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RETHINKING THE RIGHT OF EMPLOYERS TO TERMINATE AT-WILL EMPLOYEES

L. STEVEN PLATT*

"At-will" employees have recently been given a legal basis for suing their employers for wrongful discharge.¹ It remains to be seen whether this right is real or illusory. Like the Emperor's new clothes, the trappings of this new legal doctrine may, due to judicial intransigence, prove more apparent than real.²

The United States is one of the few industrialized nations providing minimal protection for employees working under an employment contract terminable at will.³ Employers of at-will employees have, historically, been able to discharge their employees without notice or cause.⁴ This contrasts sharply with

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1. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). See also discussion concerning recent decisions *infra* notes 10-46 and accompanying text. The difficulty plaintiffs may have in applying *Palmateer* to their situations was recently demonstrated by the Cook County Circuit Court's refusal to apply *Palmateer* to a situation in which an employee was discharged for reporting embezzlement. *Petrik v. Monarch Printing Co. Inc.*, Civ. No. 81-7654 (Cir. Ct. Cook County filed April 13, 1981), *appeal filed*, No. 81-2732 (1st Dist. 1981).

2. See *Ruinello v. Murray*, 36 Cal. 2d 687, 227 P.2d 251 (1951) (oral promise of bonus not enforced); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976) (company manual indicating dismissals only for "good cause" not enforced); *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28 (La. Ct. App. 1975) (oral promise of job security not enforced); Note, *Kelsay v. Motorola, Inc.: Total Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claim*, 12 J. MAR. J. PRAC. & PROC. 659, 664-65 (1979). See generally, Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

3. See, e.g., *Summers, Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 508 (1976). See generally *Peck, Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979).

4. Employees working in the private sector are protected by arbitration provisions which have been held to be enforceable by the courts. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Peerless Laundry Co.*, 51 Lab. Arb. (BNA) 331 (1968) (Eaton Arb.); *Keeny Mfg. Co.*, 40 Lab. Arb. (BNA) 974 (1963) (Donnelly, Arlio, Arb.). See generally M. TROTTA, *ARBITRATION OF LABOR-MANAGEMENT DISPUTES* 230-38 (1974). Civil Service employees are governed by the Civil Service Reform Act of 1978, 5 U.S.C.

the rules governing collective bargaining agreements which generally provide that employees can only be discharged for "just cause."⁵ The rules governing at-will employment are beginning to swing in this direction as a greater percentage of Americans are being hired on an at-will basis.⁶

The common law rule permitting employers to indiscriminately discharge at-will employees has come under attack. Both commentators and courts are finding the common law distinction between protected and at-will employees indefensible.⁷ Recently, some courts have implied that at-will employees can only be terminated in good faith.⁸ Others have either inferred job duration terms or imposed tort liability to protect employees against abusive or retaliatory discharge.⁹ Unfortunately, neither courts nor commentators have been able to develop a coherent doctrine for the imposition of tort or contract liability concerning at-will employees. This failure could lead to judicial unwillingness to either enforce or broaden an "at-will doctrine."

This article will examine the underlying basis for the development of what will hereafter be referred to as the "at-will doc-

§ 7503 (Supp. II 1978). For a discussion concerning the range of protection available to government employees, see J. WEISBERGER, *JOB SECURITY AND PUBLIC EMPLOYEES* 9-19, 45-65 (2d ed. 1973). Constitutional protections can also be invoked. See generally, Lowy, *Constitutional Limitations on the Dismissal of Public Employees*, 43 BROOKLYN L. REV. 1 (1976).

5. See *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967); LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* § 149 (2d ed. 1913); S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1017, at 129-30 (3d ed. 1957).

6. The strength of unions in America has never been weaker than it is today with union workers making up a smaller and smaller percentage of the work force as a whole. Recent census reports indicate that between 60% and 65% of all Americans are now hired on an at-will basis with only 22% in the private sector and only 15% in the public sector being members of an employee union. See BUREAU OF CENSUS, UNITED STATES DEP'T OF COMEMRCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1979*, at 427 (Table 704) (union employed); *id.* at 392 (Table 644) (total labor force); *id.* at 313 (Table 509) (government employees). See also, *supra* note 3.

7. See Peck, *supra* note 3; Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22d ANNUAL CONFERENCE ON LABOR 171 (1970); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975) [hereinafter cited as *Abusive Discharge*]; Note, *Implied Contract Rights to Job Security*, 26 STANFORD L. REV. 335 (1974) [hereinafter cited as *Job Security*]. For an informative article advocating statutory reform as opposed to common law change, see Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

8. See *Fortune v. National Cash Reg. Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

9. See, e.g., *Payne v. AHFI/Netherlands, B.V.*, 522 F. Supp. 18 (N.D. Ill. 1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

trine" by examining recent decisions in this area and their historical antecedents. The parameters of the at-will doctrine will be assessed in light of modern contract and tort principles. Finally, there will be a discussion of whether the creation of job security rights for at-will employees is better handled in either a judicial or statutory framework.

RECENT DECISIONS

The Palmateer and Kelsay Decisions

Recent decisions have held that an employee who is engaged in an at-will employment relationship can only be discharged when the reason for the discharge does not contravene public policy.¹⁰ In *Palmateer v. International Harvester Co.*,¹¹ the Illinois Supreme Court held that a discharge is in derogation of public policy when it strikes "at the heart of a citizen's social rights, duties, and responsibilities."¹² To plead his cause, the victim of wrongful discharge need only allege "that the employer discharge[d] the employee in retaliation for the employee's activities, and that the discharge [was] in contravention of a clearly mandated public policy."¹³

Palmateer represents the logical outgrowth of an earlier Illinois Supreme Court decision, *Kelsay v. Motorola, Inc.*,¹⁴ which, for the first time, recognized retaliatory discharge as a cause of action in Illinois. In *Kelsay*, the plaintiff had filed a workmen's compensation suit after being told by her employer that if she did so, she would be terminated. After filing the claim, Kelsay was terminated. She then filed a lawsuit for retaliatory discharge and was awarded \$1,000.00 in compensatory damages and \$25,000.00 in punitive damages.

The *Kelsay* court, in examining the Workmen's Compensation Act, found that its policy did not preclude a cause of action for retaliatory discharge even though the Act ostensibly functions as the exclusive remedy for actions against the employer.

10. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). See also *supra* note 9.

11. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

12. *Id.* at 130, 421 N.E.2d at 878-79.

13. *Id.* at 134, 421 N.E.2d at 881.

14. 74 Ill. 2d 172, 384 N.E.2d 353 (1978). For a comparison of how the *Kelsay* opinion distinguishes previous court rulings in Illinois, compare *Kelsay, id.*, with *Teale v. Sears, Roebuck & Co.*, 66 Ill. 2d 1, 359 N.E.2d 473 (1976) (criminal penalties in the Illinois Age Discrimination Act, ILL. REV. STAT., ch. 48, §§ 881-887 (1975) were exclusive and did not allow a cause of action for damages). See also *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977).

The court recognized that an action in tort exists for employees terminated for filing a workmen's compensation claim. Further, the court held that "punitive damages [could] properly be awarded in cases such as [*Kelsay*] for retaliatory discharge."¹⁵

Cases In Other Jurisdictions

Palmateer and *Kelsay* followed the approach taken by courts in a number of jurisdictions which allow at-will employees great latitude in actions against their former employers for wrongful discharge. These rulings can generally be grouped into three categories: those requiring employers to discharge at-will employees in good faith;¹⁶ those developing implied-in-fact promises of employment for a specified duration;¹⁷ and those imposing tort obligations protecting employees against abusive or retaliatory discharge.¹⁸

The first of these approaches, the good faith approach, has been used by courts in the First and Second Circuits.¹⁹ Recovery stems from the tortured view that at-will employment

15. 74 Ill. 2d at 189, 384 N.E.2d at 361 (1978). See *supra* note 14. Taken together, the *Kelsay* and *Palmateer* decisions yield the conclusion that it may no longer be realistic to view an employment contract as terminable at will unless otherwise agreed. Another question which is raised by these two decisions is whether a business in Illinois can insure itself against the risk of a wrongful discharge suit and punitive damages stemming therefrom. A recent Illinois decision held that public policy prohibits insurance for punitive damages. See *Beaver v. Country Mutual Ins. Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981).

16. See, e.g., *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977); *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974); *Zimmer v. Wells Management Corp.*, 348 F. Supp. 540 (S.D.N.Y. 1972). See also *Petermann v. International Bhd. of Teamsters Local 396*, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 28 (1959).

17. Some commentators have correctly noted that the search for additional consideration seems highly artificial and runs contrary to the traditional rule that courts should not inquire into the adequacy of consideration. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 4-3, at 136 (2d ed. 1977). The logical conclusion, therefore, is that anything more than nominal consideration supplied by the employee is sufficient to support all of the employer's promises, including the employer's expressed and implied promise not to discharge his at-will employees unjustly. See 3A.L. CORBIN, *CONTRACTS* § 684, at 224 (1960). For cases on point, see *Grauer v. Valve & Primer Corp.*, 47 Ill. App. 3d 152, 154-55, 361 N.E.2d 863, 865-66 (1977) (letter from employer establishing implied promise of job for a definite period); *Carter v. Bradlee*, 245 A.D. 49, 280 N.Y.S. 368 (1935), *aff'd*, 269 N.Y. 667, 200 N.E. 48 (1936); *Delzell v. Pope*, 200 Tenn. 641, 651, 294 S.W.2d 690, 694 (1956) (implying an employment for a fixed term).

18. See, e.g., *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (en banc); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976). The jurisdictions adopting the tort approach with the public policy exception include California, Illinois, Indiana, Michigan, Oregon and West Virginia. See *infra* notes 71-80 and accompanying text.

19. See *supra* note 16.

sounds in contract law. In *Fortune v. National Cash Register Co.*,²⁰ and *Monge v. Beebe Rubber Co.*,²¹ the courts restricted at-will employers to discharges performed in good faith. The Massachusetts Supreme Judicial Court held, in *Fortune*, that the plaintiff's at-will employment was based on a contract that contained an implied covenant of good faith.²² The New Hampshire Supreme Court reached the same result while relying on slightly different reasoning. That court imposed a good faith limitation based on public policy concerning labor relations in the state.²³ While the New Hampshire Supreme Court appears to be unique in applying such a rationale, the good faith requirement is in accord with other decisions.²⁴

A second group of courts has retained the traditional, formalistic position that an employer is generally able to terminate an at-will employee without justification. This group, however, has allowed at-will employees greater opportunity to overcome the obstacle imposed by the traditional view by inferring implied-in-fact promises that the employment would be for a specified duration.²⁵ While this logic is somewhat strained, employees have, under the implied-in-fact theory, succeeded by showing some clear measure of detrimental reliance such as a long distance move or a loss of some job opportunity, based on their belief that the employment would continue for a longer, specified period of time.²⁶ In some instances the courts have interpreted the forbearance of some opportunity as constituting separate consideration for the promise of employment for a specified duration.²⁷ These courts do not, however, appear

20. 373 Mass. 96, 364 N.E.2d 1251 (1977).

21. 114 N.H. 130, 316 A.2d 549 (1974).

22. 373 Mass. 96, 364 N.E.2d 1251 (1977). See also RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Draft No. 5, 1970); cf. U.C.C. § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.").

23. The New Hampshire Supreme Court held that an absolute right to discharge would violate public policy. 114 N.H. at 133, 316 A.2d at 551.

24. See *supra* note 16.

25. See *supra* note 17.

26. See, e.g., *O'Neill v. ARA Servs., Inc.*, 457 F. Supp. 182 (E.D. Pa. 1978) (plaintiff left defendant's competitor relying on a promise that he eventually would be promoted); *Rowe v. Noren Pattern & Foundry Co.*, 91 Mich. App. 254, 283 N.W.2d 713 (1979) (plaintiff left defendant's competitor relying on promise of full job security); *Lubrecht v. Laurel Stripping Co.*, 387 Pa. 393, 127 A.2d 687 (1956) (plaintiff sacrificed other job opportunity in reliance on new job security).

27. See *Brawthen v. H. & R. Block, Inc.*, 28 Cal. App. 3d 131, 104 Cal. Rptr. 486 (1972); *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305 (Iowa 1971); *Chinn v. China Nat'l Av. Corp.*, 138 Cal. App. 2d 98, 291 P.2d 91 (1955) (held that plaintiff's reliance on defendant's inducements constituted sufficient consideration).

ready to interpret statements in company personnel handbooks as constituting a promise of some degree of job security.²⁸

The most logical approach, used by yet a third group of courts, has imposed tort liabilities on employers who wrongfully discharge at-will employees. *Palmateer*, along with a number of courts throughout the country, takes this view.²⁹ In *Agis v. Howard Johnson Co.*,³⁰ waitresses were fired in alphabetical order in an attempt by the restaurant manager to determine who was withholding information concerning the pilfering of food. The court held that such "extreme and outrageous" conduct gave rise to a cause of action for the intentional infliction of emotional harm.³¹

The *Agis* court could have rendered its decision by applying conventional tort law rather than using the at-will doctrine. Other courts, however, have addressed the issue directly by finding tort liability based on a "public policy exception" to the traditional terminable-at-will rule. The leading decision in this area is *Petermann v. Teamsters Local 396*.³²

In *Petermann*, the defendant instructed his employees to commit perjury at a legislative hearing. An at-will employee refused and was fired. The California Court of Appeals, in ruling for the employee, held that the employer's conduct jeopardized public policy and, therefore, constituted an abuse of the at-will right to terminate.³³ The *Kelsay* and *Palmateer* decisions are the logical outgrowth of the *Petermann* decision and in some ways represent the cutting edge in this area of the law.³⁴

28. Compare *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213 (1962) (internal corporate memorandum held not to constitute continuing offer) and *Neth v. General Elec. Co.*, 65 Wash. 2d 652, 399 P.2d 314 (1965) (oral representations made by an employer during a union election campaign held not to be enforceable promises) with *Greene v. Howard U.*, 412 F.2d 1128, 1133 (D.C. Cir. 1969) (contractual obligation created by reliance on faculty handbook) and *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494 (Mo. 1971) (policy regarding severance pay outlined in manual held enforceable promise).

29. See, e.g., *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); *Glenn v. Clearman's Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (en banc). See also Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. Rev. 777, 797.

30. 371 Mass. 140, 355 N.E.2d 315 (1976).

31. *Id.* at 145, 355 N.E.2d at 319.

32. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *Petermann* has been distinguished, however, as a contract action. See *Tameny v. Atlantic Richfield Co.*, 152 Cal. Rptr. 52, 54-55 (Ct. App. 1979).

33. 174 Cal. App. 2d at 188-89, 344 P.2d at 27.

34. See *supra* note 29.

Other courts have adopted the public policy rationale. One court has sustained an employee's tort action against an employer who fired the at-will employee for serving on a jury.³⁵ Another held that an employer wrongfully discharged an employee who had notified his superiors at a bank of customer credit protection law violations.³⁶

The difficulty with these decisions is that while they cite public policy as the rationale for denying employers the right to terminate employees at will, the decisions have not adequately defined the parameters of the public policy rationale. *Palmateer* is particularly deficient in this respect and, without further clarification, allows for potentially frivolous and even vindictive lawsuits. This caveat was articulately expressed by Justice Underwood in his dissent in *Kelsay*:

Henceforth, no matter how indolent, insubordinate or obnoxious an employee may be, if he has filed a compensation claim against an employer, that employer may thereafter discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages, which could well severely impair or destroy the solvency of small businesses.³⁷

While this view is unduly pessimistic, in light of the right of a defendant in Illinois to demand good faith pleadings³⁸ and a more definite statement of the cause,³⁹ it identifies a very real concern in retaliatory discharge actions.

Possibly in response to this concern, a number of jurisdictions frame the public policy exception in the narrowest of terms.⁴⁰ In *Geary v. United States Steel Corp.*,⁴¹ the Pennsylvania Supreme Court held, over a strong dissent, that no clear public policy had been violated by the discharge of a salesman who had alerted his superiors to a potential defect in their product, and had objected to marketing the same.⁴² Similarly, employees have been prevented from utilizing the at-will doc-

35. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

36. *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978).

37. 74 Ill. 2d at 192, 384 N.E.2d at 362 (1978) (Underwood, J., dissenting).

38. See Section 42 of the Illinois Civil Practice Act, which provides that a pleading is not "bad in substance" when it "informs the opposite party of the nature of the claim." ILL. REV. STAT. ch. 110, § 42 (1956).

39. See Section 45 of the Illinois Civil Practice Act, which addresses itself to defects apparent on the face of the complaint. ILL. REV. STAT. ch. 110, § 45 (1956).

40. See *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Tameny v. Atlantic Richfield Co.*, 88 Cal. App. 3d 646, 152 Cal. Rptr. 52 (1979).

41. 456 Pa. 171, 319 A.2d 174 (1974). Judge Roberts, in his dissent, argued that society's interest in protection against unsafe products warranted recognition of a cause of action.

42. 456 Pa. at 175, 319 A.2d 178-79.

trine when discharged for refusing to falsify medical records,⁴³ when objecting to participation in a price-fixing plan,⁴⁴ and when disputing inaccurate corporate representations to the federal government.⁴⁵

While courts have developed a variety of exceptions to the traditional at-will termination right, only the public policy avenue appears to hold real promise, and even that approach has been marked by a distinct lack of clarity. The common thread running through these decisions is general dissatisfaction with the traditional at-will rule. Clearly, the courts recognize that the historical foundation for the at-will rules is insufficient to justify continued recognition of an absolute right of termination in favor of employers.

ORIGIN OF THE AT-WILL RULE AFFECTING EMPLOYERS

As derived from Anglo-Saxon tradition, employment arrangements in America were originally viewed as status-based relationships; the duties and responsibilities of master and servant were imposed.⁴⁶ With the advent of the industrial revolution, this provincial outlook was recast in terms of an emerging contract theory. Instead of the master being responsible for the servants' health, welfare and well-being, the new approach held the employer responsible for only the terms specified in the employment contract.⁴⁷ Those not hired for a definite period of time were presumed to serve at the employer's pleasure.⁴⁸ The at-will rule at that time epitomized the changing nature of the employment relationship, from one that was very personal in nature to one that was highly impersonal.

43. *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977).

44. *Tameny v. Atlantic Richfield Co.*, 88 Cal. App. 3d 646, 152 Cal. Rptr. 52 (1979).

45. *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976). See also *supra* note 1.

46. See, e.g., P. SELZNICK, LAW, SOCIAL AND INDUSTRIAL JUSTICE 123-30 (1969) [hereinafter cited as P. SELZNICK]; Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-22 (1976). For an in depth discussion of the master's obligations in 19th-century America, see 2 J. KENT, COMMENTARIES ON AMERICAN LAW 258-66 (1884).

47. See, e.g., H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1977). See also *Farwell v. Boston & W.R.R.*, 45 Mass. 49, 57 (1842); I A. LARSON, WORKMEN'S COMPENSATION § 4.30, at 25-28 (1978).

48. See generally R. UNGER, LAW IN MODERN SOCIETY 194 (1976); Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942). For a discussion concerning the demise of the contract reasoning theories see Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510, 1529-37 (1980).

The courts, in viewing the employment contract, applied the traditional, formalistic concept that was in vogue in the early 19th Century: manifestation of assent coupled with evidence of a definite, express term.⁴⁹ The at-will rule required a definite, express contract term to enforce a claim of wrongful discharge. As the courts later discovered, however, this approach allowed employers to act with complete, and sometimes abused, discretion.⁵⁰

At the turn of the century the *laissez-faire* attitude toward employment relationships reached its high-water mark in *Adair v. United States*,⁵¹ and *Coppage v. Kansas*.⁵² However, even in these decisions, the Court noted a growing concern by legislators that the concept of freedom of contract between the employer and employee was a cruel illusion because of the disparity in bargaining power between the two.⁵³

The *Adair* and *Coppage* decisions were modified by the Supreme Court in *Phelps Dodge Corp. v. NLRB*⁵⁴ and *NLRB v. Jones & Laughlin Steel Corp.*⁵⁵ In these decisions, the Court recognized that some restrictions should be placed on employer autonomy. The Court in *Jones & Laughlin* was especially concerned about the problems encountered by employees who worked for abusive employers.⁵⁶

Since the turn of the century, there has been a dramatic increase in the number of regulations governing the working environment and protecting individual workers.⁵⁷ Initially, these regulations developed as a response to the gradually increasing power of unions.⁵⁸ Today such regulations arise in response to the needs of the general workforce and exist to control discrimi-

49. See *supra* note 48.

50. See P. SELZNICK, *supra* note 46, at 131.

51. 208 U.S. 161 (1908).

52. 236 U.S. 1 (1915).

53. 236 U.S. at 40-42. For a discussion of the disparity in the bargaining power at the turn of the century in America, see J. GARRATY, *THE NEW COMMONWEALTH 1877-1890*, at 147-56, 174-76 (1968).

54. 313 U.S. 177, 177-87 (1941).

55. 301 U.S. 1, 33-34 (1937).

56. *Id.* See generally Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Llewellyn, *What Price Contract?—an Essay in Perspective*, 40 YALE L.J. 704 (1931).

57. See, e.g., Norris-LaGuardia Act, 29 U.S.C. §§ 101—115 (1976); Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 151—189 (1976); National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151—169 (1976); Railway Labor Act, 45 U.S.C. §§ 151—163, 181—188 (1976); Exec. Order No. 10,988, 3 C.F.R. 521 (1962).

58. See generally W. MALONE, M. PLANT & J. LITTLE, *THE EMPLOYMENT RELATION* 539-49 (1974).

nation in hiring and firing.⁵⁹ They also provide a minimum level of security for workers with seniority and those approaching retirement age.⁶⁰ All these developments evidence a shift from the *laissez-faire* attitude prevailing at the end of the 19th Century, to one that creates mutual expectations and imposes responsibilities on both the employer and the employee.⁶¹

AT-WILL DOCTRINES

Contract Principles

As discussed previously, some courts have expressed the belief that the employment relationship is the outgrowth of contractual bargaining. Underlying this theory is the questionable assumption that each party knows what best serves his interests and, moreover, that each is in a position to freely negotiate on behalf of those interests. One view, critical of this approach, suggests that when the parties are in unequal bargaining positions, traditional contract theories cannot apply.⁶² Courts which adopt this view have utilized "judicial interference" as a balancing force to eliminate unconscionable terms or conditions imposed by the stronger party.⁶³ Courts which adhere to the judicial intervention approach view the bargaining situation as one in which the employer offers the job on a take-it-or-leave-it-basis, allowing the employee virtually no latitude within which to negotiate. The resulting employment relationship allows the employer to terminate the employee solely at the employer's discretion. Contract theory courts view such terminable-at-will contracts as unconscionable, thus permitting employee redress under traditional contract theories.⁶⁴

59. See, e.g., Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2,000e-2 (1976).

60. Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1976).

61. See I.C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 359 (2d ed. 1913); 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967); see also *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123 (10th Cir.), cert. denied, 345 U.S. 941 (1953); *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

62. See, e.g., Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 236-38 (1973).

63. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (1969).

64. See RESTATEMENT (SECOND) OF CONTRACTS § 235 (Tent. Draft No. 5, 1970); U.C.C. § 2-302 (unconscionability). The difficulty with this approach is that it does not address the central issue of the at-will employment relationship. That issue is the inherently unequal position that the employer has in relation to the employee. See Trebilcock, *The Doctrine of Unequal*

In viewing the at-will employment relationship as involving an implied or express contract, courts often contradict themselves. On the one hand, they reform contracts to equalize bargaining positions; on the other hand, they assume that the parties are fully aware of the risks and have assumed those risks. In fact, the at-will employee probably knows a lot less about the strength or weakness of his bargaining position than does an employee represented by a union. It is likely that if the implied contract theory prevailed, employers would require employees to sign waivers regarding wrongful discharge.⁶⁵

The lack of bargaining power and insecurity inherent in an at-will arrangement contrasts sharply with the job security guaranteed by collective bargaining. Theoretically, the union acts not only as an information-gathering force, but also as a protector against wrongful discharge.⁶⁶ According to a recent estimate, roughly ninety percent of the collective bargaining agreements now in force in the United States limit the power of the employer to discharge employees.⁶⁷ Unions can also be expected to negotiate on all other terms concerning the employment relationship, particularly such elements as the duration of the contract and the requirement that the contract be terminated only in good faith.⁶⁸

Tort Principles

From a theoretical standpoint, a tort theory approach makes more sense than a contract theory approach. The tort approach views the employer as owing his employees a duty to deal with

Bargaining Power: Post-Benthamite Economics in the House of Lords, 29 U. TORONTO L. J. 359, 382-83 (1976). *But see* *Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 214 N.Y.S.2d 353, 174 N.E.2d 463 (1961) (employee bargained for job security and arbitration).

To a certain extent, the at-will employee has the discretion to either accept the job on the terms offered or seek employment elsewhere. By attempting to balance the unequal bargaining power of the parties by judicial interference, the courts will never change the over-all bargaining positions of the parties except on a fragmentary and interstitial basis. On occasion, employees are able to negotiate effective contractual protection, but these examples are few and far between. *See* *Keating v. BBDO Int'l, Inc.*, 438 F.2d 676 (S.D.N.Y. 1977); *Geib v. Alan Wood Steel Co.*, 419 F. Supp. 1205 (E.D. Pa. 1976); *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 266 N.W. 872 (1936).

65. *See generally* Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 216-52 (1968).

66. *See* 2 *Collective Bargaining, Negotiation & Contracts* (BNA) 40:1 (1979).

67. *Id.*

68. *See* SPECIAL TASK FORCE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *WORK IN AMERICA* 166 (1972).

them fairly and in good faith.⁶⁹ By breaching this duty the employer opens himself up to liability for damages, *i.e.*, compensation for the employee's cost and inconvenience of searching for a new job, family stress and embarrassment from loss of status.⁷⁰

The difficulty with imposing tort liability is definitional. Lacking clearly delineated limits to the right of action for retaliatory discharge, the courts are faced with the task of weeding out or preventing frivolous, even vindictive, litigation.⁷¹

The courts have addressed this concern by limiting the tort to discharges which violate "public policy."⁷² Unfortunately, this public policy limitation has not been precisely defined.⁷³ Some jurisdictions have held that public policy is that which is to be found in the constitution or statutes of the state where the case arises.⁷⁴ Others have held that public policy is that which either conflicts with present-day morals, or contravenes an established societal interest.⁷⁵

Illinois law, under *Kelsay* and *Palmateer*, defines public policy as being, at least, those acts which strike "at the heart of a citizen's social rights, duties and responsibilities."⁷⁶ There is a sound basis in those decisions for utilizing a policy approach. The preamble to the United States Constitution addresses itself

69. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 179, 384 N.E.2d 353, 356 (1979). See also UNITED STATES MANPOWER ADMINISTRATION, DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-6 (1980).

The imposition of tort liability would help to spread more equitably the costs and risks of wrongful discharge. To a certain degree, the costs to employers who arbitrarily discharge employees involve a waste of training and a loss of both manpower, continuity in the work force, and expertise. The imposition of tort liability shifts some of the risks equally among both employers and employees. See *infra* note 71.

70. See Katz & Hight, *The Economics of Unemployment Insurance: A Symposium*, 30 INDUS. LAB. REL. REV. 431 (1977).

71. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). See *supra* note 37.

72. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); see *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); see also *Abusive Discharge*, *supra* note 7, at 1441-42.

73. See England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers For Reform*, 16 ALTA. L. REV. 470, 501-02 (1978); *Job Security*, *supra* note 7, at 363.

74. See, *e.g.*, *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). See also Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 797.

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

76. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). But see *Petrik v. Monarch Printing Co. Inc.*, Civ. No. 81-7654 (Cir. Ct. Cook County filed April 3, 1981), appeal filed, No. 81-2732 (1st Dist. 1981).

to principles of justice, domestic tranquility and general welfare. Similarly, the Bill of Rights establishes the foundation of the American criminal justice system. As part of the criminal justice system, it is in the best interest of society to encourage individuals having knowledge of criminal activity to come forward and assist law enforcement agencies. While governments are constituted to secure the rights of the people and to protect property,⁷⁷ the people have a corresponding duty to provide information concerning violations of the law.⁷⁸ The court in *Palmateer* addressed itself to this consideration and held that the defendant, International Harvester Company, violated public policy by discharging Ray Palmateer for providing information to the police concerning criminal conduct by an International Harvester employee.⁷⁹

A similar approach was followed in *Petermann v. International Brotherhood of Teamsters*⁸⁰ where the California court held that it violated public policy for the defendant to discharge an employee for refusing to give perjured testimony:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. . . . [T]o fully effectuate the state's declared policy against perjury, the civil law . . . must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law. . . .⁸¹

Other courts, focusing on the public policy concept, have reached similar conclusions.

In contrast, where no clear public policy interest has been violated, courts have been reluctant to intervene.⁸² Judicial reluctance has been particularly strong when the dispute involves internal management affairs.⁸³ Where the internal dispute in-

77. See, e.g., ILL. CONST. art. I, §§ 1, 23.

78. *Id.*

79. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

80. 174 Cal. App. 2d 184, 344 P.2d 25 (1979).

81. *Id.* at 187, 344 P.2d at 27.

82. See *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976); *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Tameny v. Atlantic Richfield Co.*, 88 Cal. App. 3d 646, 152 Cal. Rptr. 52 (1979).

83. *Ruinello v. Murray*, 36 Cal. 2d 687, 227 P.2d 251 (1951) (oral promise); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976) (company manual); *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28 (La. Ct. App. 1975) (oral promise of job security). See also Comment, *Kelsay v. Mo-*

volves a difference of opinion regarding planning and design matters, however, courts have intervened when the decision would have a substantial impact on the general public.⁸⁴ Aside from the public policy limitation, courts viewing wrongful discharge in the tort context have not developed any consistent theme or purpose.⁸⁵

JOB SECURITY

What is the most feasible manner by which at-will employees can be protected? It is submitted that employee job security would be better protected by statute than by judicial decision.

As discussed above, courts have had great difficulty in deciding whether the concept of wrongful discharge is better handled as an implied contract or as a tort. While the tort approach has proved more workable, courts applying tort principles to the concept of wrongful discharge have had difficulty applying the public policy rationale.⁸⁶

A better approach would be to review the experience of other industrialized nations. West Germany, for example, has rejected the concept that the employer of an at-will employee can discharge his workers with impunity. Instead, it has imposed broad standards prohibiting "unjust discharges."⁸⁷ To enforce this policy against unjust discharges, special labor tribunals have been created to review cases of alleged abuse.⁸⁸ Similarly, Japan guarantees workers in large firms a lifetime of job security;⁸⁹ workers in smaller firms are protected by stat-

torola, Inc.: *Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims*, 12 J. MAR. J. PRAC. & PROC. 659, 664-65 (1979).

84. Geary v. United States Steel Corp., 456 Pa. 171, 185, 319 A.2d 174, 180 (1974) (Roberts, J., dissenting); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 356 A.2d 119 (1978). See also Perry v. Hark Mountain Corp., Civ. No. IP 81-631-C (S.D. Ind. April 28, 1982).

85. See, e.g., Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-06 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

86. See, e.g., Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); see also Hinrichs vs. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (Jones, J., dissenting).

87. AN ACTION TO PROVIDE PROTECTION AGAINST UNWARRANTED DISMISSALS, BGB1 499 (1951); G. HALLETT, *THE SOCIAL ECONOMY OF WEST GERMANY*, 90 (1973).

88. See H. ROBERTS, V.H. OKAMOTO & G. LODGE, *COLLECTIVE BARGAINING AND EMPLOYEE PARTICIPATION IN WESTERN EUROPE, NORTH AMERICA AND JAPAN*, 75-84 (1979) [hereinafter cited as ROBERTS, OKAMOTO & LODGE, *COLLECTIVE BARGAINING*].

89. *Id.* See E. VOGEL, *JAPAN AS NUMBER 1: LESSONS FOR AMERICA*, 131-57 (1979).

ute.⁹⁰ Those who view Japan's post-war economic miracle with envy have pointed to job security as a contributing factor in the high degree of worker productivity.⁹¹

In this country, statutory standards could be adopted providing protections similar to those under the Civil Service Act.⁹² The standards might focus on such factors as good faith, length of service, job performance and valid employer criteria such as economic conditions or employer needs.⁹³ A system of arbitration could be developed similar to that which currently exists in such areas as labor relations and employment discrimination.⁹⁴ To avoid frivolous charges, employees could be required to demonstrate either bad faith in termination or good faith on the part of the party bringing the action. A statutory approach would apprise both the employer and the employee of their respective rights and duties. Such a framework would stabilize employment relationships and might increase employee loyalty.

The judicial approach is likely to be ineffective because the doctrine would be defined by slowly developing case law.⁹⁵ This process has, thus far, produced varying and sometimes inconsistent interpretations of the parameters of the at-will doctrine. With their superior financial position, employers could, through protected and costly litigation, utilize these varying judicial decisions to distort the intent and meaning of the doctrine. Prospective plaintiffs are likely to be prevented from exercising their new-found rights, through either outright rejection of the wrongful discharge concept,⁹⁶ or by emasculation of the doctrine.⁹⁷

90. See Rōdō Kkjunhō (Labor Code), Law No. 49 of 1947, Art. 20; Judgment of Sept. 24, 1956, Dist. Ct., Tokyo, 7 Rominshū 957 (Collected Labor and Civil Code Cases).

91. ROBERTS, OKAMOTO & LODGE, COLLECTIVE BARGAINING, *supra* note 88.

92. See Civil Service Reform Act of 1978, 5 U.S.C. § 7503 (Supp. II 1978).

93. See generally B. MELTZER, LABOR LAW 784-86 (2d ed. 1977).

94. D. EWING, FREEDOM INSIDE THE ORGANIZATION 38 (1977).

95. See T. CUMMINGS & E. MOLLOY, REPORTING PRODUCTIVITY AND QUALITY OF WORK LIFE, 103-09 (1977); J. GALBRAITH, THE NEW INDUSTRIAL STATE, 128-55 (2d rev. ed. 1971). One of the problems sought to be alleviated by the courts in recognizing unjust termination as a viable cause of action, is the unfair bargaining position of the employers, vis-à-vis, the employee. See Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247, 1266-81 (1967).

96. Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1132 (Ala. 1977).

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

CONCLUSION

While courts have recognized that at-will employees have certain rights protecting them against wrongful discharge, application of the at-will doctrine has been inconsistent. Indeed, if there is a pattern to the decisions dealing with wrongful discharge, it is that those courts applying tort concepts have defined the tort in terms of public policy. Although the public policy limitation appears to be a promising approach, it is invoked in but a handful of jurisdictions.⁹⁸ Those seeking to avail themselves of this newly created right must be aware that, in the absence of statutory intervention, the likelihood of success is not great, and that at this time the right, like the Emperor's new clothes, may be more illusory than real.

98. *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (en banc); *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978).