

This Note examines the extent to which courts should apply the public policy exception to abrogate the common-law right of an employer to terminate at will. Although some limits must be placed upon employers in order to protect those employees who lack adequate bargaining power, this Note proposes that the courts should strike a balance among the interests of the employer, the employee, and society. This balance can be achieved by limiting the public policy exception to those instances in which an employee is discharged in contravention of a legislatively articulated public policy. This approach would achieve equitable results since both employers and employees would be on notice of clearly defined reasons for which an employee absolutely may not be discharged.

Part II of this Note traces the development of the at will doctrine in this country. The next part discusses the judicially created public policy exception. Part IV examines the ramifications of the use of the public policy exception upon employers. Finally, in part V this Note proposes an approach that will accommodate the interests of both the employee and the employer.

II. HISTORICAL DEVELOPMENT

Under the common law, if a contract for employment specified its duration the courts would enforce the intentions of the parties regarding the length of the employment.²⁰ If the employer retained the employee beyond the original term the courts usually implied a renewal for an identical period.²¹ If the contract, however, failed to set forth the duration of the employment, the courts determined the rights of the employer and the employee.

The rights of the employer and the employee under the English common law evolved from the Statute of Labourers, which provided that "no master can put away his servant"²² and that ap-

20. See, e.g., *Egbert v. Sun Co.*, 126 F. 568 (E.D. Pa. 1903); *Jones v. Graham & Morton Transp. Co.*, 51 Mich. 539, 16 N.W. 893 (1883); *Linton v. Unexcelled Fire-Works Co.*, 124 N.Y. 533, 27 N.E. 406 (1891). See also C. LABATT, *MASTER AND SERVANT* § 159 (2d ed. 1913).

21. See, e.g., *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 A. 176 (1887); *Fitch v. Martin*, 74 Neb. 538, 104 N.W. 1072 (1905); *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891); *Kelly v. Cartbage Wheel Co.*, 62 Ohio St. 598, 57 N.E. 984 (1900); *Norfolk Hosiery & Underwear Mills Co. v. Westheimer*, 121 Va. 130, 92 S.E. 922 (1917). See also Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942).

22. 1 W. BLACKSTONE, *COMMENTARIES* 425 (1969).

prentices could be discharged only "on reasonable cause."²³ The English courts carried forward the spirit of the Statute of Labourers after its repeal by presuming that a general hiring²⁴ was intended to serve as an employment contract for one year.²⁵ If the employment continued for longer than one year the relationship could be terminated only at the end of an additional year.²⁶ The early American courts adopted the English approach.²⁷ In the late 1800s, however, American law departed from this approach, and the United States courts developed their own common-law rule for determining the duration of a disputed employment contract.

In 1877 H.G. Wood's treatise on master-servant relationships articulated what became the American employment at will doctrine:

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.²⁸

Although the basis of "Wood's Rule" has been persuasively challenged,²⁹ it has become the primary doctrine governing employment duration in this country.³⁰ Commentators suggested that one

23. *Id.* at 426.

24. The English term "general hiring" is the equivalent of the American term "indefinite hiring"—an employment relationship with no specific duration. Annot., 11 A.L.R. 469 (1921).

25. C. LABATT, *supra* note 20, § 156. *See, e.g.,* Fawcett v. Cash, 110 Eng. Rep. 1026 (K.B. 1834); 1 W. BLACKSTONE, *supra* note 21, at 425.

26. Beeston v. Collyer, 130 Eng. Rep. 786 (C.P. 1827).

27. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE, 133 (1969). *See, e.g.,* Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891); Davis v. Gorton, 16 N.Y. 255 (1857); Bascom v. Shillito, 37 Ohio St. 431 (1882).

28. H. WOOD, *supra* note 8, § 134.

29. Wood cited three cases which supposedly supported his rule: Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); De Briar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870). H. WOOD, *supra* note 8, § 136, at 283 n.5. Commentators have severely questioned the soundness of this support. *See, e.g.,* Summers, *supra* note 9, at 485; Job Security, *supra* note 9, at 699-700; Implied Contract, *supra* note 9, at 341 nn.53 & 54.

30. Annot., *supra* note 24, at 470. *See also* C. LABATT, *supra* note 20, § 159. The leading early case citing Wood's Rule is Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895). *See also* Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908); Haney v. Caldwell, 35 Ark. 156 (1879); Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1889); Greer v. Arlington Mills Mfg. Co., 17 Del. (1 Penne.) 581, 43 A. 609 (1899); Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 N.W. 585 (1902); Louisville & N.R.R. v. Harvey, 99 Ky. 157, 34 S.W. 1069 (1896); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A. 176 (1887); Sullivan v. Detroit, Y. & A.A. Ry., 135 Mich. 661, 98 N.W. 756 (1904); Finger v. Koch &

of the reasons the common-law courts in this country adopted Wood's Rule so swiftly was to facilitate economic and industrial development during the industrial revolution³¹ in accordance with the prevalent economic ideology of *laissez faire* and freedom of

Schilling Brewing Co., 13 Mo. App. 310 (1883); Capron v. Strout, 11 Nev. 304 (1876).

Although they did not prevail, two other approaches to the employment of indefinite duration question appeared in the early American cases. The first of these approaches found the contractual rate of compensation for the employee to be determinative of the intended duration of the employment. A stipulation of pay in terms of a fixed amount per week, month, year, or other period furnished the basis for an inference that the employment was for a definite term equal to the pay period. *See, e.g.*, 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); Magarahan v. Wright & Lamkin, 83 Ga. 773, 10 S.E. 584 (1889); Alkire v. Orchard Co., 79 W. Va. 526, 91 S.E. 384 (1917). This analysis has also appeared in more recent cases. *See, e.g.*, Lowenstein v. President & Fellows of Harvard College, 319 F. Supp. 1096 (D.C. Mass. 1970) (applying Massachusetts law) (annual pay is some evidence supporting finding of definite term employment); Sandt v. Mason, 208 Ga. 541, 67 S.E.2d 767 (1951) (weekly pay indicates definite employment for one week). *But cf.* Atwood v. Curtiss Candy Co., 22 Ill. App. 2d 369, 161 N.E.2d 355 (1959) (the period for which compensation is to be earned does not, by itself, create a presumption that the parties intended the hiring to be for other than an indefinite period); Justice v. Stanley Aviation Corp., 35 Colo. App. 1, 530 P. 2d 984 (1974) (same). The rationale behind this first approach—that the intent of the parties is reflected in the units of time when compensation is made—simply does not withstand analysis. One who chooses to be paid bi-weekly rather than monthly probably does so simply to spread out one's flow of income. Likewise, the employer probably chooses a payment scheme simply to facilitate his accounting procedures. It is doubtful that either party's choice of pay periods reflects an intention regarding the duration of the employment contract. This approach represents a judicial attempt to avoid the harshness of the employment at will rule, not an adequate solution that carefully balances the interests of the parties involved.

A second alternative approach employed by some early courts considered the circumstances surrounding the employment to determine the parties' intent regarding the duration of employment. The early leading cases espousing this approach include Smith v. Theobald, 86 Ky. 141, 5 S.W. 394 (1887); Maynard v. Royal Worchester Corset Co., 200 Mass. 1, 85 N.E. 877 (1908); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Bascom v. Shillito, 37 Ohio St. 431 (1882). To determine the intentions of the parties the courts applying this approach look for distinguishing features in the contract and provisions or considerations beyond the services to be rendered. Among the elements found by these courts to reflect the intentions of the parties that a contract not be at will are the following: the length of time for which the employee has worked for his employer, Prussing v. General Motors Corp., 403 Mich. 366, 269 N.W.2d 181 (1978), and an employer's promises of job security, which could have been relied upon by the employee to his detriment, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). For other cases applying this minority approach, see Littell v. Evening Star Newspaper Co., 120 F.2d 36 (D.C. Cir. 1941); Drzewiecki v. H&R Block, Inc., 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972). *See also* 3A A. CORBIN, CORBIN ON CONTRACTS § 684 (1960). This approach is not analyzed in this Note because it, like the first approach, is a means of avoiding the finding that a contract is terminable at will and of providing the courts a pretext with which to establish a specific duration for the employment contract. The focus of this Note is on how courts have limited the employer's ability to terminate *after* it has been established that an at will contract exists.

31. *See, e.g.*, Summers, *supra* note 9, at 484-86; *Job Security*, *supra* note 9, at 700; Note, *supra* note 1, at 1824-36; *Absolute Right*, *supra* note 9, at 268; *Implied Contract*, *supra* note 9, at 342-43, 346-47.

contract. Within this framework Wood's Rule seemed equitable: terminable at will employment provided the employer the flexibility to control his workplace through the unfettered power to discharge at will and the employee the freedom to resign if he found more favorable employment or if working conditions became intolerable.

The terminable at will concept became so important that it took on constitutional dimensions. In *Adair v. United States*³² the United States Supreme Court struck down a federal statute that barred the discharge of a railroad employee for union membership on the grounds that the statute interfered both with the liberty to contract and with property rights guaranteed by the fifth amendment.³³ Seven years later in *Coppage v. Kansas*³⁴ the Court, relying on *Adair*, declared that a Kansas statute which prohibited employers from demanding, as a condition of employment, that their employees not be members of unions violated the due process clause of the fourteenth amendment.³⁵

Not until the late 1930s, when American industry was firmly entrenched and the country was recovering from the Depression, did the Supreme Court first begin to retreat from the rigid terminable at will doctrine. In *NLRB v. Jones & Laughlin Steel Corp.*³⁶ the Court upheld Congress' power to protect union activity, recognizing that the government's responsibility to ameliorate economic distress could justify the imposition of restrictions on an em-

32. 208 U.S. 161 (1908).

33. *Id.* at 174-76. The Court stated,

While . . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government . . . to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. 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 employé 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 employé. . . . In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than an employé can be compelled, against his will, to remain in the personal service of another.

Id.

34. 236 U.S. 1 (1915).

35. *Id.* at 11-13.

36. 301 U.S. 1 (1937).

ployer's autonomy. While the Court acknowledged that employers had a legitimate interest in conducting their businesses smoothly, the Court also noted that employees had the correlative right to organize.³⁷ The Court, however, observed that Congress had limited the power of the National Labor Relations Board (the Board) to the protection of this right to organize and ruled that the Board could not interfere generally with the employer's freedom in hiring and firing: "[T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [antiunion] intimidation and coercion."³⁸

Although the Supreme Court in *Jones & Laughlin* retreated somewhat from the absolute position that Congress and the states could not interfere with an employer's hiring and firing decisions,³⁹ that decision nonetheless continued to recognize the importance of the employer's ability to terminate employees at will. Other New Deal cases continued to support the employer's ability to choose their employees as long as they did not violate a statutory provision designed to protect employees. For example, in *J.I. Case Co. v. NLRB*,⁴⁰ in which the defendant company had been accused of refusing to bargain collectively in violation of the National Labor Relations Act, the Supreme Court held that "[t]he employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge."⁴¹

These labor cases illustrate that despite the change in eco-

37. *Id.* at 43-44.

38. *Id.* at 45.

39. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941), the Court noted that *Adair* and *Coppage* had been sapped of their usefulness.

40. 321 U.S. 332 (1944).

41. *Id.* at 335. See also *Associated Press v. NLRB*, 301 U.S. 103 (1937). In *Associated Press* a union filed charges that Associated Press, in violation of the National Labor Relations Act, had fired one of its employees because of his involvement in union activities. The Court noted,

The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

Id. at 132.

conomic and social conditions since the early 1900s the Supreme Court remained sensitive to the employer's right to terminate employees. This concern has persisted. As recently as 1961 the Court distinguished the ability of the federal government to discharge employees, which is circumscribed by constitutional protections, from "the complete freedom of action enjoyed by a private employer."⁴² Similarly, lower courts continued to recognize the doctrine of at will employment throughout the 1960s.⁴³ In the past twelve years, however, critics have sought to modify the rule.⁴⁴ Some courts have responded by developing a public policy exception to the at will doctrine.

III. THE PUBLIC POLICY EXCEPTION

One of the most important limits that some state courts have placed upon the employer's ability to terminate employees at will is the public policy exception. The circumstances in which the employer's right to discharge has been judicially limited under the public policy rubric may be divided into four categories. First, some courts have found the terminable at will doctrine inappropriate when employees are discharged for refusing to violate a criminal statute. Second, courts have applied the exception when employees have been discharged for exercising a statutory right. Third, a group of courts has invoked the exception to protect employees terminated for complying with a statutory duty. Last, in some circumstances courts have intervened on behalf of discharged employees, citing as authority the general public policy of the state.

A. *Discharge for Refusing to Violate a Criminal Statute*

The leading case denying an employer's right to terminate an

42. *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 897 (1961).

43. For cases applying the rule up until the 1970s, see *Buian v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970); *Entis v. Atlantic Wire & Cable Corp.*, 335 F.2d 759 (2d Cir. 1964); *Beeler v. Chicago, R.I. & P. Ry.*, 169 F.2d 557 (10th Cir. 1948), *cert. denied*, 335 U.S. 903 (1949); *Brown v. Safeway Stores, Inc.*, 190 F. Supp. 295 (E.D.N.Y. 1960); *Swaffield v. Universal Eesco Corp.*, 271 Cal. App. 2d 147, 76 Cal. Rptr. 680 (1969); *Wilson v. Red Bluff Daily News*, 237 Cal. App. 2d 87, 46 Cal. Rptr. 591 (1965); *Gressley v. Williams*, 193 Cal. App. 2d 636, 14 Cal. Rptr. 496 (1961); *Russel & Axon v. Handshoe*, 176 So. 2d 909 (Fla. Dist. Ct. App. 1965); *Carfizzi v. United Transp. Co.*, 20 App. Div. 2d 707, 247 N.Y.S.2d 162 (1964); *Winslow v. Roberts Numbering Mach. Co.*, 17 Misc. 2d 18, 183 N.Y.S.2d 817 (Sup. Ct. 1959). Part III of this Note examines cases in the last decade that have developed exceptions to the employment at will doctrine.

44. See authorities cited note 9 *supra*.

at will employee for refusing to obey his employer's instructions that he violate a criminal statute is *Petermann v. Teamsters Local 396*.⁴⁵ In *Petermann* the employee, subpoenaed to testify at a legislative hearing, was instructed by his employer to commit perjury at the hearing. The employee, however, testified truthfully and was discharged the next day. The California Court of Appeals reversed the lower court's ruling that the employee failed to state a cause of action. The court recognized that because the employment contract had no fixed duration, the employee, as a general rule, could be terminated at will by the employer. The court, however, noted that this general rule could be limited by statute.

It 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 . . . on the ground that the employee declined to commit perjury, *an act specifically enjoined by statute*. . . . [I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury.⁴⁶

Since *Petermann* other jurisdictions have allowed at will employees to sue for wrongful discharge when fired for refusing to violate a criminal statute.⁴⁷

45. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

46. *Id.* at 188, 344 P.2d at 27 (emphasis added).

47. The California Supreme Court recognized an employee's cause of action when he alleged that he was discharged for refusing to participate in an alleged price-fixing scheme in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). *Tameny's* complaint alleged that ARCO's district manager and others engaged in a combination "for the purpose of reducing, controlling, stabilizing, fixing, and pegging the retail gasoline prices of Arco service station franchisees." *Id.* at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

In *Trombetta v. Detroit, T. & I. R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978), the court adopted the public policy exception when an employee challenged his discharge for refusing to falsify state pollution control reports. The court stated, "It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws. . . . [Falsifying pollution reports] would clearly violate the law of this state." *Id.* at 495-96, 265 N.W.2d at 388.

A New Jersey court recognized a cause of action for wrongful discharge when an X-ray technician, employed under a terminable at will contract, alleged that his release resulted from his refusal to perform unauthorized catheterizations in *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978). The opinion emphasized that the State Medical Practice Act prohibited all but licensed nurses from performing catheterizations. The court stated that "an employment at will may not be terminated by an employer in retaliation for an employee's refusal to perform an illegal act. This rule is especially cogent where the subject matter is the administration of medical treatment, an area in which the public has a foremost interest. . . ." *Id.* at 418, 390 A.2d at 150.

A Connecticut court recognized an employee's cause of action when he alleged that his discharge was the result of informing his employer that some packaged goods were mislabel-

B. Discharge For Exercising a Statutory Right

Some jurisdictions recognize a cause of action by at will employees who are discharged for exercising a statutory right designed to protect employees within the employment relationship. Typical of these cases is the recurring situation of an at will employee discharged for filing a workers' compensation claim. Some courts have ruled that these discharged employees do not have a cause of action because most workers' compensation statutes provide the exclusive civil remedy against the employer.⁴⁸ The first case to afford a cause of action for an employee discharged for filing a workers' compensation claim was *Frampton v. Central Indiana Gas Co.*⁴⁹ In *Frampton* the employee filed a workers' compensation claim after receiving a work-related injury. The employee received a settlement and one month later she was fired. When the employee brought suit alleging retaliatory discharge the trial court dismissed her complaint for failure to state a claim upon which relief could be granted. The Supreme Court of Indiana reversed the lower court, reasoning that to deny a cause of action would defeat the humane purposes of the workers' compensation act. The court stated,

The Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.⁵⁰

Since *Frampton* other jurisdictions have split on the question

led in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980). Had the employee remained silent about this violation of the Connecticut Uniform Food, Drug and Cosmetic Act he would have been subject to criminal sanctions under CONN. GEN. STAT. ANN. § 19-215 (West 1977). The court stated that "an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." 179 Conn. at 480, 427 A.2d at 389. *But see* *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981) (denying petition for rehearing of dismissal of employee's cause of action alleging that he had been fired for testifying contrary to his employer's interest).

48. *See, e.g.*, *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950). This argument does not withstand analysis because while the workers' compensation statutes may provide the exclusive civil remedy against the employer for work-related injuries, an employee can assert other civil remedies arising out of circumstances that do not involve employment injuries. *See* notes 52-56 *infra* and accompanying text.

49. 260 Ind. 249, 297 N.E.2d 425 (1973).

50. *Id.* at 251, 297 N.E.2d at 427 (emphasis in original).

of whether an employer may fire an employee for filing a workers' compensation claim.⁵¹ *Kelsay v. Motorola, Inc.*⁵² is representative of the decisions that have found dismissal under such circumstances to be improper. Despite a dissent urging that the creation of a new tort be left to the legislature,⁵³ the court in *Kelsay* focused on the remedial nature of the state's workers' compensation act and refused to allow the employer's common-law right under the terminable at will doctrine to defeat the legislative intent behind the act. The employer in *Kelsay* argued that the legislature's decision to provide only criminal sanctions against an employer who threatened to discharge an employee for exercising his rights and remedies under the act precluded the plaintiff's civil action.⁵⁴ The court, however, recognized that the practical effect of disallowing an action for retaliatory discharge would be to force injured employees to choose between exercising their statutory rights or maintaining their jobs. The *Kelsay* court predicted that most employees would opt for the latter choice and thus would be left without a remedy for their workers' compensation claims. Placing employees in such a dilemma would, in effect, relieve the employers of a responsibility expressly placed upon them by the legislature.⁵⁵ The court also rejected the employer's argument that the workers' compensation act provided the exclusive remedy available to the plaintiff and thus precluded any related civil cause of action. The court noted that the exclusive remedy provision of the act limited recovery by employees to work-related injuries,⁵⁶ but the plaintiff's action concerned her discharge and did not seek additional com-

51. At least five state courts have applied the public policy exception to the at will doctrine when an employee is discharged for filing a workers' compensation claim: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (App. Div. 1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981); *Brown v. Transcom Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

At least seven state courts have refused to extend the public policy exception to at will employees discharged for filing a workers' compensation claim: *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Johnson v. National Bed Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. App. 1974); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978).

52. 74 Ill. 2d 172, 384 N.E.2d 353 (1979).

53. *Id.* at 190, 384 N.E.2d at 361 (Underwood, J., concurring in part and dissenting in part).

54. *Id.* at 180, 384 N.E.2d at 356.

55. *Id.* at 182, 384 N.E.2d at 357.

56. *Id.* at 184, 384 N.E.2d at 358.

pensation for her injury.

Courts that have refused to recognize an exception to the at will doctrine in the workers' compensation setting have not demonstrated the incisive analysis exhibited in *Kelsay*. These courts typically defer to the legislature and insist that it is best suited to create new causes of action. Rather than acknowledging the hindrance their decisions will impose on the effectuation of the legislative purpose, these courts are hesitant to support the goals of the workers' compensation acts absent express legislative authorization.⁵⁷

C. Discharge for Fulfilling a Statutory Duty

Some jurisdictions have extended the public policy exception to situations in which the employee is terminated for complying with a statutory duty. In *Nees v. Hocks*,⁵⁸ one of the first cases to recognize a cause of action under these circumstances, the employee previously had been called for jury duty but received a one year postponement. When the court recalled the employee, her employers indicated that although they could spare her "for awhile," they could not afford to have her away from her job for one month.⁵⁹ They encouraged her to ask to be dismissed from jury duty. When the employers learned that their employee had not sought to be excused they fired her.

Citing *Petermann*, *Frampton*, and *Monge v. Beebe Rubber Co.*,⁶⁰ the *Nees* court recognized that an employer's right to terminate an at will employee is not completely unfettered. The court found that countervailing community interests imposed restraints on an employer's ability to dismiss his employee. *Nees* cited the state constitution⁶¹ and state statutes enacted to implement the

57. See, e.g., *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 297, 244 S.E.2d 272, 275 (1978), in which the court concluded that "[i]f the General Assembly of North Carolina had intended a cause of action be created, surely, . . . it would have specifically addressed the problem." *Dockery* articulated the traditional negative implication rationale invoked by the courts: "[T]he failure of the General Assembly to specifically provide the claim for relief alleged by the plaintiff was an indication of its intent that no such claim be created." *Id.* at 300, 244 S.E.2d at 277.

58. 272 Or. 210, 536 P.2d 512 (1975).

59. Apparently the employee was obligated to make herself available for jury duty for one month.

60. 114 N.H. 130, 316 A.2d 549 (1974); see notes 70-81 *infra* and accompanying text.

61. 272 Or. at 218-19, 536 P.2d at 516. Or. CONST. art. VII, § 3 provides that litigants must be afforded jury trials in civil cases. *Id.* art. I, § 11 guarantees a defendant a right to trial by jury in all criminal cases. *Id.* art. VII, § 5 provides, "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors."

constitutionally guaranteed jury system⁶² as the primary authorities for this public policy. The court also referred to judicial and legislative determinations in other jurisdictions that held employers in contempt of court when they had fired employees for serving on juries.⁶³ The court, therefore, held the defendant employers liable for discharging their employee for serving on a jury.⁶⁴

Pennsylvania also has recognized a cause of action for an at will employee discharged for serving on a jury. Unlike the *Nees* court, the court in *Reuther v. Fowler & Williams, Inc.*⁶⁵ relied solely upon its state's constitution and statutes as sources of the public policy.⁶⁶ Although the court recognized the general rule that no nonstatutory cause of action exists for an employer's termination of an at will employment relationship, the court found that "where a *clear* mandate of public policy is violated by termination, the employer's right to discharge may be circumscribed."⁶⁷

Not all jurisdictions, however, have granted a cause of action

62. 272 Or. at 219, 536 P.2d at 516. Among the legislative enactments cited by the court are provisions that exempt certain persons from jury duty, that provide certain excuses from jury duty including poor health and old age and when serving would subject a person to extreme hardship, and that permit deferment of jury duty "for good cause shown." Another provision cited by the court authorizes the imposition of a fine upon persons who fail to report for jury service. *Id.*

63. The court cited *People v. Vitucci*, 49 Ill. App. 2d 171, 199 N.E.2d 78 (1964), and a Massachusetts statute, 44 MASS. GEN. LAWS ANN. ch. 268, § 14A (West 1970). It is unfortunate that the court cited these out of state sources. Certainly these extra-jurisdictional citations were unnecessary to establish the public policy of Oregon. Reference to Oregon's constitution and statutes was sufficient to establish the exception. Courts should extend the public policy exception only when a constitutionally or legislatively created public policy of the forum state is violated by a discharge of an at will employee. When the courts decide for themselves the parameters of the state's public policy, an atmosphere of uncertainty is created because neither employers nor employees know when one judge might decide that certain conduct is in the best interest of the state. See notes 119-23 *infra* and accompanying text.

64. 272 Or. at 219, 536 P.2d at 516.

65. 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978).

66. *Id.* at 32, 386 A.2d at 120. The Pennsylvania Constitution provided, "Trial by jury shall be as heretofore, and the right thereof remain inviolate." PA. CONST. art. I, § 36. Pennsylvania statutes provided that failure to obey a summons for jury service would be treated the same as any disobedience to a court summons. Although neither *Nees* nor *Reuther* made the argument, both courts could have recognized the employee's cause of action by using the *Petermann* rationale—the employer should not be allowed to use his dismissal authority to coerce an employee to conduct himself in a manner that would subject him to judicial sanctions. See text accompanying notes 122-23 *infra*.

The only court decision cited by *Reuther* to establish public policy was *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that "trial by jury in criminal cases is fundamental to the American scheme of justice." 255 Pa. Super. Ct. at 33, 386 A.2d at 121 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

67. 255 Pa. Super. Ct. at 31, 386 A.2d at 120 (emphasis added).

to an at will employee discharged for serving on a jury. The same jurisdiction that rendered the *Petermann* decision one year later affirmed a lower court's dismissal of the plaintiff's cause of action in *Mallard v. Boring*.⁶⁸ In *Mallard* plaintiff asserted that serving on a jury was within the ambit of legislation preventing employers from firing employees for their political activity. The court, however, rejected this contention. The *Mallard* court did not seek to draw a public policy argument from the state constitution or statutes. Instead, the court declined, absent some statutory authorization, to intrude upon the rights of the parties to the at will contract.⁶⁹

D. Discharge in Violation of General Public Policy

The most expansive application of the public policy exception has occurred in jurisdictions that have permitted a cause of action for at will employees discharged in violation of the state's general public policy. For example, in *Monge v. Beebe Rubber Co.*⁷⁰ the court could not identify any constitutional or statutory policy to protect the discharged employee. The court, therefore, devised a new branch of the exception to the terminable at will doctrine from its own interpretation of public policy.

The plaintiff, Monge, alleged that she had been promoted to a higher paying position after her foreman told her that she could have the job if she would be "nice" to him⁷¹ and that she was subsequently fired because she refused to date him.⁷² To support her claim, Monge produced evidence that the company's personnel manager had told her that the foreman used his position to make

68. 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

69. The court stated, "[T]he fact is the Legislature has seen fit to enact a statute affording protection from dismissal as to an election official whereas they have not done so in the case of jurors." *Id.* at 396, 6 Cal. Rptr. at 175.

70. 114 N.H. 130, 316 A.2d 549 (1974).

71. *Id.* at 131, 316 A.2d at 550.

72. Plaintiff did not bring this action claiming she had been discharged for refusing the sexual advances of her foreman in violation of the Civil Rights Act of 1964. *Cf.* *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (conditioning female employee's continued employment upon her submitting to sexual advances of a male supervisor violates Title VII of the Civil Rights Act of 1964); *Garber v. Saxon Business Prods. Inc.*, 552 F.2d 1032 (4th Cir. 1977) (employer policy or acquiescence in practice of compelling female employees to submit to sexual advances states a cause of action under Title VII of the Civil Rights Act of 1964); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977) (complaint alleging discharge for refusing sexual advances of male supervisor states a cause of action under the Civil Rights Act of 1964). *See also* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (abolishing female employee's job for refusing her male superior's sexual advances violated the Equal Employment Opportunity Act of 1972).

advances on female employees. Monge also presented other evidence to bolster her allegations. Shortly after refusing to date her foreman, Monge's new job was abolished and she was demoted to a lower paying position. Then the company terminated her overtime schedule.⁷³ When Monge requested overtime work, her foreman assigned her the job of cleaning the restroom. Finally, when she reported some problems with the machine she operated, Monge's foreman told her that she would have to return to the machine and handle the problem herself. When she refused to return to the machine and complained to her union steward, the foreman fired her. Monge was subsequently reinstated after she complained to her union. The events which led to Monge's final termination concerned her illness and subsequent absence from work. Monge received a letter stating that she was discharged for failing to report for work for three days without notifying the company.⁷⁴ She claimed that she had notified the company that she would be absent and that her alleged unexcused absence was a mere pretense for her discharge.

Defendant countered the charges of malice by producing uncontradicted evidence that Monge's new job had been terminated and her overtime schedule cancelled because of a shortage in available work and her low seniority position.⁷⁵ Although the demotion resulted in a decrease in pay, Monge still made more money than when she started with the company. Defendant conceded that the foreman asked Monge for a date, but asserted that the request was an isolated incident and was not pursued. Defendant also demonstrated that the foreman had given Monge the only extra work available when she requested overtime work. The evidence also showed that the foreman had performed some personal favors for plaintiff.⁷⁶

Despite defendant's evidence, the jury found for Monge. On appeal, the New Hampshire Supreme Court, without analyzing the underlying rationale, recognized the employee's cause of action. Although the court initially noted that the question of limiting the employer's ability to terminate at will employees required balanc-

73. 114 N.H. at 131, 316 A.2d at 550. The company allegedly did not terminate the overtime of any other employees.

74. *Id.* at 131-32, 316 A.2d at 551.

75. *Id.* at 135, 316 A.2d at 552 (Grimes, J., dissenting).

76. *Id.* at 135, 316 A.2d at 552-53. The foreman, at Monge's request, hired her husband, a mechanic, to work on his automobile. Also, when Monge could not pick up her Christmas turkey, the foreman personally delivered two turkeys to her home. *Id.*

ing the interests of the employer, the employee, and society, the court did not analyze these competing interests. Relying on *Frampton* and *Petermann*,⁷⁷ and thereby recognizing the requirement of finding a public policy basis in *Monge's* claim, the court stated, "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."⁷⁸ At no point in the opinion did the court cite any constitutional or legislative support for its conclusion of what should be in the public's best interest. The public policy ostensibly served by recognition of *Monge's* claim was not further delineated by the court. Instead, the court merely used this public policy language to justify its recognition of *Monge's* claim.⁷⁹ Thus, the court limited its review to the question of whether sufficient evidence could be found to support the jury's finding. Although the dissent contended that "reasonable men could not find for the plaintiff on the evidence in this case,"⁸⁰ the majority ruled that the jury's verdict was supported by the evidence.⁸¹

77. The court also relied on Professor Blades' influential law review article on employment at will. See Blades, *supra* note 9.

78. 114 N.H. at 133, 316 A.2d at 551.

79. *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980), indicates that the New Hampshire Supreme Court's decision in *Monge* represents a judicial attempt to create a remedy for a plaintiff. In *Howard* a widow sued her deceased husband's employer alleging that the employer fired her husband because of his old age and poor health. Relying on *Monge*, the widow argued that her husband's discharge had been motivated by bad faith, malice, or retaliation. The *Howard* court, however, refused to recognize the widow's cause of action, noting that a discharge for sickness is usually remedied by medical insurance or disability provisions in an employment contract while the proper remedy for age discrimination is provided by statute. *Id.* at 297, 414 A.2d at 1274. The *Howard* court's emphasis on other remedies available to the plaintiff suggests that the court in *Monge* provided a cause of action to a plaintiff who would otherwise have been without a remedy.

Earlier in its opinion the New Hampshire Supreme Court attempted to distinguish the *Monge* decision from the facts in *Howard*. The court stated, "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn. A discharge due to sickness does not fall within this category . . ." *Id.* at 297, 414 A.2d at 1274 (citations omitted). One commentator has argued that *Howard* thus narrows the scope of *Monge*. Comment, *Pierce v. Ortho Pharmaceutical Corp.: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L. REV. 1187, 1191 (1981). While *Howard* arguably may narrow *Monge* by requiring some affirmative action or refusal to act by the employee, the essential holding of *Monge* survived—the court maintained its power to articulate what it perceives to be the state's public policy.

80. 114 N.H. at 134, 316 A.2d at 552 (Grimes, J., dissenting).

81. The court affirmed the jury's finding for the plaintiff, but it took exception to the amount of damages awarded. The jury's award included actual damages for lost pay and

Monge's departure from clearly articulated constitutional or statutory authority and its creation of a new branch of the public policy exception to the terminable at will doctrine became a precedent for other courts that sought to expand the remedies available to discharged at will employees. One example of such an application of *Monge* is *Fortune v. National Cash Register Co.*⁸² Fortune sold cash registers for the defendant company on a commission basis. When Fortune refused to retire at age sixty-one the company discharged him. The court recognized Fortune's status as an at will employee and that he had received all commissions due under his contract. The court also acknowledged that under the employment contract the company faced no further liability to Fortune.⁸³ The court, however, intimated that the company had discharged Fortune to avoid paying him additional commissions.⁸⁴ In order to find any basis for Fortune's claim, the court found it necessary to allow an inquiry into the employer's motive for terminating the at will employee. The Massachusetts Supreme Judicial Court thus interpreted the public policy exception of the employment at will doctrine to include discharges made in bad faith.⁸⁵ The court cited *Monge* and stated,

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 to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.⁸⁶

mental suffering. Noting that *Monge's* action was in contract and that damages for mental suffering are unavailable in a contract action, the court remanded for a new trial unless she would accept damages limited to wages actually lost. *Id.* at 134, 316 A.2d at 552.

82. 373 Mass. 96, 364 N.E.2d 1251 (1977).

83. *Id.* at 101, 364 N.E.2d at 1255.

84. *Id.* at 104-05, 364 N.E.2d at 1257. Under Fortune's contract he received 75% of his commission if the territory where the cash registers were sold was assigned to him on the date of the purchase order, 25% if the territory was assigned to him at the date of delivery and installation, or 100% if the territory was assigned to him at both times. *Id.* at 97-98, 364 N.E.2d at 1253. Both NCR and Fortune were trying to sell a new line of cash registers to a customer in Fortune's territory. It is unclear from the opinion whether NCR or Fortune finally consummated the sale. Fortune received a 75% commission owed to him but he received no commission for cash registers that were delivered pursuant to this sale but after his discharge. *Id.* at 99, 364 N.E.2d at 1253-54.

85. The *Fortune* court did not even consider what public policy justifications warranted the bad faith standard. Although *Monge* did not specifically identify the public policy that justified its expansion of exceptions to the terminable at will doctrine, the court at least attempted to base its holding on some notion of public policy. See text accompanying notes 77-81 *supra*.

86. 373 Mass. at 104, 364 N.E.2d at 1257 (emphasis in original).

The court thus ruled that an allegation of bad faith constitutes a prima facie case of wrongful discharge.⁸⁷

Other courts have continued to create exceptions to the terminable at will doctrine by forging their own definition of the state's public policy. Unlike *Monge* and *Fortune*, these courts have at least attempted to rely on statutory authority before recognizing a cause of action. For example, in *Palmateer v. International Harvester Co.*⁸⁸ the employer dismissed an at will employee in a managerial position for informing law enforcement officials that a fellow employee might have been violating Illinois criminal statutes and for agreeing to work with the authorities to gather evidence against his co-employee. The court first acknowledged the public policy exception to the at will doctrine. The court then stated that this public policy is to be found in the state constitution, statutes, "and, when they are silent, in its judicial decisions."⁸⁹ Recognizing that no specific constitutional or statutory provision required a citizen to participate in uncovering and prosecuting crimes, the court nevertheless decided that "public policy . . . favors citizen crime-fighters."⁹⁰ The court then employed its own interpretation of the state's public policy and determined that to allow employers to fire employees for reporting crimes might deter citizens from volunteering information to law enforcement agencies. Because of this possible deterrence, the court recognized the employee's cause of action for retaliatory discharge.⁹¹ At no point did the court balance the effect of this dismissal on criminal enforcement with the interests of the employer in discharging the individual.

*Harless v. First National Bank*⁹² presented facts similar to *Palmateer* when the plaintiff sought damages after his discharge for reporting violations of state and federal law to his employers. Harless, a bank employee, became aware that the bank had been overcharging customers on loans and not making proper rebates, in

87. *But see* *Clink v. Board of County Road Comm'rs*, 96 Mich. App. 524, 294 N.W.2d 209 (1980) (action for loss of possible pension benefits denied under public policy exception to at will doctrine). *See also* *Savodnik v. Korvettes, Inc.*, 489 F. Supp. 1010 (E.D.N.Y. 1980) (discharged employee allowed cause of action when discharged because his pension was about to vest). A few other courts have used the good faith standard to extend protection to discharged employees. *See, e.g.*, *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); *Zimmer v. Wells Management Corp.*, 348 F. Supp. 540 (S.D.N.Y. 1972).

88. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

89. *Id.* at —, 421 N.E.2d at 878 (emphasis added).

90. *Id.* at —, 421 N.E.2d at 880.

91. *Id.*

92. 246 S.E.2d 270 (W. Va. 1978).

violation of state and federal consumer credit and protection laws. Harless claimed that his efforts to get the bank to comply with these laws resulted in his dismissal. The court found that among those courts that have discussed the public policy exception to the terminable at will doctrine, a cause of action has generally been permitted if the employee could show that the discharge contravened "some substantial public policy."⁹³ *Harless* found the requisite "substantial public policy" in the West Virginia Consumer Credit and Protection Act,⁹⁴ which was designed to regulate consumer and credit practices. The court then recognized the employee's cause of action because "[s]uch manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge."⁹⁵

The *Palmateer* and *Harless* decisions presently represent the minority position. Most courts have not permitted causes of action by employees discharged for informing enforcement authorities of employer corruption or criminal activity. For example, at will employees have been denied relief when discharged for reporting that a corporate vice president was taking kickbacks,⁹⁶ for uncovering evidence of illegal foreign currency manipulations,⁹⁷ for reporting

93. *Id.* at 273. The court noted that while most states required that this expression of public policy be found in the state's constitution or statutes, *Monge* and *Fortune* were recognized as creating a "broader concept." *Id.* at 274.

94. *Id.* at 275; W. VA. CODE, §§ 46A-1-101 to -8-102 (1981).

95. 246 S.E.2d at 276. *Harless*, unlike *Palmateer*, did not openly admit that neither constitutional nor statutory provisions necessarily supported its decision. As in *Palmateer*, the employer in *Harless* did not ask the employee to participate in illegal activity. This fact distinguishes *Harless* and *Palmateer* from the situation presented in *Petermann*. The plaintiff in neither *Harless* nor *Palmateer* exercised a statutory right. This fact distinguishes *Harless* and *Palmateer* from *Frampton* and the other workers' compensation cases in which the employees exercised rights specifically designed to protect them in the work environment. *Harless* flirted with the exception for exercising a statutory right when it discussed the West Virginia legislation allegedly in issue: "[The act] represents a comprehensive attempt on the part of the Legislature to extend protection to the consumers and persons who obtain credit in this State and who obviously constitute the vast majority of our adult citizens." *Id.* at 275-76. The *Harless* facts, however, are distinguishable from the workers' compensation cases because the consumer credit legislation was not designed to protect the individual employee *in his capacity as an employee*. Because this legislation was not designed to affect directly the relationships of the parties to an employment contract, *Harless* cannot be categorized with those cases concerning employees discharged for exercising a statutory right discussed in section III(B) *supra*.

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

97. *Edwards v. Citibank*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. 1979).

that corporate officers had violated state security laws,⁹⁸ and for possessing knowledge of criminal activity within the employer's corporations.⁹⁹

Although the public policy exception has, in some jurisdictions, greatly expanded the circumstances under which an employee may sue his employer for wrongful or retaliatory discharge, the new cause of action is not without limits. Generally, even these expansive decisions have required the employee, as a threshold test, to demonstrate that the case concerns a matter of public policy. When only private interests are at stake courts rarely allow the cause of action. For example, employees have been denied causes of action for wrongful discharge when fired for questioning an employer's internal management system¹⁰⁰ or his integrity,¹⁰¹ and for threatening to sue an employer for an injury unrelated to work.¹⁰² Similarly, causes of action have been denied employees fired for taking too much sick leave¹⁰³ and for misusing the company's Christmas fund.¹⁰⁴ Employees dismissed when falsely accused of stealing from the cash register,¹⁰⁵ when their supervisor falsified a job performance report,¹⁰⁶ and when they refused to take a lie detector test¹⁰⁷ were also denied actions against their former employers for wrongful discharge. An employee who, in his status as a shareholder, sought to examine the company's books and, as a result, was fired, was not allowed to sue the employer.¹⁰⁸ Finally, even in actions seemingly unrelated to the employer, an employee fired for attending night school¹⁰⁹ and another employee dismissed for cohabiting with one co-employee while having an affair with a married co-employee¹¹⁰ were denied causes of action for wrongful discharge.

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

99. *O'Neill v. ARA Services, Inc.*, 457 F. Supp. 182 (E.D. Pa. 1978).

100. *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980).

101. *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978).

102. *Daniel v. Magma Copper Co.*, 127 Ariz. App. 320, 620 P.2d 699 (1980).

103. *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979).

104. *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977).

105. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

106. *Patterson v. Philco Corp.*, 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967).

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

108. *Campbell v. Ford Indus. Inc.*, 274 Or. 243, 546 P.2d 141 (1976).

109. *Scroghan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977).

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

IV. ANALYSIS

Although most critics of the employment at will doctrine have focused on the perceived need for judicial intervention to protect the employee,¹¹¹ a thorough analysis of the employee discharge cases must also include an examination of the legitimate countervailing interests of the employer. Even *Monge*, the case that spawned the most liberal application of the public policy exception, recognized that a balancing of competing interests is required: "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."¹¹² *Monge* and its progeny, however, have focused almost exclusively on the concerns of the employee. These courts, which have allowed discharged employees to sue their employers for violations of general public policy, have not considered the effects that their decisions will have on employers.

The judicially created public policy exception to the employment at will doctrine has allowed a wide range of causes of action for discharged employees. The courts that have considered discharged at will employees' claims have recognized causes of action ranging from discharges for refusing to violate a criminal code and for exercising a statutory right to discharges made in bad faith.¹¹³ Thus, the permissible scope of a discharged at will employee's claim depends upon the standard for a prima facie cause of action the jurisdiction has adopted. One effect of a broad standard is that it expands the array of facts that will constitute a prima facie case and, therefore, put an employee's claim before a jury. If an employee can raise questions of fact sufficient to avoid summary judgment or a directed verdict, his chance of success before the jury is excellent. Professor Blades, a leading proponent of judicial intervention to protect at will employees, has recognized the propensity of jurors to sympathize with employees.¹¹⁴ Courts, therefore,

111. See authorities cited note 9 *supra*.

112. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

113. See part III *supra*.

114. Blades, *supra* note 9, at 1428. Professor Blades stated, [T]here is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained. . . . [T]he employer's prerogative to make independent, good faith judgments about employees is

should carefully balance the interests of the employer, the employee, and society when they determine the parameters of a prima facie case of wrongful discharge.

Fortune v. National Cash Register Co. is one example of a court's failure to engage in this analysis. The standard that *Fortune* adopted—bad faith—is overly broad. In *Fortune* the court recognized that the employee had been discharged under a contract terminable at will and that the employer had fulfilled all duties he owed to the employee. Nevertheless, the court concluded that terminations made in bad faith constitute a breach of the employment contract.¹¹⁵ The bad faith standard represents a significant departure from the *Petermann*, *Frampton*, and *Nees* standards. In those cases the discharged at will employees' complaints alleged that the discharges violated some legislatively articulated public policy.¹¹⁶ Under *Fortune's* bad faith standard, an employee's cause of action is not restricted by carefully defined standards. Thus, the employee is not required to prove that the reason for dismissal violates public policy. The bad faith standard significantly eases the employee's burden of bringing an issue of fact before a sympathetic jury.¹¹⁷

important in our free enterprise system.

Id.

115. See notes 82-87 *supra* and accompanying text.

116. In *Petermann* the employee alleged that he was fired for refusing to commit perjury. See notes 45-46 *supra* and accompanying text. The discharged employee in *Frampton* alleged that he was fired because he filed a workers' compensation claim. See notes 49-50 *supra* and accompanying text. In *Nees* the employee alleged that she was fired for serving on a jury. See notes 58-64 *supra* and accompanying text.

117. The *Fortune* court stated,

NCR claims that it did not breach the contract, and that it has no further liability to Fortune. According to a literal reading of the contract, NCR is correct.

However, Fortune argues that, in spite of the literal wording of the contract, he is entitled to a jury determination on NCR's motives in terminating his services under the contract and in finally discharging him. We agree.

Fortune v. National Cash Register Co., 373 Mass. 96, 101, 364 N.E.2d 1251, 1255 (1977) (footnote omitted).

Some courts have recognized that *Fortune's* bad faith standard is too broad. See, e.g., *Magnan v. Anaconda Indus., Inc.*, 37 Conn. Supp. 38, 429 A.2d 492 (Super. Ct. 1980). *Magnan* held that only employer conduct which contained "an aspect of fraud, deceit or misrepresentation" would meet the "bad faith" test of *Fortune*. *Id.* at ___, 429 A.2d at 494 (quoting *A. John Cohen Ins. v. Middlesex Ins. Co.*, 392 N.E.2d 862, 864 (Mass. App. 1979)). The *Magnan* test, however, still facilitates the employee's task of presenting an issue of fact so that the case must be submitted to the jury. Even under its more narrow standard, *Magnan* held that an allegation of conduct containing an aspect of fraud, deceit, or misrepresentation presented a material issue of fact so as to preclude a summary judgment. *Magnan v. Anaconda Indus., Inc.*, 37 Conn. Supp. at ___, 429 A.2d at 494. *But see* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980). In *Pierce* the court denied a doctor's

An employer in a jurisdiction that follows *Fortune* arguably is faced with the requirement that he may terminate an employee only for "just cause" since the *Fortune* court based its bad faith standard on an implied covenant of good faith and fair dealing that it found in all employment contracts. If this standard does not tacitly abolish the common-law terminable at will doctrine, then it surely has precipitated the erosion of the doctrine's viability. The court, however, did not discuss what effect it intended its bad faith standard to have on the common-law rule. Indeed, the court failed to identify any public policy basis for the bad faith standard it created. This notable absence of any careful consideration of the standard's impact on well-recognized principles of law casts doubt on *Fortune's* precedential value.¹¹⁸ A jurisdiction that nevertheless

cause of action for wrongful discharge when she alleged that she had been fired for refusing to continue research that she felt violated ethical standards and the Hippocratic Oath. Although the court recognized the public policy exception to the terminable at will doctrine, the court required that this public policy be articulated in a *clear mandate*. The court stated,

[T]he [clear mandate of public policy standard] provides a workable means to screen cases on motion to dismiss for failure to state a cause of action or for summary judgment. If an employee does not point to a clear expression of public policy, the court can grant a motion to dismiss or for summary judgment.

Id. at 73, 417 A.2d at 513.

The *Fortune* court could have ruled on the alternative theory of quantum meruit and reached the same result without relying on an exception to the employment at will doctrine. Both *Fortune* and *NCR* tried to sell a new line of cash registers to a customer that *Fortune* had serviced for six years. Under *Fortune's* contract *NCR* could sell cash registers in his territory and avoid paying him a commission only if the company gave him written notice before entering his territory. *Fortune v. National Cash Register Co.*, 373 Mass. at 98, 364 N.E.2d at 1253-54. The opinion intimates that the required notice was not given. Under a theory of restitution, the court could have asked the jury to determine whether *Fortune* had been responsible for selling the cash registers rather than *NCR*, or whether *Fortune* had earned the commission under the terms of his contract since *NCR* gave no written notice. If the jury had responded affirmatively to either inquiry and also found that *NCR* fired *Fortune* solely to prevent him from receiving these commissions, the court could have awarded him relief on a quantum meruit theory. *Fortune* sought this alternative relief, but because the court developed a "good faith" theory, *id.* at 102, 364 N.E.2d at 1256, it did not consider the merits of the restitution theory.

The court instead seized upon the concept of "good faith and fair dealing," *id.*, as the basis for recognizing *Fortune's* claim. Even under this standard the court could have recognized that the duties of the parties were embodied in the employment contract. Thus, because the employment contract was terminable at will, the only duty owed *Fortune* was to pay the commissions owed him under the contract. If the employer fulfilled these obligations, then the employer met the test of "good faith and fair dealing" in firing *Fortune*.

118. At least one court has recognized that a transformation of all terminable at will contracts into "just cause" contracts would occur under such a situation when it declined to follow *Monge v. Beebe Rubber Co.* In *Daniel v. Magma Copper Co.*, 620 P.2d 699 (Ariz. App. 1980), the court stated,

We refuse to follow *Monge*. The effect of adhering to such a rule would be to

chooses to follow *Fortune* will virtually ensure that an employee who can raise an issue of fact concerning his discharge will also be able to state a cause of action that satisfies a prima facie standard requiring only bad faith.

A. *Uncertainty in the Work Place*

Courts that have expanded the public policy exception beyond the *Petermann* and *Frampton* rationales to afford discharged employees a readily available cause of action have created an atmosphere of uncertainty in the work place: neither the employer nor the employee can be certain that a particular discharge is a violation of general public policy.¹¹⁹ This uncertainty has arisen because of the absence of clearly defined public policy standards by which to establish the parameters of a proper cause of action.

In *Monge* the court disallowed discharges "motivated by bad faith or malice or based on retaliation [because they are] not [in] the best interest of . . . the public good."¹²⁰ *Fortune* also held that at will employees could not be discharged in bad faith. These standards do not adequately notify the employer or the employee of what constitutes an impermissible discharge. Because of this vagueness, an employer may honestly believe he is justified in discharging an employee, while the distraught employee interprets the dismissal to be in bad faith or in retaliation. Under the standards adopted in *Monge* and *Fortune* such a situation is ripe for litigation. The employer might be forced to litigate the merits of a discharge that he had no way of knowing in advance might be considered unfair.

Palmateer and *Harless* also do not delineate the contours of a discharged employee's cause of action. Instead of clearly defining the parameters of an unlawful discharge, these decisions delved into what Justice Ryan called "the nebulous area of judicially cre-

expose an employer to a lawsuit every time he discharges an employee with a contract terminable at will. Under the *Monge* rule, such a contract is transformed into a hybrid contract under which the employee cannot be discharged unless his work is unsatisfactory or his services are no longer needed. The *Monge* court resolved the issue by rewriting the employment contract so that an employee cannot be fired except for cause. In that way, the *Monge* decision is a substitute for a union collective bargaining agreement.

Id. at 703.

119. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, ___, 421 N.E.2d 876, 881 (1981) (Ryan, J., dissenting).

120. *Monge v. Beebe Rubher Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

ated public policy."¹²¹ In upholding the employee's cause of action, *Palmateer* relied on the general criminal statutes of the state. *Harless* focused on a particular statute, the West Virginia Consumer Credit and Protection Act. Both decisions essentially held that general public policy dictates that citizens be encouraged to support enforcement of the state's laws and therefore, that employers should be prohibited from firing their employees for conduct aimed at preventing violation of state statutes.

Petermann and *Frampton*, on the other hand, limited the exceptions to the employment at will doctrine to legislatively articulated public policy. *Petermann* held that an employer could not discharge an employee for refusing to commit perjury. Unlike *Petermann*, in neither *Palmateer* nor *Harless* was the employee asked to violate any criminal statute. *Frampton* held that an employer could not fire an employee who filed a claim under the workers' compensation act. In *Palmateer* and *Harless* the statutes relied upon protected the public generally and were not designed to affect the employer-employee relationship specifically. By limiting the employee's cause of action to discharges that violate a clear statutory provision or that result from the exercise of a statutorily created right, *Petermann* and *Frampton* put employers and employees on definite notice of what constitutes an unjust discharge.

The *Nees* and *Reuther* decisions arguably are also examples of judicial creation of public policy. Both *Nees* and *Reuther* held that employers could not discharge employees who fulfilled their duty of serving on a jury because such dismissals violate a "recognized facet of public policy."¹²² Clearly these cases did not involve the sort of discharges involved in *Petermann* and *Frampton* since neither employee was asked to violate any statute or prevented from exercising a statutory right. Nevertheless, both *Nees* and *Reuther* relied on state constitutional and legislative guidance. The *Nees* court carefully cited legislation creating exemptions and excuses from jury duty. By negative implication this legislation had determined that persons called for jury duty who did not fall within one of the exempt or excused categories must report for jury duty. *Nees*, therefore, merely enforced the legislatively determined public policy. Moreover, both *Nees* and *Reuther* cited statutory provisions subjecting persons who failed to report for jury

121. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, —, 421 N.E.2d 876, 881 (1981) (Ryan, J., dissenting).

122. *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 33, 386 A.2d 119, 121 (1978).

duty to fines. Neither case articulated the argument, but both courts could have relied on *Petermann* and held that employers would not be permitted to threaten discharge in order to coerce employee conduct that is subject to judicial sanctions. Although the *Nees* and *Reuther* courts reached appropriate results, neither court clearly identified the legislative policy that justified the exception they applied. Despite their failure to carefully explain the basis for their decisions, both courts correctly refrained from creating their own exceptions to the terminable at will doctrine.

Judicially created exceptions to the terminable at will doctrine without clear bases in legislatively articulated public policy create uncertainty because an employer cannot be assured that a court will not, in hindsight, decide that an employee's conduct was in the best interests of the state and, therefore, favored by public policy. Expansive decisions, such as *Monge*, *Fortune*, *Palmateer*, and *Harless*, have invited employees to bring actions charging that their discharge violated some state public policy. Under existing guidelines, the boundaries of these actions are defined only by the imagination of the plaintiff's attorneys.¹²³

B. Vexatious Lawsuits

Judicial expansion of the public policy exception to the employment at will doctrine could subject employers to vexatious lawsuits.¹²⁴ At least three factors contribute to this possible result. First, decisions such as *Monge*, *Fortune*, *Palmateer*, and *Harless* have expanded the public policy exception to afford relief to employees whom the courts subjectively think need protection. Discharged at will employees in the private sector who are not protected by collective bargaining agreements or statutes are thus encouraged to bring suits.

Second, the uncertainty¹²⁵ created by *Monge* and its progeny may spawn vexatious lawsuits. After *Monge*, *Fortune*, *Palmateer*, and *Harless*, an employer cannot be certain that a discharge is free from judicial challenge. Under the *Monge* rationale an employee may claim that his discharge was motivated by bad faith, malice, or retaliation and, therefore, is not in the interest of the public good. After *Fortune* the discharged employee may simply allege

123. See, e.g., *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), in which plaintiff argued that serving on a jury came under the protection of legislation preventing employers from firing employees for their political activity.

124. See *Blades*, *supra* note 9, at 1428.

125. See notes 119-23 *supra* and accompanying text.

bad faith on the part of the employer. In jurisdictions following *Palmateer* and *Harless* an employer has no clear standards to guide him in evaluating whether an employee's conduct serves some judicially conceived public policy. The resulting uncertainty sets up the employer as an easy target of fired employees and exposes him to the continual threat of suit for wrongful discharge.

Last, because, as in *Monge* and *Fortune*, an employee can fairly easily raise a factual question that places the determination of liability before the jury, and because the employer often fears the jury's tendency to side with the employee, vexatious claims from discharged employees are encouraged. Defendant employers will often settle claims that they believe have little merit rather than risk an adverse finding by a jury.¹²⁶ The employee's motivation to bring suit and the employer's willingness to settle out of court are especially heightened in those jurisdictions that recognize the employee's action in tort rather than contract and thus subject the employer to possible punitive damages.¹²⁷

C. *Economic Impact*

Courts that have expanded the public policy exception may have failed to consider the economic impact of their decisions. *Monge* and its progeny ignored the "legitimate interest of employers in hiring and retaining the best personnel available."¹²⁸ Courts that fail to adopt a clearly defined standard or that demonstrate a readiness to expand upon legislatively articulated public policy create a situation in which employers might be inhibited from critically evaluating their employees because of the constant threat of litigation. This situation is especially troublesome when managerial or salaried employees are the subject of review because, in contrast to the wage earner whose performance generally can be measured by an objective standard, upper echelon employees are often judged by more intangible qualities such as imagination, initiative, drive, and personality.¹²⁹ Professor Blades thus warned,

The employer's evaluation of the higher ranking employee is usually a highly personalized, intuitive judgment, and, as such, is more difficult to translate into concrete reasons which someone else—a jurymen—can readily understand and appreciate. . . . Compromise of the employer's power to make

126. See notes 114-17 *supra* and accompanying text.

127. See note 13 *supra*.

128. *Geary v. United States Steel Corp.*, 456 Pa. 171, ___, 319 A.2d 174, 179 (1974) (salesman dismissed for complaints about safety of a new product).

129. See Blades, *supra* note 9, at 1428-29.

such judgments about professional, managerial or other high-ranking employees . . . is especially undesirable.¹³⁰

Whether the particular employee occupies a high position in the company or is a lower level wage earner, the inhibiting factor caused by the threat of possible litigation will be present to some degree whenever an employer considers discharging an employee. Thus, a consideration of the merits of the *Monge*, *Fortune*, *Palmateer*, and *Harless* decisions should examine the extent to which an employer will be compelled to tolerate subpar performance longer than he otherwise would. The court should consider whether the increased hesitancy to fire an employee will lead to a drop in production efficiency and a corresponding increase in cost that the public must bear or, alternatively, whether it will create more job security and thereby result in increased production and lower costs.¹³¹ Several courts have expressed their unwillingness to infringe upon the employer's business judgment in this area.¹³² These courts have correctly concluded that such policy determinations, with potentially important economic ramifications, should be left to the legislature.

Two other economic implications of judicial expansion of the public policy exception to the terminable at will doctrine warrant examination. First, courts should consider the effect such expansion would have on the small employer. Most commentators who call for judicial reform to protect employees focus on the individual employee working for the industrial giant.¹³³ These commentators have ignored the plight of the small businessman. Because smaller companies employ fewer people and because their success often depends upon a few key individuals, these companies will especially be hurt if their ability to critically evaluate their work force is impaired. This dilemma of the small business is exacerbated if the jurisdiction recognizes an action in tort because unlimited punitive damages could bankrupt these companies.¹³⁴ Second, courts should be aware that if employers perceive that their independence is unduly hampered by the law of a particular state, they

130. *Id.*

131. See Note, *supra* note 1, at 1834-35 & nn.97-102 (arguing that increased production and lower costs will result).

132. See *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976), *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, —, 421 N.E.2d 876, 885 (1981); *Geary v. United States Steel Corp.*, 456 Pa. 171, —, 319 A.2d 174, 179 (1974).

133. See authorities cited note 9 *supra*.

134. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 192, 384 N.E.2d 353, 362 (1979) (Underwood, J., concurring in part and dissenting in part).

will be discouraged from locating in that state. Courts asked to adopt the public policy exception and to determine its parameters should defer such a decision to the legislature, rather than judicially adopt a standard that could contribute to a declining business environment.¹³⁵

V. A PROPOSED APPROACH

To avoid the disadvantages that often result from an overly broad cause of action for wrongful discharge, the courts should articulate clearly those instances in which an employee will be granted a cause of action. Clearly articulated standards, however, cannot be achieved if the courts rely upon vague public policy exceptions in order to grant a discharged employee's cause of action.¹³⁶ The courts should narrow this exception by carefully defining those circumstances that will give rise to an employee's claim. Courts addressing this issue should follow *Petermann*, *Frampton*, and *Nees* and deny a discharged employee's claim unless he was fired for refusing to violate a constitutional or statutory provision, for exercising a constitutional or statutory right, or for fulfilling a constitutionally or legislatively created duty. This standard provides both employees and employers with notice of what constitutes grounds for discharge of an employee terminable at will. Moreover, this approach recognizes the legitimate interests of both the employer and the employee. Because exceptions to the employment at will doctrine, articulated by state and federal constitutions and statutes, are recognized by the courts, the employee's job security is protected. Similarly, under this approach the employer may critically evaluate his workforce and discharge unproductive or inefficient employees with clearly defined standards of the employment at will contract as his guide.¹³⁷ Defined standards also

135. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, ___, 421 N.E.2d 876, 885-86 (1981) (Ryan, J., dissenting).

136. See, e.g., *Hinrichs v. Tranquillaire Hospital*, 352 So. 2d 1130 (Ala. 1977), in which the court stated, "Public policy is a vague expression, and few cases can arise in which its application may not be disputed. . . ." We hold that this is too vague a concept to justify the creation of such a new tort. Such creations are best left to the legislature." *Id.* at 1131 (quoting *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959)).

137. See *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980). "Employees will be secure in knowing that their jobs are safe if they exercise their rights in accordance with a clear mandate of public policy. On the other hand, employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason." *Id.* at 73, 417 A.2d at 512.

will discourage disgruntled employees from bringing vexatious lawsuits¹³⁸ and ensure that the courts' time is spent on "cases involving truly *significant* matters of *clear* and *well-defined* public policy and substantial *violations* thereof."¹³⁹ Furthermore, by limiting the scope of employees' potential causes of action to circumstances within the *Petermann*, *Frampton*, and *Nees* rationale the courts guarantee that they are enforcing the state's public policy as articulated by its constitution and legislature. One judge or a handful of judges should not delve into the "nebulous area of judicially created public policy."¹⁴⁰

Some commentators argue that the courts should intervene because legislatures are unlikely to be as sensitive to the needs of unorganized labor as to the needs of highly organized and influential business.¹⁴¹ This argument, however, ignores widespread legislation already enacted to benefit labor. Congress and state legislatures have actively sought to protect workers from wrongful discharge.¹⁴² For example, Title VII of the Civil Rights Act prohibits discrimination in employment based on race, creed, nationality, and sex.¹⁴³ Under the National Labor Relations Act¹⁴⁴ employers may not fire employees for union organizing activity. The Occupational Health and Safety Act¹⁴⁵ and the Fair Labor Standards Act¹⁴⁶ make it illegal for employers to terminate employees for exercising rights created by those statutes. Other federal statutes such as the Age Discrimination in Employment Act of 1967¹⁴⁷ and the Consumer Credit Protection Act¹⁴⁸ afford protection for more specific discharges. At the state level many legislatures have passed statutes prohibiting discharges because of physical handicaps,¹⁴⁹ for serving on jury duty,¹⁵⁰ for refusing to take a lie detector

138. "[O]ur holding protects the interests of the public in stability of employment and in elimination of frivolous lawsuits." *Id.* at 73, 417 A.2d at 512.

139. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, —, 421 N.E.2d 876, 885 (1981) (Ryan, J., dissenting) (emphasis in original).

140. *Id.* at 881.

141. *See, e.g.*, Peck, *supra* note 6; *Job Security*, *supra* note 9.

142. *See* note 10 *supra* and accompanying text.

143. 42 U.S.C. § 2000e-2 (1976).

144. 29 U.S.C. §§ 157, 158(a)(3) (1976).

145. *Id.* § 660(c) (1976).

146. *Id.* § 215(a)(3) (1976).

147. *Id.* § 623(a) (1976).

148. 15 U.S.C. § 1674(a) (1976).

149. *See, e.g.*, CAL. GOV'T CODE § 12940(a) (West 1980); MASS. ANN. LAWS ch. 149, § 34K (Michie/Law. Co-op 1976); MINN. STAT. ANN. § 363.03, Subd. 1(2) (West Supp. 1981).

150. For a collection of state laws, see [1980] LAB. L. REP. (CCH) (State Laws) ¶¶ 43,035, 43,055.

test,¹⁵¹ and for filing a workers' compensation claim.¹⁵²

Critics who argue that legislatures are not adequately responsive to the needs of unorganized workers also ignore the success of labor in several countries that have adopted national legislation to protect employees who would otherwise be terminable at will. These countries include France, Germany, Italy, Japan, Sweden, and the United Kingdom.¹⁵³ In the United Kingdom, for example, an employer can dismiss an employee only for reasons that relate to ability to perform the work involved, for reasons related to the conduct of the employee, or for "some other substantial reason of a kind such as to justify the dismissal."¹⁵⁴ Unless the employee has engaged in gross misconduct, he must be given notice of the dismissal.¹⁵⁵ A fair hearing must then follow and the employee is entitled to know the specific charges against him. The employee may also be accompanied by a representative of his choice, and he must be given the opportunity to defend himself.¹⁵⁶ Employees must have advance notice of conduct that will result in discipline and the offenses charged must be the real reason for the dismissal.¹⁵⁷ If the employee is found guilty of the offense, the penalty of dismissal, rather than a lesser form of discipline, must be warranted.¹⁵⁸ If the employee is dissatisfied with the results of these procedures he may appeal to the National Industrial Relations Court.¹⁵⁹

If the time has come for reform to protect employees terminable at will, it is for the legislatures, and not the courts, to balance

151. *Id.* ¶ 43,055.

152. *Id.* See, e.g., TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1981).

153. *Job Security*, *supra* note 9, at 698 n.8. See also Peck, *supra* note 6, at 10-13; Summers, *supra* note 9, at 508-19.

154. Summers, *supra* note 9, at 514 (quoting the Industrial Relations Act 1971, § 24(2)(a), 41 HAL. STAT. 2062 (1971 Comp.)).

155. *Id.* at 513.

156. *Id.* at 514-15.

157. *Id.* at 514.

158. *Id.* at 515.

159. *Id.* at 514. See also *International Labor Organization Recommendation No. 119 concerning Termination of Employment at the Initiative of the Employer*, the English version of which is reprinted in *Comparative Labor Law and Law of the Employment Relation, A Symposium*, 18 RUTGERS L. REV. 233, 449 (1964). The Recommendation proposed that dismissal should only be allowed if the reason for the discharge went to the ability of the worker to perform the work or the worker's conduct. *Id.* An opportunity to appeal to a designated body should be provided. *Id.* at 450. If the appellate body finds the dismissal unwarranted, the Recommendation suggests that the body be authorized to order reinstatement, back pay, or other appropriate relief. *Id.* The Recommendation, however, cautioned that the appellate body should not interfere with any determination of the size of the work force. *Id.* See also *Report of the Technical Meeting Concerning Certain Aspects of Industrial Relations Inside Undertakings*, 23 INDUSTRY & LAB. 224, 239-40 (1960).

the interests of the employer, the employee, and society in making this decision. Nevertheless, most of the changes that have occurred in the employment at will doctrine have occurred as the result of judicial action. When called upon to consider the parameters of the public policy exception to the doctrine, courts should take heed of Justice Ryan's warning:

By departing from the general rule that an at-will employment is terminable at the discretion of the employer, the courts are attempting to give recognition to the desire and expectation of an employee in continued employment. In doing so, however, the courts should not concentrate solely on promoting the employee's expectations. The courts must recognize that the allowance of [an action] is a departure from, and an exception to, the general rule. The legitimate interest of the employer in guiding the policies and destiny of his operation cannot be ignored. The new [cause of action] is in its infancy. In nurturing and shaping this remedy, courts must balance the interests of employee and employer with the hope of fashioning a remedy that will accommodate the legitimate expectations of both. In the process of emerging from the harshness of the former rule, we must guard against swinging the pendulum to the opposite extreme.¹⁶⁰

VI. CONCLUSION

The general rule that an employment contract of indefinite duration is terminable at will has received severe criticism in the past twelve years. In an effort to protect employees some courts have extended the exception to the terminable at will doctrine beyond legislatively articulated public policy without considering the possible effects such an expansion could have on employers. The interests of employers, employees, and society are affected when a court seeks to extend the reach of the public policy exception. These interests should be balanced to accommodate these concerns. This goal can be achieved if courts limit the public policy exception to instances in which an employee is discharged for refusing to violate a constitutional or statutory provision, for exercising a constitutional or statutory right, or for fulfilling a constitutionally or legislatively created duty. These parameters are based on clearly articulated legislative judgment. Courts, therefore, should confine the public policy exception to these areas and await further legislative determination of the limits on an employer's right to terminate at will.

CHARLES A. BRAKE, JR.

160. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, —, 421 N.E.2d 876, 884 (1981) (Ryan, J., dissenting).