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EMPLOYMENT AT WILL IN OHIO: WORKING FROM WITHIN

The employment at-will doctrine has undergone significant modification in recent years. The debate rages on as to whether the rule should remain intact¹, be modified², or be abrogated altogether.³ Those states which have modified the rule have differed as to the scope of protection accorded the discharged employee. This comment seeks to measure the parameters of Ohio's exceptions to the at-will rule in relation to other states' views on this issue. Also included is an examination of the interplay between the legislature and the judiciary in affecting change in Ohio. A proposal designed to "solidify" the public policy exception to the at-will rule after *Phung v. Waste Management, Inc.*⁴, a recent Ohio Supreme Court case, will also be presented.

TRACING THE HISTORY OF THE RULE

At common law, the English courts indulged in the presumption that a general or indefinite hiring was for one year unless the parties intended otherwise.⁵ However, during the latter part of the 19th century, American courts departed from this presumption in favor of "Wood's Rule," named for its author Horace G. Wood.⁶ The rule proposed a contrary presumption that "a general or indefinite hiring is *prima facie* a hiring at will and, if the servant

¹See generally Epstein & Paul, *In Defense of Employment at Will*, 51 U. CHI. L. REV. 947 (1984).

²See generally Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Comment, *Protecting the Private Sector Employee who "Blows the Whistle": A Cause of Action Based Upon the Determinants of Public Policy*, 1977 WIS. L. REV. 777 (1977) (hereinafter referred to as *The Private Sector At Will Employee*); Note, *Guidelines For A Public Policy Exception To The Employment At Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617 (1981) (hereinafter referred to as Note, *Guidelines For a Public Policy Exception*); Comment, *Wrongful Discharge of Employees Terminable at Will — A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

³See generally Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985); Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983); Comment, *The Employment At Will Doctrine: Time To Collapse Another Citadel*, 11 U. DAYTON L. REV. 399 (1986) (hereinafter referred to as *Time to Collapse Another Citadel*); Note, *Defining Public Policy Torts in At-Will Dismissals* 34 STAN. L. REV. 153 (1981) (hereinafter referred to as Note, *Defining Public Policy Torts*); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (hereinafter referred to as *The Duty to Terminate Only in Good Faith*); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) (hereinafter referred to as *Protecting Employees At Will*.)

⁴23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986); see *infra* notes 73-83 and accompanying text.

⁵See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 (1974) (hereinafter referred to as *Implied Contract Rights*); *Protecting Employees At Will*, *supra* note 3, at 1933. See also Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-120 (1976), which quotes Blackstone as follows:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.

⁶H. WOOD, *MASTER AND SERVANT* (1st ed. 1877).

seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . .”⁷ Courts soon thereafter embraced this rule, giving it universal application.⁸ Although Wood offered no justifications or policy grounds for the at-will rule,⁹ commentators have hypothesized that it comported with the laissez-faire and freedom of contract ideologies existent in the late nineteenth and early twentieth centuries.¹⁰ Judicial adoption of the at-will rule facilitated the needs of a rapidly industrializing economy because employer was given a free hand to manage the workplace.¹¹ Finally, contract doctrines such as mutuality of obligation and consideration acted as further legal justifications for the at-will rule.¹²

In the course of time, unionization¹³ and governmental regulation of the workplace¹⁴ have somewhat alleviated the harsh effects of the at-will rule. Despite these mechanisms, approximately seventy million people remain vulnerable to discharge under the rule.¹⁵ For this reason, discharged employees have sought judicial intervention as an alternative means of modifying the time-honored at-will rule.

THE PUBLIC POLICY EXCEPTION

Definition/Sources of Public Policy

The judicially created cause of action for wrongful discharge¹⁶ is predicated upon the employer's discharge of an employee who engages in some

⁷*Id.* at § 134.

⁸See generally Feinman, *supra* note 5, at 126 [citing 1 C. LABATT, MASTER AND SERVANT, § 159 n.2 (2d ed. 1913)]; See also 1 WILLISTON, CONTRACTS, § 39 (rev. ed. 1938).

⁹See *Implied Contract Rights*, *supra* note 5, at 341; Feinman, *supra* note 5, at 126.

¹⁰See *Implied Contract Rights*, *supra* note 5, at 343; Mauk, *supra* note 3, at 202; Feinman, *supra* note 5, at 126; *Protecting Employees at Will*, *supra* note 3, at 1933.

¹¹See *Murg & Scharman, Employment At Will: Do The Exceptions Overwhelm the Rule?* 23 B.C.L. REV. 329, 335 (1982) [citing G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 227-316 (7th ed. 1973)]

¹²See *Marg & Scharman*, *supra* note 11, at 336-338. The doctrine of mutuality provides that “both parties to a contract must be bound or neither is bound.” A. CORBIN, 1 CORBIN ON CONTRACTS § 152 (1950). Courts in applying this doctrine to the employer-employee relationship reasoned that since the employee was not bound to provide services, the employer should be under no duty to provide employment in an at will setting. *Marg and Scharman*, *supra* note 11, at 336-337. However, treatise writers such as J. CALAMARI AND J. PERILLO, CONTRACTS § 4-14 (2d ed. 1977) have criticized the doctrine as a “misleading notion that both parties must be ‘bound,’” and have urged its abandonment. *Id.* See also 1A CORBIN ON CONTRACTS, § 152 (1963 & Supp. 1971); RESTATEMENT (SECOND) OF CONTRACTS § 81 (1979); See generally Note, *Mutuality of Obligation in Bilateral Contracts at Law*, 25 COLUM. L. REV. 705 (1925).

¹³See *Protecting At Will Employees*, *supra* note 3, at 1934: “Collective bargaining agreements protect approximately twenty-five percent of the nonagricultural United States labor force.”

¹⁴See *Marg & Scharman*, *supra* note 11, at 338 n.54 and 339 n.60 for a list of federal statutes which protect workers from being discharged for specified activities.

¹⁵See *Protecting At Will Employees*, *supra* note 3, at 1934; St. Antoine, *Employee Terminations and the Erosion of the At Will Doctrine*, in DEVELOPING RIGHTS OF EMPLOYEES IN THE WORKPLACE, 36-38 (C. Bakaly & J. Feerick eds. 1981).

¹⁶See, e.g., *Adler v. American Standard Corp.*, 291 Md. 31, 36, 432 A.2d 464, 467 n.2 (Ct. App. 1981) (although courts have described such discharges as “wrongful,” “abusive,” or “retaliatory,” use of the phrase “wrongful discharge” covers all three characterizations.)

type of activity which is protected by the "public policy" of that state.¹⁷ Generally, public policy refers to "the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare."¹⁸ It concerns the "community common sense and common conscience,"¹⁹ and protects against acts that lend themselves to "injustice or oppression, restraint of liberty, commerce and natural or legal right."²⁰ Such a broad definition of what constitutes public policy caused Justice Sutherland in *Patton v. United States*²¹ to remark that:

. . . . the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.²²

As it relates to the employment relationship, finding a workable definition of "public policy" determines whether a state court will sanction the public policy based wrongful discharge tort.²³ In states adopting this exception, the sources of public policy from which courts draw support will determine whether a specific employer-employee fact pattern will justify the wrongful discharge limitation.²⁴ Courts have differed as to the sources of bona fide state expressions of public policy, and how clear or substantial the public policy source must be to support a wrongful discharge claim.²⁵

¹⁷Murg & Scharman, *supra* note 11, at 343-44.

¹⁸Campbell v. Monumental Life Ins. Co., 32 Ohio L. Abs. 107, 108, 34 N.E.2d 268, 274 (1940); *See also Adler*, 291 Md. at 45, 432 A.2d at 472; Maryland National Capital Park and Planning Commission v. Washington National Arena, 282 Md. 588, 605, 606, 386 A.2d 1216, 1228-29 (1978).

¹⁹Snyder v. Ridge Hill Memorial Park, 61 Ohio App. 271, 287, 22 N.E. 2d 559, 566 (1938).

²⁰Stocker v. Henne, 11 Ohio Dec. 733, 736-37, 8 Ohio N.P. 514, 516 (C.P. 1901).

²¹281 U.S. 276 (1930).

²²*Id.* at 306. *See also* Lamont Building Co. v. Court, 147 Ohio St. 183, 185, 70 N.E. 2d 447, 448 (1946) ("public policy is an uncertain and indefinite term . . . [and judges] must take care not to infringe on the rights of parties to make contracts . . ."); Hinrichs v. Tranquillaire Hospital, 352 So. 2d 1130, 1131 (Ala. 1977) (public policy is "too vague a concept" to justify allowing for a wrongful discharge exception to an at will employment agreement); *Maryland-National Capital Park*, 282 Md. at 605-606, 386 A.2d at 1228 (1978) (there is no true workable definition of public policy, and as a result, judges are forced to discern public policy "based on nothing more than their own personal experience and intellectual capacity.")

²³*Protecting Employees At Will*, *supra* note 3, at 1947.

²⁴*See Guidelines for A Public Policy Exception*, *supra* note 2, at 622-23. The author identifies seven origins of public policy as follows: "1) [public policy derived] from no source; 2) from the social desirability of an activity or the importance of a community interest; 3) from related, but not directly implicated, constitutional and statutory provisions and case law; 4) from common law principles conferring a right on an employee or imposing an obligation on an employer; 5) from a statute conferring a right on the employee or making illegal an act performed by an employee at the request of his employer 6) from a statute which not only makes illegal the act the employer asks the employee to perform, but also subjects the employee to criminal liability; and 7) from a statute that prohibits the discharge." *Id.* at 623.

²⁵*See generally* Mauk, *supra* note 3, at 229-245; *Guidelines For A Public Policy Exception*, *supra* note 2, at 622-623; Murg & Scharman, *supra* note 11, at 343-355; *Protecting Employees At Will*, *supra* note 3, at 1936-1937; *Defining Public Policy Torts*, *supra* note 3, at 155-158; *The Private Sector At Will Employee*, *supra* note 2, at 187-199; *Time to Collapse Another Citadel*, *supra* note 3, at 404.

Undoubtedly, the most wide-ranging and least principled basis for deducing public policy concerns is through judicial self-expression. For example, the Illinois Supreme Court, in *Palmateer v. International Harvester Co.*²⁶ held that the plaintiff-employee, who was fired in retaliation for reporting a fellow employee suspected of criminal activity to law enforcement officials, stated a cause of action for wrongful discharge. The impetus for the court's decision was that public policy favored citizen cooperation with law enforcement officials in order to expose crime and to enforce criminal statutes.²⁷ This public policy notion, although deemed "important" or "fundamental,"²⁸ had no constitutional or statutory basis for its recognition.²⁹

Similarly, the New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*³⁰ modified the at-will rule without offering any constitutional, statutory, or common law foundation for its holding. Although noting that changing legal, social, and economic conditions had significantly altered the traditional employer-employee relationship,³¹ the court cited no precedent for the blanket rule that "in all employment contracts, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in his employment and the public's interest in maintaining a proper balance between the two."³² Thus, any terminations motivated by bad-faith or malice contravened the public's best interests, and struck the balance in favor of an employee claim for breach of contract.³³ The *Monge* Court placed misguided reliance on two foreign cases³⁴ in support of its holding, as these decisions had created a wrongful discharge remedy from expressions of public policy implied from statutory provisions.³⁵

A major drawback to judicially-defined public policy is its lack of legislative input for broad scale "reapportionment of legal rights within the employment relationship."³⁶ Employer breaches of public policy are considered breaches of duties imposed by law³⁷ and require the judiciary to scrutinize the

²⁶85 Ill. 2d 124, 133 421 N.E.2d 876, 880 (1981).

²⁷*Id.* at 132, 421 NE.2d at 880.

²⁸*Id.*

²⁹*Id.*

³⁰114 N.H. 130, 316 A.2d 549 (1974).

³¹*Monge*, 114 N.H. at 132-33, 316 A.2d at 551.

³²*Id.*

³³*Id.* *Monge* has been criticized for its lack of clarity as to whether it created a public policy exception grounded in tort, or a "bad-faith" limitation sounding in contract. See *Mauk*, *supra* note 3, at 207 (explaining that *Monge* represents a tort-contract hybrid, and that courts have cited *Monge* as supportive of both the public policy (tort) and bad-faith (contract) limitation on the at-will rule).

³⁴*Monge*, 114 N.H. at 133, 316 A.2d at 551; See *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). See *infra* notes 43-45, 59-61, and accompanying text.

³⁵See *infra* notes 43-45, 59-61 and accompanying text.

³⁶*The Private Sector At Will Employee*, *supra* note 2, at 797.

³⁷*Mauk*, *supra* note 3, at 229.

social acceptability of the employer's conduct³⁸ in reviewing a wrongful discharge claim. This process lends itself to an *ad hoc* adjudication of discharges within the employment relationship.³⁹ Consequently, the employer is left with no clear guidelines as to what types of discharge will ultimately result in a successful wrongful discharge claim.

Recognizing the rather arbitrary and unpredictable nature of judicially-formulated notions of public policy, courts have looked to positive law⁴⁰ for guidance in shaping the contours of public policy in the employment setting. Statutes, which are considered the best evidentiary sources of public policy,⁴¹ have provided the most common method of gathering public policy from which a wrongful discharge remedy is created.⁴²

Wrongful discharge claims for breaches of public policy that are derived from legislative enactments can be positioned into two broad categories. The first category concerns statutes which confer a right to an employee within the ambit of the employment relationship, such as the right to file a worker compensation claim. *Frampton v. Central Indiana Gas Co.*⁴³ concerned an employee who was discharged after filing such a claim. The Indiana Supreme Court noted that worker's compensation was enacted for the benefit of employees and unless an employee was given a wrongful discharge remedy to combat a retaliatory discharge, "a deleterious effect on the exercise of a statutory right"⁴⁴ would occur. The important public policy breached in *Frampton* was the unfettered right on the part of the employee to file a compensation claim pursuant to the Indiana Workman's Compensation Act.⁴⁵

The Michigan and Illinois courts followed the *Frampton* court's lead in *Sventko v. Kroger Co.*⁴⁶ and *Kelsay v. Motorola, Inc.*⁴⁷ These cases also in-

³⁸Defining Public Policy Torts, *supra* note 3, at 158.

³⁹See *Protecting The Private Sector At Will Employee*, *supra* note 2, at 798.

⁴⁰Positive law refers to "[l]aw actually and specifically enacted or adopted by proper authority for the government of an organized jural society." BLACK'S LAW DICTIONARY 1046 (5th ed. 1979). This definition would include constitutions and statutes.

⁴¹See 2A S. SUTHERLAND, STATUTORY CONSTRUCTION, § 56.01 (4th ed. 1984) [hereinafter referred to as STATUTORY CONSTRUCTION].

⁴²See generally *id.* at § 56.02, where the author states:

A classic example of the use of public policy derived from statutes as a legal determinant occurs in the law pertaining to the question of what contracts are unenforceable because of illegality. Contracts made in violation of a criminal statute are generally held to be illegal on the basis of statutory public policy, although no civil sanctions are expressly imposed.

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

⁴⁴*Id.* at 251, 297 N.E.2d at 427. In part, the court relied upon IND. CODE § 22-3-2-14 (1971) which states: "No contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act." *Id.* at 252, 297 N.E.2d at 427-28. The court ruled that an employer discharge in this manner constituted a "device," *id.* at 252, 297 N.E.2d at 428, but reliance on this express statutory provision was only tangentially related the court's analysis of what public policies the Act embodied.

⁴⁵*Id.*

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

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

volved employees discharged for pursuing worker's compensation claims. Both courts held that a wrongful discharge cause of action was proper despite the fact that the worker's compensation statutes neither prohibited nor provided a remedy for a retaliatory firing.⁴⁸ The public policy which the employer discharges offended was an efficient employee remedy system envisioned by the statutory scheme of the Acts read as a whole.⁴⁹ Large-scale retaliatory firings would deprive the injured employee a compensatory remedy and, thus, subvert the legislative policies embodied in the worker's compensation statutes.⁵⁰

An employer's interference with an employee's right to secure a minimum wage necessitated a cause of action for wrongful discharge in *Montalvo v. Zamora*⁵¹. *Montalvo* involved a plaintiff-employee who was discharged after sending to his employer a written request to be paid the California minimum wage. The Court of Appeals reversed the trial court and held that plaintiff had stated a cause of action under California Labor Code Section 923⁵² and The Minimum Wage Law for Women and Minors.⁵³ Under Section 923, the public

⁴⁸See *Sventko*, 69 Mich. App. at 649, 245 N.W.2d at 154 (Although "[t]he Legislature has not made retaliatory discharges . . . a subject of any criminal sanction . . . [t]his is certainly no indication on the part of the Legislature that [this type of] conduct is consistent with public policy."); *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357 (court noting that legislative intent not to proscribe retaliatory firing through silence would be inconsistent with the overall purpose of the Illinois Workmen's Compensation Act.)

⁴⁹See *Sventko*, 69 Mich. App. at 647-48, 245 N.W.2d at 153-54; *Kelsay*, 74 Ill. 2d at 180-81, 38 N.E.2d at 357.

⁵⁰*Sventko*, 69 Mich. App. at 648, 245 N.W.2d at 153; *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357. Not all states have implied a wrongful discharge tort from workmen's compensation legislation. In *Christy v. Petrus*, 365 Mo. 1187, 1189, 295 S.W. 2d 122-124 (1956), the Missouri Workmen's Compensation Act provided for criminal liability where the employer interfered with any rights within the Act granted to employees. The Missouri Supreme Court held that "a statute which creates a criminal offense and provides a penalty for its violation, will not be construed as creating a new civil cause of action . . . unless such appears by express terms or by clear implication to have been the legislative intent." *Id.* at 1192, 295 S.W.2d at 126.

Christy's reasoning was found persuasive to a North Carolina Court of Appeals in *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 297, 244 S.E.2d 272, 275 (1978) The *Dockery* court ruled that the absence of a statutory wrongful discharge remedy evinced a legislative intent not to address this problem. *Id.* However, in 1979, N.C. GEN. STAT. § 97-6.1 (1979) was added to the North Carolina Workmen's Compensation Act. Section 97-6.1(a) prohibits employer discharges where the employee institutes any proceedings under the Act, and 97-6.1(b) imposes civil liability for damages upon a violation of 97-6.1(a).

See also *Segal v. Arrow Industries Corp.*, 364 So.2d 89, 90 (Fla. Dist. Ct. App. 1978) (court in one paragraph, per curiam decision rejected *Frampton*, see *supra* notes 43-45 and accompanying text, and *Sventko*, see *supra* notes 46-50 and accompanying text).

⁵¹7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970).

⁵²The statute declared that ". . . the public policy of this State is as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. at 73-75, 86 Cal. Rptr. at 403-04, quoting CAL. LABOR CODE § 923 (West 1971).

⁵³ Any employer who discharges, threatens to discharge, or in any other manner discriminates against any employee because the employee has testified or is about to testify, or because the employer believes that the employee will testify in any investigation or proceedings relative to the enforcement

policy expressly declared was the right of the employee to ". . . negotiate the terms and conditions of his employment . . ."⁵⁴ As the employee was a member of the class protected by the statute, a wrongful discharge suit for damages was proper, despite the absence of a specific remedy within Section 923.⁵⁵ The employer's conduct was held to be actionable under the Minimum Wage provisions because the statute established as public policy the protection of women and children.⁵⁶ It is significant that a wrongful discharge action was similarly implied under the Minimum Wage laws and the imposition of criminal liability on the employer did not preclude this civil remedy.⁵⁷

The second category of positive law that has sanctioned wrongful discharge relief is statutory or constitutional provisions from which both employee rights and a wrongful discharge remedy are implied. They have no per se application to the employment relationship, yet the employer's actions contravene the public policy considerations that are ingrained in these sources.⁵⁸ Allowing an employee to sue for damages under a wrongful discharge theory facilitates the policy concerns found in these sources.

A subset of this category concerns employment-related acts which place the employee under threat of criminal penalty. For example, in *Petermann v. International Brotherhood of Teamsters, Local 396*⁵⁹, the plaintiff, a union business agent, refused his supervisor's request to make false statements at a committee hearing. A cause of action for the employee's subsequent discharge was mandated by the state's declared policy against perjury reflected in its penal code.⁶⁰ Denying a civil remedy would seriously impair this public policy and hamper the administration of justice in general.⁶¹ The reasoning in *Peter-*

Id. at 76, 86 Cal. Rptr. at 405.

⁵⁴*Id.* at 73, 86 Cal. Rptr. at 403.

⁵⁵*Id.* at 74, 86 Cal. Rptr. at 403.

⁵⁶*Id.* at 76, 86 Cal. Rptr. at 405.

⁵⁷*Id.* See also *Glenn v. Clearman's Golden Cock Inn*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (court held that employer's discharge of employee exercising rights under California Labor Code to apply for union membership was actionable under wrongful discharge theory notwithstanding the imposition of criminal liability on the employer and the absence of a statutory provision allowing a civil action for damages). The wrongful discharge tort has also been recognized outside of the labor relations context. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1366 (3rd Cir. 1979), where the court held that a statute proscribing the use of polygraph examinations in the employment setting embodied a recognized facet of public policy sufficient to allow a wrongful discharge claim. The court cited *State v. Community Distributors, Inc.*, 64 N.J. 479, 317 A.2d 697 (1974) wherein the New Jersey Supreme Court had concluded that problems in administering and objectively interpreting polygraph tests, as well as privacy and self-incrimination concerns, militated against their overall effectiveness. *Perks*, 611 F.2d at 1365. See generally *Herman, Privacy, The Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1972). Although the pertinent statute alluded to in *Perks* provided solely for criminal liability, *Perks*, 611 F.2d at 1365, a civil wrongful discharge action was implied in favor of the employee because of the policy concerns noted above.

⁵⁸See *The Private Sector At Will Employee*, *supra* note 2, at 791.

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

⁶⁰*Id.* at 188-89, 344 P.2d at 27.

⁶¹*Id.* See also *O'Sullivan v. Mallon*, 160 N.J. Super 416, 418, 390 A.2d 149, 150 (1978) (Rationale of *Petermann* extended and applied to X-ray technician discharged for failure to perform catheterizations that would place the employee in violation of state Medical Practice Act).

mann laid the doctrinal foundation for protecting employees who were discharged for refusal to alter pollution control reports,⁶² participate in the illegal fixing of retail gasoline prices,⁶³ commit other illegal acts in furtherance of antitrust violations,⁶⁴ or acquiesce to the mislabeling of food products⁶⁵ — all under fear of criminal liability.

However, it is not necessary that the refusal to heed the employer's solicitations directly implicate the employee in criminal activity for a cause of action in wrongful discharge to lie. In *Harless v. First National Bank in Fairmont*,⁶⁶ an employee alleged he was discharged for bringing violations of West Virginia and federal consumer credit and protection laws to his superior's attention.⁶⁷ The West Virginia Supreme Court of Appeals allowed the employee's wrongful discharge claim. The Court focused on the Legislature's "comprehensive attempt to extend protection to the consumers and persons who obtain credit . . ." as evidenced in the West Virginia Consumer Credit and Protection Act.⁶⁸ As the Act affected a substantial number of people within the state, the unequivocal public policy of consumer protection would be frustrated if the employer was allowed to discharge an employee seeking compliance with its terms.⁶⁹

*Nees v. Hocks*⁷⁰ illustrated that public policy can be inferentially deduced from state constitutional and statutory provisions and applied to the employment setting accordingly. *Nees* involved allegations that an employee was

⁶²See *Trombetta v. Detroit, Toledo and Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978). Reasoning "that the public policy of this state does not condone attempts to violate its duly enacted laws," *Id.* at 495, 265 N.W.2d at 388, the court held actionable the employer's discharge of the plaintiff in retaliation for refusing to alter reports and adjust sampling results required to be filed with the state of Michigan. *Id.* at 496, 265 N.W. 2d at 388. Pursuant to statute, the employee faced the possibility of a misdemeanor conviction and a \$25,000 fine: "A person . . . who renders inaccurate a monitoring device or record required to be maintained by the commission is guilty of a misdemeanor and shall be fined not less than \$2,500.00 nor more than \$25,000.00 for each violation." Mich. Comp. Laws Ann. § 323.10(2) (West 1971).

⁶³See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr 839 (1980). The employee claimed his discharge stemmed from his refusal to threaten independent service station owners to reduce gasoline prices in an amount set by his employer. In responding to plaintiff's complaint, the court analogized his situation to *Petermann*, 174 Cal. App. 184, 344 P.2d 25 (1949) and found that "an employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order." *Tameny* 27 Cal. 3d at 178, 610 P.2d at 1336-1337, 164 Cal. Rptr. at 846.

⁶⁴See *McNulty v. Borden Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979).

⁶⁵See *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980). It is not altogether clear from the majority opinion the specific underlying basis for the modification of the at will rule, although the court placed much emphasis on the fact that had the plaintiff participated in the mislabeling scheme, he faced potential criminal liability under the Connecticut Uniform Food, Drug and Cosmetic Act. *Id.* at 478, 427 A.2d at 388.

⁶⁶246 S.E. 2d 270 (W. Va. 1978).

⁶⁷*Id.* at 272.

⁶⁸*Id.* at 275-276.

⁶⁹*Id.* at 276. Although the court noted that violations of the Act could result in criminal penalties, the plaintiff employee was not subject to criminal liability under the Act.

discharged for being called and serving on a jury. The starting point for the Supreme Court of Oregon's analysis was the Oregon Constitution, which provided a right to a jury trial in criminal and civil cases in the presence of competent jurors.⁷¹ These provisions, along with state statutes excusing potential jurors only in certain limited instances, indicated "that the jury system and jury duty are regarded as high on the scale of American Institutions and citizen obligations."⁷² In order to promote the "substantial societal interests in having citizens serve on juries"⁷³ and to ensure the viability of the jury system, a right in the plaintiff to sue for wrongful discharge was necessary to promote these ends.

Does the Public Policy Exception to the At Will Employment Agreement Exist in Ohio After Phung?

In *Phung v. Waste Management, Inc.*,⁷⁴ the plaintiff was a chemist at a toxic waste disposal site who alleged that his employer had violated "various statutory, regulatory, and societal obligations"⁷⁵ and that his discharge stemmed from bringing these violations to his superiors' attention.

In a two page opinion, the majority announced three justifications for not creating a public policy exception as applied to the particular facts of the case. As an initial matter, the allegations pleaded by Phung "failed to state a violation of a sufficiently clear public policy to warrant creation of a cause of action . . ."⁷⁶ and were merely conclusory. The Ohio Supreme Court went on to state that public policy did not mandate a per se exception to the employment at will doctrine "when an employee is discharged for reporting to his employer that it is conducting its business in violation of the law."⁷⁷ Finally, and perhaps most significantly, the Court reasoned that matters relating to the protection and welfare of State employees were primarily a legislative rather than a judicial concern.⁷⁸ Specifically, the Court noted legislative attempts to modify or limit

⁷¹*Id.* at 218-219, 536 P.2d at 516.

⁷²*Id.* at 219, 536 P.2d at 516.

⁷³*Id.* at 220, 536 P.2d at 516; *See also* Reuther v. Fowler & Williams Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978), where the court decided the same issue in the employee's favor. The *Nees* court's analysis was persuasive to the *Reuther* majority, which concluded that a "recognized facet of public policy" was extant from similar Pennsylvania state constitutional provisions. *Id.* at 32-33, 386 A.2d at 120-21. One California appellate court has held differently. In *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), the court held that jury duty was not tantamount to a political activity protected by a California statute which read: "No employer shall make, adopt, or enforce any rule, regulation, or policy . . . controlling or directing, or tending to control or direct the political activities or affiliations of employees." *Id.* at 394-95, 6 Cal. Rptr. at 174. Inasmuch as jury duty did not rise to the level of a political activity, the employee's discharge for serving on a jury was proper. Thus, *Mallard* was decided solely on statutory grounds, and no reference was made to the California state constitution as plaintiff apparently did not raise this as a legal issue.

⁷⁴23 Ohio St. 3d 100, 491 N.E. 2d 1114 (1986).

⁷⁵*Id.* at 101, 491 NE 2d at 1115.

⁷⁶*Id.* at 102, 491 N.E.2d at 1116-17.

⁷⁷*Id.* at 103, 491 N.E.2d at 1117.

the employment at will doctrine in the areas of worker's compensation and employment discrimination.⁷⁹ The majority opinion was in accord with some lower Ohio court decisions which had rejected the public policy exception.⁸⁰

There is no doubt that employers who are now sued for wrongful discharge in Ohio will elevate *Phung* to the legal proposition that no public policy exception exists in Ohio. However, the majority left many questions unanswered surrounding the public policy doctrine that *Phung* cannot be read so broadly. To the contrary, a careful reading of *Phung* indicates that the public policy exception is still an open issue in Ohio.

The majority left unanswered whether the Supreme Court would have entertained plaintiff *Phung's* complaint if he had alleged *with specificity* the public policy concerns breached by his employer. A reasonable inference drawn from the language of the opinion⁸¹ is that a different result may have been obtained had the plaintiff specified the purported public policy interests at stake. Secondly, *Phung* represents less a wholesale rejection of the public policy exception than a narrow rule of law sustaining employer terminations where the employee reports *to his employer* that its business practices are in violation of the law.⁸² The Court did not address whether a cause of action could be sustained where an employee reported his employer's alleged violations directly to law enforcement officials — a situation found sufficient to warrant a wrongful

⁷⁹*Id.* The majority opinion triggered a stinging dissent from Justice Brown, who expressed disappointment over the majority's refusal to join the majority of states who had created a public policy exception. See *Phung*, 23 Ohio St. 3d at 104, 491 N.E.2d at 1117 (Brown, J., Dissenting) and cases cited at n.1. The dissent took issue with the majority's contention that *Phung's* complaint was defective, noting that inferences drawn from the language of the complaint clearly implicated violations of "fundamental public policies of the state of Ohio." *Id.* at 106, 491 N.E.2d at 1119-1120. Moreover, the majority ignored two statutory provisions that addressed broad public interest concerns. *Id.* at 107, 491 N.E.2d at 1120. One was OHIO REV. CODE ANN. § 3734.99(A) (Page 1981) which states:

Except as otherwise provided in division (B) of this section, whoever recklessly violates any section of this chapter, except section 3734.18 of the Revised Code, governing the storage, treatment, transportation, or disposal of hazardous waste is guilty of a felony and shall be fined at least ten thousand dollars but not more than twenty-five thousand dollars or imprisoned for at least two years but not more than four years, or both. Whoever violates any section of this chapter governing the disposal of solid wastes, or violates section 3734.18 of the Revised Code, shall be fined not more than two hundred fifty dollars. Each day of violation constitutes a separate offense.

OHIO REV. CODE ANN. § 2921.22(A) (Page 1975) provides that "no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities." These two statutory expressions of public policy would be sufficient to state a cause of action for wrongful discharge. *Phung*, 23 Ohio St. 3d at 107, 491 N.E.2d at 1120.

⁸⁰See *West v. Roadway Express, Inc.*, 8 Ohio B. 155, 161-63, (1982) (after a thorough review of the jurisdictions upholding or rejecting the public policy exception, the court noted that Ohio had taken no position on its viability, and other remedies obtainable by statute did not warrant establishing the doctrine *subjudice*); *Rachubka v. St. Thomas Hospital Medical Center*, No. 11596 (9th Dis. Ct. App. October 10, 1984) (available in Ohio App. Dec. on Fiche 84-28-9d); *Aylward v. First Bankcorp.*, (9th Dist. Ct. App. September 12, 1984) (available in Ohio App. Dec. on Fiche 84-24-9d); *Teubert v. Elkem Metals Co.*, (4th Dist. Ct. App. December 19, 1984) (available in Ohio App. Dec. on Fiche 84-19-4d); *Senft v. General Electric Co.*, (6th dist. Ct. App. July 9, 1982) (available in Ohio App. Dec. on Fiche 82-15-6d).

⁸¹See *Phung*, 23 Ohio St. 3d 100, 491 NE 2d 1114.

⁸²The official court syllabus states: "Public policy does not require that there be an exception to the employment-at-will doctrine when an employee is discharged for reporting *to his employer* that it is conducting its business in violation of law." *Phung*, 23 Ohio St. at 100, 491 N.E. 2d at 1114 (emphasis added).

discharge cause of action by at least one state supreme court.⁸³

Finally, the *Phung* court's view that the judiciary should play a limited role in employment matters⁸⁴ is an unnecessarily narrow one for several reasons. For example, Ohio courts⁸⁵ have granted injured employees the right to pursue an action against their employers for intentional torts notwithstanding the fact that the Ohio Worker Compensation statutes⁸⁶ did not expressly grant such a right. This judicial intervention indicates that the legislature and the judiciary have at least played a dual role in shaping the contours of the employment relationship.

Several other factors militate in favor of sanctioning a similar right on the part of the employee to bring a cause of action for wrongful discharge. Insofar as the employment at will rule is a judicially created doctrine,⁸⁷ "it is appropriate that . . . newly recognized exceptions to its application should come from judicial decisions."⁸⁸ In other areas of judicially created law, courts have not hesitated to bring about change when circumstances have merited the need to do so.⁸⁹

Furthermore, the realities of the legislative process impact upon the inter-relationship between legislatures and courts in the creation of new rights and duties. A major criticism of deferring employment matters to the legislature is that:

statutes are not enacted because they incorporate good ideas or principles; rather, they are enacted because organized interest groups lobby for their enactment. Employees who have not been organized by a labor union are

⁸³See *supra* notes 26-29 and accompanying text.

⁸⁴See *Phung*, 23 Ohio St. 3d at 103, 491 N.E. 2d at 1117.

⁸⁵See *Jones v. V.I.P. Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984); *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982), *cert denied* 459 U.S. 857 (1982); *Delamotte v. Midland Ross*, 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).

The *Blankenship* court noted that ". . . neither the relevant [Ohio] constitutional language nor the pertinent statutory language expressly extend the grant of immunity to actions alleging intentional tortious conduct by employers against their employees." *Blankenship*, 69 Ohio St.2d at 612, 433 N.E.2d at 575-576 (emphasis added).

⁸⁶See OHIO REV. CODE ANN. § 4123.74 *et seq* (Page 1980).

⁸⁷See *Mauk*, *supra* note 3, at 255; see also *Phung*, 23 Ohio St. 3d at 107, 491 N.E. 2d at 1120 (1986) (*Brown, J.*, dissenting); notes 5-12 and accompanying text).

⁸⁸*Mauk*, *supra* note 3, at 255.

⁸⁹The common law doctrine of sovereign immunity is a prime example. See *Kojis v. Doctor's Hospital*, 12 Wis. 2d 367, 107 N.W.2d 131 (1961) *modified*, 12 Wis. 2d 367, 107 N.W.2d (1961). In abrogating the doctrine, the court noted that "the rule of *stare decisis*, however desirable from the standpoint of certainty and stability, does not require us to perpetuate a doctrine that should no longer be applicable in view of the changes in present day charitable hospitals." *Id.* at 372, 107 N.W.2d at 133-34; *McAndrew v. Mularchuk*, 33 N.J. 172, 193, 162 A.2d 820, 832 (1960) (insofar as governmental immunity limitations of respondeat superior were placed there by the judiciary, "it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of a general rule of action created by the judicial branch of government cannot or should not be removed by its creator"); *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 132 (1957) (seeing "no necessity for insisting on legislative action in a matter which the courts themselves originated"); See also *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 43 Wash. 2d 162, 260 P.2d 765 (Sup. Ct. 1953); *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958).

exactly that: unorganized and therefore lacking in the unity of purpose and effort that produces a successful lobby. On the other hand, employers have associations that traditionally have lobbied against legislation conflicting with employer interests . . .⁹⁰

Furthermore, general legislative indifference in areas such as tort reform,⁹¹ a high turnover rate of elected representatives,⁹² and a less than conducive legislative work environment⁹³ taints the notion that wholesale changes in employment affairs should await legislative directive.

Given these legislative impediments, it is logical to conclude that the judiciary should be the catalyst in reforming the employment at will rule.⁹⁴ Endorsing judicial reform in this area is a mere recognition that our American system of jurisprudence has always delegated to courts a proportionate role of improving the law and preserving its continuity.⁹⁵ In addition, there exists an important legislative check on an overzealous judiciary: the legislature is free to overturn or modify "the determination of a respected body of impartial men [or women]."⁹⁶

A PROPOSAL FOR OHIO

As employment matters, in general, and the at-will rule in particular, are not solely areas of legislative concern, the relevant inquiry involves identifying those circumstances in which a wrongful discharge cause of action may be legitimately applied. Establishing a workable set of criteria borrowed from other jurisdictions will result in a set of guidelines that should minimize vexatious lawsuits and protect the employee from an unjust discharge.

To temper fears of judicial policy making and the unpredictability that would result,⁹⁷ courts should imply a wrongful discharge action only where

⁹⁰See Peck, *supra* note 3, at 3.

⁹¹See Peck, *The Role of Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 268 (1963).

⁹²*Id.* at 273.

⁹³*Id.* at 272. Although Peck urges active judicial reform in problematic areas such as contributory-comparative negligence, *Id.* at 304-305; contribution, *Id.* at 307-308; emotional distress, *Id.*; and liability of land owners and occupiers, *Id.* at 309-311. The aforementioned factors which impact upon legislative decision making would have universal application to any legislation in general, including legislation (or the lack thereof) in the employment-at-will arena.

⁹⁴*Id.* at 285. An example of a legislative response to a judicial determination in the employment area is provided by *Fawcett v. Murphy Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976). In *Fawcett*, the Ohio Supreme Court held that a violation of Ohio's age discrimination statute (OHIO REV. CODE ANN. § 4101.17(A) (Page 1980)) did not give rise to a civil cause of action for damages since such a right was not intended "by clear implication." *Id.* at 249, 348 N.E.2d at 147. Three years subsequent to *Fawcett*, the Ohio Legislature responded by adding § 4101.17(B), which expressly granted the right to bring a civil action for a violation of § 4101.17(A) See OHIO REV. CODE ANN. § 4101.17(B) (Page 1979).

⁹⁵R. KEETON, *VENTURING TO DO JUSTICE*, 11 (1969).

⁹⁶Peck, *supra* note 90, at 286.

⁹⁷See *supra* notes 16-26 and accompanying text.

there is a clearly articulated statutory or constitutional expression of public policy. For instance, remedial legislation enacted for the benefit of a class, like consumers⁹⁸ or those covered by worker's compensation,⁹⁹ implicates policy concerns deserving of protection due to the "pervasive legislative scheme"¹⁰⁰ underlying such acts. Relevant criminal code provisions could also provide sufficient indicia of legitimate state public policy.¹⁰¹

As a second limitation on the wrongful discharge tort, the employer's actions must significantly impair or frustrate the policies envisioned in these sources. In essence, the employer's act in discharging the employee should not only harm the employee, but society in general since "the crux of the wrongful discharge tort lies in the harm, threatened or actual, to society should employers be free to discharge for a particular reason."¹⁰² *Frampton*¹⁰³ and *Sventko*¹⁰⁴ are illustrative of the manifest harm to all workers that would flow from a discharge pursuant to filing a compensation claim. The harm to our institutional jury system¹⁰⁵ and the undermining of the administration of justice¹⁰⁶ also exemplify the type of broad threat to society that should trigger a cause of action. However, where the discharge only minimally affects the public or societal interest,¹⁰⁷ or merely involves private or proprietary interests,¹⁰⁸ no cause of action should be implied.

Procedurally, the discharged employee should be required to plead with specificity the public policy concerns allegedly breached by the employer. The specificity burden would serve to notify the employer of the underlying basis of the claim and to satisfy the apparent unwillingness of some courts to let the employee rely on conclusory allegations in wrongful discharge pleadings.¹⁰⁹

⁹⁸ See *supra* notes 66-68 and accompanying text.

⁹⁹ See *supra* notes 43-50 and accompanying text.

¹⁰⁰ See RESTATEMENT (SECOND) OF TORTS § 874(A) comment i. (Proposed official draft 1977).

¹⁰¹ See *supra* notes 59-61 and accompanying text.

¹⁰² *Guidelines for A Public Policy Exception, supra* note 2, at 636.

¹⁰³ See *supra* notes 43-45 and accompanying text.

¹⁰⁴ See *supra* notes 46-50 and accompanying text.

¹⁰⁵ See *supra* notes 69-72 and accompanying text.

¹⁰⁶ See *supra* notes 59-61 and accompanying text.

¹⁰⁷ See *Guidelines For a Public Policy Exception, supra* note 2, at 639-640.

¹⁰⁸ See *Campbell v. Ford Indus., Inc.*, 266 Or. 479 513 P.2d 1153 (1973) (Minority shareholder-employee allegedly discharged for refusal to acquiesce to a fraudulent forced selling of his stock could not recover under wrongful discharge theory for injuries to his interest as an employee, but only to his interest as a shareholder); *Percival v. General Motors Corp.*, 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd* 539 F.2d 1126 (8th Cir. 1976) (corporate employee alleging wrongful discharge for urging management to correct potentially misleading information regarding corporations' work on alternative power plants did not implicate any broad public policy concerns); see also *Becket v. Welton Becket & Associates*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky 1977); *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); but see *Protecting Employees At Will, supra* note 3, at 1948 (stating that public-private distinctions as a basis for wrongful discharge relief often overlap, and therefore should not factor into a determination of whether a cause of action lies).

¹⁰⁹ See generally *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986); *Adler v. S*

Other procedural devices could be implemented to circumscribe wrongful discharge litigation. Making the employer's actions presumptively correct or compelling the employee to prove his case by a "clear and convincing" standard are also worth consideration.¹¹⁰

In addition, there are two other limitations that would limit application of the wrongful discharge tort. An employee who has a statutory remedy for the discharge should be barred from pursuing an independent tort action.¹¹¹ Underlying this rule is the notion that the employee should not be allowed to expand his remedies when statutes have specified the method or extent of recovery.¹¹² Finally, legislative repeal or modification exists as an inherent limitation on the wrongful discharge tort.¹¹³

Admittedly the public policy doctrine underlying the wrongful discharge tort is not a model of clarity.¹¹⁴ However, courts should not refrain from implementing this remedy where a narrowly tailored set of guidelines, both substantive and procedural, exist. Certainly, the concept of public policy is no more vague than other legal standards such as "good faith," "proximate cause," or "probable cause."

FURTHER LIMITATIONS ON THE AT-WILL RULE: CONTRACT PRINCIPLES

The traditional exceptions to the employment at will rule based on principles of contract law were narrow and few. In order to create a contract for continued employment, the employee had to show that some type of separate or additional consideration other than services to be rendered was given to the employer.¹¹⁵ If additional consideration was given by the employee, the

American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

¹¹⁰See *Blades*, *supra* note 2, at 1429.

¹¹¹Limiting the wrongful discharge rule in this manner would be consistent with present Ohio thought on this issue. See *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979); *Dadas v. Prescott, Bell, and Turben*, 529 F. Supp. 203 (N.D. Ohio 1981); *Welch v. Brown's Nursing Home*, 20 Ohio App. 3d 15, 484 N.E.2d 178 (1984); *But see Mauk*, *supra* note 3, at 243 and cases cited at n. 213 (contending that the more liberal view is to recognize wrongful discharge tort as an independent and additional remedy).

¹¹²See cases cited at n. 111 and accompanying text.

¹¹³See *supra* note 96 and accompanying text.

¹¹⁴See *supra* notes 16-25 and accompanying text.

¹¹⁵See *Pearson v. Youngstown Sheet and Tube Co.*, 332 F.2d 439 (7th Cir. 1964) (discharged at will employee did not prove additional consideration through allegations that his 28½ years of service destroyed his suitability for employment elsewhere); *Peterson v. Scott Construction Co.*, 5 Ohio App. 3d 203, 451 N.E.2d 1236 (1982); *but see H.S. Kerbaugh, Inc. v. Gray*, 212 F. 716 (2nd Cir. 1914) (at will employee continuing in employment in exchange for employer's promise to pay bonus constituted sufficient consideration to enforce promise). Of course, an employee could always defeat the at will rule by showing that the parties never intended such an agreement. In *Bascom v. Shillito*, 37 Ohio St. 431, (1882), the defendant employer modified the plaintiff-employee's salary from a monthly to a yearly basis upon the employee's request for more permanent employment. The employee contended that his discharge subsequent to the modification was ineffective since the modification was tantamount to a hiring for a term. The employer submitted that no hiring for a term resulted, and therefore the employee was terminable at will. The Ohio Supreme Court ruled in favor of the employee, holding that "proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact[s] . . ." should

<http://ideexchange.uakron.edu/akronlawreview/vol20/iss3/6>

employer presumably intended not to discharge except for cause.¹¹⁶ Absent some proof of additional consideration, courts consistently refused to construe indefinite hirings as anything other than at will agreements on the grounds that such contracts lacked mutuality of obligation.¹¹⁷

Application of the traditional mutuality doctrine to employment and policy handbooks is illustrated by *Johnson v. National Beef Packing Co.*¹¹⁸ The employee discharged in *Johnson* contended that a "Company Policy Manual" containing a "just cause" provision, along with statements dealing with employee benefits, holidays, vacation and insurance, bound the employer expressly or impliedly to a fixed term of employment. The Supreme Court of Kansas affirmed summary judgment in favor of the employer on the basis that the manual "was only a unilateral expression of company policy and procedures."¹¹⁹ The terms of this "unilateral expression" were not bargained for, nor was there a meeting of the minds on the statements contained therein.¹²⁰

be considered. *Id.* at 433-434. However, no hiring for a term will be implied merely from a contract which provides for an annual rate of salary, and is silent as to the duration of employment. See *Henkel v. Educational Research Council of America*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976). See also, *Byrd v. Mac Tools, Inc.*, NO 81CA6 (12th Dist. Ct. App. June 2, 1982) (available in Ohio App. Dec. on Fiche 87-7-12d).

¹¹⁶See *Murg & Scharman*, *supra* note 3 at 358.

¹¹⁷See *Blades*, *supra* note 2, at 1419 and cases cited at n. 72. For a discussion of the mutuality doctrine, see *supra* note 12 and accompanying text.

¹¹⁸220 Kan. 52, 551 P.2d 779 (1976).

¹¹⁹*Id.* at 55, 551 P.2d at 782.

¹²⁰*Id.* One Ohio court, in *Jones v. East Center For Community Mental Health, Inc.*, 19 Ohio App.3d 19, 482 N.E.2d 969 (1984) has applied the *Johnson* approach to personnel manuals. Analyzing the plaintiff-employees personnel handbook within the mutuality of obligation framework, the Court of Appeals held that the manual failed to create binding obligations since "[the employee] gave nothing in return for [the promises contained in the manual], and thus . . . was not bound by the agreement." *Id.* at 22, 482 N.E.2d at 973. Since the employee was not bound by the manual's terms, the manual could not be considered a binding contract to provide for lifetime employment. *Id.*

Curiously, the same court of appeals less than one month after *Jones* enforced an employer's written and oral assurances of severance pay in *Helle v. Landmark, Inc.* 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984). In *Helle*, the employer distributed a policy manual establishing a severance plan for employees who were terminated due to economic necessity. The plaintiff employees were also given oral assurances by company agents of their entitlements to severance pay. Subsequently, the company amended the severance provisions such that the employees received substantially less severance pay.

In reversing the trial court's dismissal and upholding the severance plan as it existed before the amendment, the court totally abandoned the mutuality of obligation analysis applied in *Jones*. The *Helle* court started from the analytical premise that parties to an at will agreement may otherwise modify it, *Id.* at 7, 472 N.E.2d at 772, and such modifications are binding where the "paradigm elements" of offer, acceptance, and consideration are met. *Id.* at 8, 472 N.E.2d at 774. After concluding that the oral and written representations of severance pay constituted an offer, *Id.* at 8-9, 472 N.E. 2d at 774-775, the court ruled that acceptance was satisfied when the employee remained on the job after learning of the severance policy. *Id.* at 10, 472 N.E.2d at 776. Finally, and most importantly, the court abandoned the *Jones* rationale requiring the employee to satisfy the element of consideration by giving something in return for the promises contained in the manual. Rather, "for purposes of consideration, the employee's retention and continued performance of his work suffice to render the new condition of severance pay enforceable." *Id.* at 11, 472 N.E. 2d at 775. Mutuality of obligation had no applicability to unilateral contracts such as employment contracts, which call for performance of a promise. *Id.* at 12, 472 N.E. 2d at 776. Thus, the *Helle* court was in line with modern contract thought limiting the mutuality doctrine to bilateral contracts, where the parties exchange reciprocal promises. *Id.* (citations omitted). See also *Bolling v. Clevepack Corp.*, 20 Ohio App. 3d 113, 484 N.E. 2d 1367 (1984) (*Helle* followed).

There is no principled reason for applying the mutuality doctrine to *Jones* and abandoning it in favor of a more modern approach liberalizing the consideration necessary to give the manual legal effect as the court did in *Helle*. Although the employee in *Jones* sought to imply a contract term for lifetime employment based

Therefore, the manual was a mere gratuity, and had no binding legal effect on the employer.

Several factors have coalesced in the movement toward a more liberal standard of determining what limitations, if any, should be placed on the employer in an at will relationship. The first is a recognition that "the presumption that an employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence."¹²¹ Examining all the facts and circumstances between the parties may reveal an intent to set the employment duration for a fixed period of time.¹²² Since the primary focus is on the intent of the parties, there has been a departure from the mechanical rule that a contract for permanent employment should *always* be construed as a contract terminable at any time by any party.¹²³ Given this shift in focus, employment handbooks or policy statements have undergone judicial scrutiny in search of the parties' intent. The employer ostensibly distributes these statements with an eye towards receiving certain benefits incident to the employment relationship.¹²⁴ It necessarily follows that the employer may also have created binding obligations in exchange for these benefits.

*Toussaint v. Blue Cross and Blue Shield*¹²⁵ stands for the proposition that an at-will employee can be endowed with the contractual right not to be discharged except for cause. The modification of an otherwise at-will agreement can be implied from the policy manuals or statements distributed to the employee, or through the employer's express oral agreement to terminate only for

on the manual, as opposed the employee in *Helle* seeking performance of specific promises in the manual, both situations involved unilateral employment contracts. Furthermore, courts have looked with disfavor on the employer's argument that cases involving the employee's expectation of *benefits* grounded in the manuals are distinguishable from those where the employee seeks to imply a "just cause" termination provision from the manual. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 598, 292 N.W.2d 880, 882 (court rejected employer's argument that manuals created expectations of certain benefits, but created no expectations of job security).

¹²¹Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324, 171 Cal. Rptr. 917, 925 (1981).

¹²²See *Id.*

¹²³*Pine River State Bank v. Mettile*, 333 N.W.2d 622, 630 (Minn. 1983); See also *Pugh*, 116 Cal. App. 32d at 327, 171 Cal. Rptr. at 925 (employment contracts, like other agreements, should be construed to give effect to the intention of the parties as demonstrated by the language used, the purpose to be accomplished and the circumstances under which the agreement was made); *Toussaint*, 408 Mich. at 610, 292 N.W.2d at 890. (Although "employers are . . . free to enter into employment contracts terminable at will without assigning cause . . . an employer's express agreement to terminate only for cause, or statements of company policy and procedure . . . can give rise to rights enforceable in contract.")

¹²⁴See *Decker, Handbooks and Employment Policies As Express Or Implied Guarantees of Employment — Employer Beware*, 5 J.L. & COMM. 207 (1984-85). Handbooks or employment policies promote an awareness of company rules, *Id.* at 210, create order, increase employee morale, and often times provide for procedural mechanisms for handling disputes. *Id.* at 211.

¹²⁵<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss3/6>
408 Mich. 579, 292 N.W. 2d 880 (1980).

cause.¹²⁶ The manual becomes "instinct with an obligation"¹²⁷ because the elements of offer, acceptance, and consideration are met: the manual constitutes the offer, the employee's continuing in employment constitutes the acceptance, and the benefits flowing to the employer as a result of policies expressed in the manual act as consideration.¹²⁸ By following the guidelines set out in the manual, the employer enjoys the advantage of an orderly and loyal work force through a uniform set of rules applied fairly and consistently to all employees.¹²⁹

An agreement not to discharge except for good cause can be implied even where no elaborate handbook is distributed by the employer. In *Pugh v. See's Candies, Inc.*,¹³⁰ the court recognized that the employer's conduct in dealing with its employees can provide the basis for limiting the ability to terminate at will.¹³¹ As examining the employer's conduct in each case is a factual question, relevant circumstances such as the employee's length of employment, commendations and reprimands, assurances given to him or her by the employer, and other evidence of custom is subject to scrutiny.¹³² Thus, a thirty-two year employee who provided meritorious service to his company stated a cause of

¹²⁶*Id.* at 610, 292 N.W. 2d at 890. The *Toussaint* court identified two instances which would bind the employer not to terminate the employee except for cause. The first instance involves an employer's oral representations that could be construed as a promise not to discharge except for good cause. Whether or not these oral representations lend themselves to a "... construction ... that the employer has agreed to give up his right to discharge at will without assigning cause," *Id.* at 610, 292 N.W.2d at 890, is a question for the jury. *Id.* at 613, 292 N.W.2d at 891. The second instance involves the manual itself. *Id.* at 598, 292 N.W. 2d at 884.

¹²⁷*Id.* at 613, 292 N.W.2d at 892 (quoting *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917)).

¹²⁸*Toussaint*, 408 Mich. at 615-16, 292 N.W.2d at 893 (quoting *Cain v. Allen Electric & Equipment Co.*, 346 Mich. 568, 78 N.W. 2d 296 (1956)). The consideration necessary to support the offer (*i.e.*, the manual) can also be met where the employee stays on the job and does not exercise his right to leave. See *Pine River State Bank v. Mettite*, 333 N.W. 2d 622, 627 (Minn. 1983).

¹²⁹*Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892. The Ohio Supreme Court has not expressly ruled whether a policy manual or handbook can give rise to an implied contract term to be discharged only for good cause. However, in *Hendrick v. Center For Comprehensive Alcoholism Treatment*, 7 Ohio App. 3d 211, 454 N.E.2d 1343 (1982), the court of appeals held that the trial court improperly granted the employer's motion to dismiss where the employee alleged that her employee handbook constituted an implied in fact agreement not to discharge her except for cause. The court noted that questions of fact existed as to whether the terms and conditions in the manual were a part of her employment contract. *Id.* at 213, 454 N.E.2d at 1346. *Hedrick* was cited with approval by the Ohio Supreme court in *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 104, 483 N.E.2d 150, 154, where the court stated that "employee handbooks, company policy, and oral representations have been recognized in some situations as comprising components or evidence of the employment contract."

One lower Ohio appeals court has upheld manual provisions relating to discharge of the employee. See *Day v. Good Samaritan Hospital & Health Center*, No. CA-8062 (2nd Dist. Ct. App. August 17, 1983) (available on Ohio App. Dic. on Fiche 83-18-2d) (court held that manual provisions created unilateral contract which obligated the employer to discharge in accordance with manual's provisions).

¹³⁰116 Cal. App. 3d 330, 171 Cal. Rptr. 917 (1981).

¹³¹*Id.* at 329, 171 Cal. Rptr. at 927. See also *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972).

¹³²*Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927; See also *Kochis v. Sears, Roebuck & Co.*, No. CA-2175 (5th dist Ct. App. 1984) (available in Ohio App. Dec. on fiche 84-2-5d) (Court affirmed jury finding that employee's at will agreement modified by employer's statement to employee that he could not be fired if he did a good job).

action for wrongful termination upon his discharge subsequent to a dispute with the company union.¹³³

Finally, the doctrine of promissory estoppel¹³⁴ can operate to impose a just cause requirement.¹³⁵ In order for the doctrine to modify an otherwise at-will agreement, the employer must reasonably expect that the employee will rely on the representation to his or her detriment through action or forbearance.¹³⁶ Whether the elements of promissory estoppel are met is a question of fact.¹³⁷

Although the doctrine is frequently invoked in situations where the employee leaves previous employment in reliance upon a new employment offer subsequently revoked,¹³⁸ it has also been applied in conjunction with the employment manual. Not only does the manual raise certain employee expectations,¹³⁹ but it arguably induces some type of action or forbearance in addition.¹⁴⁰ Promissory estoppel measures the reasonableness of this conduct,¹⁴¹ and thus offers an alternative to *Toussaint*¹⁴² and its focus on whether there was consideration for the manual.¹⁴³

CONCLUSION

Many commentators have proposed abolishing the employment at will rule through statutory enactment,¹⁴⁴ or through novel legal theories inviting

¹³³See generally *Pugh*, 116 Cal. App. 330, 171 Cal. Rptr. 917 (1981).

¹³⁴RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979) defines promissory estoppel as:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee of a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

¹³⁵Mauk, *supra* note 3, at 224.

¹³⁶*Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d at 105, 483 N.E.2d at 155.

¹³⁷*Id.* For a criticism of *Mers* court's resolution of the factual issues before it in that case, See *Time To Collapse Another Citadel*, *supra* note 3, at n. 129.

¹³⁸See Mauk, *supra* note 3, at 224 and cases cited at n. 104. *But see* *Frankart v. Jeep Corp.*, No L.-85-062 (6th Dist. Ct. App. November 8, 1985) (available on Ohio App. Dec. on Fiche 85-25-6d). In *Frankart*, a laid off employee contended that he relied on his employer's promise that if he returned to work, his job would become permanent in nature, and that as a consequence, he refused employment elsewhere. He returned to work, and was subsequently discharged. The Court of Appeals upheld the trial court's dismissal, stating that the allegations at best supported the inference that the employee was hired at will. However, the court's analysis only begs the question of whether the at will contract should have been modified due to the representations made by the employer, and whether the employee's actions supported a claim for promissory estoppel relief.

¹³⁹See generally *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

¹⁴⁰See *Hedrick v. Center for Comprehensive Alcoholism Treatment* 7 Ohio App. 3d 211, 214 454 N.E.2d 1343, 1346-47 (1982) (court held question of fact existed as to whether statements in employee manual were promulgated "with the design to induce [plaintiff] to remain in her employment, . . . that she reasonably believed these terms and conditions were binding . . . and that these terms . . . induced her to remain employed . . .").

¹⁴¹See *supra* notes 135-137 and accompanying text.

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

¹⁴³Promissory estoppel serves as a substitute for consideration. Murg & Scharman, *supra* note 11, at 359; *Time to Collapse Another Citadel*, *supra* note 3, at 418.

¹⁴⁴See generally *Bence, A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 18

judicial application.¹⁴⁵ However, practical realities militate against statutory repeal of the rule,¹⁴⁶ while judicially abolishing the rule appears too drastic a step to take at the present time. Furthermore, the at will rule retains some usefulness in the workplace since it adequately "responds to the manifold perils of employment contracts . . ."¹⁴⁷

Insofar as the rule is also subject to harsh results, states like Ohio have attempted through judicial and legislative action to balance the often competing interests of employer and employee. Indeed, the Ohio Supreme¹⁴⁸ Court has provided the underpinnings for a modern contractual analysis aimed at defining the true intent of the parties to an at-will agreement. And the Ohio legislature has given the discharged employee on occasion a modicum of protection.¹⁴⁹

However, Ohio courts have failed to recognize that substantial public policy concerns exist within its Revised Code. Where certain guidelines exist for determining public policy, courts should take the initiative and imply tort remedies for its breach. In light of *Phung v. Waste Management, Inc.*,¹⁵⁰ convincing a court that it is the proper forum to take this initiative may be the biggest hurdle to clear.

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207 (1983); Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976).

¹⁴⁵See *Protecting At Will Employees*, *supra* note 3 (arguing for implied contractual duty to terminate only in good faith); *Defining Public Policy Torts*, *supra* note 3 (business judgment rule should be applied to at will dismissals).

¹⁴⁶See *supra* notes 90-93 and accompanying text.

¹⁴⁷Epstein & Paul, *supra* note 1 at 952.

¹⁴⁸Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

¹⁴⁹See, e.g., OHIO REV. CODE ANN. § 2313.18 (Page Supp. 1985) (employer liable for contempt for discharge employee summoned for jury duty); OHIO REV. CODE ANN. § 4101.17(B) (Page 1980) (persons between ages of forty to seventy discriminated against without just cause may file a civil action); OHIO REV. CODE ANN. § 4123.90 (Page 1980) (employer liable in damages for discharging employee who files compensation claim).

¹⁵⁰23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

