Course Announcement for Students Registered for
Employment Law—Job Security & Rights

Spring Quarter 2010
Prof. Karl Klare

1. The syllabus will be distributed at the first class session.

2. The course materials consist of one course-packet to be purchased at Gnomon Copy.

3. There is a reading assignment for the first class session. For your convenience, I have reprinted the first-day readings below. The assignment is—

Blackstone, Commentaries, excerpt
Turner
Note, Employment-at-will
Payne
Wood's Rule
Restatement § 2.01 & accompanying notes
Compare: Civil Rights Act of 1964, § 703(a)
N.H. man loses job over 35¢ & notes

Excerpt from from Thomas M. Cooley's
I William Blackstone, Commentaries on the Laws of England
ed. by James DeWitt Andrews (4th ed. 1899) (notes omitted)

Of Master & Servant

[*425 . . .] 1. **Classes of servants**.—The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra mœnia* (within the walls), or domestics. The contract between them and their masters arises upon the hiring. 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: but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married one, under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry, and no master can put away his servant, or servant leave his master, after being so retained, wither before or at the end of his term, without a quarter's warning; unless upon [*426] reasonable cause, to be allowed by a justice of the peace, but they may part by consent, or make a special bargain.

2. **Apprentices**.—Another species of servants are called *apprentices* (from *apprende*, to learn), and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery, and sometimes very large sums are given with them, as a premium for such their instruction; but it may be done to husbandmen, nay, to gentlemen, and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them, and it is held that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion; for which purposes our statutes have made the indentures obligatory, even though such parish-apprentice be a minor. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions, who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice; and parish-apprentices may be discharged in the same manner, by two justices. But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction, for the same, at any time within seven years after the expiration of his original contract.

3. **Laborers**.—A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia*, as [*427] part of the family; concerning whom the statues before cited have made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work. 2. Defining how long they must continue at work in summer and in winter. 3. Punishing such as leave or desert their work. 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages; and, 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

4. **Quasi-servants**.—There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial capacity; such as *stewards*, *factors*, and *bailiffs*: whom, however, the law considers as servants *pro tempore* (for a time), with regard to such of their acts as affect their master's or employer's property . . . .

TURNER V. MASON
14 M. & W. 112, 153 Eng. Rep. 411 (1845)

ASSUMPSIT. The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would become the servant of the defendant, to wit, in the capacity of housemaid, for certain wages, to wit, the wages of 7*l.* for the year, the defendant promised the plaintiff to employ her in that capacity, and for the wages aforesaid, and to continue her in such situation until the expiration of a month after notice or warning given by the plaintiff or defendant, or either of the, to put an end to such service; and that, in case the defendant should put an end to such service without such notice or warning, he should pay to the plaintiff the said wages for a month. It then alleged that the plaintiff became the servant of the defendant upon the terms aforesaid, and that, although she was ready and willing to continue in such service, yet the defendant discharged her without such notice or warning as aforesaid. Plea, that before the defendant discharged the plaintiff . . . the plaintiff requested the defendant to give her leave to absent herself from his dwelling-house, and from his said service and employ, during the then ensuing nights, and until the following day, and thereupon the defendant then refused the said plaintiff such leave as aforesaid, and forbade her from absenting herself from the said dwelling-house, or from his said service or employ; and the said plaintiff then, without the leave and license and against the will of the defendant, and disregarding her having been so forbidden as aforesaid, left the said defendant's dwelling-house, and his said service and employ, and absented herself therefrom . . . during the following night, and until the following day, and therefore the defendant did then discharge the plaintiff from his said service and employ . . . .

Replication, that just before the said time when the plaintiff so requested the defendant to give her leave to absent herself from his said dwelling-house, and from his said service and employ . . . one Hannah Turner, the mother of the plaintiff, had been seized with sudden and violent sickness, and was then in imminent peril of death, and by reason thereof the said H. Turner believed herself likely to die, and being anxious to see the plaintiff before her death, had then requested the plaintiff to visit her, whereupon the plaintiff . . . requested the defendant to give her leave to absent herself from his said dwelling-house, and from his said service and employ, during the then ensuing night and until the following day . . . for the purpose of enabling the said plaintiff to visit her said mother in her said sickness, and to see her before her death; she the plaintiff not being hereby likely to cause any injury or hindrance to the said defendant in his domestic affairs and business, and not intending to be thereby guilty of any improper omission, or of any unreasonable delay of her duties as such servant; and because the defendant then wrongfully and unjustly forbade her from so absenting herself from his said dwelling-house, and from his said service and employ, she the plaintiff, for the purpose of visiting her said mother in her said sickness, and seeing her before her death . . . left the defendant's said dwelling-house, and his said service and employ, and absented herself therefrom . . . for the time in the said plea mentioned . . . and for no other or longer period, or for no other or different purpose, she the said plaintiff not thereby causing any injury or hindrance to the defendant in his said domestic affairs or business, not being thereby guilty of any improper omission or unreasonable delay of her duties as such servant of the said defendant as aforesaid, as she lawfully might for the cause aforesaid . . . .

POLLOCK, C.B.:

I am of opinion that [the employer's] plea is perfectly good. It discloses an order, in itself perfectly lawful, by the master of a servant, that she shall not leave his house for the night; and alleges that, notwithstanding that order, she did leave his house and his service, and stayed out all night. She had no right, against his will, to leave his service at all. The plea is therefore a good plea. Then the [employee's] replication . . . . does not state that she gave the defendant any notice of the purpose for which she desired to absent herself, or that her doing so was of advantage or use to her mother, but merely that it was to visit her that she might see her before her death. It is very questionable whether any service to be rendered to any other person than the master would suffice as an excuse: she might go, but it would be at the peril of being told that she could not return . . . .

PARKE, B.:

I am of the same opinion. The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. It was laid down by [case citations omitted] that the willful disobedience of any lawful order of the master is a good cause of discharge. Here the plea discloses a perfectly lawful order, namely, that the [plaintiff] should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. *Prima facie*, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to show that the defendant had any notice or knowledge of the mother's illness. It is therefore clearly bad, and our judgment must be for the defendant.

ALDERSON, B.:

. . . . [T]he replication . . . . is informal, because it does not show that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But if this were otherwise, these circumstances would amount only to a mere moral duty, and do not show any legal right. We are to decide according to the legal obligations of parties. Where is a decision founded upon mere moral obligation to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties. There may, undoubtedly, be cases justifying a willful disobedience of such an order; as where the servant apprehends danger to her life, or violence to her person, from the master; or where, from an infectious disorder raging in the house, she must go out for the preservation of her life. But the general rule is obedience, and willful disobedience is a sufficient ground of dismissal . . . . [Opinion of Rolfe, B, omitted.]

Judgment for the defendant.

EMPLOYMENT-AT-WILL

The most common form of the employment relationship in the United States today is a legal arrangement known as "employment-at-will." By contrast, almost every other advanced industrial democracy rejects employment-at-will.

At-will employment is conceived to be a contract. The **duration** (or **term**) of the contract is **indefinite**, meaning that the contract continues indefinitely unless and until it is terminated by one of the parties. A contract for employment at-will may be terminated at any time by either party without advance notice for a good reason, a bad reason, a mistaken reason, a false reason, or no reason at all. The party terminating the contract is not obliged to state a reason for doing so; indeed, the terminating-party need not even *possess* a reason.

There are only two exceptions—both quite modern—to the rule that at-will employment may be terminated at any time for any reason or for no reason. 1. An employer may *not* discharge an employee, even an at-will employee, for a reason that violates a *statute* (e.g., the Civil Rights Act of 1964, which, where applicable, prohibits race, gender, and other, specified forms of invidious employment discrimination). 2. A large majority of US jurisdictions also now hold that an employer may *not* discharge an employee, even an at-will employee, for a reason that violates *public policy*.

Theoretically, the right to terminate at-will employment is *reciprocal*, that is, *either* party may terminate the relationship at any time, with or without cause. However, most modern legal disputes concern the employer's termination of the contract by discharging an employee.

At-will employment is not mandatory. The at-will rule is a *presumption applied in the course of contract interpretation*. It is sometimes referred to as a **default rule** of interpretation. The rule holds that, *where the parties to an employment contract do not specify terms other than or in conflict with an at-will relationship, they are deemed to have intended to create an at-will relationship*. The parties are free to specify any other lawful terms for the employment relationship they wish. The at-will rule kicks in when courts must interpret an employment contract that is silent on questions of duration and job security.

"At will" became a dominant principle of US employment law during the second half of the 19th century, a development paralleled by the emergence of other common law "building blocks" such as the consideration doctrine, the objective will-theory of contract, the negligence principle, the reasonable man [sic] standard, contributory negligence, assumption of risk, and the fellow-servant rule. With the exceptions noted, at-will remains the default presumption in every US jurisdiction except Montana, Puerto Rico, and the US Virgin Islands.

PAYNE v. WESTERN & ATL. RR CO.
81 Tenn. 507, 49 Am.Rep 666 (1884),
overruled on other grounds,
Hutton v. Watters, 132 Tenn. 527, 179 SW 134 (1915)

INGERSOLL, Sp. J., delivered the opinion of the court.

[Editor's note: Many of the railroad's employees shopped at a store owned by Payne and located near the railroad's tracks leading into Chattanooga, Tennessee. Apparently, ill-will developed between Payne and Anderson, a high-level manager (and legal agent) of the railroad. Payne alleged that Anderson and others embarked upon a malicious con-spiracy to ruin his business. The core allega-tions were that Anderson announced that he would discharge any employee of the rail-road who shopped at Payne's store; that rail-road employees were intimidated by this threat and ceased doing business with Payne; and that his business was thereby ruined. The defendants moved to dismiss for failure to state a claim. They argued that they had a legal right to discharge employees for trad-ing with plaintiff, or for any reason what-ever, or for no reason at all, and therefore it could not be unlawful to threaten to do so, even maliciously. The trial court sustained the demurrer and dismissed the suit. The case then went before "referees" (in effect, an intermediate appellate tribunal) who recommended reinstatement of the action. The state supreme court had to decide whether, on the facts alleged, plaintiff had stated a claim for tort liability for injurious interference with another person's business relations. Along the way to its conclusion, the court addressed the issue of whether the railroad had the right to fire employees (or to threaten to do so) because they traded with the plaintiff.]

. . . . Plaintiff . . . denies that the defendants had the right to discharge or threaten to discharge employes[*] for trading with him, because the concession of such authority and its exercise by strong corporations and large manufacturers would unfairly defeat and destroy competition, and tend to create monopoly in trade; whereas, the law should discourage the latter and foster the former . . . .

The novelty, interest and importance of the questions demand a careful examination of the cases and the principles involved. The case turns upon the common law. The first question is: Is it unlawful for one person, or a number of persons in conspiracy, to threaten to discharge employes if they trade with a certain merchant? Would it be unlawful to discharge them for such reason? if not, it surely would not be unlawful to "threaten" it.

If the employes are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employe an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employe's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie even to the employe; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action could accrue either to employe or stranger for breach of contract; for no contract is broken. If the act is unlawful it must be on other grounds than breach of contract, as,

[*] Editor's note: in older cases, "employee" is often spelled "employe" or "employé."

that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business.

For any one to do this without cause is censurable and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And, if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them he might fail in business. On the contrary, my own dealings may be so important that, if I cease to trade with him, he must close his doors. Shall my act in keeping away a hundred of my employes be unlawful, because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own custom?

Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left, without interference to buy and sell where they please, and to discharge or retain employes at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the employer. He may refuse to work for a man or company, that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or he may yield to the demand and withdraw his custom or cease his dealings, and the obnoxious person be thus injured or wrecked in business. Can it be pretended that for this either of the injured parties has a right of action against the employes? Great loss may result, indeed has often resulted from such conduct; but loss alone gives no right of action. Great corporations, strong associations, and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition, and foster monopolies, and thus greatly injure individuals and the public; but power is inherent in size and strength and wealth; and the law cannot set bound to it, unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity or quality. The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose; they may refuse to employ or dismiss whom they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others.

Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. A fortiori they may "threaten" to discharge them without thereby doing an illegal act, per se. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employes. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is em-

ployment. The law leaves employer and employe to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employe may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary, irresponsible and intolerable as that exercised by Scroggs and Jeffreys[*] . . . .

. . . . A majority of the court, therefore, conclude that the act done, i.e., the publication of the notice that the company would discharge employes who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and, though done wickedly and maliciously, and in pursuance of a wicked design, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner.

The report of the Referees will therefore be set aside, and the judgment of the circuit court affirmed.

[Freeman, J., with whom Turney, J. concurred, dissented. They agreed with the majority that the railroad had a legal right to discharge an at-will employee for shopping at Payne's. But, contrary to the majority, they maintained that tort liability can arise where an act that is otherwise legal is performed without justification and with malicious intent to injure another. Thus, the dissent challenged the majority on a point of tort law, but not on the basic assumptions of employment law.]

. . . . So here is an act threatened and done which of itself might be lawful, that is to discharge the employe, but when you add a conspiracy to do so in all cases if the parties trade with another and thus injure him, and to do this with that purpose, here is an act done directly with the evil intent that injures another, and much more should the party respond in damages for it. Whenever there is an act done with the purpose to injure another, and not simply in the exercise of one's legal right and that injury is produced, and the means used naturally tend to the end designed, then for that injury the party should be held responsible, even though the act with no such purpose, and no such result might be lawful . . . .

. . . . It is argued that a man ought to have the right to say where his employes shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reasons for what he has done; that the trader was unworthy of patr-onage; that he debauched the employe, or sold, for instance, unsound food, or any other cause, that affected his employes' use-fulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employe for good cause, or without any reas-on assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold the thr-eat over the employe in terrorem to fetter the freedom of the employe, and for the purpose of injuring an obnoxious party.

Such conduct is not justifiable in morals, and ought not to be in law, and when the injury is done as averred in this case the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer, an improper and injurious use is all it forbids.

[*] Editor's note: Sir William Scroggs and Baron George Jeffreys were 17th century English judges. Jeffreys' ruthless conduct of criminal trials of the Crown's political enemies earned him the nickname, "the Hanging Judge." Scroggs was notoriously abusive toward Roman Catholics.

In view of the immense development and large aggregations of capital in this favored country – a capital to be developed and aggregated within the life of the present generation more than a hundred fold – giving the command of immense numbers of empolyes, by such means as we have before us in this case, it is the demand of a sound public policy, for the future more especially, as well as now, that the use of this power should be restrained within legitimate boundaries. Take for instance the larger manufacturing establishments of the country – of which we will in time have our full share, when thousands upon thousands of hard-working operatives will be employed. It will be to their interest to have free competition in the purchase of supplies for their wants, and its beneficial influences in keeping prices at the normal standard. The merchant and groceryman, and other traders should be untrammelled to furnish these, and the employes untrammelled in the exercise of his right to purchase where his interest will best be subserved. If, however, these masters of aggregated capital can use their power over their employes as in this case, all other traders except such as they choose to permit will be driven away or crushed out, and their capital probably alone have a monopoly to furnish his employes at his own rates freed from competition. The result is that capital may crush legitimate trade, and thus cripple the general property of the country and the employe be subject to its grinding exactions at will.

The principle of the majority opinion will justify employers, at any rate allow them to require employes to trade where they may demand, to vote as they may require, or do anything not strictly criminal that employer may dictate, or feel the wrath of employer by dismissal from service. Employment is the means of sustaining life to himself and fam-ily to the employe, and so he is morally though not legally compelled to submit. Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced, but public policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may escape or overleap these boundaries, should be carefully but judiciously guarded. For its legitimate uses I have perfect respect, against its illegitimate use I feel bound, for the best interests both of capital and labor, to protest.

. . . . I therefore think the action prima facie maintainable, and the demurrer should be overruled.

Note and Questions

Payne holds that an employer may "discharge or retain employes at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se" (page 1-3, left-hand column (indicated "1-3L")). There is some controversy as to whether *Payne* and similar cases of the era followed settled law or made new law. In any event, was *Payne* correctly decided? If the Tennessee Supreme Court faced the same case today, should it overrule *Payne*? If so, what rule should it substitute for the "at-will" principle?

Wood's Rule

From Horace Gay Wood, A Treatise on the Law of Master & Servant (John D. Parsons, Jr., Publisher: Albany, NY, 1877; facsimile reprint, William S. Hein & Co: Buffalo, NY, 1981) (notes omitted).

§ 134. General hiring. –

. . . . [T]he rule [in the United States, as compared to England] is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants. But when from the contract itself it is evident that it was the understanding of the parties that the time was to extend for a certain period, their understanding, fairly inferable from the contract, will control. Thus if A agrees with B to work for him eight months for $104, or $13 a month, this will not only be treated as a contract for eight months' service, but also as an entire contract, performance of which is a condition precedent to a recovery of any portion of the wages, and in *all* cases where a definite term is fixed, the fact that the wages are to be at so much a month, and no time is fixed for a payment of the wages, does not make the contract divisible, and full performance is a condition precedent to a recovery of wages. Thus, in one case, the defendant contracted to work for the defendant seven months, at $12 a month, and it was held an entire contract, and that no part of the wages could be recovered until the contract was fully performed, or performance is waived or prevented by the defendant. So where the contract is to work at so much a day for one month or any other period, or at so much a month for six months, no time being fixed for payment, full performance is a condition precedent to a right thereto . . . .

Restatement of the Law (Third), Employment Law[*]
Tentative Draft No. 2 (2009)[1]

Chapter 2. Termination

§ 2.01 Default Rule Of An At–Will Employment Relationship

Unless a statute, other law or public policy or an agreement or binding promise or statement under § 2.02 limits the right to terminate, either party may terminate an employment relationship with or without cause.

Comment:

a. Rebuttable presumption of at-will employment. At its core, employment is a contractual relationship. All contracts need default rules that provide starting points for bargaining between the parties and that control in the event different rules are not supplied in the contract or by law. The courts in 49 states and the District of Columbia recognize the principle that employment is presumptively an at-will relationship. (The sole exception is Montana, which by statute requires "good cause" for an employer's termination of a nonprobationary employee.) The at-will presumption states a default rule that applies when the agreement between the parties or other binding promise or statement under § 2.02 does not provide for a definite term or contain a limitation on either party's power to terminate the relationship.

Illustrations:

1. Employer X and employee E enter into an employment agreement providing for a one-year term, renewable for an additional year if neither party serves the other with at least 30 days' notice prior to termination of the one-year period. Two months into the relationship, X terminates the agreement. X is subject to liability for breach of contract (10 months of pay subject to mitigation of damages) because the parties' agreement provides for a definite term, which overcomes the presumption of at-will employment . . . .

2. Employer X and employee E enter into an employment agreement providing for a $50,000 "annual salary" plus benefits. Two months into the relationship, X serves E with notice of termination of the agreement. X is not, without more, in breach of contract because this agreement is presumed to provide only for at-will employment. The statement of employment at an annual rate of salary does not, standing alone, guarantee a year's employment or otherwise overcome the presumption of at-will status.[2]

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[*] As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

[1] Editor's note: The ALI commissioned this draft in connection with its Third Restatement project. However, Employment Law was not treated as a separate subject in the earlier Restatements. Formalities aside, this is the first restatement of the subject.

[2] Editor's note: Compare Wood, Law of Master & Servant [1877] § 134, reprinted in the course materials, stating: "A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no

b. Contrary agreement. Agreements and binding employer promises or statements that would overcome the presumption of at-will employment are discussed in § 2.02. An example is provided in Illustration 1 above.

c. Statutory provision. The at-will default rule serves to guide courts in evaluating the rights and obligations of the parties under their agreement; it does not supersede controlling legislation. Virtually all legislation regulating the employment relationship restricts to some extent the kinds of adverse employment decisions employers may make. To take an important example, many statutes bar employers from making adverse decisions against employees because the employees exercise a right under those laws by filing a claim or participating in investigatory and enforcement proceedings authorized by the law. Section 2.01 should be read in a manner consistent with such statutory restrictions. (See also § 4.02(c).) . . .

d. Other law or public policy. In addition to statutory restrictions of the type illustrated above, in some cases a well-established public policy may also supply a basis for limiting the employer's power to terminate an at-will employment relationship. The tort of wrongful discipline in violation of public policy is discussed in Chapter 4. Although in many cases the source of public policy is legislation, some jurisdictions have recognized in appropriate cases non-statutory sources of public policy such as decisional law and certain established principles of professional or occupational responsibility; this development is discussed further in § 4.03. Section 2.01 should be read in a manner consistent with such public-policy limitations.

e. Termination. The at-will presumption applies not only to employer discharges of employees but also to other adverse employer actions or decisions falling short of discharge, including those that reasonably elicit a resignation from the employee. Compensation and benefits issues are treated in Chapter 2.

Illustration:

4. Employer X enters into an at-will employment agreement with employee E, providing that E will function as a marketing representative and will be paid at a rate of $50,000 per year plus benefits. Two months into the relationship, X announces that because of declining demand for X's product, E will henceforth be paid at the annual rate of $40,000 plus benefits. E continues to work and sues for breach. Because no contractual, statutory, or public policy restriction applies, X has not breached the at-will agreement by reducing E's salary prospectively. (Note: This Illustration rests on the premise that no nonmodifiable employee entitlement was created to the prior $50,000–per-year salary rate.) The same result is reached if E quits and sues for breach. (Note: Under these circumstances, the reduction may be regarded as a "constructive discharge" for purposes of the unemployment insurance laws, and E may thus be able to receive unemployment benefits even though employees who voluntarily quit are typically excluded from such benefits.) . . .

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presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve" (note omitted).

REPORTERS' NOTES

Comment a . . . . [T]he at-will default rule is presently recognized in 49 states and the District of Columbia. Montana is the only U. S. state to have enacted a statute requiring a showing of "good cause" for all employer terminations of an employee's employment effected after the employee has completed a probationary period . . . . Since 1930 Puerto Rico by statute requires "just cause" for discharge of employees working under an indefinite term of employment. The exclusive remedy for a termination without cause is monetary compensation based on years of service; reinstatement is not an authorized remedy. See Puerto Rico Law 80, 29 L.P.R.A. § 185a . . . . Attempts at changing U.S. law have not been successful. In 1991, the National Conference of Commissioners of Uniform State Laws approved, and circulated to the states for their consideration, a "Model Employment Termination Act" that provided a statutory requirement of "good cause" for an employer's termination of an employee. As of March 2009, no jurisdiction has adopted the Model Act . . . .

While the positive law is well settled, there is a continuing debate among commentators concerning whether the at-will default rule is sound policy . . . . Critics highlight the unfairness of allowing employers to make adverse decisions of considerable importance to employees and their families without having to demonstrate cause before a neutral arbiter. They note that employees often labor under the misconception that employers in fact do not have the legal authority to discharge or discipline without cause. Moreover, they suggest that because of the prevalence of statutory restrictions on employers, coupled with the many exceptions to the at-will rule that will be treated in this Restatement, employers as a practical matter assume their employment decisions are subject to regulatory or judicial scrutiny, and hence will be able to adjust to a cause regime without difficulty . . . .

Several justifications have been offered for the at-will default rule. The first is that the rule reflects the background assumptions of the parties to the employment contract, and if the parties want a different rule governing termination, they are free to negotiate it . . . . This rationale has been challenged by some writers who point to limited survey evidence that employees believe they have rights against termination without cause when in law they do not. See, e.g., Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At–Will World, 83 Cornell L. Rev. 105 (1997); also her Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge, 1999 U.Ill.L. Rev. 447. Other studies emphasize the incidence of employment relationships reverting to at-will status in response to court decisions recognizing limits on termination without cause, as evidence that the agreements that parties in fact reach correspond to the at-will default rule . . . .

A second justification for the at-will default rule is that it reflects not so much the premises of the parties but, rather, the property rights of the employer, and for that reason any departure from that baseline should be bargained for, in the absence of a statutory or public-policy restriction. Those critical of the rule are likely to counter that employees have a need for job security and build up reasonable expectations that increasing years of service should ripen into a property right in one's job that cannot be lost without a showing of cause . . . .

Ultimately, the issue from a policy perspective is whether the additional protection afforded

employees by a cause regime (in addition to existing statutory and other protections) would outweigh the economic and administrative costs inherent in subjecting all employment decisionmaking to legal scrutiny; and even if that were the case, whether such a change in the legal landscape should be effected by courts rather than the legislature . . . .

Legislation protecting employees from "unfair dismissal" is common in other developed countries; often the law requires adjudication in specialized tribunals outside of the civil courts and limits remedies to an established multiple of lost income (subject to £75,000 cap in Great Britain). Canada's common law permits termination without cause of employees not working under a fixed-term contract if adequate notice of termination is furnished . . . .

Title VII, Civil Rights Act of 1964, as amended
(codified at 42 U.S.C. §§ 2000e to 2000e-17)

§ 703. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

N.H. man loses job over 35 cents;
Company's claim that he stole prevents collection of benefits

The Boston Globe
June 28, 1992, Sunday, City Edition
By Bob Hohler, Globe Staff

NEWPORT, N.H. – All Harry King wanted, he said, was a cup of coffee.

But the price he paid for taking 35 cents from a former supervisor's desk to buy his morning coffee from a vending machine at the Sturm, Ruger and Co. gun factory has brought him to the brink of financial ruin.

After 22 years on the job, the only one he has had since returning from Vietnam in 1970, King had barely finished the coffee in question in March when he was fired for what the company classified as theft.

In a case that King's supporters say highlights the imbalance of power between workers and management at one of New Hampshire's largest companies, Sturm, Ruger officials rejected King's assertion that he had planned to repay the 35 cents as soon as he changed a $ 10 bill that morning. They dismissed his explanation that employees commonly left change in their work areas and borrowed from each other. And, despite King's previously flawless work record, they ordered him escorted from the factory the same day.

Company officials later argued before a state unemployment appeals board that King, 45, a former volunteer firefighter who now serves as president of the Newport Babe Ruth Baseball League, should be denied unemployment benefits under a state law that prohibits compensation to workers who were fired "for arson, sabotage, felony or dishonesty."

"I don't think they've been very fair to me at all," King said last week at the New Hampshire Legal Assistance office in Claremont. "After all the years I've put in there, I feel very slighted and hurt by what happened."

Although the unemployment appeals board ruled that King's firing was for misconduct rather than dishonesty, the misconduct classification disqualified him both for unemployment benefits and a state welfare program for unemployed parents. King, a father of two, also tried to get help from the Newport welfare department.

Now, with no income or medical insurance and his family of four living on $ 273 a month in food stamps, King faces foreclosure on his home, pressure from bill collectors and the stigma of losing his career for alleged thievery.

The taint is particularly acute in Newport, where Sturm, Ruger, with nearly 1,000 workers, is the town's largest employer. "I walk down the street and my old friends shun me because they're afraid if they associate with me they might be dragged down the same way," King said. "It's very embarrassing."

Sturm, Ruger officials did not respond to several requests to discuss King's firing. But reports filed with the unemployment appeals board detail the company's case against him, which sprang from his former supervisor's complaint that change was disappearing from her desk.

In response, the company's security contractor placed marked coins on the desk and began to focus a video camera on the area the night of March 3. Two days later, 80 cents disappeared, but the camera recorded no one near the desk the previous evening, according to the report filed by Allied Security Inc.

Another 13 days passed before the next incident, in which $ 1.10 in change disappeared. But again, the camera, recording only at night, provided no clues.

The security company then began videotaping the desk in the hours before King's former supervisor arrived in the morning. The next day, March 19, 35 cents disappeared, and the camera recorded a man standing behind the desk at 5:30 a.m., according to the report. "The tape isn't very clear, but at this time it could be one of two people," including King, the report states.

Four days later, another 35 cents was gone, and the surveillance tape clearly indicated that King stood behind the desk on the morning the change disappeared, according to the report.

The report does not say whether King was recorded taking the change. However, King has acknowledged taking the change, although he has steadfastly maintained that he borrowed it rather than stole it. "All the years I've worked there, people have picked up money for coffee off other people's benches and come back the next day to pay them back," he said.

A former coworker, Rebecca Saunders, of Sunapee, supported King's explanation in a notarized letter to the unemployment appeals board. And she noted that King and his former supervisor had long been friends.

"To an outsider, this looks like 'an employee steals money from boss' drawer,' " she wrote. "It is just a situation of a friend of probably 20 years or more borrowing 35 cents for coffee."

Company officials made no other allegations against King at his unemployment hearing, according to his lawyer, Jonathan Baird of New Hampshire Legal Assistance. And Saunders, who worked with King for 10 years, argued that he was a model employee until his firing.

King said he was unsure why the company, which is not unionized, reacted so harshly to the missing change incident. He speculated that it might stem from his three months on worker's compensation while he was treated last year for tendinitis [sic] in his rotator cuff, an injury he developed during 18 years of building .22-caliber rifles on the company assembly line.

When King returned to work in January, he was reassigned to the customer service department, which reduced his hourly pay from $ 11 to $ 7.50. He said he questioned the reassignment and tried to apply for positions that paid his previous wages, which he said may have irked management, including his former supervisor.

But now, as he searches for a new job and awaits word on possible financial assistance from the American Legion, King said he, too, is irked. Should he ever have a chance to return to Sturm, Ruger, he said, "I would never go back. Why should I go back to a place that has stuck me like they have?"

Notes & Questions
Regarding Harry King's Case

1. The *King* case illustrates a central feature of U.S. social policy—access to a wide range of social benefits is tied to the possession of a job (or possession of a suitable work history). The *employer* made a summary, ex parte decision that King merited discharge; as a result, the *government* disqualified him from receiving income-interruption benefits for the unemployed and for un-employed parents (the latter program being designed primarily to assist children). However, at least under the Unemployment Compensation program, King had the right, which he exercised, to challenge the employer's accusation at an adversary hearing conducted by the New Hampshire's UC agency. See N.H. Rev. Stat. § 282-A:48 (right to appeal initial agency determination to appeals tribunal); N.H. Rev. Stat. § 282-A:56 (impartial hearing; procedure). See generally Social Security Act § 303(a)(3), 42 U.S.C. § 503(a)(3) (to qualify for federal financing, state UI programs must provide opportunity for a "fair hearing" to UI applicants whose claims are denied) (all 50 states meet this requirement).

King had no medical insurance. The article is unclear whether he had medical coverage be-fore the incident. If he *did* once have coverage before, almost certainly that was because, and *only* because, he possessed a job. The Consolidated Omnibus Budget Reconciliation Act of 1985, commonly known as COBRA, provides that terminated employees who, prior to termination, were covered under a group health plan must be afforded an opportunity to purchase certain continuation health coverage at group rates. However, an employee terminated for "gross misconduct" is ineligible. See 29 U.S.C. § 1163(2).

Upon retirement, King will most likely claim "social security," that is, retirement income under the portion of the Social Security Act establishing the federal old-age and survivors insurance benefits program (codified at 42 U.S.C. §§ 401-422). "Social security" is a type of public pension plan. Eligibility depends on a variety of factors, the most important being the accumulation of 40 earnings-quarters (ten years in aggregate) of work history in certain kinds of paid labor. With 22 years in manufacturing, King will probably qualify for social security when he becomes eligible for retirement. As Social Security law stands now, a discharge for theft interrupts an employee's earning history but does not divest the employee of benefits to which he/she otherwise is or becomes entitled. Theoretically, Congress has the power to change that, see Flemming v. Nestor, 363 U.S. 603 (1960) (Social Security benefits do not vest), but is unlikely to do so for reasons of practical politics.

But social security payouts are limited, even to a claimant with King's lengthy work history. Most Americans aspire to supplement their retirement income from social security, if any, with in- come from contractual pension schemes, such as pension benefits negotiated in a collective bargaining agreement. *If* Mr. King's (non-unionized) employer provided a pension benefit, any pension contributions King earned in the past would have irrevocably "vested" in his

favor after five years of service under a commonly-used formula set by the Employee Retirement Income Security Act (ERISA). See ERISA § 203, 29 U.S.C. § 1053. With rare exceptions, vested pension entitlements cannot be taken away ("forfeited") even if the employee is guilty of proven misconduct. However, the company's decision to fire him would result in loss of the opportunity to enhance his retirement income by accumulating further entitlements and by progressing to a higher salary (which would increase his ultimate payout).

2. Regarding loss of his job, King speculates that the employer's harsh response to the alleged 35¢-theft (which he denies) was actually motivated by his earlier exercise of rights under worker's compensation, a social program designed, among other things, to respond to the problem of income interruption due to industrial injury. If King could establish that the employer's true motive for discharging him was to retaliate for his earlier workers compensation claim, and that the alleged 35¢-theft was just a pretext, he would have a cause of action in New Hampshire for wrongful discharge in violation of public policy.

In a landmark case assigned later in the course, Monge v. Beebe Rubber Co. 114 N.H. 130, 316 A.2d 549 (1974) (cause of action found in favor of female employee discharged for resisting supervisor's sexual advances), the New Hampshire Supreme Court held that a contract of employment-at-will contains an implied-in-law covenant of good faith and fair dealing which may be used to challenge extreme employer overreaching. The NH Supreme Court subsequently limited *Monge* to discharges in violation of public policy. In most U.S. jurisdictions, it violates public policy to discharge an employee in retaliation for the employee's exercise of statutory rights under a government program (such as workers compensation). However Mr. King was fired for theft, not for exercising a statutory right. Discharge for theft does *not* violate public policy, *even if the charge is false*. Thus, Mr. King would not have a public-policy claim against the employer unless he could convince the trier-of-fact that the alleged 35¢-theft actually had nothing to do with his being fired; it was just an elaborate cover-up to hide the real motive, which was to retaliate for the workers compensation claim. In practice, it is often extremely difficult to prove that an adverse party was wrongly motivated and is supplying the court with a false explanation of the party's conduct. Thus, at least on the facts we learn from the news article, a successful claim by Mr. King under *Monge* appears to be most unlikely.

3. Even if he had a very strong case of retaliatory motive, Mr. King would probably find it impractical to pursue such a claim. To do so, he would need counsel willing to undertake costly litigation. He obtained representation by a Legal Services attorney for his unemployment-compensation case. However, publicly-subsidized representation is unlikely to be available for a potentially fee-generating, wrongful-discharge case. A private attorney would ordinarily demand a contingency-fee arrangement to take such a case. But whether a contingency-fee arrangement makes economic sense for an attorney depends on the size of the expected recovery. Expectable recoveries in this type of case turn primarily on lost future earnings, which are usually quite low with respect to blue-collar employees. As a practical matter, therefore, employees in King's position often find it quite difficult or impossible to obtain legal representation.

4. Assume that, on these facts, Mr. King has no legal recourse against the employer. As a matter of social policy, is that desirable or undesirable? Suppose Mr. King could prove to the satisfaction of a trier-of-fact that he was innocent of theft.