THE LEGAL CHOKEHOLD: PROFESSIONAL EMPLOYMENT IN OHIO UNDER THE EMPLOYMENT-AT-WILL DOCTRINE

by

LORRAINE K. PHILLIPS*

INTRODUCTION

Those of us who chose to pursue the education and expense essential to a professional career likely entered the working world bright-eyed and eager, ready to achieve greatness. Did it cross our minds that our jobs might not last forever, that the sunny words we heard during our interviews probably were not enforceable promises, and that it might be wise to seek formal job security provisions in Ohio? After all, Ohio is an "employment-at-will" state.

This article seeks to present the employment-at-will doctrine and the theories of its erosion. In particular, the article will examine Ohio case law from a practical perspective, with emphasis on which theories are most likely to provide successful arguments around the employment-at-will rule. In addition, the article will reveal trends and possible future proposals to deal with employment disputes.

To provide a focus, let us imagine a young, outspoken, talented, and ambitious female attorney. She is one of those eager individuals, who enters the corporate world with absolutely no thought of job security. After all, why would someone with obvious talent give a thought to the termination of employment? She expects to be a star, and people do not lose their jobs when they perform well, do they?

Suddenly the company's finances are in trouble and the doors will surely close. Should the attorney await the inevitable? No, of course, she will immediately seek another position. Now she is much more sensitive to the issue of job security, but only from the perspective of the employer's financial well-being.

She is wooed by another corporation, whose representatives proudly describe the company's holdings and obvious stability. They explain that joining their

* Staff Counsel, National Labor Relations Board; L.L.M. Georgetown University Law Center (1991); J.D. University of Toledo (1981); B.A. University of Michigan (1977).
legal office would enhance the attorney’s career, and her rise through frequent promotions would lead her to personal financial security as well. Soon after a tour of the corporation’s lavish executive suites and an elegant lunch in the executive dining room, she promises to consider joining the corporation.

After contemplating the assurances she has received, she decides to leave her current employer before becoming eligible for a severance package. She will also forego opportunities to join law firms with growing practices in her area of expertise. She accepts the corporation’s offer to join their "family."

The attorney leaves her job, moves to the new employer’s city, rents an apartment, and comes to work. She is presented with an employment application which she must complete and sign. The acknowledgement language above her signature contains the following: "I understand that I am an employee-at-will, that my employment relationship may be terminated by me or the employer at any time, for any reason, or for no reason. I also understand that nothing contained herein creates a contract of employment and that no one except the Chief Executive Officer has the authority to change the terms of this relationship to create a contract of employment." She is similarly presented with an Employee Handbook, which represents "Guidelines". The handbook prominently proclaims that it does not create a contract of employment, as the employees are employees-at-will.

What happens if, several years later, the employee’s employment is terminated for refusing to admit to committing some contrived offense? Does she have any legal recourse? What are her best arguments? Is she likely to succeed in a legal action? Before we examine her specific situation under the principles determined by Ohio law, let us take a more panoramic view of the employment-at-will doctrine and its erosion across the United States.

**The Employment-At-Will Doctrine and its Erosion**

*Employment-At-Will*

Two-thirds of the American work force is governed by the employment-at-will doctrine, which grants employers absolute freedom to discharge without notice or cause.¹ The employment-at-will doctrine has been summarized as a rule under which: "[a]n employer may dismiss an at-will employee for a good reason, a bad reason, or for no reason at all."² This common law rule was also paraphrased in

¹ Note, Protecting At-Will Employees Against Wrongful Dismissal: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980).
² H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 1 n.1 (3d ed.1990). Perritt indicates that the Industrial Revolution led to the need for greater freedom in employment terms than had been known
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Payne v. Western and ATL. RR:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.\(^3\)

In this way, on the basis of "freedom of contract," the law indicates that the at-will rule reflected the mutual desire of the employer and employee to retain the freedom to end the relationship at any time.\(^4\) The at-will rule provides that "any indefiniteness about the intended duration of the employment contract automatically creates the presumption that the employment relationship is terminable at will." The rule discourages considering expressions of intent, conduct or circumstances surrounding the employment "transaction." The employment relationship is seen as a "series of unilateral contracts," whereby the employee accepts the offer by continued performance.\(^5\)

Perritt explains Horace Wood's version of the "American Rule" of employment-at-will, that a general or indefinite hiring is prima facie a hiring at will.\(^6\) Courts began to construe promises of "permanent employment" as promises of "indefinite employment." An indefinite contract would not be enforced unless the employee could prove the existence of independent consideration beyond mere performance of the job. The presumption of employment-at-will and the independent consideration requirement prevented recovery for wrongful discharge under contract theory.\(^7\)

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\(^4\) Note, Employee Handbooks, supra note 3, at 198-99. As the note indicates, this rule was harsh for employees because, absent a fixed term, unlawful discrimination, or a specific constitutional right, the discharged employee had no recourse against the employer. See e.g., Lynas v. Maxwell Farms, 279 Mich. 684, 687, 273 N.W. 315, 316 (1937).

\(^5\) Note, supra note 1, at 1818.

\(^6\) Perritt, supra note 2, at 9-10. Perritt explains that Wood's rule became standard in most jurisdictions. He also comments, however, that modern historians note that Wood offered little to substantiate his position, citing four cases which did not truly support the adoption of the employment-at-will rule. While it began as a presumption, Wood's rule became a "substantive limitation on employment contracts," often precluding the enforcement of an informal employment contract.

\(^7\) Id. at 10-11.
In *Adair v. U.S.*\(^8\), an agent of an interstate carrier was convicted for discharging an employee because he was a member of a labor union. The case involved a constitutional attack on the statute which made the discharge a criminal offense. The court noted that it was part of every individual's civil rights to refuse business relations with any person for any reason. "Equity will not compel the actual, affirmative performance by an employee of merely personal services, any more than it will compel an employer to retain in his personal service one who...is not acceptable to him."\(^9\) While the Court recognized the constitutional guarantee against deprivation of liberty and property without due process, it found the employment-at-will doctrine to be a reasonable restraint.

...the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of...Adair, however unwise such a course may have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, ...however unwise such a course on his part might have been, to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract....In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be...that any employer is under any legal obligation, against his will to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.\(^10\)

Many such nineteenth century concepts have been repudiated or modified. Concern about employment relations has increased since the inception of employment-at-will. The workplace has become significantly regulated to promote unionization, prevent discrimination, establish a minimum wage, promote health and safety, establish retirement security, and to devise programs to

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\(^9\) Id. at 164.
\(^10\) Id. at 174-76. See Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1417 (1967) and Coppage v. Kansas, 236 U.S. 1 (1915). As Blades clarifies, both *Adair* and *Coppage* were rejected as the industrial revolution destroyed the classical ideal of freedom of contract on which these cases were based. Id. at 1418. In NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 45-46, the Court approved the National Labor Relations Act's protection of the employees' right to unionize free of intimidation and coercion and aimed at preventing employers from using discharge to intimidate and coerce.
compensate for workplace injuries.\textsuperscript{11}

The importance of at-will employment to employers appears obvious when considering the large number of terminations in the United States: perhaps as many as three million non-economic based terminations per year, with the rate for non-organized employees being twice that of unionized labor.\textsuperscript{12} The at-will rule promoted economic growth by giving business owners control over the workplace. Public interest concerns, as well as concerns about controlling the abuse of managerial discretion, however, eroded the employment-at-will doctrine. This erosion occurred first through statutes, and then through actual private causes of action for wrongfully discharged employees.\textsuperscript{13} The at-will doctrine had given employers sovereignty over the workplace. Because employees had no bargaining power in their own economic or working conditions, employers had maximum flexibility to retain or discharge employees at their discretion. Statutes were eventually enacted to promote better labor relations, with little impact on the job security of the vast majority of American workers who do not or cannot belong to unions.\textsuperscript{14}

Professor Peck describes a termination scenario in his article to depict the literal consequences of employment-at-will\textsuperscript{15}. Peck's hypothetical employee is a supermarket cashier whose employer says that there is no obligation to explain the reasons for her termination. Without a union, the employee would have no satisfactory means to grieve or protest her termination. A court would hold that she is an at-will employee, terminable without cause. Prospective employers may ask why she was terminated. If she lies, she may be discovered and therefore lose a job opportunity, whereas if she truthfully indicates that the employer refused to provide a reason, dishonesty may be presumed. She would thereby be rendered unemployable in what may be her only area of experience and one of the few areas in which she is competent, suffering this deprivation without hearing or proof of cause. Peck assumes that, given the favored position of

\textsuperscript{11} Note, supra note 1, at 1826-27.

\textsuperscript{12} Stieber & Baines, The Michigan Experience with Employment-At-Will, 67 N. E. B. L. Rev. 140, 141 (1988). This article cites Lynas v. Maxwell Farms, 279 Mich 684, 273 N.W. 315 (1937) for the traditional at-will rule as it was once applied in Michigan. Where the employee understood he had a permanent position, the court found that, in the absence of distinguishing features or additional consideration for the services to be rendered, the contract was an indefinite hiring, terminable at the will of either party. Id. at 145.

\textsuperscript{13} Mallor, Punitive Damages for Wrongful Discharge of At Will Employees, 26 WM. & MARY L. REV. 449 (1985). Mallor noted that, per Novosel v. Nationwide Insurance Company, 721 F.2d 894 (3d Cir. 1983), at least 29 jurisdictions recognize some private right of action, although there is no theory accepted by all states and no agreement whether the action sounds in tort or contract.

\textsuperscript{14} Id. at 455.

\textsuperscript{15} Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1, 4-6 (1979).
employers, it is likely that few suits will be brought by at-will employees.\textsuperscript{16}

Peck estimated that 60-65\% of the non-agricultural work force in the United States is terminable at-will.\textsuperscript{17} He indicated in 1979 that there were as many as 300,000 discharge and discipline cases per year that would have been subject to grievance and arbitration had the employees been unionized, which could mean that a substantial number of the decisions would have been overturned during the process. Instead, the many at-will employees are left without remedy, bearing the burden of a substantial injury.\textsuperscript{18}

In his often-quoted article, Professor Blades notes that the freedom of the individual is threatened whenever there is dependence upon a private entity with more power than the individual, a generality which is true in employment relationship.\textsuperscript{19} He explains that this is the imbalance that led to unionism. He uses \textit{B.F. Goodrich v. Wohlgemuth}\textsuperscript{20} to illustrate his point. Due to his comparative immobility, the worker is highly vulnerable to private economic power. As technological advances require specialization, the range of employment alternatives narrows. Therefore, concern over job security increases and workers are more easily oppressed. Because employers under the at-will doctrine can terminate employees for good cause, no cause or even cause that is morally wrong without incurring liability, the employee is forced to rely on the employer's whim for preservation of his livelihood, tending to make him a "docile follower" of the employer's every wish.\textsuperscript{21}

Blades believes that the philosophy giving rise to the employer's dominion over the employee, including the arbitrary right to employ or discharge without regard to motive, may have fit the "rustic simplicity of the days when the farmer or small entrepreneur who may or may not have employed others, was the epitome of American individualism."\textsuperscript{22} But he finds the philosophy incompatible with modern large, impersonal corporate employers. In 1967, however, the courts strictly adhered to the traditional rule that, in the absence of a statute or agreement limiting the right of discharge, the employer may discharge an employee at any time for any reason.\textsuperscript{23}

\textsuperscript{16} \textit{Id.} at 4-6.

\textsuperscript{17} \textit{Id.} at 9.

\textsuperscript{18} \textit{Id.} at 10.

\textsuperscript{19} Blades, \textit{supra} note 10, at 1404. This early article urges the erosion of the at-will doctrine.

\textsuperscript{20} \textit{B.F. Goodrich v. Wohlgemuth}, 117 Ohio App. 493, 192 N.E.2d 99 (1963). The B. F. Goodrich employee in this case was enjoined from working for one of the few other companies in existence which designs and manufactures space suits, based on his knowledge of trade secrets.

\textsuperscript{21} Blades, \textit{supra} note 10, at 1405.

\textsuperscript{22} \textit{Id.} at 1416.

\textsuperscript{23} \textit{Id.}
Arbitrary or economically unjustified dismissals have detrimental repercussions. Empirical studies indicate that discharge from employment affects self-perception as much as economic well-being. The fear of discharge and vulnerability to employer coercion continue, especially among the increasing number of white collar workers whose jobs are least likely to be protected by collective bargaining.

The Erosion of the Employment-At-Will Doctrine

The employment-at-will doctrine continues to provide a presumption that a dismissal is legal. The employee must rebut the presumption. Courts are becoming more receptive to awarding punitive damages in tort or for breach of the implied covenant of good faith and fair dealing, in cases involving the abuse of power in the contractual employment relationship. This reflects changing views about the responsibilities of those who possess economic power. Professor Blades agrees that employers should be able to discharge employees for failure or refusal to do work in accordance with the employer's direction, as is management's prerogative. His concern involves those areas of an employee's life that have little or no relevance to the employment relationship; he maintains that the courts should balance the business interest of the employer and the personal interests of the employee. Many courts and academics have supported the erosion of the employment-at-will doctrine to varying degrees and by using varied theories.

There have been traditional exceptions to the employment-at-will doctrine for many years. These include: 1) company executives, entertainers and other highly paid employees who have sufficient individual bargaining power to obtain an express contract for a definite term, wherein the duty to discharge only for just cause is expressed or implied in law; 2) employees covered by collective bargaining agreements which contain a just cause provision; and 3) public employees who are entitled by statute or regulation to just cause for discharge and

25 Id. at 606-607.
26 Id. at 609. See also Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1406, 1418 (1967); Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 Ohio State L.J. 1, 10 (1979).
28 Mallor, supra note 13, at 485.
29 Blades, supra note 10, at 1406.
Until relatively recently, there was no tort of wrongful discharge. However, the just cause concept was, however, developing in labor arbitration cases. Jobs have become more important; the career and workplace often become one's life focus.\(^3\) Discharge has been labeled the capital punishment of the industrial world because of its devastating effects: severe economic hardship, imminent stoppage of medical coverage, intense emotional distress and from being labeled a failure, inevitable tremendous loss of self-esteem, the harm to reputation, loss of standing in the eyes of family, friends, and co-workers, and of course, difficulty in finding a new job.\(^3\) During the last twenty years, there has been a veritable explosion in the area of employee rights.\(^3\) The employment-at-will doctrine began to erode in the 1970's as courts found remedies for victims of outrageous discharge.\(^3\)

Mr. Tobias, a plaintiffs' attorney in Cincinnati, indicates that most people believe it is illegal to discriminate for any arbitrary reason. He also suggests that most workers believe that unequal treatment, solely because of a personality conflict unrelated to work, is also illegal.\(^3\) Increased public awareness of dismissed employees has resulted in at least five trends: 1) discharged employees being more likely to seek counsel, 2) more employees threatening litigation, 3) more attorneys specializing in employment law, 4) law schools broadening their curriculum in the area, and 5) increasing law suits.\(^3\)

In the employment relationship, mutuality of contract is an illusion. The employer possesses the predominant power in the bargaining relationship. Blades states that the employee's right to work for whomever he chooses is "too valuable to be circumscribed or limited" in order to prevent the abuse of the coercive power of the employee's threat to quit his job.\(^3\) The employer is clearly the party with the power to coerce and intimidate, a recognition of which provides a foundation for various regulations in the workplace.\(^3\) Where an employee's

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\(^3\) Tobias, supra note 24, at 179-80. Tobias explains that the remaining non-union private sector exceeds 60% of the work force with no blanket protection from the at-will doctrine. He does note, however, that there is limited special purpose legislation prohibiting discrimination and retaliatory discharge for the exercise of a statutory or constitutional right.

\(^3\) Id. at 181.

\(^3\) Id.

\(^3\) Id. at 182.

\(^3\) Id. at 183.

\(^3\) Id.

\(^3\) Id. at 185.

\(^3\) Blades, supra note 10, at 1425-26.

\(^3\) See supra note 11.
experience is of special value or where advanced age makes it doubtful he can readily obtain comparable employment, the employee becomes even more susceptible to the employer's coercive power and less likely to succeed in mitigating damages.\textsuperscript{39} Blades urges that abusive terminations become recognized causes of action, with punitive damages available as a deterrent.\textsuperscript{40} Blades heralds the onslaught of employment litigation which has become the topic of whole courses of study. Indeed, as noted by at least two commentators, quoting Novosel v. Nationwide Insurance Company,\textsuperscript{41} as of 1983, courts in 29 states had already granted some form of exception to the common law rule, and 5 additional states and the District of Columbia had indicated a willingness to do so.

In 1967, Blades advocated a personal remedy for damages in discharge cases, including coverage for the expenses of a job search, lost earnings, the difference in earnings if the employee must settle for a lesser paying job, and emotional damages for the stigma and mental anguish attached to the job loss. Blades recognized that employees are not psychologically prepared for the loss of security and status inherent in the job loss. One of the reasons behind his advocating a new cause of action for abusive discharge is his realization that the fear of discharge and "vulnerability to coercion" is especially "acute" among professionals and white collar employees. He urged a cause of action to discourage interference with the freedom and integrity of such employees.\textsuperscript{42} The law has evolved in the very direction Blades espouses in his ideology. Workers are now being protected in the courtroom.

According to Professor Massingale:

[M]any changes in the law have contributed to the creation of the current employment environment. During the last 25 years, security for the worker has been encouraged by court decisions curtailing the unrestricted right of an employer to dismiss a worker arbitrarily. The process began slowly, but it has gained momentum as recent decisions clearly point to the erosion of the employment-at-will doctrine.\textsuperscript{43}

She points out that a number of early decisions were based on statutes, but that, in the 1980's, courts began to recognize an action for wrongful termination

\textsuperscript{39} Blades, \textit{supra} note 10, at 1426.

\textsuperscript{40} \textit{Id.} at 1427.

\textsuperscript{41} 721 F.2d 894, 896 (3d Cir. 1983). \textit{See Note, Employee Handbooks, \textit{supra} note 3, at 199; Mallor, \textit{supra} note 13, at 452.}

\textsuperscript{42} Blades, \textit{supra} note 10, at 1413-14. Professor Peck feels that the failure of the law to protect against unjustifiable dismissal reflects that our standards are lower than those of other economically developed countries and some less developed. Peck, \textit{supra} note 15, at 12-13.

on other theories. By 1985, 37 states recognized the public policy exception to the at-will doctrine, 31 recognized the implied contract exception and five recognized the covenant of good faith and fair dealing exception.44

1. The Public Policy Exception

In some states, an employee may recover in tort when the discharge offends public policy. Perritt identifies the elements of proof under the public policy theory:

1. A clear public policy manifested in a state or federal constitution, statute or administrative regulation, or in the common law;
2. The dismissal in issue would jeopardize the public policy;
3. The dismissal was motivated by conduct related to the public policy;
4. Lack of legitimate business justification for the dismissal.45

When an employee asserts a claim under the public policy theory, a balancing analysis incidentally weighs the employee's interest in job security against the employer's economic interest in having the unilateral right to make employment decisions. In this balancing, however, societal interests are weighed most heavily. The employment-at-will rule, the societal interest which favors the employer, remains a presumption. Unless the employee can show countervailing public policy interests, the employment-at-will doctrine mandates that the employer escape liability.46 States have accepted the public policy exception in varying degrees, and some have not accepted it at all.

The New York Court of Appeals refused to recognize the tort cause of action in Murphy v. American Home Products,47 stating that "such recognition must await action of the Legislature."48 Professor Mallor feels that the heart of the problem with this theory is its imprecision, that is, the need to define the societal interest at stake.49 The Plaintiff in Murphy based his suit on the allegation that he was terminated in retaliation for reporting to top management what he considered to be accounting improprieties. The court found that the rule of non-liability for the discharge of an at-will employee should only be amended through

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44 Id. at n.12.
45 Perritt, supra note 2, at 3.
46 Id. at 30.
48 Id. at 87, 4955.
49 Mallor, supra note 13, at 460.
a "statutory scheme."\textsuperscript{50}

Courts generally attempt to balance the importance of the public policy against the burden of limiting management discretion and usually require a clear mandate that the particular policy is necessary to protect the public interest.\textsuperscript{51} There must be a connection between the termination and the acknowledged public policy separate from the interest in the stability of labor relations. Thus, under this theory, the employee's interests are said to be furthered only incidentally to society's interests.\textsuperscript{52} Public policy protection cases generally fit into three categories:\textsuperscript{53} 1) discharge for exercising a statutorily conferred right,\textsuperscript{54} 2) discharge for refusal to disobey a law,\textsuperscript{55} and 3) discharge for whistleblowing or in retaliation for informing about the violation of a law.\textsuperscript{56}

Most courts require that an employee be able to point to a clear mandate of public policy as expressed in existing law.\textsuperscript{57} In \textit{Brockmeyer v. Dunn & Bradstreet},\textsuperscript{58} an employee was terminated following a relationship with his secretary, her subsequent termination, and her suit for sex discrimination. In his suit, the employee alleged that he was terminated for refusal to lie on behalf of the employer in his secretary's sex discrimination suit. The court failed to find a clearly defined public policy against discharging an employee because his testimony may be contrary to the employer's interests.\textsuperscript{59} Courts are unlikely to intervene where the discharge involves private disputes and internal matters, in deference to the policy favoring employer discretion in the workplace.\textsuperscript{60}

\textsuperscript{50} \textit{Murphy}, 58 N.Y. 2d at 293, 448 N.E. 2d at 90, 461 N.Y.S. 232. In fact, the court eliminated Murphy's claim for intentional infliction of emotional distress, refusing to permit the Plaintiff to "subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress." The New York Court clearly intended to avoid creating a tort for wrongful termination couched in any theory. \textit{Id.}

\textsuperscript{51} \textit{Massingale, supra} note 43, at 191.
\textsuperscript{52} \textit{Mallor, supra} note 13, at 459.
\textsuperscript{53} \textit{Massingale, supra} note 43, at 192-93.

\textsuperscript{57} \textit{Mallor, supra} note 13, at 461.
\textsuperscript{58} \textit{Brockmeyer v. Dunn & Bradstreet}, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).
\textsuperscript{59} \textit{Id.} at 572-73, 335 N.W.2d at 840.
\textsuperscript{60} \textit{Mallor, supra} note 13, at 467.
Plaintiffs are most likely to prevail when two factors are present: 1) the policy is clear, i.e. specific and based on written law, and 2) the discharge presents a clear threat of frustrating that policy. Petermann v. International Brotherhood of Teamsters serves as an early example of a case that obviously fits these criteria. In Petermann, the plaintiff was discharged for refusing to commit perjury. The public policy was clearly stated in the California Penal Code, making it a crime to "solicit the commission of perjury" and the public has a great interest in the enforcement of the policy. The policy was embodied in written law and the discharge was certainly in contravention of the spirit of that law.

Nees v. Hocks, an Oregon case, is another example of an obvious public policy case. The employee was discharged for performing her legal duty to serve on a jury. Her employer asked her to request that she be excused, which she failed to do. The court considered jury duty to be "high" on the scale of citizen obligations, and so fashioned tort liability based on the employer's interference with the duty.

Other courts are willing to stretch to find statutory authority for the public policy. For example, in Cloutier v. Great Atlantic & Pacific Tea Company, the New Hampshire Supreme Court found that the public policy "derived" from the Occupational Safety and Health Act of 1970 which imposes a duty on the employer to furnish a workplace free from recognized hazards. The employee was responsible for making bank deposits, but was terminated when the store was burglarized after a deposit had not been made on the employee's day off. The employer had cut the practice of providing a police escort during the daily deposit procedure as a cost-saving measure, thus creating a "hazardous work environment." It is doubtful that OSHA intended to address this sort of practice when it imposed upon employers the duty of providing a safe workplace.

Even less reliance on a clear public policy was required in Novosel v.
This case broadly expanded the range of public policies upon which to base torts by finding the "absence of a statutory declaration of public policy" to be no bar to the existence of a cause of action. The plaintiff was terminated for refusing to participate in his employer's lobbying efforts in support of the "No Fault Reform Act" in Pennsylvania, and for privately stating his opposition to the company's position. The Court found that the concern for the rights to political expression and association expressed in both the U.S. and Pennsylvania constitutions was sufficient to state a public policy. The Court suggested that "general policies in society," such as the constitutional policy in favor of freedom of expression, are adequate bases upon which to bring a public policy tort action in Pennsylvania. Of course, private actors are not generally subject to the prohibitions of the First Amendment. Novosel avoided the problem by applying First Amendment principles as basic tenets of society.

These cases show the various stands that courts have taken with the public policy exception to the employment-at-will doctrine. Some courts refuse to recognize the exception at all. Other courts recognize the exception where the mandate of public policy clearly expressed in a statutory or constitutional provision. Still other courts have gone so far as to base a cause of action in general societal principles with a connection to constitutional provisions.

2. The Implied Contract Exception

In many states, an employee whose employer dismisses him or her in violation of promises made orally or implied from a course of conduct, employment policies, or handbooks may recover for breach of contract. Perritt explains the three elements of this cause of action:

1. Employer made a promise of job security;

2. Employee gave consideration for the promise (may be in the form of detrimental reliance);

3. Employer breached the promise by dismissing the employee without cause.

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72 Id. at 899. See Perritt, supra note 27, at 400; St. Antoine, A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower, 67 Neb. L. Rev. 56, 60 (1988); Grodin, Past, Present and Future in Wrongful Termination Law, 6 Lab. Law 97, 103 (1990).
73 Novosel, 721 F.2d at 896.
74 Perritt, supra note 2, at 2.
75 Id.
Most medium to large companies have written rules, procedures, handbooks, and/or manuals that may be construed as prohibiting unjust dismissals. These written materials, considered with other indicia of the employer’s intent, such as verbal promises and company practices and customs, may raise an employee’s expectations of job security. The traditional view was that personnel manuals and employee handbooks had no contractual status. Policy statements in a personnel manual were mere unilateral statements by the employer and were subject to unilateral amendment. Even promises, such as those of employee loyalty, which benefited the employer were considered gratuitous and unenforceable absent consideration independent of the performance of the job.

In an increasing number of jurisdictions, however, employee handbooks are found to contain enforceable contract rights. Implied contractual rights can be found in the terms of an employee handbook, policy manual, memorandum, or oral statements made by the employer. In examining the circumstances, facts or employer assertions, courts may find either an implied contract for permanent employment or an at-will agreement modified to become permanent employment terminable only for good cause. The rationale behind these developments lies in the contractual principle of expectation. When an employer makes statements or performs acts indicating an employee will be terminated only for good cause or otherwise assuring job security, the employer creates an expectation of permanent employment. Contracts are enforced to protect such expectations.

In the early 1980’s, courts began to "take employers at their word." Statements of policy in personnel manuals or handbooks or oral commitments to employees at the time of hiring give rise to express or implied contracts that the employees will not be discharged except for just cause. In Pugh v. See’s Candies, Inc., an employee was terminated after 32 years of service. The court noted that a variety of factors, in addition to independent consideration, come into play in deciding whether an implied contract exists. These include the employer’s personnel policies or practices, longevity of service, actions or communications by the employer reflecting assurances of continued employment.

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76 Tobias, supra note 24, at 188.
77 Note, Employee Handbooks, supra note 3, at 200-201.
78 Id. at 205.
81 St. Antoine, supra note 72, at 61.
82 Id.
and industry practices." Toussaint v. Blue Cross and Blue Shield is a seminal case in the implied contract area.

The Plaintiff in Toussaint specifically inquired about job security and was basically told that he would be employed as long as he performed his job. His argument that he should only be dismissed for just cause was strengthened, according to the Michigan court, because he was handed a manual of personnel policies which reinforced the oral assurance of job security. The court held that:

[Employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring.

This theory of recovery allows courts to protect the expectations of the parties. Toussaint, the leading case attacking the traditional approach to employee handbooks, rejects the notion that handbook provisions must be the subject of bargaining.

Courts relying on the implied contract theory of recovery have rejected the traditional idea that independent consideration is necessary to support a contract based on the employer's promises in its employee handbook. The mere performance of services is consideration sufficient to make the employee handbook part of an at-will contract, whether the handbook modifies the pre-

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84 Id. at 327, 171 Cal. Rptr. at 925-26 (Many successful cases grounded in contract theory involve long-term employees).

85 408 Mich. 579, 292 N.W. 2d 880. Cf. Rowe v. Montgomery Ward & Co., No. 84848 (Michigan Supreme Court July 31, 1991). (The Michigan Supreme Court recently refused to apply Toussaint when pre-employment negotiations regarding job security did not occur). See also Stieber & Baines, supra note 12, at 140. Michigan's law involving the implied contract exception to employment at will is very developed.

86 Toussaint, 408 Mich. at 598, 292 N.W.2d at 884.

87 Id. at 614-615, 292 N.W.2d at 892.

88 Mallor, supra note 13, at 456-57.

89 Note, Employee Handbooks, supra note 3, at 209-10.

90 Id. at 211.
existing contract or is part of the original contract.\textsuperscript{91} In a growing number of states, continuing to work after the receipt of a promise of job security is sufficient consideration, as it represents the detriment bargained for by the employer.\textsuperscript{92}

Employers who are sensitive to litigation potential have sanitized handbooks and inserted disclaimers to restate the employment-at-will doctrine and negate the existence of a contract.\textsuperscript{93} A clear and prominent disclaimer in the handbook generally forecloses the employee's claims.\textsuperscript{94} Disclaimers are a means for the employer to preclude the enforcability of promises of employment security made in the handbook or job application. Written or oral assurances of continued employment may, however, vitiate the effect of a disclaimer.\textsuperscript{95} "The principles of reliance, adhesion, and legal presumptions against the draftsman may assist the employee to overcome the unfair effect of these disclaimers."\textsuperscript{96} The sophisticated employer will not only insert disclaimers in employment literature, but will also advise its staff to refrain from giving verbal assurances to employees that may be interpreted as if the company will terminate only for cause.\textsuperscript{97}

The employer's capacity to eliminate or restrict contract rights and policy declarations is generally confined to enlightened firms. Oral assurances and individual guarantees are most likely made to mid-to high-ranking management personnel. Therefore, the persons who need protection the most, the rank and file in small shops, generally have no implied contract rights.\textsuperscript{98} Unilateral contract analysis will not seriously threaten the employment-at-will doctrine because an employer can still discharge employees without invoking the implied contract exception, so long as the employer follows its own handbook provisions.\textsuperscript{99}

3. The Implied Covenant of Good Faith and Fair Dealing

The third common law doctrine which has become an exception to the

\textsuperscript{91} Id. See Pine River State Bank v. Mettille, 333 N.W. 2d 622 (Minn. 1983) (Provisions of personnel handbook distributed after hiring may become part of original employment contract if meet requirements for formation of unilateral contract, continuing to work sufficient consideration).

\textsuperscript{92} Perritt, supra note 27, at 412. Perritt also comments that, even where provisions are not "bargained for," promissory estoppel principles should apply.

\textsuperscript{93} Tobias, supra note 24, at 188.

\textsuperscript{94} St. Antoine, supra note 72, at 61.

\textsuperscript{95} Perritt, supra note 27, at 417.

\textsuperscript{96} Tobias, supra note 24, at 189.

\textsuperscript{97} Mallor, supra note 13, at 458. See also Williams, "Employers Can Avoid Legal Pitfalls in Employment," The Daily Reporter (Columbus) September 28, 1990, at 5; and Spurgin & Hassman, The At-Will Employment Doctrine And Employee Handbooks, 53 TEX. B. J. 27, 30 (1990).

\textsuperscript{98} St. Antoine, supra note 72, at 62-63.

\textsuperscript{99} Note, Employee Handbooks, supra note 3, at 215.
employment-at-will doctrine is the covenant of good faith and fair dealing, which is implied in all contracts as a matter of law. This theory conceptually enables the employee to recover for breach of contract when the employer violates the covenant. While the employer may terminate an at-will contract for any reason, no reason, a good reason, or a bad reason, the employer also has a duty not to "exercise this right unfairly or in bad faith." In its broadest interpretation, Perritt indicates that a terminated employee need show:

1. An employment relationship;
2. Termination of the employment; and
3. Some aspect of the termination as unfair or in bad faith.

In actuality the covenant of good faith and fair dealing was not meant to add new terms to a contract, but to enforce the intention of the parties to the contract. In other words, the covenant is implied so that the parties will not frustrate the contracts they enter. In his dissent in Murphy v. American Home Products, Judge Meyer applies the covenant to suggest that, where the employer requires an employee to report on other employees, it is implicit that the employer will not terminate the employee for following the instruction.

An interesting aspect of the development of this exception to the employment-at-will doctrine involves its remedies. While the language of the theory is couched in contract terms, tort remedies have been provided by courts in the states that recognize the covenant. In all states, parties to a contract have an implied duty to exercise good faith and fair dealing in the performance of the contract. This theory is used to avoid one party's interference with the contractual obligations of the other party or his right to receive benefits under the contract. In several states, the theory has been applied to the employment relationship.

The concept of "fairness" arrived in the workplace with California leading the way with large jury verdicts. In Petermann v. International Brotherhood of
The California Court indicated that it was "well settled that the employer must act in good faith." In *Cleary v. American Airlines, Inc.*, the company claimed the employee was terminated for theft and the employee claimed he was wrongfully terminated on the basis of his union activities. While California’s labor code codified at-will employment, the court found that the fact that a contract is terminable at will does not give the employer the absolute right to terminate. The Court recognized that the concept of good faith and fair dealing was first formulated by the California courts in the insurance context, but added that a covenant is implied in every contract, including one that is at-will, that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.

The court noted two primary factors in finding the covenant: 1) longevity of service and 2) the employer’s expressed internal grievance procedure, which operated as a "form of estoppel, precluding any discharge of such an employee by an employer without good cause."

Again, while these causes of action were based in contract, the courts did not limit themselves to contract damages. This is so even when the courts are not clear that they are in fact applying tort theory. In December, 1988, the California Supreme Court seriously evaluated this trend in *Foley v. Interactive Data*, and found that employees could no longer receive punitive damages in tort based on bad faith dismissals because the cause of action actually rests in contract. The Court thus overturned a long line of lower court decisions granting tort damages, including *Cleary*. The Court found that there was no special relationship in the employment context, such as there is in the insurance context, under which the implied covenant of good faith and fair dealing was developed. At least one commentator applauded the decision, noting, however that the implied covenant should never attach in the employment context because there is actually no contract at all in an at-will relationship.

109 Id. at 189, 344 P.2d at 28.
111 Id. at 450, 168 Cal. Rptr. at 726.
112 Id. at 453, 168 Cal. Rptr. at 728.
113 Id. at 455, 168 Cal. Rptr. at 729.
115 McGuire, supra note 114, at 109.
116 Id. at 109-110. But see Fenton & Miller, supra note 114, at 307. These authors find a definite contract in the at-will employment relationship and believe that contractual damages are appropriate in breach of implied covenant cases pending legislation extending it.
As the common law rule of employment-at-will came under increasing attack, some courts began to recognize that employers had too much discretion, allowing them to take unfair advantage of employees. In response, some states recognized the implied contract right to terminate only in good faith.\(^{117}\) The trend started in *Monge v. Beebe Rubber Company*\(^{118}\) There, the New Hampshire Supreme Court found that a termination of an at-will employment contract which is "motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of contract."\(^{119}\) Thus, the Court began imposing a duty upon employers to act in good faith, although the covenant is not specifically identified. New Hampshire has curtailed this trend since the *Monge* decision.\(^{120}\)

In *Fortune v. National Cash Register*,\(^{121}\) the Massachusetts Supreme Judicial Court specifically supported the proposition that good faith is implied in contracts terminable at will. Fortune, a 25-year employee, was terminated when he was on the brink of closing a very large sale which would have entitled him to a substantial bonus commission. In finding for the plaintiff, the Court determined that there is an implied covenant of good faith and fair dealing in every contract.\(^{122}\) While not speculating as to whether the good faith requirement is implicit in every employment-at-will contract, the court found a breach of contract in the case.\(^{123}\) It must be noted that it is a proper application of the covenant, to enforce the existing terms of a contract.

Some states, such as Michigan,\(^{124}\) have not adopted the covenant of good faith and fair dealing. Perritt believes that California, Montana and Massachusetts are the only states which rely heavily on the implied covenant as a primary wrongful dismissal doctrine.\(^{125}\)

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\(^{117}\) Note, *supra* note 1, at 1817.


\(^{119}\) *Monge*, 114 N.H. at 133, 316 A.2d at 551. (The terminated employee was a victim of sexual harassment).

\(^{120}\) *Mallor, supra* note 13, at 468.


\(^{122}\) *Id.* at 103, 364 N.E.2d at 1257.

\(^{123}\) *Id.*

\(^{124}\) *Stieber & Baines, supra* note 12, at 150. The authors note that the Michigan courts have not adopted the covenant and have defined public policy narrowly even though Michigan was considered on the forefront of wrongful discharge litigation.

\(^{125}\) Perritt, *supra* note 27, at 421.

As the Montana courts steadily expanded the grounds upon which terminated employees could sue during the 1980's, in 1987 the legislature began to respond to the backlash of employers. The Montana legislature eventually passed the Wrongful Discharge from Employment Act, while the courts expanded claims based on the implied covenant of good faith and fair dealing and upheld large punitive damage awards.

Montana employers thought the best way to change the direction of the law was through legislative action. The Wrongful Discharge from Employment Act, which covers non-probationary employees, acknowledges the legitimacy of public policy causes of action and those involving violations of written personnel policies. Damages are specified as up to four years' wages and fringe benefits, representing a compromise between the traditional at-will rules and tort damages, and have become the exclusive remedy of the discharged employee.

The statute, the only one of its kind, permits three causes of action: 1) retaliatory discharge for refusal to violate public policy, 2) discharge without just cause, and 3) discharge in violation of express written personnel policies. Remedies are limited to lost wages and benefits four years from the date of discharge, with a duty to mitigate. Reinstatement is not available and punitive damages are only available in cases of public policy violations with fraud or actual malice. Damages for pain and suffering or emotional distress are prohibited. Once suit is filed, under the statute's unique arbitration clause, either party may request arbitration within 60 days. If the other party refuses to arbitrate and then loses the suit, he must pay the requesting party's attorney fees.

In August, 1989, the National Conference of Commissioners on Uniform State

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128 Schramm, *supra* note 126, at 108. (Employees covered by a collective bargaining agreement or contract for a specific term are exempted from the Act's coverage).
129 Id. at 109.
130 Id. at 110.
133 Schramm, *supra* note 125, at 110.
134 Id. at 111.
Laws completed a draft of the Uniform Employment Termination Act, with several provisions of which are modeled after Montana's statute.\textsuperscript{135} However, the plaintiff must exhaust internal grievance procedures before filing suit.\textsuperscript{136} The proposed statute also provides the attorney fees incentive toward arbitration.\textsuperscript{137} The statute would specifically exclude from its application employment contracts for a specific term, employees covered by collective bargaining agreements, and government employees.\textsuperscript{138} To date, no state has adopted such a statute, embodying the ultimate erosion of employment-at-will, other than Montana. Approximately 45 states have recognized some modification to the at-will doctrine, and bills forbidding wrongful termination have been introduced to protect employees against unjust discharge.\textsuperscript{139}

In light of the development of the law in this area across the United States, it will be interesting to examine how our young attorney will fare when forced to rely on the current state of Ohio law.

**EMPLOYMENT-AT-WILL AND ITS EROSION IN OHIO**

*Employment-at-Will*

The employment-at-will doctrine is alive and well in Ohio. This can be illustrated by examining, in chronological order, several cases which have upheld the doctrine.

*Henkel v. Educational Research Council*\textsuperscript{140} involves a written employment agreement, whereby the defendant agreed to employ the plaintiff at an annual salary. The Plaintiff contended that the offer of an annual salary, along with the facts and circumstances surrounding it, created a contract of employment for one year.\textsuperscript{141} The court identified the "modern rule":

\[\text{In the absence of facts and circumstances which indicate that the agreement is for a specific term, an employment contract which provides for an annual rate of compensation, but makes no provision as to the duration of the employment, it is not a contract for one year, but is}\]

\textsuperscript{135} *Id.* at 116.
\textsuperscript{136} *Id.* at 117.
\textsuperscript{137} *Id.* at 118.
\textsuperscript{138} *Id.* at 125.
\textsuperscript{140} Henkel v. Educational Research Council, 45 Ohio St. 2d 249, 344 N.E. 2d 118 (1976).
\textsuperscript{141} *Id.* at 251, 344 N.E.2d at 119.
terminable at will by either party.\textsuperscript{142}

Because there was no evidence that plaintiff was offered employment for any particular period of time, and the employer's policy forbade such a contract, the employment relationship was terminable at the will of either party.\textsuperscript{143}

In another case, Susan Fawcett was employed by G.C. Murphy for approximately 14 years before she was terminated for allegedly stealing a box of cookies.\textsuperscript{144} While the plaintiff believed that the right of an employer to terminate employment for any cause and at any time should be limited by principles which protect persons from gross disregard of their rights, the Ohio Supreme Court felt constrained to follow its previous holdings and refused to limit the employment-at-will doctrine.\textsuperscript{145} Thus, if our young attorney faced termination in the mid-1970's, she would have likely had no recourse whatsoever under Ohio law, as it clung steadfastly to the employment-at-will rule.

In June, 1990, an Ohio, court of appeals decided \textit{Modarelli v. First Fed. Savings & Loan Ass'n of Wooster},\textsuperscript{146} which provides an excellent transition in our analysis. The case examines the exceptions to the employment-at-will rule recognized in Ohio, while stating that the employment-at-will doctrine still poses a "formidable barrier" to employee suits.\textsuperscript{147} Modarelli, a vice president, was terminated due to his volatile relationship with coworkers and employees under his supervision. The Court noted that the crux of an at-will relationship is that either party can terminate the relationship for any reason, but added that three exceptions are recognized:

1. Facts and circumstances surrounding an oral agreement may give rise to an implied contract that cause is required for discharge [cite omitted],

2. Detrimental reliance on promises of job security (promissory estoppel) [cite omitted],

3. Discharge in violation of a statute and so in violation of public policy. [cite omitted].\textsuperscript{148}

\textsuperscript{142} \textit{Id.} It is interesting to note that, while the court identifies this as the modern rule, it cites cases from 1882 and 1900 to support its position.

\textsuperscript{143} \textit{Id.} at 261, 344 N.E.2d at 125.

\textsuperscript{144} Fawcett v. G. C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

\textsuperscript{145} \textit{Id.} at 249, 348 N.E.2d at 147.


\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}
The first two exceptions are both based in contract. Therefore, the Court points out the two theories under which Ohio courts have found exceptions to the employment-at-will doctrine: 1) contract, or quasi-contract, and 2) public policy. Like Michigan, the contractual exceptions are far more developed and the public policy exception is construed narrowly. However, courts in Ohio find adequate reasons to deny that the facts of a case fit an exception.

In *Modarelli*, the Court held that representations made to the employee that his employment was directly related to his job performance did not create an implied contract term that he could only be terminated for cause. The court bases its decision in part upon its determination that *Helmick v. Cincinnati Word Processing Inc.*, a decision about assurances of job security, applied principles of promissory estoppel rather than implied contract. The Court found Modarelli’s allegations insufficient to avoid the formidable barrier of employment-at-will.

As noted in *Modarelli*, however, other cases have been more successful in escaping the employment-at-will’s tenacious grasp in the Ohio courts.

**The Public Policy Exception**

At late as 1986, it appeared that Ohio might not recognize the public policy exception to the employment-at-will doctrine. In *Phung v. Waste Management, Inc.*, the Ohio Supreme Court found that an at-will employee who is discharged for reporting to the employer its violation of the law does not state a cause of action for wrongful discharge. Phung served as chief chemist at a toxic waste disposal site when he determined and reported that his employer was violating its "legal and societal obligations." The Court held that Phung’s allegations failed to state a violation of a "sufficiently clear public policy" to warrant creation of a cause of action.

According to the Phung court, public policy does not require an exception to the at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of the law. While the court did not absolutely foreclose the concept of a public policy exception, it decided the

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149 *Id.*

150 *45 Ohio St. 3d 131, 543 N.E.2d 1212 (1989).*

151 *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

152 *Id.* at 106, 491 N.E.2d at 1119.

153 *Id.* at 102, 491 N.E.2d at 1116-17.

154 *Id.* at 103, 491 N.E.2d at 1117. The court specifically noted that the legislature had not formulated a cause of action under such a scenario, although it had done so for a discharge for filing a workers compensation claim or for discriminatory discharge.
facts of the particular case were insufficient to create the exception. It is interesting to note, however, that the decision was written by the judge sitting for Justice Douglas who could not participate because he had heard the case in the appellate court. Had Justice Douglas, participated in the Supreme Court decision, it may have been decided differently.

In 1990, however, Justice Douglas did have an opportunity to express the Court's views. A public policy exception was found warranted in *Greeley v. Miami Valley Maintenance Contractors, Inc.*155 Greeley was terminated as a result of a court order requiring child support payments to be made by wage assignment directed to his employer. His employer refused to withhold the child support and terminated him. The child support wage withholding statute specifically contains a prohibition against retaliatory discharge.156 If employers could merely pay a fine to avoid compliance, the legislative scheme would be frustrated.157 The Court found in *Greeley* the "clearly sufficient authority to warrant" the public policy exception that was lacking in *Phung*.158

Justice Douglas wrote, "...the time has come for Ohio to join the great number of states which recognize a public policy exception to the employment-at-will doctrine."159 The Court held that "public policy warrants an exception...when an employee is discharged or disciplined for a reason which is prohibited by statute."160 Although the employment-at-will doctrine remains "alive and well" in Ohio, the right of employers to terminate for "any cause" no longer includes a discharge which violates not only a statute, but also public policy.161

The Court clearly leaves open the possibility of public policy exceptions other than those for statutory violations, and allows the public policy cause of action to be brought in tort,162 a significant development in Ohio law. The exception does little for an "ordinary" termination of a professional. In the case of our attorney who is terminated for insubordination for refusing to admit to a contrived charge, a statutory prohibition does not come to mind. Thus, while principles of fairness may certainly call into question an employer’s action, an employee is unlikely to succeed on public policy grounds unless Ohio extends the exception to cover circumstances violating "vague" societal policies.

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156 *Id.* at 230, 551 N.E.2d at 983.
157 *Id.* at 232, 551 N.E.2d at 984.
158 *Id.* at 233, 551 N.E.2d at 986.
159 *Id.* at 234, 551 N.E.2d at 986.
160 *Id.*
161 *Id.*
The Implied Contract and Promissory Estoppel Exceptions

In 1982, an Ohio court of appeals recognized that employment relationships of indefinite duration may be modified by an employer’s literature, such as handbooks and policy statements. In Hedrick, the Court acknowledged the Supreme Court’s position in the 1976 Henkel decision that an employment contract is terminable at will unless the parties agree to contract otherwise. Despite the general employment-at-will rule, the courts were giving more consideration to the intent of the parties.

Helle v. Landmark, Inc., while not a termination case, acknowledges that an employer in an at-will relationship may legally obligate itself by adding new terms and conditions to the relationship. The case involved the enforceability of the employer’s severance package as expressed in the employee handbook and orally. The Court used a unilateral contract analysis and found the employee’s continued performance of his job to be sufficient consideration for the contract. When faced with the disclaimer contained in the employee handbook, the court determined that the verbal assurances defining the severance provisions negated the disclaimer. The Helle court noted the modern decisional tendency against defeating contracts on the technical ground of lack of mutuality and cited some of the most prominent cases in the area, such as Toussaint and Pine River. Although the Court in Bernard v. Rockwell International Corp. distinguished the "Helle doctrine" because the case involved severance rather than termination, contractual theories have flourished in carving an exception to employment-at-will.

In 1985, the Ohio Supreme Court decided Mers v. Dispatch Printing Company. While employed by the Columbus Dispatch, Mers was arrested and charged with rape and other crimes. He was suspended without pay until the criminal charges could be favorably resolved. The criminal case ended with a hung jury and the charges were ultimately dismissed. The Dispatch nevertheless

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163 Hedrick v. Center for Comprehensive Alcoholism Treatment, 7 Ohio App. 3d 211, 454 N.E.2d 1343 (1982).
166 Id. at 7, 472 N.E.2d at 772.
167 Id. at 9, 472 N.E.2d at 774.
168 Id. at 9, 472 N.E.2d at 775.
172 Id. at 932.
terminated Mers' employment. Mers claimed relief on a breach of contract or promissory estoppel basis as a result of promises made by the employer and its handbook provisions as well as its failure to follow its published grievance procedures.

The Court refused to abolish the employment-at-will doctrine, instead citing a line of Ohio cases upholding the rule. The court found, however, that this case "demonstrates that there are occasions when exceptions to the general rule are recognized in the interest of justice." Although this is a termination case, the Court cited the "Helle doctrine" as precedent: employee handbooks, company policy, and oral representations have comprised components or evidence of the employment contract. The Court had no problem applying promissory estoppel to an employment-at-will case, remanding the case for a jury evaluation of the meaning of the Dispatch's promise and whether the resulting acts were reasonable. The Court held that:

"The doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise.

The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee."

In this manner, the Ohio Supreme Court used the quasi-contractual theory of promissory estoppel to find modification of the employment-at-will relationship. Ohio courts have continued to adopt these principles.

In Brown v. Otto C. Epp Memorial Hosp., the applied actual contract principles in a termination case. Despite provisions in the employee handbook to the contrary, the employer refused to reinstate the employee following a period of medical leave. The Court found that an employee handbook or employment policy may form a part of an employment contract and that, in this case, both

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174 Id. at 101, 483 N.E.2d at 152.
175 Id.
176 Id. at 103, 483 N.E.2d at 153.
177 Id.
178 Id. at 105, 483 N.E.2d at 154.
179 Id. at 106, 483 N.E.2d at 156.
parties intended to be bound by the provisions about leaves of absence.\footnote{Id. at 199, 535 N.E.2d at 327.} The Court remanded the case so that a jury could weigh the evidence to determine whether the employer gave Brown "good-faith" consideration for re-employment.\footnote{Id. at 200, 535 N.E.2d at 328. See also Bolling v. Clevepak Corp., 20 Ohio App. 3d 113, 484 N.E.2d 1367 (1984). (Parties to an employment contract are bound by principles of good faith and fair dealing).}

In another case, an employee sued the nursing home for which she worked for breach of an employment contract. The suit arose after the employee was told to either resign or be fired upon being given four written deficiency notices after giving improper medication to a diabetic.\footnote{Biskupich v. Westbay Manor Nursing Home, 33 Ohio App. 3d 220, 515 N.E.2d 632.} While noting unequivocally that Ohio adheres to the employment-at-will doctrine, presuming an at-will relationship in the employment context, the Court also stated that parties are free to enter agreements which are for a specific term.\footnote{Id. at 221, 515 N.E.2d at 633.}

Citing \textit{Mers},\footnote{Mers v. Dispatch Printing Co., 19 Ohio St.3d 100, 483 N.E.2d 150 (1985).} the Court found the terms and representations in an employee manual to be relevant in determining the nature of the employment agreement and whether promissory estoppel is applicable.\footnote{Biskupich, 33 Ohio App. 3d at 221, 515 N.E. 2d at 634.} This development in Ohio case law is very useful to our young attorney, as she struggles to determine if she has a cause of action for her discharge. She was sensitive to job security when she was engaged in her job search, and specifically addressed the issue during the interview process. Although, in her naivete, her concern was the financial security of the corporation, her questions elicited responses that reached far beyond the company's financial strength. She was assured that her own job performance would lead to frequent promotions and a swift rise up the corporate ladder. In essence, accepting the company's offer of employment would mean a "successful career."

We should remember that the attorney weighed these assurances heavily in deciding to leave her job before becoming eligible for severance pay and in deciding to eliminate potential opportunities with law firms. Clear arguments for detrimental reliance emerge even before considering her relocation. The subject of employment-at-will is never discussed. The employment application she signs when she starts the job contains the disclaimer language. Her employee handbook also prominently contains a similar disclaimer. Her best arguments should focus, therefore, on the agreement she thought had been reached before she arrived at her first day of work. Escaping prominent and unambiguous disclaimer language in Ohio is not, however, a simple task. Later case law in this
area, perhaps alleging contracts of adhesion, may be more helpful.

In *Uebelacker v. Cincom Systems, Inc.*, the Court examined a claim of promissory estoppel based on verbal assurances of job security, as well as a contract claim based on provisions in an employee handbook. Although the court upheld summary judgment on the contract argument because of the handbook’s prominent disclaimers, it remanded the case to the jury for a decision regarding the promissory estoppel claim. The plaintiff in *Stokes v. Worthington Ind., Inc.* also claimed detrimental reliance in his cause of action. Stokes did not have a worthwhile contract cause of action based on his employee handbook because the handbook specifically provided for termination for behavior such as he committed.

Stokes’ promissory estoppel argument failed because he admitted that he had not relied on the handbook; in fact, there was no evidence he had ever read it. The case serves as a reminder that the essential elements of the cause of action must be met regardless of the factual scenario involved in a case. A successful contract claim requires the employee’s knowledge of the employer’s policy, and promissory estoppel requires reliance. An employee can hardly rely upon a policy of which he is unaware. The case also reiterates Ohio’s policy not to recognize a tort cause of action for wrongful termination.

*Helmick v. Cincinnati Word Processing* involves a claim of sexual harassment in addition to the promissory estoppel exception to employment at-will. The Ohio Supreme Court noted that, "standing alone, praise with respect to job performance and discussion of future career development will not modify the employment-at-will relationship." In this case, however, specific promises were found to have been made upon which Helmick relied to her detriment. During her interviews, she was promised job security and opportunities for

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188 *Id.* at 273, 549 N.E.2d at 1217-18. Please note that the court also addresses the issue of emotional distress in the termination context. After defining the elements of an emotional distress cause of action, the court notes that an employer generally has a legal right to discharge an employee and bears no liability for any emotional distress that might result from the discharge. In this case, however, the emotional distress claim was based on more than the termination, i.e. harassment, wrongful detention, defamation, and assault and battery so that the issue of abuse of privilege was permitted to go to the jury. *Id.* at 275-76, 549 N.E.2d at 1219-21.
190 *Id.*
191 *Id.*
192 *Id.*
194 *Id.* at 135-36, 543 N.E.2d at 1216.
advancement in consideration for her discontinuing other interviews.\(^\text{195}\)

Helmick was also induced to forego her search for another job while she was employed by the defendant when her performance was praised, she was offered a raise, and was assured that her career with the company was in order as long as her job performance was good. The plaintiff’s demonstration of detrimental reliance on specific promises of job security can create an exception to the employment-at-will doctrine.\(^\text{196}\)

This case is very useful to our terminated attorney in her legal analysis. Helmick’s allegations that she was promised job security and opportunities for advancement during her interviews formed the partial basis of her promissory estoppel argument. The attorney in our case received nearly identical assurances during her interviews. She also received praise during her employment, some of which is evidenced by positive employment evaluations and generous raises. She should also provide evidence of the calls she received from "recruiting firms" that she did not pursue because she relied on the assurances of job security and career opportunities. If she had actually begun to interview for jobs and then abandoned the quest for a new job in reliance on promises and gestures made by her employer, she should also emphasize these facts.

In \textit{Kelly v. Georgia-Pacific Corp.},\(^\text{197}\) the plaintiff relied upon provisions in company manuals in bringing a promissory estoppel claim. The Court stated that at the heart of the \textit{Mers}\(^\text{198}\) opinion was its recognition that the history of relations between an employer and employee may give rise to contractual or quasi-contractual obligations even when the employment relationship is at-will.\(^\text{199}\) The facts and circumstances surrounding the oral at-will relationship, including the character of the employment, custom, the course of dealing, and company policy can be considered to determine the employment "contract's" terms concerning discharge.\(^\text{200}\) Representations made by the company should be viewed in light of their reasonable effect on the employee, i.e what the employer should reasonably expect the employee to believe the promise means if he acts or fails to act in reliance on the promise.\(^\text{201}\) In \textit{Kelly}, the question of whether management was aware it had given the employee the impression he

\(^{195}\) Id. at 136, 543 N.E.2d at 1217.

\(^{196}\) Id. at 137, 432 N.E. 2d at 1218. Justice Douglas concurred in the decision, stating that he eagerly awaits the time when the Court loses its view that one party can violate the rights of others with malice aforethought. He again expressed his opinion that, whereas this type of behavior is not tolerated in other areas of the law, it should not be tolerated in the employment relationship. \textit{Id}.


\(^{198}\) \textit{Mers v. Dispatch Printing}, 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

\(^{199}\) \textit{Kelly}, 46 Ohio St. 3d at 139, 545 N.E.2d at 1249.

\(^{200}\) \textit{Id}.

\(^{201}\) \textit{Id}. at 139, 545 N.E.2d at 1250.
would be treated fairly was one for the jury, and the jury would analyze the reasonableness of the reliance.  

In *Williams v. CAP Gemini America,* the plaintiff raised the theories of promissory estoppel and implied contract to avoid the employment-at-will doctrine. Williams was recruited by someone who had worked with him at G.E. and claimed that the letter offering a position constituted his employment contract. He was not informed that he would have to sign another agreement, and indicated that had he been informed about the at-will provisions, he would not have left his job at G.E. The document establishing the at-will nature of the relationship was not signed by the appellant until after he had quit his job at G.E. and started the job with the defendant. These facts were sufficient to avoid summary judgment for the defendant under the promissory estoppel theory.

The Court also recognized the implied contract theory recognized in *Henkel, Mers, Hedrick, Helle and Kelly,* whereby oral representations, employee handbooks and company policies have been recognized as components or evidence of the employment contract. The defendant’s offer letter containing an annual rate of pay was claimed by plaintiff to be an employment contract; oral assurances of job security were claimed to create an implied contract. Summary judgment on this theory was also overturned. The case illustrates once again the difficulty Ohio courts have had in dealing separately with the implied contract and promissory estoppel theories. The same passages of the seminal cases, such as *Mers,* are cited by various courts as support for both. This is certainly understandable because both theories are based in contract. Most states, in fact, appear to treat both under the implied contract exception to the employment-at-will rule.

In June, 1990, an Ohio appellate court decided *Masek v. Reliance Electric Co.,* a termination suit by a member of a corporate legal department. Masek’s termination was based on poor work performance, allegedly involving: 1) repeated complaints from corporate managers, 2) bad work habits, 3) poor handling of contract negotiations, and 4) failure to provide essential documents

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202 Id. at 140, 545 N.E.2d at 1250. See Worrell v. Multiress, Inc., 45 Ohio St. 3d 241, 543 N.E.2d 1277 (1989) (analyzing the computation of damages).


204 Id.

205 Id.

206 Id.

necessary for a corporate divestiture. He argued that the employee handbook and representations of continued employment conditioned upon acceptable job performance gave rise to his claim of promissory estoppel. After a review of *Mers, Kelly* and *Greeley*, the Court determined that the issue could not be decided on summary judgment, but had to go to the trier of fact. The Court also found that the issue of whether Masek’s performance was deficient could not be decided on summary judgment.

It is clear that a terminated individual, such as our young attorney, may be able to reach a jury under a contractual exception to the employment-at-will doctrine. The ability to assert a cause of action will largely depend on the employee’s success in avoiding at-will language in company documents and prominent disclaimers that the documents create any contractual relationship. Our plaintiff should definitely claim reliance on specific representations made during interviews, particularly those involving job security and advancement opportunities. Timing is also extremely important.

In our scenario, the attorney should stress her reliance on statements made to induce her to leave her job and forego her severance package, as well as her relocation before she was ever given any indication that the employment relationship would be "at-will." In particular, she should claim that any at-will contract created by the documents which were provided following her detrimental reliance would be one of adhesion. After all, she had no choice but to sign the employment application, having already left her other job and having moved to accept the new position.

Our attorney should also claim reliance on the employee handbook, despite its disclaimers. She should emphasize any portions that encourage a sense of "belonging" or "family." In addition, any provisions that imply an employee will be treated "fairly" should be stressed. She should also use the employer’s progressive discipline policy to her advantage because the employer apparently ignored it. Finally, she should argue that her employer should not be entitled to promulgate and publish policies that encourage reliance and then escape objection through the disclaimers. Of course, even if she reaches the jury, that does not necessarily connote success. In Ohio, the terminated employee’s best chance for a successful dismissal suit does rest on contract or quasi-contract grounds.

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208 Id.
209 Id.
210 Id. The Court did uphold summary judgment on the claim of intentional infliction of emotional distress, based on plaintiff’s failure to demonstrate extreme and outrageous conduct by the employer so as to be utterly intolerable.
The Implied Covenant of Good Faith and Fair Dealing

A few Ohio cases have alluded to standards of good faith and fair dealing in the employment context. In 1984, in Bolling v. Clevepak Corp.,\(^\text{211}\) a severance pay case, the Court assumed that parties to an employment contract, as with any other contract, are bound by standards of good faith and fair dealing.\(^\text{212}\)

The Court in Mers made it clear, however, that it would follow the Fawcett\(^\text{213}\) decision and refuse to recognize a duty of the parties to act in good faith.\(^\text{214}\) In 1989, an appellate court clarified this position using the traditional language used in employment cases.\(^\text{215}\)

In this case, the plaintiff claimed a breach of the implied covenant of good faith and fair dealing.\(^\text{216}\) In this decision, the Court cited the Phung\(^\text{217}\) case as Ohio's position that an at-will employee is subject to discharge even if done in gross or reckless disregard of the employee's rights.\(^\text{218}\) The Court noted that while the Ohio Supreme Court has recognized a duty of good faith and fair dealing in the insurance context, it refuses to do so in wrongful discharge cases brought by at-will employees. The Court would not extend a cause of action for breach of the covenant of good faith and fair dealing to wrongful discharge claims.\(^\text{219}\) In Ohio, the implied covenant is not recognized and making a claim based on its breach would be fruitless.

Recent Cases Upholding Employment-at-Will

It is important to understand that cases have still been won by defending with the employment-at-will rule. It is useful to review a few of these recent cases. In Bernard v. Rockwell International,\(^\text{220}\) the Sixth Circuit examined a case in which Rockwell employees received and signed, when they were hired from other companies, a "Report for Work Notice and Employment Agreement."\(^\text{221}\) While one provision set forth the employee's agreement to perform faithfully in accordance with company policies, another specified the employee's

\(^{212}\) Id. at 121, 484 N.E.2d at 1376.
\(^{216}\) Id. at 24, 552 N.E.2d at 241.
\(^{217}\) Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).
\(^{218}\) Kuhn, 50 Ohio App. 3d at 24, 552 N.E.2d at 242.
\(^{219}\) Id.
\(^{220}\) Bernard v. Rockwell Int'l, 869 F.2d 928 (6th Cir. 1989).
\(^{221}\) Id. at 929.
acknowledgement that he served at will and could be terminated in accordance with Rockwell's procedures. The handbook provided during orientation stated that the company would apply its rules in a fair manner and would use progressive discipline in line with the philosophy that discipline would be corrective rather than punitive. Plaintiffs were fired for failing to attend a management status meeting.

The court refused to recognize the *Helle* decision as precedent because it involved severance pay rather than termination. In addition, the Court refused to recognize an implied contract. The Court also found promissory estoppel to be inapplicable because the employees only learned of the provisions in the handbook after their arrival in Ohio, foreclosing the notion of detrimental reliance. Clearly, the Sixth Circuit Court has been conservative in its application of Ohio law. In several instances, however, the state courts have been equally conservative.

Although *Day v. American Greetings* involves an injury and application of a handbook's sick leave provisions, Day was terminated and filed suit for wrongful tortious termination. The court states that "Ohio does not recognize such a claim in employment discharge" so that the claim was properly dismissed by the court below. When contemplating a cause of action in this area, our terminated attorney should recall Ohio's reluctance to recognize a tort of wrongful discharge and so should be careful to draft her claims as fitting recognized exceptions to the employment-at-will rule.

In *Buddner v. Teledyne Republic Mfg.*, however, an employee's attempt to so draft the complaint backfired. The Court recognized that an exception to the employment-at-will rule exists in Ohio when employee handbooks, company policies and oral representations demonstrate the existence of an employment contract. However, the Court found that the plaintiff was terminated for violating company policy as stated in the document upon which she based her termination.

**References**

222 *Id.* at 930.
223 *Id.*
225 *Bernard v. Rockwell Int'l.*, 869 F.2d at 932.
226 *Id.*
227 *Id.* at 933.
229 *Id.*
claim. In its inimitable way, the Ohio court warned plaintiff that she could not have her cake and eat it, too. This case reminds us how very careful we must be in drafting pleadings in this area.

The Ohio Supreme Court recently decided *Karnes v. Doctors Hospital*, in which a terminated employee attempted to plead a contractual cause of action based on an employee handbook. The attempt was unsuccessful because the handbook contained prominent disclaimers of any intent to create an employment contract and because the plaintiff failed to show that she was aware of the handbook or its provisions. In addition to providing an indication of the extreme difficulties in avoiding effective disclaimer language, the case reminds employees to read the literature provided by the employer.

Summary

Our young attorney should be very aware of the strength of the employment-at-will doctrine in Ohio as she weighs her legal options. It is a very difficult presumption to escape. Even if she avoids summary judgment in favor of the employer, she is certainly not assured a favorable jury verdict, and if she does win, she cannot presume that the award will be substantial.

There is another very important factor for the attorney to consider. The lawsuit she is considering will take a severe emotional toll on the plaintiff. Not only are there no guarantees of success, but these cases are very difficult and personal for the individuals involved. Termination from employment creates serious consequences for an employee, affecting every area of the employee’s life. Engaging in a law suit re-opens all of the wounds and allows dissection of each in excruciating detail. Our young attorney must be willing to face the emotional turmoil inherent in the suit before she files. For some, even with a potentially successful contract or quasi-contract claim against the employer, it might be more healthy to avoid suit.

One means of doing so would be to negotiate with the employer immediately upon its move to terminate the employee. She could explain her potential rights and inform the employer that a lawsuit can be avoided by allowing her to resign with an attractive severance package. This should be given very serious consideration.

Some sophisticated employers may in fact try to force an employee to resign by threatening termination as the alternative. Courts in Ohio do not appear to

231 *Id.*
233 *Id.* at 141, 555 N.E.2d at 282-83.
recognize "constructive termination" where an employee is essentially discharged because the conditions of employment have become untenable. An employee faced with such a situation can certainly call the employer's bluff, hoping that the employer will not go through with the termination. The employee must, however, be willing to deal with the termination if the employer does pursue it.

**THE FUTURE IN WRONGFUL DISCHARGE LITIGATION**

Most of the academicians quoted herein have opinions about the way termination law should evolve in the future. Professor Peck, for example feels that it is inevitable that employment-at-will will fail to survive. He thinks courts will require just cause in termination cases as well as in serious discipline actions.

Peck proposes that employers in the non-organized sector provide limited review by higher ranking personnel of decisions to initiate discharge, with the basis and rationale being stated so that the reasonableness of decisions would be reviewed by courts. Citing the products liability line of cases involving negligent manufacture of products, Peck shows how the judiciary can be creative and change the law. Limited review would bring to unorganized employees the benefits of progressive discipline that are required by arbitrators in the organized sector. The "due process" required in progressive discipline systems generally includes the employee being informed of the existence of a rule, violation of which will lead to discipline and possibly discharge. The first violation may merit a warning, the second a suspension, after which discharge may occur.

Another judicial approach involves implying the duty to terminate only in good faith. The good faith standard allows the courts the flexibility to deal with length of service, past performance, type and level of employment, and the economic needs of the firm. Under this standard, employees could still be terminated for poor performance. The proponent of this approach recognizes that high level management must withstand increasingly subjective standards. These employees should have to overcome a higher hurdle to show abusive discharge;

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\text{\textsuperscript{234}} \text{Peck, supra note 15, at 1.} \\
\text{\textsuperscript{235}} \text{Id. at 2.} \\
\text{\textsuperscript{236}} \text{Id. at 47-48. The author even suggests that the government's refusal to protect employees of an indefinite term while it protects federal and union employees might be a denial of equal protection.} \\
\text{\textsuperscript{237}} \text{Id. at 43.} \\
\text{\textsuperscript{238}} \text{Id. at 48. Peck notes that certain offenses should be grounds for immediate termination. He also comments that moves by the judiciary to impose minimal due process requirements in these cases would probably produce a legislative response recognizing a right to continued employment absent just cause for discharge.} \\
\text{\textsuperscript{239}} \text{Note, supra note 1, at 1836.} \\
\text{\textsuperscript{240}} \text{Id. at 1840.}
\]
they owe the employer a high degree of trust and cooperation.\footnote{Id.} For employees, such as foremen, salesmen, supervisors and middle-managers, who are between union safeguards and the privileges afforded to top management, good faith protection would be available.\footnote{Id. at 1840-41.}

Legitimate grounds for discharge under a good faith standard would include incompetence, unsatisfactory performance after warnings, clear violations of reasonable rules, unauthorized absence, and insubordination.\footnote{Id. at 1841.} The employee would have the burden to prove the employers’s decision unreasonable and damages would include lost wages, the cost and inconvenience of a job search, lost future income, moving expenses, mental and emotional distress from embarrassment and loss of status, and punitive damages.\footnote{Id. at 1842-43.}

Another author believes that the objective of wrongful discharge actions is to correct the imbalance of power resulting from the inability of employees to bargain individually for job security.\footnote{Mallor, supra note 13, at 489.} She doubts the ability of courts to handle the litigation that would result from the imposition of a just cause standard for discharge. Instead, she suggests that punitive damages would be a good means to deter the abuse of power in the discharge context.\footnote{Id.} The use of punitive damages would express society’s disapproval of the exploitation of superior power and would create a strong incentive for employers to conform to legal duties. In other words, a remedy that would get the attention of the Board of Directors and the personnel office might halt abusive employment practices.\footnote{Id. at 496.}

A practitioner in employment law agrees that employers have little incentive in their treatment of employees absent fear of large verdicts.\footnote{Tobias, supra note 24, at 189.} There are other drawbacks to litigation in resolving employment disputes. An employee offered reinstatement may be too upset to return to a hostile environment, yet the law may require the employee to accept the job or risk losing the right to damages. The duty to mitigate hurts those most aggressive in post termination job searches. Many employees do not have the funds to pay a retainer to an attorney; those who do have such funds tend to be at least middle-level managers. In addition, many employees have a hard time finding counsel willing to handle their cases,
especially where the potential for damages is not great.\footnote{Id. at 190.}

Several authors advocate legislative alternatives to judicial reform in the wrongful discharge arena.\footnote{See Perritt, supra note 27, at 422; McGuire, Foley v. Interactive Data Corporation: The Implied Covenant of Good Faith and Fair Dealing, 41 LAB. L.J. 108, 111 (1990); Grodin, Past, Present, and Future in Wrongful Termination Law, 6 LAB. LAW. 97, 104 (1990); Blades, supra note 10, at 1433-34. Blades indicates that legislation could vest exclusive jurisdiction to hear discharge cases in administrative commissions, which have the advantage of administrative responsibility and expertise and can provide a wide range of remedies. Blades, amazingly perceptive in 1967, also found legislation to be unlikely without a strong lobby to promote it.} Perritt finds it possible to draft a constitutional wrongful dismissal statute that provides for adjudication in an administrative or arbitration tribunal.\footnote{Perritt, supra note 27, at 427.} His suggestion for drafting includes the following provisions:

1. Grant attorneys' fees to the plaintiff,

2. Codify the three common law exceptions to employment at-will (public policy, implied contract, and breach of the implied covenant of good faith and fair dealing), and

3. Limit damages to back pay with a possibility of double or treble damages.\footnote{Id. at 430.}

Perritt also feels that the enactment of legislation is unlikely, largely because plaintiff's attorneys are satisfied with the status quo.\footnote{Id. at 430.}

Indicating that the time is ripe for legislation, Grodin identifies some of the same problems with litigation as does Tobias.\footnote{Id. at 430.} Only employees whose status and pay make litigation worthwhile are protected. Legislation would allow fine tuning of procedures, such as the exclusion of small employers and the provision of remedial schemes, and would provide blanket minimal coverage for all employees.\footnote{Id. at 105.} The Montana statute and the proposed uniform act assign enforcement of the just cause standard to arbitrators, a more expeditious and cost-effective procedure, using arbitrators with a reservoir of experience under collective bargaining agreements. Problems, such as the finality of the award and who will bear the costs, can be overcome.\footnote{Id. at 105.}
St. Antoine feels that "the prevention of arbitrary treatment of employees may be not only humane but also good business. Marked correlations have been observed between a secure work force and high productivity and quality output." Elimination of the employment-at-will rule would not mean that American business would lose its competitiveness in the international market, although the employers would lose some flexibility in job arrangements. Protection from unfair discharge is provided by statute in about 60 countries, including Sweden, Norway, Japan and Canada. Just cause legislation would save employers from the financial liability of large jury verdicts if the remedies are limited and the cases are adjudicated by arbitrators.

St. Antoine also recognizes that courts have no capacity to construct the administrative apparatus necessary for enforcement and are not accessible to rank and file workers. He suggests that a statute be drafted which articulates a standard in terms of just cause without further definition remaining silent on the burden and quantum of proof. He would exclude certain employees, such as those with a pension worth over a certain amount, probationary employees, and employees with contracts for a fixed term. He would similarly exclude small employers, public employers, and employers whose employees are organized. He would specifically include discipline other than discharge and constructive discharge. St. Antoine favors binding arbitration. He feels the arbitrator should have the option to award severance pay instead of reinstatement, plus back pay, income for a limited time, and maybe attorneys' fees to the prevailing party. Like others, St. Antoine finds that unjust dismissal makes no sense ethically; its elimination is becoming a moral and historical imperative.

Massingale agrees that the current system is expensive, time consuming and does not serve the parties well. She advocates a new system which would require good cause for termination and limit the employer's liability; she suggests that arbitration would make recovery more readily available to wrongfully terminated employees and would reduce costs. She believes her solution is

257 St. Antoine, supra note 72, at 69.
258 Id. at 68.
259 Id. at 71.
260 Id. at 71-72.
261 Id. at 72-73.
262 Id. at 73, 76.
263 Id. at 76.
264 Id. at 77-78.
265 Id. at 79.
266 Id. at 81.
268 Id. at 188.
sensitive to employers by limiting exposure to damages as well as defense costs. Adopting a system such as the one in Montana would lend more certainty to the employment relationship for both the employer and employee. Massingale favors the adoption of a uniform statute wherein damages would be limited to economic injury for a limited period, with punitive damages either prohibited or available in very limited circumstances. She sees the advantages of a "good cause/dispute resolution via arbitration" system to include greater certainty for both parties, greater consistency in awards, increased judicial economy and rapid recovery at a fraction of the cost.

Tobias thinks that a federal law with uniform standards is the best approach to remedy the current ineffective system. He would combine all federal anti-discrimination and state claims in one hearing. He supports a short statute of limitations and relaxed rules of evidence, with attorneys' fees going to a prevailing employee, the government paying the arbitrator, and flexible remedies.

Other alternative solutions are a federal no-fault insurance policy for discharge and a statutory no-cause dismissal option, both permitting discharge without cause coincident with mandatory compensation. The "no-cause compensation scheme" abandons the issue of just cause entirely, providing automatic compensation for any termination as determined by an established formula. A statutory no-cause approach provides the payment of discharge compensation as an alternative to litigating a wrongful discharge action. Five variables, including length of employment and age, would be used in the formula to derive the compensation. If both parties accept the option, it then becomes the sole remedy, and all other claims are waived.

The federally mandated no-fault insurance system to settle wrongful discharge claims is analogous to the workers compensation system. An employer can dismiss an employee for any reason and the employee will be automatically compensated. An employee would only be eligible if he signed a waiver of the

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269 Id. at 202.
270 Id. at 205.
271 Id. at 209.
272 Id.
273 Tobias, supra note 24, at 190.
274 Id.
276 Id. at 150.
277 Id. at 151.
278 Id.
279 Id. at 152.
right to sue at the time of hiring.\textsuperscript{280} In this system, the award is based on such factors as length of service and salary.\textsuperscript{281} While employers generally oppose legislation that increases liability, they may favor predictability in terms of liability and costs. Defense attorneys may similarly favor predictability.\textsuperscript{282} The strongest opponents are likely to be plaintiffs’ attorneys, who have the most to lose.\textsuperscript{283}

When he participated in a panel discussion in 1989, Paul Tobias, a Cincinnati attorney, remarked that he had just attended a meeting of the Executive Board of Plaintiffs’ Employment Lawyers Association, during which the attorneys responded with a resounding "no" vote to proposed legislation.\textsuperscript{284} The law of employee rights is just catching up to where it should be, and plaintiffs’ attorneys object to employers trying to convince the legislature to take away the employees’ rights and "give nothing in exchange."\textsuperscript{285} Tobias ends his discussion by stating that we are in the midst of a "law revolution", as the erosion of employment-at-will has started to slow. He predicts that the solution will be a federal one. He urges law students and academicians to help solve the problems, acknowledging that professors started the erosion with law review articles and suggesting that "maybe they can bail us out of the current state of confusion."\textsuperscript{286}

Professor Peck concludes his article with the hopes that he might help convince the courts that they should abandon the employment-at-will rule, which "does not accord human dignity the value it deserves and usually receives in American law."\textsuperscript{287}

\textbf{OHIO’S FUTURE}

Although employers in Ohio have not felt the pressures of the commonplace awarding of huge jury verdicts, and plaintiffs' attorneys do not favor just cause legislation, a legislative scheme should be enacted. Perhaps there is a way to draft a statute that would not be offensive to plaintiffs’ attorneys.

The goal is to provide a remedy for those most often left without: the

\textsuperscript{280} Id. (The Waiver does not apply to statutory claims).
\textsuperscript{281} Id. at 153.
\textsuperscript{282} Id. at 156.
\textsuperscript{283} Id. at 157.
\textsuperscript{285} Id.
\textsuperscript{286} Id. at 449-450. See also Grodin, Past, Present, and Future in Wrongful Termination Law, 6 LAB. LAW. 97, 106 (1990).
\textsuperscript{287} Peck, \textit{supra} note 15, at 49.
uncertain cases, the plaintiffs unable to finance litigation, or those unable to find an attorney to represent them. In order to gain the support of plaintiffs’ attorneys and best protect employees, the statute should offer an elective remedy. In other words, those plaintiffs who can find counsel to represent them in litigation and can afford to finance it would remain free to pursue a lawsuit.

Discharged employees whose claims are not so attractive to counsel could elect to pursue the statutory remedy. This statute would, however, limit recovery to reinstatement or alternatively two years’ front pay, back pay, costs of finding employment (e.g. outplacement services) and attorneys’ fees. Hearings under that statute should be adjudicated by an administrative agency or arbitrator. Both could draw heavily on experience in civil rights or arbitration of employee grievances in the organized sector. Both parties could be represented in the hearing, enabling them to rely on attorneys and labor relations specialists with vast experience in employee relations.

This scheme would protect employees at-will, rather than those under either a contract for a definite term or a collective bargaining agreement. While attractive to employers, limits on remedies, particularly the unavailability of punitive damages or damages for pain and suffering, will not likely be sufficient to overcome their objections.

Employers are currently able to evade responsibility for most discharges of at-will employees. Nevertheless, the rights of individual employees must be protected somehow, as most states are realizing. The statutory scheme should be an option or, in the alternative, large damage awards should be more readily available to employees who are able to prove that they are entitled to relief under a recognized exception to the employment-at-will rule. If employers strenuously object to limited protection for discharged employees, they might prefer having Ohio courts move toward recognizing the tort of wrongful discharge or constructive discharge. The imminent danger of monetary losses might persuade the employers that the statutory remedy is indeed a reasonable one.

CONCLUSION

Authors have suggested various ways in which to assault the employment-at-will doctrine. Many states have actually been slow to erode the doctrine. In two states where the erosion was allowed to grow unchecked, however, that erosion has been slowed. In California, the judiciary decided to attack the onslaught of damage awards in the Foley decision. The court determined that actions under breach of the implied covenant of good faith and fair dealing would be limited to a contract cause of action and would no longer give rise to tort damage awards. Pressure from employers in Montana led to a legislative response to the rising damage awards. Thus legislation has been seen as a solution to both insufficient
employee protection and overly generous employee awards.

While the efforts and ideas of the authors are admirable, it is doubtful that a solution to this problem will be forthcoming in the near future. Many states do not seem to realize the extent of the problem; awards have been relatively small and the work force remains largely silent, partly because the current system is inaccessible. Legislative involvement would require serious lobbying by employers who, as in Montana, seek to limit monetary awards. In many states, like Ohio, however, it is difficult to reach a jury, let alone receive a huge damage award.

Employers will continue to employ law firms to help with preventive measures, such as drafting employee handbooks to avoid contractual obligations and providing training seminars to supervisors so they avoid making representations that might give rise to contractual obligations or detrimental reliance. Even in states that are not on the forefront of creativity on the wrongful discharge scene, employers would rather not pave the way. If a legislative solution is to arrive, it will likely come from the federal level.

Meanwhile, where does the current situation leave our young professional attorney who is trying to decide whether to file suit? We have reviewed her best options should she choose to file, and some of the inherent pitfalls in participating in such highly emotional litigation. The trauma may be avoided by negotiating an attractive separation agreement and avoiding suit altogether.

The negotiated settlement, however, sends a bad message to the employer that its actions will continue to go unchallenged and unpunished. The employer will be saved the expense of litigation and possible exposure to more significant damages. With the difficulties most employees face in obtaining an attorney, financing the litigation, and the potential emotional upheaval, the employee may have very little choice and will let the employer get away with the termination.

There is another major reason the settlement may be the attorney's most attractive option. The horrors of pursuing employment litigation do not end with the expense and emotional trauma of the suit itself. Will another corporation or law firm seriously consider hiring an attorney who has sued her previous employer?