EMPLOYMENT AT WILL AND PUBLIC POLICY

by

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INTRODUCTION

The most significant employment law development in the last two decades has been the erosion of the conventional employment at will doctrine and the concomitant creation of statutory and common law exceptions to its dictate.

In recent years, United States' courts in particular have become increasingly dissatisfied with the absolutist formulation of the doctrine and its perceived harshness and inequity. Accordingly, the courts have abandoned their former strict allegiance to the doctrine and have commenced to carve out far-reaching exceptions curtailing the employer's wide latitude to discharge.

The most widely-accepted and expansive approach employed by the courts emerges as the "public policy" exception. This exception confines the employer's scope of discharge upon a finding that the employer's conduct contravened some important public policy. The exception thus abandons the rule insulating employers from liability for such a discharge.

The process of developing the public policy exception began slowly, but now has gained such momentum that recent decisions point to the eventual demise of the employment at will doctrine.

Although the common law creation and extension of the public policy exception has substantially eroded the conventional doctrine, it is, however, not altogether dead. The doctrine continues to sustain the premise, regardless of how circumscribed, that a discharge is legal. The discharged employee must refute the premise by demonstrating that his or her discharge undermined "public policy." The law in almost all United States jurisdictions, moreover, does not mandate that a private employer show a "good reason" for discharging an employee.

The salient fact, though, is that the employment at will doctrine has experienced great erosion. The many recent court-created exceptions, particularly in the public policy arena, and the wide variations of law among the states, have

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engendered uncertainty and unpredictability as to whether a particular discharge will trigger legal responsibility.

The purposes of this article are to examine the current public policy caselaw, commentary, and related statutes, to explain and interpret in detail this significant area of employment law, and to propose a just principle to govern the discharge aspect of the employment relation.

THE EMPLOYMENT AT WILL DOCTRINE

Definition

The traditional general rule regarding employment at will holds that where an employment relation is of indefinite duration, the employer may discharge an employee or an employee may leave at any time, for any reason, without being liable thereby for any legal wrong. The conventional doctrine, moreover, permits an employer to discharge an employee even for a cause which is morally wrong. Considering the stark dichotomy between law and ethics condoned by the doctrine, a careful analysis requires an opening investigation into the doctrine’s derivation.

History

United States jurisdictions customarily proclaim “employment at will” as the conventional legal doctrine and thus the initial general rule governing employment relations; yet the early English common law traditionally presumed that an employment relation which did not specify duration was for a one year term. The English

1 See, e.g., Patton v. J.C. Penney Co., 301 Or. 117, 122, 719 P.2d 854, 857 (1986) (merchandising manager discharged for failing to break off a social relationship with a female co-employee, even though no socialization at work and no written or unwritten policy proscribing socializing) (“It may seem harsh that an employer can fire an employee because of dislike of the employee’s personal lifestyle, but plaintiff is subject to the traditional doctrine of ‘fire at will.’”); Delaney v. Taco Time Int’l, Inc., 297 Or. 10, 14, 681 P.2d 114, 116 (Or. 1984).


4 See, e.g., Wagenseller, 147 Ariz. at 375, 710 P.2d at 1030; Ludwick, 337 S.E.2d at 214; Sides v. Duke Hosp., 74 N.C. App. 331, 339, 328 S.E.2d 818, 824 (1985), discretionary review denied, 333 S.E.2d 490 (N.C. 1985) (“Inasmuch as the terminable at will doctrine may not have been a part of the English common law, it is thus possible that the pedigree of our common law rule is questionable.”); Wall, At Will Employment in Washington, 14 U. PUERTO RICO L. REV. 71, 74-75 (1990); Massingale, At-Will Employ-
courts, moreover, held the employer liable for breaching an employment contract if the employer discharged the employee without "reasonable cause." In the early 19th century, United States' courts followed the English rule.6

During the late 19th century, however, United States' courts departed from the earlier common law and developed the rule that indefinite employment was terminable at the will of either party for any reason. The origin of the doctrine is traced to an 1877 treatise on Master-Servant Law written by New York attorney and professor, H.G. Wood. He is "credited" with formulating the rule that came to be known as the employment at will doctrine. Wood declared:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is terminable at the will of either party. . . .10

State courts, regardless of the soundness of the rule's foundation,11 adopted the rule and perforce converted it into a substantive rule of law for employment relations which soon became the generally accepted "American" rule.12

References

1 Freed and Polsby, The Doubtful Provenance of 'Wood's Rule Revisited, 22 ARIZ. ST. L.J. 551, 556 (1990) ("Although the at-will rule was not universal, little question exists that Wood was articulating an idea that was generally accepted.").

2 See, e.g., Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884), rev'd on other grounds, 132 Tenn. 544 (1915); Martin v. N.Y. Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895); Wall, supra note 4, at 74-75;
United States' common law thus was transmuted into a doctrine whereby an employer possessed the right to discharge an at will employee at any time and for any reason, even a morally wrong reason, without any legal liability therefor.

Rationale

The salient question necessarily arises as to why the state courts, in a substantial deviation from common law, seized upon Wood's formulation as a vehicle for change and applied it "systematically and vigorously" to employment relationships. The answer is found in the advent of the Industrial Revolution in the late 19th century.

The employment at will doctrine emerged because it was well-suited to the favorable business-oriented social, economic, and political climate that maturated its development. During that period, the judiciary, bolstered by the prevailing attitudes of laissez-faire economics and freedom of contract, encouraged industrial growth by actively supporting the right of an employer to control its own business, including approving the right to an employer to discharge at will.

As the United States evolved into an industrialized nation, there came the decline of the master-servant relationship and the rise of the more impersonal employer-employee relationship. The emerging capitalist employer required wide latitude in employment practices, especially the license to regulate the size of its labor force, in order to confront growing competition and to meet changing market conditions. The employment at will doctrine promoted and protected the capitalist employer by empowering its rule over the labor force. The employer now had great flexibility to upgrade its labor force or to dismiss employees during times of reduced demand for production; the employee now had a keen motivation to maintain high performance standards to keep his or her position.

Moskowitz, supra note 5, at 35.

Wall, supra note 4, at 75.

Sidell, 74 N.C. App. at 339, 328 S.E.2d at 824; Moskowitz, supra note 5, at 33, 43.

Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66, 417 A.2d 505, 509 (1980); Ludwick, 337 S.E.2d at 214 ("[T]he doctrine, if not expressly created to subserve the laissez-faire climate of the late 19th century, has had the effect of doing so."); Wall, supra note 4, at 75; Leonard, supra note 4, at 641; Moskowitz, supra note 5, at 43.

Callahan, supra note 11, at 456; Massingale, supra note 4, at 187, 188-89; Freed & Polsby, supra note 11, at 558; Appel & Harrison, Employment At Will in Iowa: A Journey Forward, 39 Drake L. Rev. 67 (1989-1990); Leonard, supra note 4, at 641; Moskowitz, supra note 5, at 38-39 (freedom of contract as constitutional "dogma").

Leonard, supra note 4, at 641.


Massingale, supra note 4, at 188-89; Freed & Polsby, supra note 11, at 558.

Leonard, supra note 4, at 641.
The courts, in response to the economic changes sweeping the United States, performed a role as developers of the common law, and ushered in a doctrine which reflected the requirements, expectations, and beliefs of the then dominant business class.²¹

An additional rationale is commonly cited to support the conventional doctrine - the principle of mutuality. That is, not only can the employer not be compelled to retain an employee, but also the employee cannot be compelled to work for the employer.²² As one court declared:

Our disinclination to expand [the exceptions to the rule] serves to protect employees as well as employers. . . . In the absence of any employment contract, the counterpart to the employer's privilege to terminate at will is the privilege of the employee to do the same. . . . Employees have a strong interest in maintaining that privilege free from threat of suit, lest employers be supplied with a new weapon with which to harass any employee wishing to change jobs. Thus, the rights of employer and employee to decline to create conditions for terminations benefit both.²³

Dated business ideology and the theory of mutuality thus formed the cornerstones of the employment at will edifice.

Criticism

Although the conventional doctrine is rationalized in terms of mutuality, the relationship of an individual employee to an employer, especially a large corporate employer, is not an equal relationship. The ordinary employee must work in order to obtain the means to live, and often must accept work not of his or her preference. Many employees are bound geographically to their jobs; they have invested time and knowledge in their positions; and they do not have the financial means to change jobs freely.²⁴ In reality, employees seldom quit voluntarily;²⁵ rather, they live in fear of losing their positions absent some legal grounds assuring a secure position.

The employer, however, not only has been able to select the person to be employed, but has also been able to dictate almost all of the terms of the employment relationship.²⁶ The employer, moreover, rarely suffers more than an inconvenience when an employee resigns. If an employer desires to retain an employee who is

²¹ Wagenseller, 147 Ariz. at 375, 710 P.2d at 1030; Leonard, supra note 4, at 641.
²² Callahan, supra note 11, at 457; Freed & Polsby, supra note 11, at 558 ("reflecting the value of individualism . . . and the mobility of labor").
²⁴ Moskowitz, supra note 5, at 34.
²⁵ Massingale, supra note 4, at 200-01.
²⁶ Id.
contemplating resigning to take another position, the employer merely has to make its own position more appealing. The consequences of an involuntary severing of the relationship, especially if sudden, clearly work a far greater hardship on the employee than the employer. The employment at will doctrine, therefore, is not a mutual, equal, or symmetrical relationship. As one court remarked:

While the doctrine is cast in mutuality, affording to employees as well as employers the right of at will termination, it cannot be seriously contended that, equality, it impacts with equal force. . . . [I]t assures equality to the employee as does the law which forbids the rich as well as the poor to sleep under bridges.28

Given the considerable disparity in economic power and bargaining positions between employers and employees, particularly large corporate employers, and the employer’s chiefly unchecked control over the terms and conditions of the employment relation, abuses in the treatment of employees naturally arise.29 The courts, of course, now are being asked to respond to the need to protect employees from abusive practices by the employer.

The conventional doctrine has been subject to further increasing criticism as not reflecting the reasonable expectations of contemporary employers and employees30 and no longer being suited to evolving economic relations between the parties.31 As one justice expounded:

Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. This doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and duty of amending it to reflect social and economic changes.32

27 Id.
29 Massingale, supra note 4, at 189. Moskowitz, supra note 5, at 34 (“numerous reported cases reflect the potential for overreaching”) & 48 (“numerous reported court cases provide insight into the potential for abuse”); Maltby, The Decline of Employment At Will - A Quantitative Analysis, 41 LAB. L.J. 51, 51-52 (1990) (approximately 150,000 workers in the U.S. who are unjustly discharged every year).
30 Leonard, supra note 4, at 675, (“A continued presumption of at will employment seems inconsistent with more than merely the unspoken assumptions of the parties. The continued reluctance of some state courts to recognize that . . . seems an indulgence in unnecessary legal fiction.”).
31 Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66, 417 A.2d 505, 509 (1980) (“The 20th century has witnessed significant changes in socio-economic values that have . . . led to reassessment of the common law rule. Businesses have evolved from small and medium sized firms to gigantic corporations in which ownership is separate from management. . . . The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.”).
The conventional doctrine, finally, is criticized for discouraging legal and moral behavior. An employee threatened with discharge for reporting or refusing to engage in misconduct will be disinclined to do so; an employer undeterred from such wrongful discharges may inflict them more freely.

Statutory Exceptions

Recognizing the criticisms levied against the conventional doctrine, federal and state legislatures have qualified the once universal doctrine. Nonetheless, the employment at will doctrine remains in force subject only to the specific exceptions carved out by statute or the common law.

The Public Policy Exception

Introduction

The most extensive and logical exception to the employment at will doctrine is the common law, public policy exception. When an employee is discharged for a reason or in a manner that contravenes some clearly defined and fundamental public policy, the employer may be held legally accountable. The recent substantial development of the exception discloses a surging judicial disfavor with the conventional doctrine and a concomitant effort to formulate a more even-handed principle.

Rationale

The purpose of the public policy exception is to protect the interests of the employee, the employer, and society. Employees possess a job security interest in knowing that they will not be discharged for reasons that contravene public policy. Employers possess an interest in knowing that they can retain sufficient latitude to make necessary personnel changes so long as their conduct is consistent with public policy. Society possesses an interest in a stable employment market, the advancement of fundamental public policies, and the dissuasion of frivolous litigation by disgruntled employees. The courts, of course, must rise to the challenge of creating a well-crafted public policy formulation that balances the preceding interests.

33 Callahan, supra note 11, at 456.
34 Id.
35 For a general discussion of statutory encroachments, see Leonard, supra note 4, at 642. For a discussion of specific statutory exceptions, see infra notes 72-74 and accompanying text.
36 See infra note 53 and accompanying text for a detailed explanation of the exception.
38 Pierce, 84 N.J. at 70, 417 A.2d at 511; Brockmeyer, 113 Wis. 2d at 574, 335 N.W.2d at 841.
39 Pierce, 84 N.J. at 73, 417 A.2d at 512; Brockmeyer, 113 Wis. 2d at 574, 335 N.W.2d at 841.
At the heart of the reasoning underpinning the public policy exception is the recognition that the employment at will doctrine is, in essence, a "lawless" doctrine which sanctions conduct inimical to societal welfare.40 As one court stressed:

... [I]n a civilized state where reciprocal rights and duties abound, the words 'at will' can never mean 'without limit or qualification'. ... for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and there not for long - it certainly cannot be suffered in a society such as ours without the weakening of the bond of counterbalancing rights and obligations that holds such societies together. Thus, ... there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.41

The necessity of imposing law and order in the employee discharge arena has compelled the courts to forge public policy into a legally viable armament.

The Public Policy Exception As a Tort

Many jurisdictions provide employees with a legal remedy in tort for a wrongful or retaliatory discharge that contravenes a particular, important public policy.42 Courts have had little difficulty in recognizing a tort remedy since the cause of action arises neither from any agreement between the employer and employee nor from any expectations inferred from their relationship, but from a duty implied in law based on a societal judgment as to what constitutes unreasonable discharge

40 Leonard, supra note 4, at 657-58.
As the public policy exception is actionable in tort, damages caused by emotional distress may be properly considered. As one court observed:

We believe that public policy also requires us to allow a wrongfully discharged employee a remedy for his or her complete injury. . . . In addition to monetary loss of wages, the employee may suffer mentally. 'Humiliation, wounded pride, and the like may cause very acute mental anguish. . . .' We know of no logical reason why a wrongfully discharged employee's damages should be limited to out-of-pocket loss of income, when the employee also suffers causally connected emotional harm.

The public policy tort, moreover, can serve as the basis for a punitive damage award if the requisite standard is met.

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43 Haynes v. Zoological Soc'y of Cincinnati, 567 N.E.2d 1048, 1050 (Ohio C. P. 1990) (tort damages appropriate because of violation of public policy "deeply ingrained in community and moral values"); Swan, supra note 42, at 615; Horowitz, supra note 42, at 62; Moskowitz, supra note 5, at 50.

44 See, e.g., Haynes, 567 N.E.2d at 1050-51 (retaliatory demotion and harassment of zoo employee who complained to management of unsafe conditions); Travis, 921 F.2d at 112 (employee discharged and health insurance cancelled when employee invoked rights under Fair Labor Standards Act); Delaney v. Taco Time Int'l, 297 Or. 10, 12, 681 P.2d 114, 115 (1984); McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 n.3 (Tex. 1989) (dicta), rev'd on other grounds, 111 S. Ct. 478 (1990); Massingale, supra note 4, at 201 (psychological effects on individuals who lose their jobs can be easily documented).

45 Niblo v. Parr Mfg., 445 N.W.2d 351, 355 (Iowa 1989) (plant employee discharged for threatening to file a Worker's Compensation claim after being informed by her doctor that she had a severe case of chloracne, caused by contact with chemicals at work).

46 See, e.g., Swanson v. Eagle Crest Partners, 105 Or. App. 506, 510, 805 P.2d 727, 729 (1991) (punitive damages properly submitted to jury in case of wrongful constructive discharge for resisting and complaining of unwanted sexual conduct and contact); Travis, 921 F.2d at 112; Burk, 770 P.2d at 28 n.10; McClendon, 779 S.W.2d at 71 n.3 (dicta); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 736 (Tex. 1985) (Kilgarlin, J., concurring); Delaney, 297 Or. at 13, 681 P.2d at 115 (1984); Roberts v. Ford Aerospace and Communications Corp., 224 Cal. App. 3d 793, 797, 274 Cal. Rptr. 139, 142-43 (1990) (black employee discharged after complaining to management of repeated and escalating acts of racial harassment, including racially pejorative statements scrawled on the walls of the bathroom, ridicule by other employees, and mimicking of his manner of speech); Witt v. Forest Hosp., 115 Ill. App. 3d 481, 489, 450 N.E.2d 811, 816 (1983) (deterrent purpose of punitive damages); but see Smith, 464 N.W.2d at 687 ("[P]unitive damages should not be awarded in the case that first recognizes the tort of retaliatory discharge. . . .").

47 See, e.g., Roberts, 224 Cal. App. 3d at 797, 274 Cal. Rptr. at 142-43 (substantial evidence that employer terminated employee in violation of public policy against racial discrimination and that employer acted with malice sufficient for retaliating against employee for complaining of the discrimination); Peru Daily Tribune v. Shuler, 544 N.E.2d 560, 563 (Ind. Ct. App. 1989) ("evidence of obdurate and oppressive behavior . . . not resulting from moniquitous human failing, mere negligence, or honest error in judgment") (newspaper sales representative told her supervisor of work-related injury and need for treatment and filed a Workers' Compensation claim; yet her employment was terminated despite lack of any prior indication that her performance was substandard, with no cause being given for discharge, and employee was refused re-employment after her doctor released her to return to work); Sides, 74 N.C. App. at 348-49, 328 S.E.2d at 830 ("wanton and reckless disregard" standard); Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1376 (9th Cir. 1990) (applying Oregon law), cert. granted, 111 S. Ct. 2791 (1991) (employee clerical worker discharged for resisting sexual harassment by her general manager recovered punitive damages under standard of "extraordinary or extreme transgressions of social norms").
Although this relatively new tort certainly provides the means to attain justice in the workplace, the tort is not immune to challenge.

**Problems with the Public Policy Tort**

The paramount problem plaguing the public policy tort is the vagueness of the term “public policy” and the concomitant difficulty in elucidating a precise definition. Closely related to this problem is the perplexity in ascertaining the exact sources of public policy.

The uncertain status of the public policy tort formulation, its rejection by some courts, and the state-by-state, case-by-case decision-making, render it difficult for employers and employees and their attorneys to predict when a court may next find that a discharge contravenes public policy.

The fear, of course, is that absent explicit delineation of the sources of public policy and promulgation of precise standards as to what conduct constitutes a public policy violation, the exception could degenerate into “an amorphous source of just cause litigation” or “transforming at will employment into life tenure regardless of work performance.”

In order to check the criticism levied against the public policy exception, it is essential to examine the sources and standards of public policy.

**The Sources and Standards of Public Policy**

**Introduction**

In order to comprehend the parameters of the public policy tort, it is necessary to discover the sources of public policy adverted to in the public policy tort decisions. Moreover, in order for principled decision-making to exist in this area of law, it is

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48 See, e.g., Burk, 770 P.2d at 28-29 (“vague meaning of the term public policy”); Berube v. Fashion Center, 771 P.2d 1033, 1042 (Utah 1989) (“In fact, a precise definition of public policy may be virtually impossible. . . . In Utah, we have frequently invoked the concept of public policy without articulating precisely its origin or definition.”); Ludwick v. This Minute of Carolina, 337 S.E.2d 213, 215 (S.C. 1985) (“The difficulty rests in determining a precise definition of the expression ‘public policy.’”); Massingale, supra note 4, at 191 (“The term . . . eludes precise definition.”); Moskowitz, supra note 5, at 52-53.

49 See, e.g., Berube, 771 P.2d at 1042 (“the nature and scope of ‘substantial public policies’ upon which the exception is based are not always so easily discerned”); Crawford, You’re Fired, Public Policy Wrongful Discharge after McClendon, Tex. B.J., April 1991, at 331.

50 See Burk, 770 P.2d at 28-29 (“In light of the vague meaning of the term public policy, we believe the public policy exception must be tightly circumscribed.”); Ludwick, 337 S.E.2d at 215 (“The principle involved is more easily stated than judicially applied. The difficulty rests in determining a precise definition of the expression ‘public policy.’ Hence, the public policy exception has been extended by some courts to particular job terminations not recognized by others.”); Moskowitz, supra note 5, at 52-53.


essential to ascertain the exact standards that will trigger a tortious violation of the exception. It is efficacious first to delineate the sources of public policy and then to examine the standards for a violation pursuant to a particular source.

An initial search directs one to the supreme law of a jurisdiction - its constitution.

Constitutional Sources of Public Policy

It is a legal axiom that constitutions protect against "state action" and not purely private conduct. Yet whether constitutional protections apply exclusively to state action is not dispositive of the public policy question. An employee of a private employer need not confine his or her case to the narrow issue of state action. Rather, the cases indicate that constitutions, particularly Bills of Rights, are viewed as fundamental sources of public policy upon which to build a tort cause of action against a private employer.

Constitutional Source-Based Standards for Public Policy

Pursuant to constitutional sources, the public policy tort encompasses a variety of protections modeled on constitutional rights.

The right to privacy, undoubtedly of fundamental societal importance and thus held in high esteem by constitutional doctrine, is viewed as evidence of a public policy supporting privacy in the workplace. Consequently, if an employee's

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53 See, e.g., Johnson v. Carpenter Technology, 723 F. Supp. 180, 185 (D. Conn. 1989) (federal constitution "protects against incursions of the government and persons acting as gov't agents"); Booth v. McDonnell-Douglas Truck Serv., 585 A.2d 24, 28 (Pa. Super. Ct. 1991) ("The Pennsylvania Constitution contains clauses prohibiting laws which impair the obligation of contracts ... [but] ... [t]his is a dispute between private parties; as no allegation of state action has been made, the constitutional provision cited by [employee] does not apply."); Perritt, supra note 51, at 403.

54 See, e.g., Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899-900 (3d Cir. 1983) (applying Pennsylvania law) ("... a cognizable expression of public policy may be derived in this case from either the First Amendment of the U.S. Constitution or Article I... of the Pennsylvania Constitution"); Rojo v. Kliger, 52 Cal. 3d 65, 90, 276 Cal. Rptr. 130, 146 (1990) (the California constitutional "provision unquestionably reflects a fundamental public policy against discrimination in employment - public or private"); Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123, 1132-33 (Alaska 1989) ("Alaska's constitution contains a right to privacy clause. ... [I]t can be viewed by this court as evidence of a public policy supporting privacy."); Boyle v. Vista Eyewear, 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) ("letter and purpose of a constitutional provision or scheme"); Perritt, supra note 51, at 403 ("There is no logical reason ... why the Bill of Rights cannot be used as a foundation for public policy to permit tort recovery."); Leonard, supra note 4, at 659 ("The most traditional sources for finding public policy are the official documents of policy - federal and state constitutions."); contra Johnson, 723 F. Supp. at 185 (Employee "attempts to discern a public policy that will support his discharge ... claims from the right to privacy. Despite the importance of that right as defined in federal constitutional terms, in the context of an employee's claim against a private employer such a right has little force because it protects against incursions by the government and persons acting as government agents.").

55 See, e.g., Luedtke, 768 P.2d at 1131-32 ("The next question we address is whether a public policy exists protecting an employee's right to withhold certain 'private' information from his employer. We believe such a policy does exist, and is evidenced in the ... constitution of this state. ... Alaska's constitution
termination entails conduct by the employer which contravenes the employee’s privacy interest, the public policy tort is triggered.56

The right to privacy, however, in the workplace or otherwise, is not absolute. The employee’s right to privacy must be balanced against the competing public policies protecting the interest of the employer to regulate its workforce and the interests of society.57 Accordingly, “[w]here the public policy supporting the (employees’) privacy in off-duty activities conflicts with the public policy supporting the protection of the health and safety of the workers and even the (employees) themselves, the health and safety concerns are paramount.”58

The public policy doctrine similarly has been interpreted to protect the

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56 See, e.g., Semore, 217 Cal. App. 3d at 1093, 266 Cal. Rptr. at 285-86 (chemical plant employee terminated because he refused to consent to a pupillary reaction eye test to determine if he was under the influence of drugs); Perritt, supra note 51, at 409 (It is “... reasonable that some fundamental aspects of employees’ private lives should be protected from employer coercion lest fundamental policies enshrined in constitutional doctrines be jeopardized.”); see also Hames, Are Terminations Precipitated by an Invasion of Privacy Wrongful? 42 LAB. L. 371, 375 (1991) (“Cases claiming that employee terminations contravene a clearly mandated public policy because they are based on unlawful invasions of their common law right to privacy are relatively rare. Accordingly, it is not possible to determine whether the common law right to privacy constitutes a clearly mandated public policy... [O]ther cases involving the public policy exception... coupled with the cases reviewed herein... suggest that if the reasons for an employee’s termination, or the manner in which the terminations are conducted, constitute actionable invasions of their common law right to privacy, they are also likely to constitute wrongful terminations pursuant to the public policy exception.”); contra Borse v. Piece Goods Shop, 758 F. Supp. 263, 268 (E.D. Pa. 1991) (“[N]o public policy, constitutional or otherwise, inhibits a private employer from requiring its employees to submit to urine testing for the presence of drugs and alcohol... [A]n employee discharged for refusing to submit to this form of drug and alcohol testing would not have a cause of action for wrongful discharge.”).

57 See, e.g., Quitmeyer v. Southeastern Penn. Transp. Auth., 740 F. Supp. 363, 367 (E.D. Pa. 1990) (“The interests the employer seeks to advance and the interests of society in protecting the employer’s freedom of action in such cases are important factors to be considered.”); Semore, 217 Cal. App. 3d at 1093, 266 Cal. Rptr. at 286 (“The resolution of the... dispute depends upon balancing an employee’s expectation of privacy against the employer’s needs to regulate the conduct of its employees at work.”); Luedtke, 768 P.2d at 1130 (competing public concern for safety).

58 Id. at 1136-37 (employees who worked on a drilling rig not wrongfully discharged by employer for refusing to submit to urinalysis screening for drug use where one employee was given notice of future test and second employee had a notice and opportunity to schedule test at reasonable time). Note that in Luedtke the public policy approach is largely encompassed within the implied covenant of good faith and fair dealing. Id. at 1130. See Quitmeyer, 740 F. Supp. at 367 (engineer discharged by transit authority following negative drug test conducted more than a year after involvement in a fatal grade-crossing accident); Turner v. Owens-Corning Fiberglass Corp., 777 S.W.2d 792, 795 (Tex. Civ. App. 1989), vacated on other grounds, 787 S.W.2d 955 (Tex. 1990) (plant nurse’s discharge for refusing to be voluntarily admitted to a substance abuse facility located outside the state as a condition of her continued employment held not to be a wrongful discharge); Hennessey, 247 N.J. Super. at 309, 589 A.2d at 176 (lead pumper in oil refinery discharged after random urine drug test not basis for public policy cause of action since no right to private use of controlled substances by adults in their homes).
constitutional equivalent of free speech rights in the workplace. The leading case in the field is *Novosel v. Nationwide Insurance Co.*,\(^5^9\) where the U.S. Court of Appeals declared:

The definition of a ‘clearly mandated public policy’ as one that ‘strikes at the heart of a citizen’s social rights, duties, and responsibilities’ . . . appears to provide a workable standard for the tort action. . . . The protection of an employee’s freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a Worker’s Compensation claim.\(^6^0\)

Although free speech is a paramount societal right, it is not an absolute right in the workplace or otherwise. The *Novosel* court thus proposed a four part inquiry to determine whether employee speech triggers the public policy tort: (1) Does the speech prevent the employer from efficiently carrying out its responsibilities?; (2) Does it impair the employee’s ability to carry out his or her own responsibilities?; (3) Does it interfere with essential and close working relationships?; and (4) Does the manner, time, and place in which the speech occurs interfere with business operations?\(^6^1\) Only by seeking the answers to such questions can the proper balance among the parties be attained.

The protection of important constitutional freedoms in the workplace by virtue of the public policy doctrine also extends to freedom of association,\(^6^2\) freedom from discrimination,\(^6^3\) and freedom from defamation.\(^6^4\)

\(^{59}\) 721 F.2d 894 (3d Cir. 1983).

\(^{60}\) *Id.* at 899 (district claims manager discharged for his refusal to participate in lobbying effort for No-Fault Reform Act and for his privately stated opposition to the company’s political stand); *see Perritt, supra* note 51, at 397.

\(^{61}\) *Novosel*, 721 F.2d at 901.


\(^{63}\) *Rojo v. Kliger*, 52 Cal. 3d 65, 90, 276 Cal. Rptr. 139, 146, (1990) (physician’s assistants continually subjected to sexual harassment and demands for sexual favors by physician and their refusal to tolerate that harassment or acquiesce in those demands resulted in wrongful discharge) (“[W]hether article 1, section 8 [of the California Constitution] applies exclusively to state action is largely irrelevant; the provision unquestionably reflects a fundamental public policy against discrimination in employment - public or private - on account of sex. Regardless of the precise scope of its application, article I, section 8 is declaratory of this state’s fundamental public policy against sex discrimination, including sexual harassment, which . . . is merely one form of sex discrimination.”).

\(^{64}\) *Delaney v. Taco Time Int’l*, 297 Or. 10, 18, 68 P.2d 114, 118 (1984) (“The Oregon constitution contains two provisions dealing with defamation. . . . These two sections indicate that a member of society has an obligation not to defame others. . . . Plaintiff here was discharged for fulfilling a societal obligation. We hold that defendant is liable for wrongfully discharging plaintiff because plaintiff refused to sign the potentially defamatory statement.”).
Privacy, speech, association, and the other preceding constitutional protections are, of course, not the only recognized constitutional rights. One commentator ingeniously has noted that “[d]ue process is also constitutionally recognized. Part of substantive due process is the rationality idea: the idea that injury must be justified by some good cause. It is a relatively short logical step... to transform the public policy tort into a legally imposed just cause standard.” If the courts were to apply such reasoning, the obvious result would be the rapid demise of the employment at will doctrine.

Constitutions, although paramount in the United States’ legal scheme, are not the only significant sources of public policy.

Statutory Sources of Public Policy

Traditional and established sources of public policy also are found by the courts to be located in federal and state legislation and administrative provisions made pursuant to legislatively conferred authority. A discharged employee may not be required to point to a specific statute; rather, the presence of a statutory scheme can support the finding of a state’s public policy. Some jurisdictions, however, restrict statutory sources of public policy to statutes that carry penal penalties or “strike... at the heart of our social structure.” The judicial fear is that since

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65 Perritt, supra note 51, at 402.
66 See, e.g., Wagenseller v. Scottsdale Mem. Hosp., 141 Ariz. 370, 380, 710 P.2d 1025, 1035 (1985) (nurse refused to participate in activities that “arguably” would have violated state’s indecent exposure statute). The court declared that “[t]he law enacted by the legislature established a clear policy that public exposure... is contrary to public standards of morality. We are compelled to conclude that termination of employment for refusal to participate in public exposure... is a termination contrary to the policy of this state.” Id. The court further noted that once the policy embodied in the statute is ascertained, a “technical violation of the statute” is not necessary. Id. at n.5. See Leonard, supra note 4, at 659.
68 See, e.g., Dabbs v. Cardiopulmonary Management Servs., 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129, 133 (1987) (employee, respiratory therapist, discharged by employer-hospital based upon her protest of working conditions in hospital). The employee, according to the court, was “not required to point to a violation of a specific statute by her employer”; rather “there is statutory support for plaintiff’s assertion her discharge violated a substantial public policy principle. There is no question California has a public policy favoring qualified care for its ill and infirm. The list of sections in the Business & Professions Code dealing with safeguards for the health of patients is lengthy.... The legislation recognizes each particular practice affects the public health, safety, and welfare and as such requires regulation and control.” Id.
70 Redick v. Kraft, 745 F. Supp. 296, 304 (E.D. Pa. 1990) (“Plaintiff contends that his termination violated public policy. The ‘public policy’ on which plaintiff relies is that purportedly reflected by the Wage Payment and Collection Law.... While the policy in favor of paying one what he has earned is highly desirable, it is not one that ‘strikes at the heart’ of our social structure.”).
“[v]irtually every statute reflects a public policy judgment. . . [t]o extract a public policy exception to the at-will employment doctrine from each statute would effectively eviscerate that doctrine.”

Statutory Source-Based Standards for Public Policy

By utilizing concepts of public policy contained in statutes, courts have crafted various standards for the public policy tort.

1. Statutes Expressly Prohibiting Discharge

An obvious and narrow public policy exception to the employment at will doctrine thus arises when a statute expressly prohibits an employee’s discharge under certain conditions. Such statutes clearly reflect a public policy curtailing the employer’s discretion to discharge. Accordingly, the courts have held that an employer who violates such a statute has contravened public policy, thus exposing the employer to tort liability.


72 See, e.g., Shaffer v. Frontrunner, 57 Ohio App. 3d 18, 20, 566 N.E.2d 193, 195-96 (1990) (cause of action exists for wrongful discharge resulting from violation of public policy set forth in state statute with regard to jury duty which prohibited employer discharge of any “permanent” employee summoned to serve as juror); Scott v. Otis Elevator, 572 So. 2d 902, 903 (Fla. 1990) (“Section 440.205 reflects the public policy that an employee shall not be discharged for filing or threatening to file a Workers’ Compensation claim.

73 See, e.g., Albright v. Longview Police Dep’t., 884 F.2d 835, 843-44 (5th Cir. 1989) (award of punitive damages pursuant to statute upheld for nurse who had been retaliated against by hospital for filing a Workers’ Compensation claim); Scott, 572 So. 2d at 903 (“We hold that an employer who violates this statute has committed an intentional tort, thereby exposing itself to liability for damages for emotional distress.”); Wilcox v. H’Vee Food Stores, 458 N.W.2d 870, 872 (Iowa App. 1990) (state statute making it a misdemeanor for an employer to require a polygraph test as a condition of employment held to create a private cause of action in an employee bookkeeper who was terminated for refusing to take polygraph exam as part of investigation of cash shortages); Ford v. Blue Cross & Blue Shield of Conn., 216 Conn. 40, 62-63, 578 A.2d 1054, 1064-65 (1990) (emotional distress and punitive damages recoverable pursuant to statute in employee’s action alleging wrongful termination in retaliation for filing a Workers’ Compensation claim); Greeley v. Miami Valley Maintenance Contractors, 49 Ohio St. 3d 228, 234, 551 N.E.2d 981, 986 (1990) (employer, who discharged employee as a result of court order which required employer to withhold child support payments through wage assignments, violated statute prohibiting employer from discharging employee on the basis of garnishment of the employee’s wages) (“To disallow a civil remedy for violations of [the statute] frustrates the policy and purposes of the statute. Therefore, the only logical conclusion is that the General Assembly did not intend to foreclose a civil remedy. . . .”); see also International Union v. Johnson Controls, 813 S.W.2d 558, 564 (Tex. Ct. App. 1991) (cause of action pursuant to Texas Workmen’s Compensation Act).
2. Refusal to Violate a Statute

An employee whose discharge resulted from a refusal to perform an act, ordered by the employer, which would violate a statute is very likely to receive protection under the public policy exception. The protection also is extended to employees who are discharged for refusing to violate an administrative regulation.

Since statutes reflect attitudes that the community strongly holds, statutes perforce embody important societal obligations not to commit unlawful acts. Consequently, to uphold a discharge for refusal to violate a statute "... would sanction defiance of the legal process legislated. ... In a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible." Courts and commentators further realize that without the protection afforded by the public policy exception, the employee would be placed in the intolerable position of choosing between job security and statutory compliance.

The protection afforded by public policy, however, is not automatic. The employee must demonstrate that the terms of the statute in question amount to "... more than a broad general statement of policy." Many jurisdictions mandate, moreover, that the statute carry criminal, not civil, penalties in order to invoke the

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75 See Callahan, supra note 11, at 458; Massingale, supra note 4, at 193; Moskowitz, supra note 5, at 51; see, e.g., Sargent v. Central Nat'l Bank & Trust Co., 809 P.2d 1298, 1300-01 (Okla. 1991) (bank auditor discharged for refusing to destroy or alter report to bank's audit committee; several statutes prohibited act which his superior urged auditor to commit); but see Jarvinen v. HCA Allied Clinical Lab., 552 So. 2d 241, 242 (Fla. Dist. Ct. App. 1989).


77 Madani v. Kendall Ford, 102 Or. App. 478, 481, 794 P.2d 1250, 1252 (1989) (Newman, Judge, concurring in part, dissenting in part); Sargent, 809 P.2d at 1302 ("A demand to destroy or alter a bank auditor's report clearly runs counter to the principles which the Federal code espouses.").


79 See id.; Coman, 325 N.C. at 176-77, 381 S.E.2d at 447-48 ("Plaintiff allegedly was faced with the dilemma of violating ... public policy and risking imprisonment ... or complying with public policy and being fired from his employment. Where the public policy providing for the safety of the ... public is involved, we find it in the best interest of the state on behalf of its citizens to encourage employees to refrain from violating ... public policy at the demand of their employers."); Moskowitz, supra note 5, at 51.

80 See Lorenz v. Martin Marietta Corp., 802 P.2d 1146, 1149 (Colo. App. 1990) (mechanical engineer, terminated for refusing to file a report to NASA containing false and misleading statements, regarding employer's work); see also Merck v. Advanced Drainage Sys., Inc., 921 F.2d 549, 554-55 (4th Cir. 1990) (applying S.C. law) (employee, vice-president of plant operations, argued that discharge was for refusing to defraud state government by certifying that employer's plastic tubing for highway drainage systems was manufactured in compliance with standards of the American Association of State Highway Officials, but standards not clear and thus no violation of public policy).
public policy exception.\textsuperscript{81}

Even if the employer discharged the employee for refusing to violate a statute, the employee can sue the employer successfully only if he or she satisfies the causation requirement. As one court explained:

\begin{quote}
. . . [A] plaintiff must allege and prove more than that she was fired, she must allege and prove that her firing was caused by a prohibited retaliatory motive. . . . Without the requisite causation there might be a discharge, but not an actionable discharge. . . . There must be facts for a ‘causal connection’ between the refusal to act and the discharge, facts other than the refusal and the discharge themselves.
\end{quote}

When considered with other circumstances the fact of ‘rapidity and proximity in time’ between refusal and discharge sometimes can create the necessary inference of prohibited motive. . . .\textsuperscript{82}

Other courts impose even more strict causation requirements by mandating that the discharge was “significantly motivated”\textsuperscript{83} by the employee’s refusal or the “sole reason”\textsuperscript{84} for the termination.

In spite of the rigors of the causation criteria, the “refusal to violate a statute”

\textsuperscript{81} See, e.g., Harrison v. Edison Brothers Apparel Stores, 924 F.2d 530, 534 (4th Cir. 1991) (retail employee discharged after she refused manager’s request for sex) (“[W]e think it apparent that the exchange of sexual intercourse for the valuable economic benefit of a job fits within North Carolina’s criminal prohibition.”); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (“illegal act”) (deckhand fired for refusing to pump bilges into the water); Hancock v. Express One Int'l., 800 S.W.2d 634, 636 (Tex. Ct. App. 1990) (pilot discharged because he refused to fly under conditions which would require him to violate regulations regarding flight and rest time limitations prescribed by FAA but regulations only carried civil penalties ranging from a reprimand to revocation of a pilot’s certificate and not criminal penalties); but see Vaske v. DuCharme, McMillen, & Assocs., 757 F. Supp. 1158, 1163 (D. Colo. 1990) (employee, salesperson in contact lens industry, discharged when he refused to sign a contract containing non-compete clause, did not have cause of action even though state statute voiding covenant not to compete) (“While the violation of the instant statute could result in criminal penalties, . . . the employer, not the employee, would be in jeopardy for infringements.”).

\textsuperscript{82} Hamann v. Gates Chevrolet, 910 F.2d 1417, 1420 (7th Cir. 1990) (applying Indiana law) (employee, clerk in title department, refused to notarize altered titles for over two years and she continued to refuse, approximately 10-20 times, during the two year time period before she advised co-employee not to notarize; yet despite these refusals, employer took no action against employee during this period).

\textsuperscript{83} White v. American Airlines, 915 F.2d 1414, 1421 (10th Cir. 1990) (applying Okla. law) (plaintiff, shift superintendent of DC-10 aircraft maintenance, alleged that he was discharged because he refused to perjure himself, as requested by defendant’s outside counsel, during deposition concerning DC-10 crash, but lower court failed to instruct jury that employer should be held liable only if employee’s termination was significantly motivated by employee’s refusal to commit perjury, rather than the refusal merely being one motivation for the discharge).

\textsuperscript{84} Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229, 230 (Tex. Ct. App. 1990) (engineer, discharged for refusing to certify plans for exploratory shaft due to safety concerns, claimed that discharge violated Texas Penal Code prescribing “reckless conduct” but insufficient evidence that discharge for refusal to commit the illegal act was the “sole reason” for the termination).
standard of the public policy formulation emerged as a potent tool to circumscribe
the employer's latitude to terminate an at will employee.

3. Pursuing Statutory Rights

Closely related to the previous public policy statutory standard is the criterion
of pursuing statutory rights. Pursuant to this aspect of public policy, an employee
who is discharged for pursuing or vindicating a statutory right related to his or her
role as an employee possesses a public policy tort cause of action. In order to
sustain the action, the plaintiff-employee must assert that he or she was discharged
because of conduct aimed at pursuing or vindicating the statutory right; merely
asserting that the discharge was in violation of a statutory right is insufficient.

All the preceding statutory standards, of course, protect employee conduct
that the legislature has deemed to be in the public interest. The first statutory
standard, a discharge expressly prohibited by statute, naturally reflects the strongest
policy a legislature can compose, particularly so if the legislature provides a
mechanism for the employee to vindicate the statutory protection. The second
standard, a discharge for refusing to violate a statute, also reflects a strong policy
statement from the legislature since an express legislative prohibition of conduct
compels the employee to obey or face the legislature's penalty. The third statutory
standard, pursuing statutory rights, signifies a somewhat weaker policy standard
since the legislature is not compelling an employee to vindicate the right. The
employee possessing the right has the option of invoking the right or not exercising
it. Nonetheless, the creation of the right, together with the fact that the employee
does choose to vindicate it, is sufficient for the courts to infer an enforcement
mechanism by means of the common law, public policy, tort formulation. This
aspect of public policy is premised on protecting employees who actively pursue
rights and benefits they are entitled to by virtue of statutes. To uphold a discharge
in such circumstances would, in essence, abrogate the statute's purpose.

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85 See, e.g., Travis v. Gary Community Mental Health Center, 921 F.2d 108, 111-12 (7th Cir. 1990)
(employee discharged for invoking rights under Fair Labor Standards Act); Smith v. Smithway Motor
Xpress, 464 N.W.2d 682, 685 (Iowa 1991) (truck driver, who injured back while loading, hospitalized and
unable to work for four months, received Workers' Compensation benefits, released to return to work by
his doctor, and was fired the next day without explanation); Delaney v. Taco Time Int'l., 297 Or. 10, 16, 681
discharged her for reason of pregnancy) ("A discharge because of pregnancy is a discharge 'because of sex,'
ORS 659.029, and is an unlawful act of sex discrimination under ORS 659.030. Plaintiff does not assert that
she pursued any right, but only that she was discharged in violation of a right.").
87 See Perritt, supra note 51, at 406; Leonard, supra note 4, at 660-61.
88 See Eldridge v. Felec Servs, 920 F.2d 1434, 1437 (9th Cir. 1990) (applying Alaska law); Smith, 464
N.W.2d at 685 ("Retaliatory discharge violates public policy even if the employer does not interfere with
the discharged employee's benefits." ) and at 686 ("[R]etalitatory discharge relieves the employer of his
responsibility by intimating employees into foregoing the benefits to which they are entitled in order to
keep their jobs."); Mid-South Bottling Co. v. Cigainero, 799 S.W.2d 385, 389 (Tex. Ct. App. 1990);
Massingale, supra note 4, at 192; Leonard, supra note 4, at 660-61.
The most prevalent examples of discharges that violate public policy due to an employee pursuing statutory rights are found in the Workers' Compensation cases. The courts have consistently held that an employer who terminates an employee for pursuing rights granted by Workers' Compensation statutes has committed a public policy tort violation.\(^9\)

Relief, of course, is not automatic. The employee must prove a "causal link"\(^90\) between his or her termination and the claim for Workers' Compensation benefits. Although it is generally not mandatory that the employee actually file a claim,\(^91\) the fact that the employee did not file a claim at the time of discharge, along with other evidence, may preclude recovery.\(^92\) An employer, moreover, may discharge an

\(^9\) See, e.g., Hartlien v. Illinois Power Co., 209 Ill. App. 3d 948, 954, 568 N.E.2d 520, 524-25 (1991); Griess v. Consolidated Freightways Corp. of Del., 776 P.2d 752, 754 (Wyo. 1989) (dockworkers involved in forklift accident, after being warned they would not be called back to work if they filed Workers' Compensation claims, nonetheless filed claims, and then had their names removed from the list of available workers); Peru Daily Tribune v. Shuler, 544 N.E.2d 560, 563-64 (Ind. Ct. App. 1988) (newspaper sales representative discharged after she filed a claim for a job-related injury and informed supervisor that she would be out of work for necessary surgery); Horn v. Davis Elec. Constructors, 395 S.E.2d 724, 726 (S.C. Ct. App. 1990); contra Smith v. Gould, Inc., 918 F.2d 1361, 1365 (8th Cir. 1990) (applying Nebraska law) ("Retaliatory discharges against employees for filing Workers' Compensation claims have been held actionable in some states...; however, Nebraska is not one of those states.... Although there is considerable merit to the (plaintiff)'s argument..., we are not at liberty to change state law.").

\(^90\) Harris v. American Red Cross, 752 F. Supp. 737, 739 (W.D. Tex. 1990); see Mid-South Bottling Co., 799 S.W.2d at 390 ("It was not necessary for the jury to find that (employee)'s Workers' Compensation claim was the sole reason that the company fired him. In order to prevail, he need only have shown that his claim contributed to the company's decision to terminate him."); Hopkins v. Tip Top Plumbing and Heating Co., 805 S.W.2d 280, 284 (Mo. Ct. App. 1991) (discharged employee satisfied requirement that there must be a "demonstrable exclusive causal relationship between the exercise of the right and the discharge"); Smith v. Smithway Motor Xpress, 464 N.W.2d 682, 686 (Iowa 1990) ("[I]ntimidation occurs even if retaliation is not the predominant purpose for the firing. If retaliation is allowed to weigh at all in the employer's decision to discharge, there will be a chilling effect on employees entitled to claim benefits."). In Smith, the Iowa Supreme Court, in adopting a "determining factor" test, explained: "The real issue is whether the claim for... benefits must be the determining factor or the predominant purpose behind the firing. A purpose is predominant if it is the primary consideration in making a decision; while other reasons may exist, they are less influential than the predominant purpose. A 'determinative factor'... need not be the main reason behind the decision. It need only be the reason which tips the scales decisively one way or the other." Id.; Macken v. Lord Corp., 585 A.2d 1106, 1108 (Pa. Super. Ct. 1991) ("The fact that [employee] was discharged after filing a claim... does not begin to satisfy [employee]'s burden with regard to wrongful discharge. To the contrary, [employer]'s offer of light duty employment in compliance with the directive of [employee]'s treating physician negates any allegation of action by the employer to purposefully injure employee.").

\(^91\) See, e.g., Niblo v. Parr Mfr., 445 N.W.2d 351, 353 (Iowa 1989) (plant worker discharged for threatening to file a claim after being informed by her doctor that she had a severe case of chloracne, caused by contact with chemicals at work); Mid-South Bottling Co., 799 S.W.2d at 389 (employee, merchandiser and delivery man, verbally reported injury to secretary who relayed message to company's vice-president) ("The company maintains that the evidence fails to show that employee 'filed a claim,' but rather merely shows that he notified his employer of his injury and filed the reported report of injury. We reject the company's argument as too narrow an interpretation. ..."); but see Harris v. American Red Cross, 752 F. Supp. 737, 739 (W.D. Tex 1990) (employee "cannot hope to prove this [causal] link, because at the time of her discharge... she had not filed a claim for Workers' Compensation benefits").

\(^92\) See, e.g., Washburn v. IBP, 910 F.2d 372, 374 (7th Cir. 1990) (applying Illinois law) (meat packing plant employee fell between truck and loading dock and dislocated his shoulder, told to go to nurse, but employee left plant without informing supervisors and prior to leaving had not inquired about Workers' Compensa-
employee for a job-related injury or reason so long as the employer's motive was not to retaliate against the employee for having pursued a Workers' Compensation claim.\textsuperscript{93}

While the "pursuing statutory rights" standard does provide the employee a mechanism to secure relief if the employee is terminated for vindicating specific statutory rights, a problem arises when a statute does not clearly express the rights afforded the employee.

4. Discharge Inconsistent With a Legislative Scheme

Even in the absence of a specific statutory prohibition or a specific statutory enumeration of rights, an employee's discharge still may be actionable under the public policy exception if the discharge was inconsistent with a legislative scheme.\textsuperscript{94}
This standard possesses the potential to widely expand the scope of the public policy exception because there is neither a requirement that a specific statute be violated by the employer\textsuperscript{95} nor that a specific statute even apply to the discharge at issue.\textsuperscript{96}

Perhaps because of the pliancy of the standard, not all courts accept this criterion.\textsuperscript{97} The courts commonly cite the broad, general, statutory language as the reason for their rejection.\textsuperscript{98}

Although the courts are not in agreement as to the viability of this last statutory list of sections in the Business and Professions Code dealing with safeguards for the health of patients is lengthy. . . . Although the Respiratory Care Practice Act . . . was not operative until . . . two months after plaintiff was dismissed, it was nonetheless to be foreseen in light of the myriad controls on all other branches of the healing arts.

\textsuperscript{95} See, e.g., Wagenseller v. Scottsdale Mem. Hosp., 147 Ariz. 370, 380, 710 P.2d 1025, 1035 (1985) ("[T]ermination for refusal to commit an act which might violate [the statute] may provide the basis of a claim for wrongful discharge. The relevant inquiry here is not whether the alleged . . . incidents were either felonies or misdemeanors or constituted purely technical violations of the statute, but whether they contravened the important public policy interest embodied in the law."); Dabbs, 188 Cal. App. 3d at 1444, 234 Cal. Rptr. at 134 (plaintiff "not required to point to a violation of a specific statute by her employer").

\textsuperscript{96} See, e.g., Verduzco v. General Dynamics, Convair Division, 742 F. Supp. 559, 562 (S.D. Calif. 1990) (employee, a production control supervisor in charge of sub-assembles for the cruise missile, who had worked for defense contractor for thirty-seven years, complained internally that workers with inadequate security clearances commonly reviewed documents that required a high security clearance and that materials needed for assembly were shoddy or unavailable) (Employee "points to a federal statute . . . which authorizes the Secretary of Defense to withhold from the public technical data with military application as evidence of a public interest in preventing unauthorized access to classified information. Although an alleged violation of this statute cannot form the basis for [employee's] claim because the statute refers only to the secretary's power to limit access to the information, the statute does evince a federal interest in protecting military secrets."); Bennett v. Hardy, 113 Wash. 2d 912, 925, 784 P.2d 1258, 1264 (1990) (twin sisters, dental hygienists, aged 60 and 61, discharged for opposing employer's age-hostile and offensive work environment and for hiring an attorney) (presence of anti-discrimination and unfair employment practices statutes established statutory scheme, even though in case at bar employer employed fewer than eight employees and thus was not within statutory definition of "employer").

\textsuperscript{97} See, e.g., Durham v. Fleming Cos., 727 F. Supp. 179, 181 (E.D. Pa. 1989) (employee terminated for disclosing to a warehouseman scheduled to make a delivery to employer's food distribution facility that striking picketers were behaving in an "intimidating and violent fashion"); employee argued that public policy reflected in reckless endangerment statute would be implicated in her termination) ("Even where a statute may reflect a significant public policy, it is far less likely to be implicated when the employee is neither asked to violate nor is victimized by another's violation of that statute. Significantly, in all but one of the cases in which the public policy exception was held applicable under Pennsylvania law, the employee had either refused to violate the law or was penalized for exercising a legal or constitutional right.").

\textsuperscript{98} See, e.g., Watson v. Peoples Sec. Life Ins. Co., 322 Md. 467, 588 A.2d 760 (1991) (discharged for suing her employer for workplace sexual harassment) ("right of redress" to the courts too "abstract" to support finding of public policy); see also Wagner v. General Elec. Co., 760 F. Supp. 1146, 1154 (E.D. Pa. 1991) (employee discharged because he exercised his right to access to the courts to settle a dispute did not violate public policy); Lampe v. Presbyterian Med. Ctr., 590 P.2d 513, 515-16 (Colo. Ct. App. 1978) ("[T]he plaintiff in this case relies on a broad, general statement of policy contained in a statute which creates the State Board of Nursing and which gives that Board the authority to discipline a nurse who negligently or willfully acts in a manner inconsistent with the health or safety of persons under her care. Given the general language used in the statute relied on in this case, we cannot impute to the General Assembly an intent to modify the contractual relationships between hospitals and their employees . . .") (head nurse of intensive care unit requested by hospital management to try to reduce the amount of overtime work by the nurses in her unit; she decided she could not fully comply with this request without jeopardizing the care of her patients).
The question emerges, however, as to whether constitutions and statutes are the only sources for public policy determinations.

Judicial Decisions As Sources of Public Policy

Clearly, public policies may be rooted in constitutions and statutes. An exigent issue emerges, however, as to whether judicial decisions also can serve as a source for public policy determinations. Most states appear flexible in their approach to the public policy exception, holding that judicial decisions can provide the foundation for the public policy tort. Some state courts, though, reject any judicial role as a public policy source, commonly citing an aversion to usurp a perceived legislative function. Despite the existence of a federal and state constitutions, the "neat separation of functions between executive, legislative, and judicial branches has become blurred over two centuries of practice. From the very beginning, . . . state courts played an important role in identifying public policy wholly apart from legislature or executive actions." Moreover, as one court noted:

Limiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection but have limited access to the political process. Judicial decisions can also enunciate substantial principles of public policy in areas in which the legislature has not treated.

Even after recognizing judicial decisions as sources of public policy, one still must attempt to discern any guidelines utilized by the courts in fashioning judi-

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99 See, e.g., Dabbs, 188 Cal. App. 3d at 1443, 234 Cal. Rptr. at 132-33 (fundamental public policy may be expressed by the courts in decisional law); Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989) ("clear mandate of public policy as articulated by constitutional, statutory or decisional law"); Delaney v. Taco Time Int'l, 297 Or. 10, 16, 681 P.2d 114, 118 (1984); Hinson v. Cameron, 742 P.2d 549, 553-54 n.10 (Okla. 1987) ("judicially fashioned notions of public policy [that] did not necessarily contravene any explicit statutory provisions") Boyle, 700 S.W.2d at 871 (judicial decisions of state and national courts); Appel and Harrison, supra note 16, at 77.

100 See, e.g., Borden v. Johnson, 196 Ga. App. 288, 291, 395 S.E.2d 628, 630 (1990), cert. denied, (1990) (employee alleged that she was terminated because of her pregnancy) ("[U]nless our General Assembly has created a specific exception . . . an at-will employee has no viable state remedy in the form of a tort action for 'wrongful discharge' against his or her former employer. . . . The General Assembly has not enacted such a 'public policy' exception which is to be applied when an at-will employee's employment is allegedly terminated because of gender in general or pregnancy in specific.").

101 Id. at 289, 398 S.E.2d at 629 ("The courts of this state have consistently held that they will not usurp the legislative function, and, under the rubric that they are the propounders of 'public policy,' undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged 'wrongful termination' of the employment of an at-will employee. . . . [I]n the absence of any express statutory provision for such a civil remedy . . ., we decline to create judicially such a remedy. Courts may interpret laws, but may not change them").

102 Leonard, supra note 4, at 658.

cially-created public policy. The courts naturally look to prior judicial decisions as sources of public policy as well as well-recognized common law concepts.

Relying on the judiciary as a source of public policy is subject to criticism, however. Commentators complain of the vague and subjective nature of this judicial source, which may engender protracted case-by-case litigation to define its scope, thus rendering the prediction of future cases a hazardous undertaking at best.

Proper reliance on the judiciary as a source of public policy will require an effort to identify the precise standards for the public policy exception enunciated pursuant to a judicial source.

**Judicial Source-Based Standards for Public Policy**

In fulfillment of their perceived function as developers of public policy, the courts have set forth certain standards of conduct deemed inappropriate in a discharge situation. Most courts, however, tend to apply judicially-created public policy criteria narrowly, “... applying only those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good.”

1. Refusal To Perform An Illegal Act

Closely related to the standard of refusing to violate a statute is the judicially created public policy tort criterion of refusing to perform an illegal act. This criterion differs from the statutory standard since the public policy tort may be predicated on a discharge for a refusal to commit a tortious act or for merely

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105 Watson v. Peoples Sec. Life Ins. Co., 322 Md. 467, 477, 588 A.2d 710, 766-67 (“Although the ‘declaration of public policy is normally the function of the legislative branch,’ . . . this ‘Court has not confined itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this state.’ . . . The clear mandate of public policy . . . could be found [in] . . . the individual’s interest in preserving bodily integrity and personality . . . .”); Perritt, supra note 51, at 401-02.
106 See, e.g., Leonard, supra note 4, at 658-659 (The “... expectations are not easy to articulate, and it should not be too surprising when a judicial decision in an evolving area of private law does not articulate ideally the reason underlying its result.”); Crawford, supra note 49, at 331; Robein, Golden, and Siegel, Wrongful Discharge: A Panel Discussion, 6 Lab. Law. 319, 327 (1990).
107 Crawford, supra note 49, at 331; Robein, et al., supra note 106, at 327.
108 Crawford, supra note 49, at 331.
inquiring into the legality of a requested act.\textsuperscript{112}

2. Performing An Important Public Obligation

When an employee is discharged for seeking to perform an important public obligation, the employer can be subject to the public policy tort.\textsuperscript{113} The courts emphasize that the employer must have thwarted not merely a private interest of the employee but an important public function.\textsuperscript{114} A recurring instance of the tort’s applicability arises when an employee is discharged for seeking to testify in a legal proceeding potentially adverse to the employer.\textsuperscript{115}

3. Whistle-Blowing

A significant public policy standard has been crafted by the courts to protect employees who report certain wrongful employment activities.\textsuperscript{116} The courts

\textsuperscript{112} Johnston v. Del Mar Distrib. Co., 776 S.W.2d 768, 771-72 (Tex. Ct. App. 1989) (employee, required to prepare shipping documents for goods, was instructed by employer to label package containing a semi-automatic weapon as “fishing gear,” sought advice of Treasury Department and then was discharged) ("[P]ublic policy prohibits the discharge of an employee who in good faith attempts to find out if the act is illegal.... Public policy demands that [an employee] be allowed to investigate into whether such actions are legal so that she can determine what course of action to take. . . .")

\textsuperscript{113} See, e.g., Hinson, 742 P.2d at 553-54 n.9; Delaney, 297 Or. at 15-16, 681 P.2d at 117-18.

\textsuperscript{114} See, e.g., Delaney, 297 Or. at 15-16, 681 P.2d at 117 (example of jury service).

\textsuperscript{115} See, e.g., Bishop v. Federal Intermediate Credit Bank of Wichita, 908 F.2d 658, 662-63 (10th Cir. 1990) (applying Okla. law) ("We believe that the Oklahoma Supreme Court would recognize a public policy exception to the at-will doctrine if [the former President of Product Credit Association] can in fact prove that he was terminated because of testimony given during a hearing conducted by Senator Boren and Representative Synar. Recognition of the exception supports our tradition of free, direct, and truthful testimony at legislative hearings. . . ."); Sides v. Duke Univ., 74 N.C. App. 331, 343, 328 S.E.2d 818, 826-27 (1985) (nurse anesthetist, advised by several hospital physicians and by hospital attorneys that she should not tell all that she had seen relating to patient’s treatment, which resulted in permanent brain damage from the alleged negligent administration of anesthetics by a doctor, nonetheless testified fully, and was subsequently discharged) ("[N]o employer ... has the right to discharge an employee and deprive him of his livelihood ... because he refuses to testify untruthfully or incompletely. . . . One of the merited glories of this country is the multitude of rights that its people have, rights that are enforced ... by our courts, and nothing could be more inimical to their enjoyment than the unbridled law defying actions of some of the false or incomplete testimony of others. If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims."); Hoth v. American States Ins. Co., 753 F. Supp. 703, 709 (N.D. Ill. 1990) (employee discharged when employer discovered that he intended to testify on behalf of his wife, a co-worker, in her Workers’ Compensation action). The \textit{Hoth} Court also addressed the “causation” issue: “The timing of the discharge, standing alone, does not establish a genuine issue of fact as to causation. The plaintiff must demonstrate that the decision-maker was aware of the [employee’s] intention to testify. To this end, the plaintiff [must] put forth certain evidence which may establish this awareness.” \textit{Id.}

\textsuperscript{116} See generally Spurgin, supra note 110, at 110; Callahan, supra note 11, at 460-61; Massingale, supra note 4, at 194; Swan, supra note 42, at 617-18; Perritt, supra note 51, at 408-09.
frequently use the phrase “whistle-blowing” to state the standard. They define it as the “... good faith reporting of a serious infraction of rules, regulations, or the law affecting public health, safety or general welfare by a co-worker or an employer to either company management or law enforcement officials.” The employer’s contravention of this standard also results in the tort sanction. This aspect of the public policy exception is rationalized on the ground that a discharge of a whistle-blowing employee jeopardizes the interests of co-workers as well as the public’s health, safety, and welfare.

The whistle-blowing cases customarily entail employees who report violations of the law by the employer or co-workers either to governmental authority or internally to management. There is also some authority that protects employ-

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117 See, e.g., Farnam v. Crista Ministries, 116 Wash. 2d 659, 669, 807 P.2d 830, 834 (1991); Hinson, 742 P.2d at 553-54 n.11.


120 Parr, 727 F. Supp. at 1165-66; Collier v. Superior Court (MCA Inc.), 228 Cal. App. 3d 1117, 1121, 279 Cal. Rptr. 453, 454 (1991) (“Petitioner’s report served not only the interests of his employer but also the public interest . . . and the interest of innocent persons who stood to suffer specific harm from the suspected illegal conduct.”); Massingale, supra note 4, at 194; Swan, supra note 42, at 617-18 (“Giving whistle-blowers a claim for wrongful termination via the retaliatory discharge exception . . . adds to both the probable cost of wrongdoing and to the probability of detection.”); Perritt, supra note 51, at 408-09; but see Farnam v. Crista Ministries, 116 Wash. 2d 659, 667, 807 P.2d 830, 836 (1991) (“Conduct that may be praiseworthy from a subjective standpoint or may remotely benefit the public will not support a claim for wrongful discharge.”) (nurse at Christian Nursing Home discharged for reporting the legal procedure of removing of nasal gastric tube from patient to state and media).

121 See, e.g., Schweiss, 922 F.2d at 474 (employee discharged for contacting OHSA about alleged violations occurring at assembly plant where she worked); Boyle, 700 S.W.2d at 877-78 (plaintiff, laboratory helper for optical manufacturer, discharged for reporting employer’s lens hardening and testing procedures to FDA); Witt v. Forest Hosp., 115 Ill. App. 3d 481, 485, 450 N.E.2d at 813 (nurse at psychiatric hospital terminated on the basis that she had provided information to the Guardianship and Advocacy Commission concerning rights violations and patient care issues).

122 See, e.g., Collier, 228 Cal. App. 3d at 1122, 279 Cal. Rptr. at 455 (employee, regional marketing manager, discharged for disclosing suspicions of criminal conduct to higher management); Parr, 727 F. Supp. at 1166 (operations manager discharged for informing company’s management officials of supervisor’s scheme to defraud the company as well as supervisor’s other “dubious” activities); Alfiier, 201 Ill. App. 3d at 569-70, 559 N.E.2d at 173 (railroad employee discharged for reporting theft by fellow employees); but see Winters v. Houston Chronicle, 795 S.W.2d 723, 724-25 (Tex. 1990) (cause of action for retaliatory discharge not recognized) (plaintiff employee alleged that he was fired for reporting the illegal activities of his fellow employees, including thefts and “kickbacks” to upper-level management); Drohan v. Sorbus, Inc., 401 Pa. Super. 29, 46-47, 584 A.2d 964, 972 (1990) (employee, vice-president of marketing for a computer maintenance firm, discharged for questioning employer’s commission programs and requesting internal investigation to determine legality thereof).
ees who report health and safety concerns to management. The courts, however, are more likely to protect employees who report violations of law to government than those who report health and safety concerns to management or to the media. One court has condemned the differentiation between external and internal whistle-blowing as a "nonsensical distinction." The court reasoned:

When an employee reports criminal activity to his employer, he helps to expose crime and facilitates the enforcement of the Criminal Code. Therefore, an important public policy is hampered if he is discharged as a result. A report to an employer does not transform a violation of the Criminal Code from a matter of public concern into a private dispute. The employee who chooses to approach his employer should not be denied a remedy simply because a direct report to law enforcement agencies might effectuate the exposure of crime more

123 See, e.g., White, 908 F.2d at 671 ("sixth level" supervisor's complaints to management of defects in brake installations at automobile plant constituted "whistle-blowing" for which employer would be unable to discharge employee); Verduzco v. General Dynamics Air Div., 742 F. Supp. 559, 562 (S.D. Cal. 1990) (employee, a production control supervisor in charge of sub-assemblies for the cruise missile, who had worked for defense contractor for 37 years, complained internally about workers with inadequate security clearances commonly reviewing documents that required a higher security clearance and that materials needed for assembly were shoddy or unavaiable); Jenkins v. Family Health Program, 214 Cal. App. 3d 440, 449-50, 262 Cal. Rptr. 798, 802-03 (1989) (plaintiff nurse practitioner alleged that her termination was based on her complaining to defendants that conditions at work were substandard and required modifications so as to make such conditions fair and safe for both the employees and patients); Haynes, 567 N.E.2d at 1050 (zoo demoted employee, a bear and walrus keeper, for complaining to management and reporting to Federal officials investigating polar bear attack, of unsafe conditions in bear and walrus area).

124 See, e.g., Smith, 917 F.2d at 1345 (warehouse and inventory control supervisor discharged for reporting water and air pollution by corporation to Personnel Director) ("[W]e would expect [that] . . . before recognizing a cause of action on behalf of an employee who has complained to management about workplace conduct, to insist at least that the employee be charged either by the employer or by the law with the specific responsibility of protecting the public interest and that he or she be acting in that role when engaging in the discharge causing conduct."); Stuart, 753 F. Supp. at 325 (employee, senior staff engineer, discharged for certain complaints regarding aircraft and for discussing allegedly defective or unsafe designs with other employees) ("The undisputed facts indicated that [employer] considered and rejected plaintiff's safety concerns and suggestions. . . . Plaintiff has not identified a particular statute, rule, regulation . . . which [employee] allegedly violated."); Tittle v. Crown Airways, 751 F. Supp. 585, 586 (S.D. W. Va. 1989) (no cause of action exists for an employee who reports to management what employee perceived as safety violations committed by chief pilot during commercial flight), aff'd, 928 F.2d 81 (4th Cir. 1990); Winters, 795 S.W.2d at 724-25 (plaintiff employee alleged that he was fired for reporting the illegal activities of his fellow employees, including thefts and "kickbacks," to upper-level management); Callahan, supra note 11, at 460-61.

125 See, e.g., Rozier, 88 Ill. App. 3d at 999-1000, 411 N.E.2d at 50, 54 (nurse discharged from job at hospital for reporting incidents she witnessed, of various abuses and improper conduct by other employees towards patients for whom she had responsibility, to a local newspaper, after she reported the incidents to her supervisors, who took no action); Farnam v. Crista Ministries, 116 Wash. 2d 659, 672, 807 P.2d 830, 836 (1991) ("While [employee] voiced her objections to [employer] and the long-term care ombudsman, she also went to the media with her objections, thereby turning the issue of the withdrawal of the two patient's NG tubes into a public controversy. She did this, despite having acknowledged that she believed that [employer] acted within the law."); Callahan, supra note 11, at 460-67.

quickly.127

Another whistle-blowing problem arises when the employee's position subsequently is found to be erroneous. In such a situation, the courts posit a "good faith" belief requirement to test the viability of the cause of action.128 As one court explained:

... [W]e believe that the social harm from reporting in good faith a complaint that may turn out, after investigation, to be unfounded is potentially far less than the harm of not reporting a well-founded complaint for fear of the consequences. The social benefit from investigating all potentially significant violations of a patient's statutory rights is far greater than the social benefit, if any, from allowing an employer to terminate an employee who in good faith reports to the appropriate authorities situations which prove to be not violations.129

A final problem arises when the whistle-blowing employee is an attorney. Does the employee-attorney possess a cause of action when he or she is discharged for disclosing information learned as a result of the attorney-client relationship? One court has answered in the affirmative130 and has proposed a balancing test to resolve the dilemma:

... [E]ven if [the attorney's] discharge resulted from information he learned in his capacity as an attorney, that the information was privileged and that the privilege was not waived, the court must determine whether there were any countervailing public policies favor-

127 Id.; accord Collier v. Superior Ct. (MCA, Inc.), 228 Cal. App. 3d 1120, 1123-24, 279 Cal. Rptr. 453, 456 (1991) ("If public policy were strictly circumscribed . . . to provide protection from retaliation only where employees report their reasonable suspicions directly to a public agency, a very practical interest in self-presentation could deter employees from taking any action regarding reasonably founded suspicions of criminal conduct by co-workers. Under that circumstance, an employee who reports his or her suspicions to the employer would risk termination. . . . The situation is no better for the responsible employer, who would be deprived of information which may be vital to the lawful operation of the workplace unless and until the employee deems the problem serious enough to warrant a report directly to a law enforcement agency.").
128 See, e.g., McQuary v. Bel Air Convalescent Home, 69 Or. App. 107, 108, 684 P.2d 21, 23-24 (1984), cert. denied, 298 Or. 37, 688 P.2d 845 (Or. 1984) (plaintiff, employed as In-service Director of Nurses' Training and Education at defendant's licensed intermediate care nursing home, discharged for threatening to report alleged patient mistreatment to an appropriate state agency) ("Having found that plaintiff has a potential wrongful discharge claim, we turn to the question whether she must prove that [defendant's] actions in fact, constituted 'patient abuse' in the broad sense of the term, or must only show that she in good faith believed that they did. . . . We . . . hold that an employee is protected from discharge for good faith reporting of what the employee believes to be patient mistreatment to an appropriate authority") Stuart, 753 F. Supp. at 324 (requirement that "plaintiff made his report out of a good faith concern over the wrongful activity rather than from a corrupt motive such as malice, spite, jealousy, or personal gain").
ing disclosure of privileged information. The sanctity of the attorney/client privilege is not an absolute bar to disclosure. . . . After balancing the competing public policies of the attorney/client privilege versus protecting individuals from serious bodily harm or death, we find clear support in favor of disclosing information when the attorney reasonably believes it is necessary to prevent serious bodily harm or death.131

Despite its difficulties, the whistle-blowing standard has become so engrained in the caselaw that some states have codified this aspect of the public policy exception in their statutory law.132

4. Discharge Contrary to the Public Interest

Another aspect of the public policy exception concerns the judicial source-based “catch-all” category for a discharge contrary to the public interest. According to this standard, an employer is tortiously liable if an employee is terminated for engaging in conduct related to his or her role as an employee and the conduct involves an important public interest.133 The standard is rationalized on the general grounds of protecting the “public good.”134

The essential element of the public interest formula is to determine what conduct inures to the benefit of the public’s interest at large as opposed to a particular employee’s private interest. The caselaw provides some limited guidance as to what conduct is “public,”135 thereby triggering the tort, and what activity is merely

131 Id. at 60, 560 N.E.2d at 1046.
132 See, e.g., CONN. GEN. STAT. ANN. §§ 31-51(m) (West Supp. 1989); OHIO REV. CODE ANN. § 4113.51 (Supp. 1988); see generally McKiernan, Protection for Private Employee Whistleblowers in Texas, TEX. B.J., (July 1991), 668, 670 (examination of Texas, state, and federal statutes); Massingale, supra note 4, at 194; Leonard, supra note 4, at 661; Moskowitz, supra note 5, at 45.
133 See, e.g., Carlson v. Crater Lake Lumber Co., 105 Or. App. 314, 796 P.2d 1216, 1219 (1990), modified on other grounds, 103 Or. 190, 804 P.2d 511 (1991); Burk, 770 P.2d at 29; Hinson v. Cameron, 742 P.2d at 553-54 n.11 (Okla. 1987); see Leonard, supra note 4, at 661 (“public functions which would be obstructed if employers penalize employees for participating in them”).
134 Boyle, 700 S.W.2d at 871; accord Dabbs, 188 Cal. App. 3d at 1444, 234 Cal. Rptr. at 133 (general societal concerns for health, safety, and welfare); Watson v. Peoples Life Ins. Co., 322 Md. 467, 480-81, 588 A.2d 760, 766 (Md. Ct. App. 1991) (employee, sales agent, discharged for seeking legal redress against co-workers for workplace sexual harassment culminating in assault and battery); Id. at 481, 588 A.2d at 767 (court found public policy, inter alia, in “the state’s interest in preventing breaches of the peace”); see Swan, supra note 42, at 615 (“[T]he important consideration in affording a cause of action to the fired employee is the injury to the public after the employer’s flouting of public policy.”).
135 See, e.g., Dias v. Sky Chefs Inc., 919 F.2d 1370, 1374 (9th Cir. 1990) (clerical worker discharged for resisting sexual harassment by general manager) (“important public interest” for employee not to be discharged for resisting sexual harassment on job); Chamberlin v. 101 Realty Inc., 915 F.2d 777, 786-87 (1st Cir. 1990) (applying N.H. law) (plaintiff architectural designer terminated by defendant building development firm because she did not submit to sexual advances in the workplace); Boden v. Anaconda Minerals Co., 757 F. Supp. 848, 854 (S.D. Ohio 1990) (plaintiffs alleged discharge for advocating better employment opportunities and protesting against disparate treatment based on race and sex); Swanson v. Eagle Crest Partners, Ltd., 105 Or. App. 506, 508, 805 P.2d 727, 728 (1991) (em-
The problem with such a standard, of course, is where to draw the line between public and private interest conduct. Since "[t]he realms of private interest and of public interest in employment substantially overlap . . .," and since " . . . no clear-cut rules exist to determine what activity constitutes a public interest and what constitutes merely a private interest," commentators fear case-by-case, unprincipled and uninformed judicial decision-making, as " . . . plaintiffs attempt . . . to extend this exception to virtually any situation in which an employee is dismissed for acting in a way which might be seen as public-spirited . . ." If the line cannot be precisely drawn, the legitimacy of this aspect of public policy, particularly as an expedient to tort liability, is severely tested.

employee constructively discharged for complaining of and resisting unwanted sexual conduct and contact); Carlson v. Crater Lake Lumber Co., 103 Or. App. 193, 194, 796 P.2d 1217, 1219 (1990) (sawmill employee claimed constructive discharge based on supervisor's slapping her on buttocks and engaging in systematic harassment by swearing at her, insulting her, and criticizing her work) ("when an employee is discharged for exercising an employment related right of important public interest"); Dabbs v. Cardiopulmonary Mgt., 188 Cal. App. 3d 1437, 1438-39, 234 Cal. Rptr. 129, 132-33 (1987) (employee, a certified respiratory therapist, discharged for boycotting work in protest of what she considered to be unsafe working conditions in that her employer had begun scheduling only one certified respiratory therapist for duty on a shift during which the employer customarily scheduled three therapists); McClendon v. Ingersoll-Rand Co., 779 S.W.2d 691 (Tex. 1989) (salesperson and distributor of construction equipment was discharged by employer four months before his retirement and pension benefits vested) ("[P]ublic policy favors the protection of integrity in pension plans and requires . . . an exception to the employment-at-will doctrine."); rev'd on other grounds, 111 S. Ct. 478, 483 (1990) (federal pension law - ERISA - preempted wrongful termination claim under Texas common law; Supreme Court relied only on preemption issue and did not address substance of Texas public policy rule); see Crawford, supra note 49, at 330-31 (analysis of McClendon); Swan, supra note 42, at 619 ("best line might be drawn between situations wherein the employer's activity is subversive of a public activity or institution, and those lacking such negative impact on the public").

136 See, e.g., Pytluk v. Professional Resources, 887 F.2d 1371, 1378 (10th Cir. 1989) (applying Okla. law) (public policy not contravened when plaintiff engineer was discharged pursuant to reduction in force provision left to sole discretion of company); Brennan v. Midland Mem. Hosp., 809 S.W.2d 348, 350 (Tex. Ct. App. 1991) (employee, hospital respiratory therapist, discharged for taking pictures of newsworthy child patient admitted to emergency room); Patton v. J. C. Penny Co., 301 Or. 117, 118, 719 P.2d 854, 857 (1986) (male merchandising manager, who had earned several awards, discharged for failing to break off a social relationship with a female co-worker, even though no socialization at work and no written or unwritten policy proscribing socializing, between employees); Willcuts v. Galesburg Clinic Assoc., 201 Ill. App. 3d 847, 851-53, 560 N.E.2d 1, 4-5 (1990), cert. denied, 136 Ill. 2d 556, 567 N.E.2d 344 (1991) (physician, expelled from medical clinic of which he was a member, claimed that members were attempting to "freeze him out" of business by failing to refer patients to him and consult with him, and by attempting to make his patients their own, and thus jeopardizing the health care of those patients and the community) (physician did not demonstrate that his personal grievance is anything more than a private dispute among co-workers); Elliott v. Tektronix, 102 Or. App. 388, 395, 796 P.2d 361, 365 (1990) (employee security dispatcher, discharged for attendance record, claimed employer failed to follow a support services attendance policy to which employee and employer had contractually committed themselves) ("Although this case involves the exercise of a right associated with plaintiff's employment, complaining about a perceived contractual breach is not a right . . . related to an important public interest.").

137 Swan, supra note 42, at 615.

138 Horowitz, supra note 42, at 67.

139 Swan, supra note 42, at 615; Horowitz, supra note 42, at 67.

140 Leonard, supra note 4, at 661.
5. Discharge for Complying With A Code of Ethics

Although the definition of the "public interest" may be difficult to ascertain, the declaration that members of a profession serve that interest certainly is not subject to dispute. Caselaw exists, consequently, holding that Codes of Ethics of a profession properly may be regarded as sources of public policy. Thus, the discharge of an employee for acting in conformity with the Code of Ethics of his or her profession, or for refusing to violate the code, is a violation of the public policy exception, resulting in tort liability for the employer.

The rationale to maintain such a criterion has been stated thoroughly and forcefully by one commentator:

... [E]ach profession is based on distinctive knowledge and service to the community. Each helps shape our culture in significant ways. Law, medicine, and other professions play a direct role in the formation of public policy and its implementation. The practitioners in these highly trained professions possess specific skills needed to solve individual and communal problems. They must be given the leeway to address these problems in a manner consistent with ethical standards. In addition, the at-will professional employee motivated by ethical concerns attempts to correct a problem at the risk of the substantial financial investment in his education, his long-term financial security, and his career standing and reputation. Even if fortunate enough to avoid dismissal (occupational capital punishment for the worker), the professional employee may encounter more subtle retaliatory actions, such as less desirable work assignments, loss of prestige, and decrease in promotional and pay opportunities.

Moreover, state licensure exerts tremendous pressure upon the at-will professional employee. The statutes grant regulatory bodies the power of admission and expulsion from the profession. A professional license may be revoked because of the violation of statutes that allow discipline because of 'unprofessional' or 'unethical' conduct. The

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142 See, e.g., Kalman, 183 N.J. Super. at 158-59, 443 A.2d at 730-31 (plaintiff pharmacist discharged for his refusal to close pharmacy located in grocery store on July 4, after learning from Board of Pharmacy that pharmacy was required to be open as long as employer's store was open) ("[D]efendant's proposed closing would have exposed the public to the risk that dangerous drugs might be accessible to the public if no pharmacist were present. This is an instance where a Code of Ethics coincides with public policy.... [T]herefore, that code justified plaintiff's action and rendered the discharge voidable as contrary to public policy."); see Callahan, supra note 11, at 458-59, and n.21 (list of cases); Moskowitz, supra note 5, at 53, 56-57, 62.
disciplinary statutes are based on violations of codes of ethics and state-promulgated rules and regulations.\textsuperscript{143}

Codes of Ethics certainly add to the responsibilities of a member of a profession. Yet merely interjecting a Code into a discharge controversy is insufficient to protect the member of a profession. The courts require that the Code represent a clear expression of public policy,\textsuperscript{144} the Code provisions relied on define a standard of conduct beneficial to the public and not only the member of the profession,\textsuperscript{145} the member of the profession explicitly refers to rights and responsibilities pursuant to the Code,\textsuperscript{146} and that the member is not solely motivated by his or her own morals.\textsuperscript{147}

\textsuperscript{143} Moskowitz, supra note 5, at 59-60.

\textsuperscript{144} See, e.g., Pierce, 84 N.J. at 76, 417 A.2d at 514 (physician did not have cause of action for wrongful discharge in opposing continued research on a particular drug, where physician did not contend that ingredient in drug was harmful or posed imminent risk, but that drug was controversial, and where the Hippocratic Oath did not contain a clear mandate of public policy which prevented physician from continuing research); Warthe, 199 N.J. Super. at 28, 488 A.2d at 234 ("dubious assumption that the Code for Nurses represents a clear expression of public policy"); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982) (employee, senior auditor, discharged because he questioned whether internal accounting practices were in accord with Code of Ethics of the Institute of Internal Auditors) ("The code of ethics of a private association does not establish public policy"); Kalmann, 183 N.J. Super. 158-59, 443 A.2d at 730-31.

\textsuperscript{145} See, e.g., Kalmann, 183 N.J. Super. 158-59, 443 A.2d at 730-31 ("Plaintiff invokes the following paragraph from the Code of Ethics of the American Pharmaceutical Association: 'A Pharmacist... should not engage in any activity that will bring discredit to the profession and should expose, without fear or favor, illegal or unethical conduct in the profession. . . . ' We have no doubt that plaintiff was required by this code to report defendant's attempt to flout state regulations. We disagree with defendant that this ethical obligation is 'designed to serve only the interest of' the pharmacy profession, as opposed to the interests of the public. . . .") [emphasis in original]; Pierce, 84 N.J. at 72, 417 A.2d at 512 ("In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession . . . probably would not be sufficient."); Warthen, 199 N.J. Super. at 26-27, 488 A.2d at 233-34 (registered nurse, after citing nurse's Code of Ethics, and her personal moral, medical, and philosophical objections to performing kidney dialysis on a terminally ill, double amputee patient, and after giving her supervisors advance notice, was terminated) ([P]laintiff cites the Code for Nurses to justify her refusal to dialyze the terminally ill patient. She refers specifically to the following provisions and interpretive statement: 'The Nurse provides services with respect for human dignity and the uniqueness of the client. . . . If personally opposed to the delivery of care in a particular case because of the nature of the health problem or the procedure to be used, the nurse is justified in refusing to participate. . . . ' It is our view that as applied to the circumstances of this case the passage cited by plaintiff defines a standard of conduct beneficial only to the individual nurse and not to the public at large. . . . The position asserted by plaintiff serves only the individual and the nurses' profession while leaving the public to wonder when and whether they will receive nursing care.").

\textsuperscript{146} See, e.g., Warthen, 199 N.J. Super. at 26-28, 488 A.2d at 234; Pierce, 84 N.J. at 74, 417 A.2d at 513 ("Dr. Pierce argues that by continuing to perform research on loperamide she would have been forced to violate professional medical ethics expressed in the Hippocratic Oath. She cites the part of the oath that reads: 'I will prescribe regimen for the good of my patients according to my ability and judgment and never do harm to anyone.' Clearly, the general language of the oath does not prohibit specifically research that does not involve tests on humans and that cannot lead to such tests without government approval. We note that Dr. Pierce did not rely on or allege violation of any other standards, including the codes of professional ethics.")

\textsuperscript{147} See, e.g., Pierce, 84 N.J. at 72, 417 A.2d at 512 ("[A]n employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of
Surely, meritorious arguments can be advanced to maintain such a properly restricted Code of Ethics standard to the public policy exception. Before the standard can serve as a just means of protection, however, the key question as to whom exactly is protected by the standard must be answered. In resolving this issue, a crucial distinction between “professionals” and “members of a profession” must be precisely delineated.

6. Outrageous Discharges

The Code of Ethics public policy criterion applies to explicit moral standards embodied in codes that inure to the benefit of the public. The criterion does not countenance liability for malicious or immoral conduct. The most far-reaching and expansive standard to the public policy exception, however, pertains to discharges appropriately deemed outrageous and imposes liability for malicious and immoral discharges.

There exists some limited authority evidencing a judicially developed public policy standard sanctioning an employer who maliciously discharges an employee. A malicious discharge is explained as one entailing “disinterested malevolence” or “ulterior purpose.” The problem with this standard, though, the employee’s profession.”); Warthen, 199 N.J. Super. at 28, 488 A.2d at 234 (“[W]e have no hesitancy in concluding on this record that plaintiff was motivated by her own personal morals, precluding application of the ‘public policy’ exception . . .”); Kalman, 183 N.J. Super. at 157, 443 A.2d at 729-30 (“[P]laintiff was not motivated by his personal values or conscience, but rather by his perception of his professional obligations.”).

Foley v. Presbyterian Ministers’ Fund, 749 F. Supp. 109, 111-12 (E.D. Pa. 1990) (reverend, vice-president in charge of field operations, discharged to deprive him of his pension and alter his pension rights) (“. . . [P]laintiff’s claim of wrongful discharge is predicated upon a similar allegation of a malicious intent on the part of the employer to withhold or diminish his pension income. . . . [P]laintiff’s claim of wrongful discharge falls under the recognized exception for terminations allegedly involving a specific intent to harm.”); Booth v. McDonnell Douglas Truck Serv., 401 Pa. Super. 241, 244-45, 585 A.2d 24, 29 (1991) (employee, discharged after dispute with employer concerning amount of commissions owed employee, argued that employer terminated him with a specific intent to harm.) (Employer “has the right to resist what it views to be overreach by [employee]. [Employer] has another right: to discharge [employee], an at-will employee, for no reason or any reason. We refuse to hold that an employer who exercises that right because of a dispute over compensation due the employee is liable for wrongful discharge.”); Yetter v. Local Trucking, 401 Pa. Super. 467, 474-77, 585 A.2d 1022, 1026-27 (1991) (fact that employer selectively enforced company rules against employee, that supervisor personally disliked and was jealous of employee, and that employer fabricated numerous instances of job misconduct, did not rise to level of “specific intent to harm” discharge); Tourville v. Inter-Ocean Ins. Co., 353 Pa. Super. 53, 56-58, 508 A.2d 1263, 1265-66 (1986), appeal denied, 514 Pa. 619, 521 A.2d 933 (Pa. 1987) (insurance broker discharged due to illness and temporary inability to do job was not maliciously discharged); Appel and Harrison, supra note 16, at 85-86; see also Watson v. Peoples Life Ins. Co., 322 Md. 467, 476-79, 588 A.2d 760, 764-66 (Md. Ct. App. 1991) (“abusive” discharge recognized when employee terminated for seeking legal redress against co-worker for workplace sexual harassment culminating in assault and battery); Id. at 481, 588 A.2d at 767 (“The clear mandate of public policy which employee’s discharge could be found to have violated was the individual’s interest in preserving bodily integrity and personality. . . .”).

Tourville, 353 Pa. Super. at 56-57, 508 A.2d at 1265 (There is “no proper interest involved in the malevolent act [and] . . . no reason for the action other than an atavistic desire to hurt another. . . . If there is not present a cause, which in everyday, civilized life would serve as the basis for the action, then the malevolence surely is pure, unadulterated and disinterested.”).

Id. at 56-57, 508 A.2d at 1266 (“[A] harmful action is done with sufficient reason . . . but it is done with
is that the term "malicious" customarily is employed as a criterion for imposing punitive damages, not as a standard for triggering initial tort liability.

Even more problematic is the standard imposing liability for immoral conduct. There exists some very limited authority sanctioning tort liability pursuant to the public policy exception against an employer who discharges an employee in an immoral or unethical manner.\textsuperscript{151} Although no extensive discussion is necessary to establish a fundamental public interest in a workplace free from immoral discharges, the question arises as to whether a public policy tort is the proper protective means, particularly when defining the terms "immoral" and "unethical" emerges as a herculean task.

The caselaw treating malicious and immoral terminations clearly indicates the wide scope of the common law public policy exception. The present system of evolving judicially created standards, in fact, has become so extensive and intricate so as to prompt legislative action.

**STATUTORY REMEDIES**

Some jurisdictions govern the discharge aspect of the employment relationship, not by reliance on common law exceptions, but rather by means of Wrongful Discharge statutes. Three such statutes will be examined briefly herein: Montana's, Puerto Rico's, and the Model Uniform Act.

Montana's statute, the "Wrongful Discharge From Employment Act,"\textsuperscript{152} provides that a discharge is wrongful if the discharge was not for "good cause" and

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\textsuperscript{151} Wagenseller v. Scottsdale Mem. Hosp. 141 Ariz. 370, 378, 710 P.2d 1025, 1033 (1985) (nurse, appointed to paramedic coordinator in emergency department, discharged for refusing to join in a personnel group's stagings at the hospital of a parody of the song 'Moon River', which concluded with members of the group 'mooning' the audience) ("The interests of society as a whole will be promoted if employers are forbidden to fire for cause which is 'morally wrong.'"); Hinson v. Cameron, 742 P.2d 549, 553 (Okl. 1987) (nurse's assistant, terminated for not following orders, claimed that order that precipitated her discharge was never given to her either at the beginning or during the "fateful" shift and that supervisor subsequently altered the assignment sheet) ("Neither the hospital nor [the supervisor] ordered [employee] to perform an illegal act or denied her an opportunity to exercise her legal rights. She was not prevented from performing an important public obligation nor was her termination occasioned by articulated concerns for the [hospital's] legal or ethical misconduct."); Massingale, supra note 4, at 200 ("There are unquestionably terminations that involve outrageous conduct by an employer or circumstances underlying a discharge that are so egregious that the legal system cannot and should not condone the discharge of the wronged employee."); see also Watson, 322 Md. at 476-79, 588 A.2d at 764-66 ("abusive" discharge); but see Berube v. Fashion Centre, 771 P.2d 1033, 1043 (Wash. 1989) ("[E]ven those principles which are widely held values may not be sufficient to justify wrongful termination recovery.").
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\textsuperscript{152} MONT. CODE ANN. § 539-2-901 (1989). For a discussion of the Montana statute, see Massingale, supra note 4, at 206-07; Grodin, Toward a Wrongful Termination Statute for California, 42 HASTINGS L.J. 135, 142, and n.42 (1990); Perritt, supra note 51, at 423-24; Leonard, supra note 4, at 668-71.
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the employee has completed the employer's probationary period. Good cause is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform duties, disruption of the employer's operation, or other legitimate business reason." The statute does not elaborate further on the appropriate reasons for a discharge.

The statute also provides that a discharge is wrongful if "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy." The statute defines public policy as "... a policy in effect at the time of discharge concerning the public, health, safety, or welfare established by constitutional provision, statute, or administrative rule." Note that the statute is silent as to any role for the judiciary as a source of public policy.

Montana's statute encourages voluntary arbitration, but does not prohibit lawsuits to enforce the statute. Remedies, however, are limited. A wrongfully discharged employee "... may be awarded lost wages and fringe benefits for a period not to exceed four years from the date of discharge, together with interest thereon." The employee, moreover, may recover punitive damages "... if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge." The statute is silent as to any reinstatement remedy and expressly prohibits "pain and suffering" and emotional distress damages.

The Puerto Rican statute not only mandates that an employee not be discharged without good cause, but actually specifies in detail appropriate reasons for a discharge. The remedy for a wrongful discharge amounts to a severance payment based on salary and length of employment.

154 Id. at 903(5). See Cecil v. Cardinal Drilling Co., 244 Mont. 405, 409, 797 P.2d 232, 234 (1990) (oil drilling company executive discharged during decline in oil prices) ("It is well-settled in the caselaw prior to the Act that economic conditions constitute a 'legitimate business reason.' This court has held that employers should not be foreclosed from 'engaging in legitimate reductions in force necessary to maintain the economic vitality of the company...'. Furthermore, an employer is entitled to be motivated by and serve its own legitimate business interest and must be given discretion who it will employ and retain in employment.").
156 Id. at § 39-2-903(7).
157 Id. at § 39-2-914.
158 Id. at § 39-2-913.
159 Id. at § 39-2-905(1).
160 Id. at § 39-2-905(2).
161 Id. at § 39-2-905(3).
162 P.R. Laws Ann. tit. 29 § 185 (1985); see Grodin, supra note 152, at 142, and n.43.
163 P.R. Laws Ann. tit. 29 § 185, 185(a) (1985).
164 Id. at § 186(b).
165 Id. at § 185(a).
The Model Employment Termination Act, promulgated by the National Conference of Commissioners on Uniform State Laws, also contains a good cause discharge standard for employees with at least one year’s tenure.

The presence of such statutes indicates not only dissatisfaction with the conventional employment at will doctrine but also with the current limitations on the doctrine which have evolved primarily through judicially created exceptions. If the doctrine is perceived as unfair, and if the present system of common law exceptions is regarded as uncertain, unpredictable, expensive, and time-consuming, the question arises as to what body of government is best fit to reform the system.

**Legislative vs. Judicial Initiatives**

Most of the recent, significant developments in employment law have been accomplished through federal and state legislation. The common law system of exceptions to the employment at will doctrine, especially those pursuant to “public policy,” composes a conspicuous anomaly to the statutory pattern. Accordingly, many commentators argue that additional legislation would be the preferable solution to the employment at will problem.

Commentators espousing a legislative solution point to the uncertainty caused by the state-by-state, case-by-case decision-making, and the ensuing expense and delay in litigating public policy discharges. Commentators also emphasize that the courts lack the “institutional competence,” not only to provide broad protection to workers, but also to effectuate the necessarily detailed remedial solution.

Even if the legislatures are reluctant to treat this subject matter, the courts still may have a role to play in further development of the common law exceptions in the interest of justice. Such activity may stimulate legislative attention and suggests to the legislators that they promulgate statutes in this area of employment law. Moreover, “[i]f the courts determine that the at will presumption is inconsistent with the contemporary body of employment laws, and the legislatures have not responded to the messages contained in the wholesale adoption of

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166 National Conf. of Commissioners on Uniform State Laws, Uniform Employment Termination Act (July 1990 draft). For a discussion of the Model Uniform Act, see Robein, et al., supra note 106, at 319(f); Grodin, supra note 152, at 145; Callahan, supra note 11, at 457-58, and n.15; Perritt, supra note 51, at 424.

167 Uniform Employment Termination Act, supra note 166, at 2(a).

168 See, e.g., Grodin, Past, Present, and Future in Wrongful Termination Law, 6 LAB. LAW. 97, 104 (1990); Massingale, supra note 4, at 207; Grodin, supra note 152, at 141; Perritt, supra note 51, at 422.

169 Massingale, supra note 4, at 187, 207; Grodin, supra note 152, at 141.

170 Massingale, supra note 4, at 187; Grodin, supra note 152, at 141.

171 Grodin, supra note 152, at 141.

172 Grodin, supra note 152, at 141.

173 Massingale, supra note 4, at 207; Grodin, supra note 168, at 104.

174 Grodin, supra note 168, at 104; Grodin, supra note 152, at 141.

175 Grodin, supra note 152, at 141; Leonard, supra note 4, at 673, 671.

176 Perritt, supra note 51, at 422; Leonard, supra note 4, at 668, 673.
exceptions sapping the vitality of the rule, the court would be justified in taking the next step... and substituting a doctrine they believe to be more consistent with what legislatures would do if they were to bring the law of employment termination into line with the rest of employment law by statute."

If the goal is broad protective coverage for employees pursuant to a good cause - arbitration scheme, then legislation, of course, is the only means to attain it. The question remains, however, as to whether the courts have a function to perform as developers of a body of public policy tort law.

THE PROPOSED PRINCIPLE

Introduction

The prevalence of public policy caselaw, combined with the statutory limitations on the employment at will doctrine, indicate clearly that the legal system should reject the conventional dogma and forge a new legal principle to govern the discharge aspect of the employment relation.

This principle must balance the needs of all the parties to the employment relation. Employees require reasonable employment security protection. Employers need flexibility to operate their businesses and manage their work forces. Society requires that its members be treated with dignity and respect and that significant public policies be safeguarded. The legal system wants a principle that devises certainty, predictability, and stability to all parties.

The principle proposed herein consists of two main components: first, a legislatively mandated good cause discharge standard, administered by an arbitration scheme, and with limitations on the liability of employers; and second, a restricted public policy tort formulation implemented by the courts.

The Good Cause - Arbitration Component

1. Good Cause

The Montana and Puerto Rico statutes indicate the two basic approaches to discharge legislation: either prohibit discharges except for good cause or enumerate the reasons for which a discharge is permitted. The former approach is the preferable one since the term "good cause" has the combined virtues of a track record as the accepted standard in labor arbitration and of flexibility." Moreover, "... since it is impossible to list all permissible grounds, and since the propriety of a dismissal on any ground will depend on the totality of circumstances, a listing has limited

176 Leonard, supra note 4, at 673.
177 Grodin, supra note 152, at 145-46.
Clearly, the economic circumstances of the employer must be included in any explication of "good cause," as well as the standard of performance of the employee. Other justifiable grounds for discharge should include absenteeism or chronic tardiness, involvement in criminal activity within or outside the firm, insubordination that actively disrupts business activity, and employee conduct outside the firm which substantially lessens the employee's value to the business. Less clearly justifiable, though potentially "good cause," grounds might encompass incompatibility with management or other employees, lack of respect and deference to management, a poor attitude toward work, and voicing dissent.

The rationale for a good cause standard is simply based on the societal interest in curtailing the employer's power to discharge absent a plausible and legitimate reason. Employees properly expect to be treated as persons deserving dignity and respect, not as mere objects to be discarded or replaced arbitrarily. Requiring a "good" reason for a discharge, and informing employees of the reason, ensures that employees will not be discharged in an arbitrary, capricious, or whimsical manner.

The initial imposition of a "good cause" discharge requirement, of course, will not eliminate all the problems attendant to a discharge. There always will be an appropriate argument as to what criteria constitute good cause. In addition, the explicit reason for a discharge, even though equating to "good cause," may be merely a pretext to mask circumstances that would not rise to the level of a "good cause" requirement. Consequently, some form of hearing must be provided to evaluate employer discharge decisions.

2. Arbitration

Surely, litigation in the form of jury trials is not the select forum to judge employer determinations against a good cause discharge standard. Accordingly, some form of arbitration emerges as the proper method to adjudicate good cause discharge cases. Arbitration is the preferable option because it is a low-cost, expeditious, familiar, widely-accepted, and effective means to ensure that a modicum of due process is afforded to discharged employees.

The requirement that an employee be discharged only for good cause, and that the employee be afforded a hearing before an arbitrator in which the good cause is demonstrated, is derived from a societal obligation to ensure that its members

178 Id.
179 See Zoerb v. Chugach Elec. Ass'n, 798 P.2d 1258, 1262-63 (Alaska 1990) (reduction in work force compelled by legitimate and sufficient business reasons may constitute good cause to terminate an employee); Massingale, supra note 4, at 204-05; Leonard, supra note 4, at 639, 683.
180 Leonard, supra note 4, at 639, 683.
181 Massingale, supra note 4, at 204-05.
182 For a discussion of the arbitration remedy, see Grodin, supra note 152, at 151; Massingale, supra note 4, at 206; Robein, et al., supra note 106, at 323; Grodin, supra note 168, at 104-06.
are treated with respect and dignity. Respect for a person demands more than simply being informed of the cause for one's discharge, because the cause may be untrue, fake, or insufficient; rather, dignity demands a hearing to show the cause.

The burden of proving this good cause for discharge should be placed on the employer as the employer is the party most likely to possess the facts essential to resolving the dispute.\textsuperscript{183}

Since the arbitration scheme will be legislatively mandated on the parties, some sort of limited judicial review should be instituted.\textsuperscript{184} While a too thorough review would negate many of the advantages of the arbitration alternative, fairness dictates that a mandatory, although "final," award be subject to minimal judicial review, perhaps for errors of law.\textsuperscript{185}

3. Remedies

If the arbitration process determines that good cause for the discharge was lacking, the employee initially is entitled to an award of back pay and benefits for the wrongful termination.\textsuperscript{186}

However, reinstatement, the conventional component to a back pay award, is not an advantageous corrective. The arbitration process is likely to produce resentment and animosity between the parties. Compelling the employee's return to a potentially poisoned atmosphere is certainly not conducive to an efficacious employment relationship. Forcing an unwanted association on the employer, moreover, frequently will spawn a tenacious employer hunt for other "good" causes for the discharge, possibly including pretextual reasons, less clearly justifiable reasons such as insubordination or voicing dissent, or unsatisfactory performance stemming from a purposively oppressive workload.\textsuperscript{187}

Since reinstatement is not part of the remedial solution, merely limiting the employee to an award of back pay and benefits, subject to a reduction by wages from a new position, is insufficient to render the wrongfully discharged employee whole.\textsuperscript{188} Consequently, some type of monetary award in the form of a wrongful discharge payment is required. The award could be based on such factors as length

\textsuperscript{183} See Leonard, supra note 4, at 646, 683 for a discussion of the "burden" issue.

\textsuperscript{184} For a discussion of judicial review of arbitration decisions, see Grodin, et. al., supra note 106, at 323; Grodin, supra note 152, at 151-55; Perritt, supra note 51, at 426.

\textsuperscript{185} Grodin, supra note 152, at 152-55; Grodin, supra note 168, at 106.

\textsuperscript{186} See Massingale, supra note 4, at 206; Horowitz, supra note 42, at 59, 84 for a discussion of the back pay issue.

\textsuperscript{187} See the following commentators who also argue against the reinstatement remedy: Massingale, supra note 4, at 206; Leonard, supra note 4, at 670, 685.

\textsuperscript{188} Leonard, supra note 4, at 683-84.
of service and salary at the time of the discharge.\textsuperscript{189} Such an award would compensate the employee for the stress, loss of status and seniority, and any attendant difficulties in securing another equivalent position.\textsuperscript{190}

Additional damages in the form of emotional distress or punitive damages would not be permissible in such an arbitration proceeding. Attorney’s fees to the prevailing employee, however, should be recoverable in order to maintain the incentive for employee representation,\textsuperscript{191} though such fees should be limited.\textsuperscript{192}

Such a circumscribed remedial scheme will ensure basic fairness to the wrongfully discharged employee without subjecting the employer to expansive liability in an arbitration proceeding.

4. Limitations on the Good Cause - Arbitration Proposal

In order to ensure fairness to the employer, such a broad, mandatory, good cause-arbitration, discharge plan should be subject to two significant limitations.

The proposal should exclude “small” employers, perhaps those employing 5-8 or fewer employees, as such employers lack the personnel and facilities to implement good cause-arbitration procedures. Since employees of a small employer work very closely on a regular basis with their employer, any thought of forcibly reinstating the employee is foolish.

The good cause-arbitration proposal, moreover, should not apply to probationary employees of any employer.\textsuperscript{193} Such probationary employees, defined as new employees serving a probationary period of one year, could be discharged during the probationary period without the employer demonstrating good cause.

A long term employee, by contributing to the employer’s continuation and successes, merits a right not to be discharged except for good cause and deserves the reason for the discharge to be demonstrated by the employer. A probationary employee, however, has not made a similar investment in the business, either on behalf of the employer or personally in terms of time and benefits accrued. An

\textsuperscript{189} Discharge payment proposals include the following offered by commentators: Prince, \textit{A Modest Proposal: The Statutory 'No-Cause' Alternative to Wrongful Discharge in California}, 24 \textit{San Diego L. Rev.} 137, 172(f) (1987) (variables include employee’s age, length of employment, average salary, a work quality factor, and a payment multiplier equivalent to a full year salary); Grodin, \textit{supra} note 152, at 159 (“front pay” proposal consisting of an award of money representing a prediction of what an employee will lose in the future as a result of the wrongful discharge, taking into account earning potential in other jobs, and limited to one or two years); Leonard, \textit{supra} note 4, at 684 (“severance pay” proposal calculated by a formula relating to the employee’s normal rate of pay to his or her seniority).

\textsuperscript{190} Leonard, \textit{supra} note 4, at 683-84.

\textsuperscript{191} See Horowitz, \textit{supra} note 42, at 86; Grodin, \textit{supra} note 152, at 159.

\textsuperscript{192} Horowitz, \textit{supra} note 42, at 59, 84 (attorney’s fees should not exceed amount of back pay awarded).

\textsuperscript{193} Massingale, \textit{supra} note 4, at 205-06.
employer, nonetheless, is unlikely to discharge even a probationary employee without good cause or the employee would not have been employed initially.  

5. Conclusion

One objective of the principle proposed herein is broad, all-embracing, minimal, protective coverage for all non-probationary employees of employers over a certain size. Consequently, legislation appears to be the only way to attain a good cause-arbitration scheme. Yet, if arbitration is to be made mandatory on the parties, and wrongful discharge cases are subject to the arbitration process, what role should the courts play in developing a common law, public policy tort and in preserving the right to a jury trial in wrongful discharge cases?  

The Tort Component

1. Introduction

The legal system should not eliminate a tort component in wrongful discharge cases. When a discharge is in clear violation of a significant public policy, a tort remedy is necessary to protect the broader social interest and to assure that specific types of employee conduct are not discouraged by the threat of discharge.

2. Restrictions: Statutory Schemes and the Public Interest

In order to ensure fairness to the employer, as well as to provide predictability and stability for the legal system, a tort remedy for a violation of public policy must be delimited precisely. Accordingly, the statutory source-based standard of a discharge in violation of a legislative scheme should be eliminated from the public policy equation. Such a standard is much too vague to serve as a predicate for a public policy tort. Careful drafting of the complaint, moreover, could trigger one of the specific, well-recognized statutory source-based standards.

Similarly, the judicial source-based standard of a discharge in violation of the public interest should be abolished. The standard is so nebulous that it degenerates into a tautology, rendering a violation of the ill-defined "public interest" a violation of "public policy," so as to precipitate the public policy tort. In addition, the factual settings encompassed under "public interest," with careful drafting, could be channeled into one of the statutory, or, perhaps, the whistle-blowing criterion.

3. Refinements: Whistle-blowing and Codes of Ethics

The whistle-blowing standard itself, though meritorious, should be circum-
scribed carefully. Consequently, for whistle-blowing to serve as a basis for tort liability, the whistle-blowing employee initially must report in good faith a violation of law, or a condition threatening serious harm to the public, to his or her immediate superior, and if the immediate superior does nothing effective about the employee's concern, the employee then must exhaust any internal complaint procedures within the organization. The employee may then disclose the matter externally, to government or the media, but only if the employee possesses, or can access, evidence to justify his or her concern. If the employer discharges the employee under such narrowly drawn circumstances, the employer has committed a public policy tort.

Equally creditable as a criterion for the public policy tort is a circumscribed Code of Ethics precept. Public policy should provide a tort remedy for employees who are members of a profession. Such employees greatly affect the public interest and society possesses a profound interest in their moral behavior. Accordingly, employees who are members of a profession, who are discharged for raising or discussing ethical issues relating to their employment, or for refusing to submit to the dictates of a superior to commit unethical activity, should be able to maintain a public policy tort cause of action.\(^{196}\)

In order to confine this tort standard to its proper boundaries, a crucial distinction between members of a profession and mere professionals must be made and sustained. Although all members of a profession are professionals, not all professionals are members of a profession. This aspect of the public policy tort, of course, should inure only to the benefit of members of a profession.

Professionals generally are full-time, highly paid, skilled and knowledgeable workers possessing specialized training or learning. They are self-supervisory and occupy a place of status in society. Members of a profession also possess these characteristics.

In addition, members of a profession hold a measure of prestige and respect as well as an advanced education. Customarily owning a state granted monopoly, members of a profession are autonomous. They regulate entry into the profession, set standards for licensure, and police, discipline, and discharge their membership. Most importantly, they are bound by a Code of Ethics of the profession. The Code, if it is a legitimate one, demands moral conduct beyond the law and beyond the self-interest of the member. Doctors, lawyers, accountants, and nurses, among others, properly may be regarded as members of a profession.

These individuals are impressed with public trust and responsibility and are regarded as fiduciaries. An enlightened public policy doctrine should protect and

promote ethical conduct by members of a profession and, therefore, should regard as tortious a discharge motivated by a member’s resistance to orders of a superior that are at variance with the member’s ethical responsibilities.\textsuperscript{197} If ethical standards embodied in Codes can be used as a sword to punish the member of a profession, they similarly should serve as a shield to protect the member who follows them in the face of employer pressure.\textsuperscript{198}

A public policy tort sanction, though appropriately based on a Code of Ethics, must be bound by certain additional limitations. The employee must rely on a legitimate and recognized Code of Ethics of a profession. His or her Code-based claim must be made in good faith and be reasonable. In addition, he or she first must utilize any internal procedures of conflict resolution.\textsuperscript{199} The employee then must bring the controversy to the attention of the profession’s Ethics Committee, not only for the purpose of settling the dispute, but also for providing a record of the employee’s concern and resistance.\textsuperscript{200} If, after all these steps, the employee can demonstrate that his or her discharge was primarily motivated by adherence to a Code of Ethics or by refusal to violate a Code, the employee can recover in tort pursuant to the public policy doctrine.

4. Restrictions: Immoral and Malicious Discharges

The Code of Ethics criterion emerges as a viable standard for the public policy tort because a true Code will explicitly enunciate specific moral requirements for the member of the profession. The difficult problem thus plaguing any public policy tort criterion based on the notion of a morally offensive discharge is the lack of objective and universal ethical standards. Deciding what “ethics” principles to employ to determine which discharges tortiously are “immoral” looms as an unpredictable and hazardous undertaking at best. If the employer’s conduct is so offensive toward the discharged employee, he or she can utilize the recognized tort of intentional infliction of emotional distress as a means of redress.\textsuperscript{201} Consequently, any “immoral” discharge criterion should be extirpated from the public policy tort.

An abusive discharge standard likewise should be eliminated from the public policy doctrine. The “malicious” type language used to trigger this aspect of the tort is an appropriate standard for punitive damages, but not for initially establishing a tort. As with the preceding “morality” standard, any employer misconduct rising to the level of malice could be encompassed by the body of intentional tort law.

\textsuperscript{197} See Moskowitz, supra note 5, at 59; Note, supra note 196, at 808-09.
\textsuperscript{198} Moskowitz, supra note 5, at 65.
\textsuperscript{199} Moskowitz, supra note 5, at 65-66; Note, supra note 196, at 832.
\textsuperscript{200} Note, supra note 196, at 832-33.
5. Refinements: Private Sector "Constitutional" Rights

Private action, of course, does not contravene constitutional prohibitions. One can understand, moreover, the disinclination to utilize constitutional rights as sources of public policy in a private employment discharge context. The legitimate concern is that the application of constitutional rights to such a private relationship may engender a public policy tort so expansional and shapeless as to be ungovernable.

There are, however, certain constitutional rights, to privacy and expression, that reflect the worthiness and esteem that society holds for decided values. The values enshrined by those constitutional rights, therefore, should be regarded as sources for a precise explication of public policy standards.

Accordingly, a private sector employee should be entitled, pursuant to the public policy doctrine, to a right to privacy on- and off-the-job. Discharging an employee in contravention of this right should be the basis for a public policy tort. This private sector privacy right is manifestly not an unqualified one. The public policy standard should thus maintain that concerning off-the-job activity, employees possess the right to engage in outside activities of their choice free from employer interference. This right must be respected unless an aspect of an employee's personal life adversely affects his or her capacity to do the work, or unless the employee's conduct directly impairs the public's confidence in the employer's product or service. Regarding on-the-job activity, the employee is entitled to a reasonable expectation of privacy, for example, not to have his or her desk or locker searched, unless there is a demonstrable work-related reason for an inquiry or investigation, which is properly authorized and conducted in a reasonable manner.

As a corollary privacy rule, post-employment drug testing of private sector employees should be predicated on a reasonable suspicion that an employee is under the influence of drugs (or alcohol) that adversely affects, or could adversely affect, the employee's work performance. Random testing, however, should be regarded as an impermissible infringement of the private sector privacy right, unless the employee is undergoing rehabilitation pursuant to an employee assistance program, or unless the employee is involved in a safety-sensitive or high-risk position.

Similarly, a private sector employee is entitled, pursuant to the public policy doctrine, to freedom of expression on- and off-the-job. The standard should hold that off-the-job the employee can engage in self-expression, including criticizing the employer, so long as there is no identification with the employer, no misrepresentation, no abusive language, no disclosure of confidential information, and the employee has utilized any appropriate internal procedures, and can document or substantiate any criticism. Regarding on-the-job expression, also including criticism, the employee likewise should be entitled to such expression so long as the
employee does not foment disaffection or unrest or disrupt the orderly functioning of the employer's business.

By exactly and firmly anchoring public policy constitutional standards to weighty and eminent constitutional sources, the public policy tort doctrine can properly serve to guarantee the equivalent of constitutional rights in the private employment sector.

6. Punitive Damages

If a public policy tort has been committed, and there is malice, or the equivalent, involved in the wrongful discharge, there is a substantial justification for considering punitive damages for the purpose of punishing and deterring outrageous conduct. Punitive damages not only are consistent with the interests of the victimized employee and society but also with the self-interest of the business community. The punitive sanction, by appropriately punishing and deterring the occasional outrageous employer, keeps the legitimate employer from being at a competitive disadvantage.

7. Burdens

As the second part of the public policy principle proposed herein is a tort, with the possibility of punitive damages, the burden of persuasion should differ from that advanced in the good cause-arbitration procedure. For the public policy tort, the initial burden of establishing a prima facie case should be placed on the plaintiff-employee. This initial burden should not be onerous. However, merely establishing the prima facie case should not give the employee access to a jury, regardless of the case's strength. Once the prima facie case is made out, the burden then should shift to the defendant-employer. The employer now must overcome the negative inference raised by the prima facie case by producing relevant and credible evidence that the employee was discharged for a legitimate reason.

The burden next shifts to the employee who must demonstrate that the reason offered by the employer for the discharge is merely pretextual. If the employee is unable to show that the employer's reason is not true, summary judgment should be entered for the employer. If the employee is able to produce evidence on the pretextual issue, the employer must rebut sufficiently the employee's evidence in order to impede the employee's ultimate burden of proof at trial.

8. Conclusion

A carefully delineated burden of persuasion, together with the restrictions

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202 Massingale, supra note 4, at 208-09.
and refinements proposed herein, render the tort component to the public policy principle a more precise, proportionate, and fair instrument to achieve justice in the arena of employment termination law.

CONSEQUENCES OF THE PROPOSED PRINCIPLE

Introduction

Naturally, there are contesting considerations entailed in any attempt to propose a principle to govern the employment discharge arena. Groups directly or indirectly affected by the public policy principle encompass employers, employees, unions, the court system, attorneys, and society. Where the conventional employment at will doctrine is clung to, the employer's interest, of course, is accorded the top-most precedence. This article proposes, instead, a more balanced public policy principle, particularly comprised of good cause-arbitration procedures and a restricted tort component. In order to determine the desirability of the principle advanced herein, it is essential to ascertain and weigh the consequences of the proposed change in the conventional doctrine.

Employers

Employers are concerned with maintaining control over their workforce and with enhancing efficiency and productivity. Employers also are distressed with the uncertainty plaguing the present public policy formulation, particularly as to whether a discharge will be deemed tortiously wrongful. Traditionally, employers have resisted any legislative or common law resolution that potentially might expand their civil liability for an employee discharge.

Employers should prefer, however, a solution that offers a greater degree of predictability of outcome in discharge cases. Consequently, employers may favor a public policy principle similar to the one proposed herein, where the scope of liability and costs of discharge are delineated carefully, and the common law tort corrective is limited by exact and explicit criteria. Employers actually may welcome the greater consistency, certainly, predictability, stability, and security provided by a good cause arbitration procedure combined with a constricted tort precept.203

Adopting the proposed principle certainly does not mean all employees will be assured continued employment, regardless of their work performance or the economic constraints of the employer. Whether the burden initially is on the employer to demonstrate good cause, or the employer is impelled to show a good reason for the discharge in response to the employee's tort action, the employee

203 See the following for a discussion of the uncertainty of the present system and the predictability to be gained by arbitration plans: Wall, supra note 4, at 72-73; Horowitz, supra note 42, at 86; Massingale, supra note 4, at 187, 209.
still is being held to legitimate standards of workplace performance and comportment.204

Employers, moreover, can take precautions to limit their potential liability. A judicious employer will maintain documentation of employee performance and conduct.205 Documentation will supply a record of any employee inadequacies as well as the communication to the employee of his or her shortcomings. Sufficient documentation and notification, combined with a detailed explanation for the discharge, will reduce the prospects of an employee contesting the discharge, and enhance the ability of the employer to justify the discharge decision.206

Admittedly, certain transaction costs will stem from the intensified supervision and management necessary to prepare a proper record for the discharge, as well as the defense of the decision in an arbitral or legal forum.

These costs, though, must be measured against some of the benefits to be obtained by a streamlined good cause-arbitration procedure and a bounded tort remedy. The benefits would encompass avoiding lawsuits and the costs of litigation, particularly attorneys’ fees,207 improving the quality of the employer’s hiring, supervision, and management processes,208 maintaining good employer-employee communication and relations,209 and enhancing morale and productivity.210

One commentator, after weighing costs and benefits concluded:

To the degree that application of the public policy exception cuts into managerial prerogatives, it represents a new cost to employers, a cost associated with the labor factor of production. . . . Fortunately, to the extent that precluded discharges are viewed by employers as beyond the scope of their own anticipated behaviors anyway, these new labor costs will be minimal. Therefore, it is probable that according employees a limited security from retaliatory discharge will minimally impact on the labor market. Carefully defined and applied, the benefits of the public policy exception exceed its costs.211

204 See Leonard, supra note 4, at 677.
205 Wall, supra note 4, at 100-01; Leonard, supra note 4, at 646.
206 Wall, supra note 4, at 100-01.
207 See Horowitz, supra note 42, at 86; Robein, et al., supra note 106, at 325.
208 See Leonard, supra note 4, at 676-78.
209 See Wall, supra note 4, at 100-01.
210 Id.

211 Swan, supra note 42, at 623 (emphasis added); accord Wall, supra note 4, at 80-81 (The public policy exception “does not appear to impose an unreasonable burden on employers if the concept of public policy is clearly defined. If public policy is easily ascertainable, employers can determine when a termination or other discharge may result in liability and conduct themselves accordingly”); but see Freed and Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 EMORY L.J. 1097, 1144 (1989) (“Many economists who have argued for the abandonment of employment at will have premised their arguments on the supposedly greater efficiency of a mandatory tenure system. That premise is wrong, however, because replacing the at will rule with some form of government review of dismissal decisions will be costly.
The public policy "exception," in fact, has become so implanted in the law that one properly may assert the existence of a germinating *de facto* good cause requirement for a discharge, regardless of the endurance of the conventional, legal, employment at will rule.\(^{212}\) The concept of at will employment, in addition, often is countered by the employers' own actual expectations of the employment relationship. Employers, especially those that carefully hire, evaluate, and manage, that grant promotions and long-term benefits, and that realize that just treatment of employees is essential to productivity, fully expect the employment relationship will continue, absent deficient performance or negative economic factors.\(^{213}\)

Employers, however, should do more than self-regulate. They would be well-served to promote and participate in the promulgation of wrongful discharge statutes, or risk being excluded from the process.\(^{214}\)

*Employees*

Employees obviously possess a strong claim to employment security. They fully expect, similarly as employers, that their employment will be on a continuing basis, provided some initial probationary period is satisfied, work performance is adequate, and no adverse economic factors interfere. Employees also have an interest in being able to decline to participate in, and to disclose, illegal or harmful activity without the threatened punishment of discharge.\(^{215}\)

Although most employers act in a legal and moral manner, the latitude licensed by the conventional doctrine, together with the numerous reported public policy cases, demonstrate the potential for employee abuse.\(^{216}\) Many other wrongfully discharged employees may be constrained by the difficulties and expense of litigation from seeking redress.\(^{217}\) Lower level and lower income employees are especially deterred by the costs of litigation,\(^{218}\) and run the risk of being turned away by lawyers who cannot afford to handle the action absent any potential for tort damages.\(^{219}\) A legitimate argument can be made that certain aspects of the public

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\(^{212}\) See Massingale, *supra* note 4, at 204.


\(^{214}\) Perritt, *supra* note 51, at 397, 430.

\(^{215}\) Callahan, *supra* note 11, at 456.

\(^{216}\) Moskowitz, *supra* note 5, at 48; Maltby, *supra* note 29, at 51-52 (approximately 150,000 workers in the U.S. are unjustly discharged every year). According to Maltby; "One can safely conclude that the percentage of those (unjustly discharged workers) needing relief in California who obtain it is less than 6.7 percent. Yet California has some of the most liberal exceptions to the employment at will doctrine. Most other states have fewer and more narrow exceptions and are likely to have an even lower rate of relief for unjustly discharged workers." *Id.* at 53.


\(^{218}\) Grodin, *supra* note 152, at 140; Massingale, *supra* note 4, at 201.

\(^{219}\) Grodin, *supra* note 152, at 140.
policy tort, particularly those that required greater access to information and
greater opportunity to detect wrongful practices, or those that require performance
of important public obligations or complying with Codes of Ethics, better protect
high income, upper level employees.\textsuperscript{220}

Employees in the private sector who are not union or minority group
members or who do not engage in protected activity do not possess the right to
have a reason given and demonstrated for their discharge. Yet, protecting the rights
of employees with certain characteristics "... discriminates against employees
who are not members of protected groups because their interests in fair treatment and
continued employment are accorded less recognition than employees who are
members of such groups. ... [I]t is inconsistent with equality of treatment to deny
at least minimal protections against arbitrary discharge to the employees not so
protected. To entitle all discharged employees to an explanation related to their work
performance or economic needs of the employer would level the playing field
between different groups of employees."\textsuperscript{221}

The good cause-arbitration plan proposed herein, combined with a limited
tort of public policy, will ensure that all employees possess a rapid, cost-effect-
ive, and judicious means to redress a wrongful discharge.

\textbf{Unions}

A good cause-arbitration proposal such as envisioned herein may aid em-
ployers in avoiding unionization. Employees may no longer view collective
bargaining as a primary means of assuring fairness in the employment relationship.
Since the good cause-arbitration proposal protects employees from arbitrary
discharge, their incentive to unionize may be diminished. Accordingly, unions
probably would not support a good cause-arbitration discharge proposal.

Unions, however, still can function, and be promoted, as providers of
services not otherwise available, particularly the provision of representation in
grievance and discharge cases.\textsuperscript{222} A good cause-arbitration procedure, when
enacted into law, also can provide a "floor" to create "leverage" to help obtain a
collective bargaining agreement or a successor agreement.\textsuperscript{223} Since the remedial
scheme proposed herein contemplates limited monetary payments and not rein-
statement, the unions role in protecting employee jobs is preserved.

\textit{The Court System}

An arbitration procedure obviously would reduce the caseloads of the

\textsuperscript{220} Swan, supra note 42, at 624-25.
\textsuperscript{221} Leonard, supra note 4, at 680.
\textsuperscript{222} Id. at 670.
\textsuperscript{223} Robein, et al., supra note 106, at 322.
overburdened state and federal court systems.\textsuperscript{224} Arbitration decisions would result in an accumulation of precedents and employers and employees would be furnished with clearly defined norms to follow. Employers would be discouraged from discharging employees when evidence to support a "good cause" finding is lacking. Providing a reason for a discharge, supported by documentation, would help ensure that actual discharges are regarded by employees as justifiable, thus further discouraging legal actions.\textsuperscript{225}

A clearly defined and limited tort remedy should deter frivolous litigation and also provide a forceful inducement to settlement.

Plaintiffs’ attorneys typically have resisted any proposals that significantly reduce their role of pursuing tort remedies in wrongful discharge cases.\textsuperscript{226} The tort aspect to public policy as proposed herein, certainly does not deprive a plaintiff-employee of a tort recovery, but rather limits the tort to a more manageable, proportionate, and fair margin.

Defense attorneys typically have resisted any proposals that might increase their clients’ exposure to liability. They may favor, however, a predictable and efficient good cause-arbitration plan, particularly if it provides for a limited monetary remedy, and they would surely welcome a refined and restricted public policy tort remedy.

\textit{Society}

Society possesses a significant interest in promoting and protecting lawful and moral conduct. Society also possesses an interest in assuring fair treatment for employees and employers. The conventional employment at will doctrine, presently modified by a nebulous and expanding public policy exception, is inconsistent with society’s interests.

The discharge principle proposed herein advances society’s interest in proper behavior and achieves the necessary balance between the societal desire to protect employees from arbitrary and unjust discharges and the need to permit employers to make discharge decisions without excessive risk or hindrance.

Clearly, the conventional employment at will doctrine is incongruous with contemporary social norms and expectations.\textsuperscript{227} Society is moving towards a consensus that the employer no longer has the right to discharge at will, that

\textsuperscript{224} Massingale, supra note 4, at 209; Leonard, supra note 4, at 670.
\textsuperscript{225} Leonard, supra note 4, at 678.
\textsuperscript{226} Grodin, supra note 152, at 142; Perritt, supra note 51, at 428.
\textsuperscript{227} Grodin, supra note 168, at 97-98; Grodin, supra note 152, at 135, 138; Leonard, supra note 4, at 647-48, 679.
employees have certain interests in job security, and that an employee is entitled to be judged on the basis of ability and performance.\textsuperscript{228} The extensive statutory and common law encroachments on the employment at will doctrine are evidence that society is moving towards a further consensus that the employees' interest in job security merits direct societal protection through law.\textsuperscript{229}

\textbf{CONCLUSION}

Justice demands that the legal system abandon the notion of at will employment and institute instead a public policy principle that authorizes discharge only for good cause and permits a limited tort cause of action for violation of public policy.

An arbitration determination of good cause provides an efficient, effective, and economic method to resolve discharge disputes. Arbitration of discharges ultimately saves time, money, and anxiety and can only drive business towards more productive and competitive heights.

A narrowly defined and clearly limited public policy tort will allow the courts to safeguard employee rights and the societal interest without hampering employer flexibility and chilling the business climate. The precise and limited scope of the tort will enable the courts to screen cases systematically for frivolous lawsuits.

The public policy principle proposed herein not only advances the interests of the marketplace but also serves the cause of justice. The principle promotes equity, fairness, and due process in the fundamental workplace element of job security. By further humanizing the workplace, the proposed principle is in accord with contemporary concepts of respect for human dignity and worth which must uphold any just body of employment law.

\textsuperscript{228} Grodin, \textit{supra} note 168, at 97-98; Grodin, \textit{supra} note 152, at 138; Leonard, \textit{supra} note 4, at 679.

\textsuperscript{229} Grodin, \textit{supra} note 168, at 97-98; Grodin, \textit{supra} note 152, at 135; Leonard, \textit{supra} note 4, at 647-48.