

1991

Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds

Todd M. Smith

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Todd M. Smith, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 Case W. Res. L. Rev. 1209 (1991)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol41/iss4/7>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

WRONGFUL DISCHARGE REEXAMINED: THE CRISIS MATURES, OHIO RESPONDS

As the crisis of wrongful discharge matures in the 1990s, fundamental changes to the employment-at-will doctrine are being proposed. The 1980s saw the Ohio Supreme Court adopt a public policy exception that brought Ohio employment law into accordance with most jurisdictions. The author proposes that the Ohio Supreme Court take its analysis one step further and discard the antiquated at-will presumption entirely.

DURING THE 1980s the employment-at-will doctrine was subject to an uncertain process of erosion by exception. Courts fashioned a patchwork of exceptions to the at-will doctrine limited the power of an employer to dismiss an employee "for good cause or for no cause, or even for a bad cause."¹ Various jurisdictions recognized that an employee could not be discharged in violation of a public policy,² in breach of an implied contract,³ or in breach of the implied covenant of good faith and fair dealing.⁴

Yet in the 1980s, the exceptions proved the rule. Only narrow exceptions with limited applicability to the vast majority of employment terminations were recognized. Proposals to temper or eliminate the doctrine were confined to the world of law review articles. As the last decade of the twentieth century begins, however, the crisis of wrongful discharge has ripened, and "radical" changes are being proposed, not only by academics but also by judges, administrators, and attorneys.

In *Greeley v. Miami Valley Maintenance Contractors, Inc.*, the Ohio Supreme Court recognized a public policy exception to the employment-at-will doctrine.⁵ Most jurisdictions had recognized similar public policy exceptions in the 1980s,⁶ but it was not

1. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884).

2. See *infra* text accompanying notes 45-64.

3. See *infra* text accompanying notes 65-83.

4. See *infra* text accompanying notes 84-129.

5. 49 Ohio St. 3d 228, 233-35, 551 N.E.2d 981, 986-87 (1990).

6. *Employment at Will: State Rulings Chart*, [Individual Employment Rights Manual] 9A Lab. Rel. Rep. (BNA) 505:51-52 (Aug. 1989) [hereinafter *State Rulings Chart*] (courts in 39 states have recognized public policy exceptions to employment at will); see

until *Greeley* that the Ohio Supreme Court accepted a role in shaping a rational policy of employment termination.⁷

The *Greeley* decision, however, merely framed the issue and suggested solutions to the employment-at-will crisis. This note describes some of the alternatives discussed in *Greeley* and calls for a more fundamental approach to the employment-at-will crisis. The first section of the note traces the development of the doctrine from its nineteenth century origins. The second section analyzes Ohio's treatment of the doctrine. The third section evaluates Ohio's treatment of the law of employment termination in light of developments in other jurisdictions and proposes alternatives for Ohio. The fourth section examines the rationales underlying the at-will presumption. The note concludes that the presumption of just cause for discharge would establish a more equitable and workable framework for the resolution of termination disputes and would better serve both employer and employee interests.

I. THE HISTORY OF EMPLOYMENT AT WILL: ITS RISE, EROSION, AND STUBBORN PERSISTENCE

A. The Rise of Employment at Will

Prior to the Industrial Revolution in England, the general presumption was that employment would endure for a term of one year unless otherwise specified.⁸ While this presumption may have been the result of an attempt by the upper classes to control wages and prices,⁹ the yearly presumption protected employees from being released during the off-seasons and effectively guaranteed em-

infra text accompanying note 65.

7. See *infra* p. 1240.

8. Prior to the Industrial Revolution in England, most employment situations centered around agricultural and domestic service relationships. Note, *The State of At-Will Employment in California After Foley*, 8 ST. LOUIS U. PUB. L.J. 393, 394 (1989); see P. MANTOUX, *THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY* 145 (1928). The rule applied to these situations was articulated by Blackstone:

"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 . . . seasons; as well as when there is work to be done as when there is not"

Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976) (quoting 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 413, 425 (1765)).

9. See K. PALMER & J. COLTON, *A HISTORY OF THE MODERN WORLD* 47-48 (6th ed. 1983).

ployers a labor force.¹⁰

The Industrial Revolution marked the end of the one-year term presumption.¹¹ This presumption made less sense as employers needed the flexibility to respond to changes in the demand for their product, fluctuations in the economy, and changes in technology.¹² By the middle of the nineteenth century, the English courts had adopted the rule that, absent an express contractual provision, either party could terminate an employment relationship upon reasonable notice. The American at-will approach represents both a departure from and a continuation of this English rule.¹³ H. G. Wood gave the authoritative statement of the American rule:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring . . . and is determinable at the will of either party.¹⁴

Despite its questionable underpinnings,¹⁵ Wood's Rule generally was accepted by courts in the United States.¹⁶ In *Lochner v. New York*,¹⁷ the Supreme Court declared that a state could not

10. Note, *supra* note 8, at 394; see Feinman, *supra* note 8, at 120 (tracing the history of the master-servant relationship and employment at will in the United States).

11. See P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 135 (1969) (discussing the evolution of the free labor market). Prior to the Industrial Revolution "[t]he legal status of the master-servant relationship was viewed as essentially a domestic relationship and, with the rise of industrialization, the status of the relationship evolved to one of 'employer and employee.'" Hill, *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, 3 N. ILL. U.L. REV. 111, 113-15 (1982).

12. See Note, *supra* note 8, at 394.

13. See AMERICAN BAR ASS'N, 1982 LABOR AND EMPLOYMENT LAW COMMITTEE REPORTS 15.

14. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (2d ed. 1886) (footnote omitted).

15. See Feinman, *supra* note 8, at 125-27 (calling Wood's Rule "a mere published, ill-supported statement"); Note, *supra* note 8, at 395 & n.20 (noting modern criticism of Wood).

16. See 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 & n.2 (1913) (citing numerous cases in which Wood's Rule was recognized). "The preponderance of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is scarcely open to criticism." *Id.* § 160. The Supreme Court recognized the doctrine in dictum in *Adair v. United States*, 208 U.S. 161, 171-76 (1908) ("the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason to dispense with the service of such employee").

17. 198 U.S. 45 (1905).

interfere with the liberty of contract and infringe on "the freedom of master and employee to contract with each other in relation to their employment."¹⁸ But even during the *Lochner* era the rule was not universally approved.¹⁹

Some commentators have argued that the rule reflected the expectations and needs of the employer and employees,²⁰ while others have described the at-will presumption as an expression of the laissez-faire attitude of the late nineteenth century.²¹ Perhaps a more suitable explanation of the spread of the at-will rule is that it suited the needs of employers who desired more control over their employees²² at a time when employee interests found little sympathy in the courts.²³

B. The First Exceptions: Collective Bargaining and Anti-Discrimination Legislation

Though the rule achieved universal adoption, the economic crisis of the 1930s precipitated a general reexamination of employment relations. Congress realized that the gross "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers"²⁴

18. *Id.* at 64.

19. One commentator argued:

[T]he higher the position to which the contract relates the more certainly may it be inferred that the employer and employed expect their relationship to continue for a considerable period. It seems questionable whether a doctrine resting on a presumption which ignores that expectation as an element indicative of intention can with propriety be treated as one of general application It is at least fairly open to argument whether the more reasonable doctrine is not that which treats the duration of the engagement as an entirely open question of fact, unencumbered by any presumption whatsoever

1 C. LABATT, *supra* note 16, § 160. Williston also found it reasonable to presume that a preset period of time is intended in higher position employment contracts. *See* 1 S. WILLISTON, *CONTRACTS* § 39 (1921).

20. *See, e.g.,* Feinman, *supra* note 8.

21. *See, e.g.,* P. SELZNICK, *supra* note 11, at 135-36; Hill, *supra* note 11, at 119.

22. *See* Feinman, *supra* note 8, at 131-35 (the rule allowed an employer to silence employees by threatening immediate dismissal); Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631, 641 (1988) ("The rule also allowed employers maximum freedom to upgrade their work, their work forces or lay off workers in times of reduced need for production.").

23. *See* Leonard, *supra* note 22, at 641 n.61 ("[C]ollective labor action damaging to an employer was subject to injunction, employees injured at work could not recover against an employer if a fellow employee played any role in the accident, and legislative attempts to ameliorate harsh working conditions were considered unconstitutional by the courts.").

24. National Labor Relations Act, 29 U.S.C. § 151 (1988).

negated the presumption of contracting equality. Collective bargaining was impossible where union membership and activities were grounds for discharge. The Wagner Act's prohibitions on "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"²⁵ marked the first limitation on the employer's power to terminate at will.

The Wagner Act established protections for union activities to ensure the viability of the collective bargaining process.²⁶ The Act guaranteed employees the right to organize and to bargain collectively.²⁷ It also required employers to bargain in good faith with the union over wages, hours, and other conditions of employment.²⁸ However, "employment at-will was . . . firmly embedded in the common law."²⁹ Under the Act neither party to the bargaining process was required to agree to any proposal nor to make any concession.³⁰ The Act merely ensured union recognition and required good faith bargaining.³¹ Employees could secure protection from termination at will only through negotiations conducted by their union.

Unions did win a "just cause" standard for termination through the newly protected collective bargaining process. Generally, unions were able to secure collective bargaining agreements that provided grievance and arbitration procedures. These procedures necessarily ensured a measure of protection from employment at will.³² Collective bargaining agreements, however, never covered a majority of the work force. In 1946 union membership

25. *Id.* § 158(a)(3).

26. See generally J. GETMAN & B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 1-14 (1988) (Wagner Act focused "on eliminating barriers to organization and requiring collective bargaining"); Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 7-9 (1988) (the inequality of bargaining power would be remedied by creating a collective labor market).

27. National Labor Relations Act, ch. 372, §§ 7, 8(1), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. §§ 157, 158(a)(1) (1988)).

28. *Id.* §§ 8(5), 9(a) (codified as amended at 29 U.S.C. §§ 158(a)(5), 159(a) (1988)).

29. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1125 (1986).

30. This implicit assumption of the Wagner Act was made explicit by the Taft-Hartley amendments. Labor Management Relations Act, ch. 120, § 8(d), 61 Stat. 136, 142 (1947) (codified as amended at 29 U.S.C. § 158(d) (1988)).

31. J. GETMAN & B. POGREBIN, *supra* note 26, at 2.

32. See N. CHAMBERLAIN, D. CULLEN & D. LEWIN, *THE LABOUR SECTOR* 222-28 (3d ed. 1980)

reached its peak, totaling thirty-five percent of nonagricultural workers.³³ Present union membership has dropped to 16.4% of nonagricultural workers.³⁴ Although unions have succeeded in gaining just cause protection for their members, a growing majority of the labor force is not collectively represented.

During the 1960s and 1970s, Congress passed remedial legislation to create statutory exceptions to the employment-at-will doctrine. Congress passed Title VII of the Civil Rights Act of 1964³⁵ to prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.³⁶ Congress passed other statutory limitations on employment at will, including the Age Discrimination in Employment Act;³⁷ the Consumer Credit Protection Act;³⁸ the Occupational Safety and Health Act;³⁹ and the Employee Retirement Income Security Act of 1974.⁴⁰ These statutes extended a narrow exception to the at-will doctrine to employees within the protected class.

This remedial legislation constituted a break with the national policy of relying on collective bargaining to regulate the labor market.⁴¹ While these statutes may have narrowed the breadth of the at-will doctrine to exclude the dismissal of employees within a protected class, these statutes did little to protect other employees from an employer's power to dismiss at will. Employees who were not members of a class, or could not prove that their termination was based on membership in such a class remained unprotected from unjust discharge. One employee, be-

33. *Id.* at 124 (chart showing union participation). Another source marks 1953 as the high point of union membership when approximately one third of the nonagricultural workforce and about 25% of the total civilian labor force were collectively represented. L. TROY & N. SHEFLIN, *UNION SOURCEBOOK* 1-1 (1985); see Summers, *supra* note 26, at 10.

34. *Union Membership Down to 16.4 Percent of Workers in 1989, BLS Survey Shows*, Daily Lab. Rep. (BNA) No. 27, at B-8 (Feb. 8, 1990).

35. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

36. Title VII makes it an unlawful employment practice for an employer "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." 42 U.S.C. § 2000e-2(a)(1) (1988).

37. 29 U.S.C. § 621 (1988).

38. 15 U.S.C. § 1601 (1988) (prohibiting termination based on indebtedness or garnishment of wages).

39. 29 U.S.C. §§ 651-678 (1988) (prohibiting termination of employees who exercise their rights under the Act and refuse to work under inordinately hazardous conditions).

40. 29 U.S.C. §§ 1001-1461 (1988) (prohibiting discharge for the purpose of preventing employees from attaining vested pension rights).

41. See Summers, *supra* note 26, at 12.

cause of membership in a protected class, may have some protection or administrative recourse from an employer's at-will dismissal power, while the employee at the next work station has no protection because of the lack of such membership.⁴² Similarly, an employee fortunate enough to be covered by a collective bargaining agreement or civil service rules may enjoy greater protections than an employee doing the same work in a nonunion or non-civil-service context.⁴³

C. Judicial Exceptions that Prove the Rule

Although employment at will purports to grant unlimited discretion to terminate an employment relationship, courts in thirty-nine states have limited the scope of an employer's power to dismiss.⁴⁴ The theories justifying these exceptions fall into three categories: (1) implied contract, (2) public policy, and (3) duty of good faith and fair dealing.

1. Implied Contract

Courts in thirty-four states have recognized that employer handbooks, policies, or other representations to the employees may form an implied contract limiting the employer's right to terminate its employees.⁴⁵ At one time, courts refused to imply such limitations finding a lack of either independent consideration or mutuality of obligation. Many courts no longer require mutuality of obligation in order to incorporate the employer's promises into the employment contract.⁴⁶ Some courts have taken a more liberal view of the independent consideration requirement, holding that an employee's promise to render services,⁴⁷ beginning services for the employer,⁴⁸ staying on the job,⁴⁹ or the general benefit the em-

42. See Leonard, *supra* note 22, at 647.

43. See *id.*

44. See *State Rulings Chart*, *supra* note 6, at 505:51-52.

45. *Id.*

46. See, e.g., *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464, 443 N.E.2d 441, 444, 457 N.Y.S.2d 193, 196 (1982); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 600, 292 N.W.2d 880, 885 (1980).

47. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 925 (1981) (employer's promise to a thirty-two-year employee that he would not be discharged arbitrarily established an enforceable implied contract).

48. See *id.* at 325, 171 Cal. Rptr. at 925; *Weiner*, 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

49. See *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 302, 491 A.2d 1257, 1271 (1985).

ployer gains from an "orderly, cooperative and loyal work force"⁵⁰ is sufficient consideration to render the employer's promises enforceable. Still others have held that if the employee is aware of the manual and continues to work, the employment manual constitutes an offer to form a binding unilateral contract.⁵¹

In *Toussaint v. Blue Cross & Blue Shield*,⁵² the Michigan Supreme Court held that the enforceability of a contract depends upon consideration and not mutuality of obligation.⁵³ In *Toussaint*, two employees were told that they would not be discharged as long as they did their job. One employee was given a personnel manual stating that the company's policy was to dismiss employees only for just cause. Blue Cross argued that separate and distinct consideration was required to make the promise of just cause within the manual enforceable. It also maintained that the contract was unenforceable because of a lack of mutuality of obligation.⁵⁴

The court found that because the employer received an "orderly, cooperative and loyal work force" in return for his promise of just cause there was sufficient consideration to make the promise a binding contract.⁵⁵ The special circumstances of the employer's oral and written statements overcame the presumptive construction that the contract was terminable at will. *Toussaint* held that while an employer need not establish a just cause policy, once the policy has been announced, the employer may not treat its promise as illusory.⁵⁶

However, *Toussaint* did provide a way for employers to circumvent its holding. The court noted that disclaimers requiring prospective employees to acknowledge that they served at the will or the pleasure of the company would have eliminated any employer liability.⁵⁷ Employers could also make known to employees

50. *Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892.

51. See *Wooley*, 99 N.J. at 302, 491 A.2d at 1267; *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983). Ohio courts have relied heavily on *Pine River*. See, e.g., *Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984).

52. 408 Mich. 579, 292 N.W.2d 880 (1980).

53. *Id.* at 600, 292 N.W.2d at 885.

54. *Id.* at 599, 292 N.W.2d at 885.

55. *Id.* at 613, 292 N.W.2d at 892. The court did not require a showing of reliance by the employees on the policies in the manual. *Id.* at 613 n.25, 292 N.W.2d at 892 n.25.

56. *Id.* at 619, 292 N.W.2d at 895.

57. *Id.* at 612, 292 N.W.2d at 891. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), held that a signed disclaimer rendered company promises in an employment manual unenforceable. Sears required prospective employees to sign an application

that personnel policies are subject to unilateral changes by the employer. Employees then would have no legitimate expectation that any particular policy would continue to remain in force.⁵⁸

*In re Certified Question*⁵⁹ required the Michigan Supreme Court to decide whether an employer could unilaterally change a written discharge-for-cause policy to at-will employment, even though the right to make such a change was not expressly reserved from the outset. The court reaffirmed the basic holding of *Toussaint* that employer statements of policy may give rise to contractual obligations even without a showing that the employer intended to be bound by such statements. The court noted, however, that *Toussaint* acknowledged the employer's right to make unilateral changes in its personnel policies.⁶⁰

[I]t is one thing to expect that a discharge-for-cause policy will be uniformly applied while it is in effect; it is quite a different proposition to expect that such a personnel policy, having no fixed duration, will be immutable unless the right to revoke the policy was expressly reserved.⁶¹

Although an employee has a legitimate right to expect that his or her employer will uniformly apply personnel policies in effect at any given time, such policies are not perpetually binding contractual obligations.⁶² "In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change."⁶³ The court required employers to give reasonable notice of such changes to affected employees and prohib-

for employment that provided:

In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

Id. at 456. For additional cases upholding the Sears disclaimer, see *Ringwelkski v. Sears, Roebuck & Co.*, 636 F. Supp. 519 (E.D. Mich. 1985); *Summers v. Sears, Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980).

58. *Toussaint*, 408 Mich. at 619, 292 N.W.2d at 895.

59. 432 Mich. 438, 443 N.W.2d 112 (1989).

60. *Id.* at 444-45, 443 N.W.2d at 115.

61. *Id.* at 455, 443 N.W.2d at 120.

62. *Id.* at 455-56, 443 N.W.2d at 120.

63. *Id.* at 456, 443 N.W.2d at 120.

ited changes made in bad faith.⁶⁴

2. Public Policy

Courts in thirty-nine states have recognized causes of action in either tort or contract where an employer discharges an employee in violation of a public policy.⁶⁵ These decisions generally have rested on the rationale that legislative goals and general social policies would be frustrated if employers could discharge employees for certain "bad reasons."⁶⁶ Courts have recognized public policy exceptions to the employment-at-will doctrine where employers have discharged employees for refusing to commit a crime,⁶⁷ serving on a jury,⁶⁸ "blowing the whistle" on employer wrongdoing,⁶⁹ filing a workers' compensation claim,⁷⁰ and refusing to violate a code of ethics.⁷¹

Sources of public policy have included statutes,⁷² constitutions,⁷³ administrative regulations or decisions,⁷⁴ and even professional codes of ethics.⁷⁵ Generally, courts have recognized only those public policies that were "clear[ly] mandate[d],"⁷⁶ "well-accepted,"⁷⁷ or that "stem either from a constitutional or statutorily guaranteed right."⁷⁸

64. *Id.* at 457, 443 N.W.2d at 120.

65. *See State Rulings Chart*, *supra* note 6, at 505:51-52 (list of exceptions to employment at will in various states).

66. *See, e.g.*, *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (1959).

67. *See, e.g., id.*; *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

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

69. *See, e.g.*, *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). "An employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." *Sheets*, 179 Conn. at 480, 427 A.2d at 389.

70. *E.g.*, *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

71. *See, e.g.*, *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72-73, 417 A.2d 505, 512-13 (1980).

72. *See, e.g.*, *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

73. *See Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

74. *See, e.g.*, *Nye v. Department of Livestock*, 196 Mont. 222, 639 P.2d 498 (1982).

75. *See Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

76. *Id.* at 72, 417 A.2d at 512.

77. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 367, 353 N.W.2d 469, 474 (1984) (Williams, J., dissenting).

78. *Id.* (Williams, J., dissenting); *accord Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3d Cir. 1983).

The public policy exception to the at-will doctrine has spawned both contractual and tort remedies. Where the court's primary purpose has been to make the wronged employee whole, the remedy has been limited to contractual damages such as reinstatement and backpay.⁷⁹ Punitive damages have been awarded in tort actions where the court found it imperative to deter future employer conduct that might frustrate important social policies.⁸⁰

The case for a public policy exception is the strongest where an employee is discharged for refusing to commit a crime.⁸¹ The public policy exception is more problematic, however, when the employer's conduct is not as outrageous, when the source of the public policy is not so clear, or when the employer's particular conduct is more common.

The number of employees covered by the public policy exception is quite small. While this exception covers some of the most egregious cases of wrongful discharge, it fails to touch the vast majority of wrongful discharges.⁸² Courts have been reluctant to embrace a public policy exception to include an essentially private dispute that only remotely implicates a public concern.⁸³

3. Implied Covenant of Good Faith and Fair Dealing

The most controversial and least recognized exception to employment at will is the implied covenant of good faith and fair dealing.⁸⁴ While the courts are not in agreement as to whether this exception to the at-will doctrine arises out of a contractual right or by operation of law the implied covenant exception, like the public policy exception, raises the possibility of punitive damages for wrongful discharge.⁸⁵ Unlike the public policy exception, however, the covenant has the potential for widespread application

79. See, e.g., *Brockmeyer v. Dun & Bradstreet, Inc.*, 113 Wis. 2d 561, 575, 335 N.W.2d 834, 841 (1983) ("In contract actions, damages are limited by the concepts of foreseeability and mitigation.").

80. E.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

81. See, e.g., *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

82. See *Summers*, *supra* note 26, at 60.

83. See *supra* notes 65-71 and accompanying text (limited circumstances in which court will impose public policy exception).

84. Only twelve states recognize this exception to the at-will doctrine. For changes made in bad faith, see *State Rulings Chart*, *supra* note 6, at 505:51-52 (list of exceptions to employment at will, by state).

85. See *infra* text accompanying notes 94-126.

to private employment disputes that do not directly implicate public concerns.

The first recognition of the implied covenant exception to the at-will doctrine came in *Monge v. Beebe Rubber Co.*,⁸⁶ where a female machine operator was fired for refusing to date her foreman. The plaintiff in *Monge* brought an assumpsit action to recover damages for the breach of her employment contract. After weighing the employer's interest in running the business, the employee's interest in maintaining her employment, and the public's interest in maintaining a proper balance between the two, the court held that "a termination by the employer of a contract of employment at-will which is motivated by bad faith or malice or based on retaliation is not [sic] the best interest of the economic system or the public good and constitutes a breach of the employment contract."⁸⁷

In *Fortune v. National Cash Register Co.*,⁸⁸ the court refused to read the implied covenant as broadly as the *Monge* court did but, nevertheless, found that the employer had violated an implied covenant. The employer dismissed a salesman in order to avoid paying certain bonuses.⁸⁹ The court observed that good faith and fair dealing has been assumed or implied in a variety of contract cases, and expressly recognized by the Uniform Commercial Code and the *Restatement (Second) of Contracts*.⁹⁰

The *Fortune* court reasoned:

[T]he holding in the *Monge* case merely extends to employment contracts the rule that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair

86. 114 N.H. 130, 316 A.2d 549 (1974).

87. *Id.* at 133, 316 A.2d at 551. While the court noted that "[t]he employer has long ruled the workplace with an iron hand . . . [t]he law governing the relations between employer and employee has . . . evolved to reflect changing legal, social and economic conditions." *Id.* at 132, 316 A.2d at 551 (citations omitted). The court held that its new rule "afford[s] the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably." *Id.* at 133, 316 A.2d at 552.

88. 373 Mass. 96, 364 N.E.2d 1251 (1977).

89. *Id.* at 98-99, 364 N.E.2d at 1254.

90. *Id.* at 103, 364 N.E.2d at 1256-57 (citing examples of insurance contracts, collective bargaining agreements, secondary agreements to a stock option agreement, and contracts to be performed to the satisfaction of another party as well as U.C.C. § 1-203 (1989) and RESTATEMENT (SECOND) OF CONTRACTS § 231 (1979)).

dealing.'⁹¹

The court found that the termination of a twenty-five-year employee to avoid paying a substantial sales bonus was evidence of bad faith on the part of the employer, which had the employee "at its mercy."⁹² A company's right to control its own workforce and flexibility in decision making would not be unduly hampered by adherence to a standard of good faith.⁹³

Both *Monge* and *Fortune* viewed the covenant of good faith and fair dealing as rooted in contract; compensatory damages were available for the machine operator's lost wages and the salesman's lost bonus. *Monge* specifically disallowed recovery for mental suffering since such damages are generally not recoverable in a contract action.⁹⁴ In *Fortune* the issue of punitive damages did not arise because the plaintiff sought only the bonus provided for in the contract.⁹⁵

In *Cleary v. American Airlines, Inc.*,⁹⁶ the court held that the breach of the covenant of good faith and fair dealing sounded in both tort and contract. The court reasoned that the concept of good faith and fair dealing first formulated by California courts in insurance contracts could also be applied to employment contracts.⁹⁷ The plaintiff employee had been fired by his employer for his union organizing activities. The *Cleary* court relied on the California Supreme Court's decision in *Tameny v. Atlantic Richfield Co.*,⁹⁸ which created a public policy exception to the at-will doctrine, recognized causes of action in both contract and tort, and provided for punitive as well as compensatory damages.⁹⁹ The *Cleary* court held that the plaintiff had a cause of action for wrongful discharge.¹⁰⁰ The court also acknowledged that there was substantial authority to support a cause of action in tort for breach of the implied-in-law covenant of good faith and fair dealing.¹⁰¹ The court found that the plaintiff's eighteen years of ser-

91. *Id.* at 104, 364 N.E.2d at 1257 (citations omitted).

92. *Id.* at 105, 364 N.E.2d at 1258 (quoting *Commonwealth v. DeCotis*, 366 Mass. 234, 243, 316 N.E.2d 748, 755 (1974)).

93. *Id.*

94. *Monge*, 114 N.H. at 134, 316 A.2d at 552.

95. *Fortune*, 373 Mass. at 101 n.7, 364 N.E.2d at 1255 n.7.

96. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

97. *Id.* at 454, 168 Cal. Rptr. at 728.

98. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

99. *Id.* at 178, 610 P.2d at 1336-37, 164 Cal. Rptr. at 846.

100. *Cleary*, 111 Cal. App. 3d at 454-55, 168 Cal. Rptr. at 729.

101. *Id.* at 454, 168 Cal. Rptr. at 728 (citing *Tameny v. Atlantic Richfield Co.*, 27

vice to the company made his termination without cause a breach of the implied-in-law covenant.¹⁰² It also determined that the company's explicit policies for discharge indicated the employer's recognition of its own duty to refrain from arbitrary conduct towards its employees. The length of service and explicit policies operated as a form of estoppel, precluding discharge of the employee without good cause.¹⁰³ Because this cause of action sounded in both tort and contract, Cleary would be entitled to compensatory damages and, if his proof were sufficient, punitive damages.¹⁰⁴

While *Cleary* was only an appellate decision, it was the first in a line of cases that recognized a cause of action in tort for breach of the implied-in-law covenant of good faith and fair dealing in California.¹⁰⁵ The California Supreme Court, however, rejected the tort cause of action in *Foley v. Interactive Data Corp.*¹⁰⁶ In a four-to-three decision; the court held that a cause of action for breach of the covenant of good faith and fair dealing would only be recognized in contract.

In *Foley*, a branch manager was fired for reporting to his employer that his immediate supervisor was under investigation by the Federal Bureau of Investigation for embezzlement.¹⁰⁷ The court found that the plaintiff had stated a cause of action for breach of an implied-in-fact contract limiting the employer's right to discharge employees arbitrarily.¹⁰⁸ Although the court was willing to apply the covenant of good faith and fair dealing, it held that breach would only give rise to contract damages.¹⁰⁹

The California Supreme Court stated that damages for breach of contract traditionally have been awarded to compensate the aggrieved party, not to punish the breaching party.¹¹⁰ The

Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)).

102. *Id.* at 456, 168 Cal. Rptr. at 729.

103. *Id.*

104. *Id.*

105. See, e.g., *Huber v. Standard Ins. Co.*, 841 F.2d 980 (9th Cir. 1988); *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986); *Gray v. Superior Court*, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (1986); *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); *Rulon-Miller v. International Business Mach. Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Crosier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983).

106. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

107. *Id.* at 664, 765 P.2d at 375-76, 254 Cal. Rptr. at 213-14.

108. *Id.* at 682, 765 P.2d at 388, 254 Cal. Rptr. at 226.

109. *Id.* at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239-40.

110. *Id.* at 683, 765 P.2d at 389, 254 Cal. Rptr. at 227.

court noted that the covenant is a contract term and compensation for its breach has almost always been limited to contract rather than tort remedies.¹¹¹ The court found that the clear majority of jurisdictions had rejected tort damages for breach of the implied covenant in employment cases or had rejected the application of the covenant in such cases altogether.¹¹² The *Foley* court held that *Cleary* had erred in its reliance on the insurance analogy because, unlike wronged insureds, employees can and must mitigate their damages by attempting to find other employment.¹¹³ The employee's situation is more analogous to that of a commercial contract than it is analogous to an insurance contract, the court reasoned, as insurance contracts provide a public service in the form of protection from potential harm.¹¹⁴ In addition, the economic conflict between the employer and employee is far less than that between the insurer and insured. The need to place disincentives on the employer's conduct, therefore, would not justify the imposition of tort liability.¹¹⁵ The court expressed concern about the potentially enormous consequences that the expansion of tort liability would have on the stability of the business community.¹¹⁶ Though contract damages might prove to be inadequate, the court held that such problems are best left to the legislature.¹¹⁷

The dissent in *Foley* argued that the employment relationship was in fact analogous to the relationship between an insurer and an insured, because the public interest at stake is at least as important, and in many cases the worker may not be able to mitigate damages by finding other employment.¹¹⁸ There is a genuine concern that some employers and insurers will act arbitrarily unless threatened with damages that, unlike traditional contract damages, exceed the short-term profit of the arbitrary conduct.¹¹⁹ The dissent argued that neither insurance contracts nor employment contracts are entered into for commercial advantage but rather

111. *Id.* at 684, 765 P.2d at 389, 254 Cal. Rptr. at 227.

112. *Id.* at 686, 765 P.2d at 391, 254 Cal. Rptr. at 229.

113. *Id.* at 692, 765 P.2d at 396, 254 Cal. Rptr. at 234.

114. *Id.*

115. *Id.* at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234.

116. *Id.* at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239.

117. *Id.* at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239.

118. *Id.* at 708, 765 P.2d at 407, 254 Cal. Rptr. at 245 (Broussard, J., concurring in part and dissenting in part).

119. *Id.* at 707, 765 P.2d at 407, 254 Cal. Rptr. at 245 (Broussard, J., concurring in part and dissenting in part).

are entered into to provide basic financial security.¹²⁰ The tort remedy arises from "society's right to deter and demand redress for arbitrary or malicious conduct which inflicts harm on one of its members."¹²¹

As in *Cleary*, the Montana Supreme Court in *Gates v. Life of Montana Insurance Co.*¹²² found employment contracts to be analogous to insurance contracts and allowed punitive damages for bad faith employer practices.¹²³ In *Gates*, the employee handbook entitled employees to a warning before dismissal for poor job performance. A cashier was told, in contravention of the handbook, to resign or face termination for poor performance. The plaintiff cashier charged that the employer forced her to resign in order to avoid liability for unemployment compensation and pension benefits. When the plaintiff withdrew her resignation, she was dismissed.¹²⁴

The *Gates* court held that the employer had breached the implied covenant of good faith and fair dealing. The court held that the breach of the covenant was not an obligation arising out of the employment contract but an obligation imposed by law. The

120. *Id.* at 709, 765 P.2d at 407-08, 254 Cal. Rptr. at 246 (Broussard, J., concurring in part and dissenting in part).

The principal reason we permit tort damages for breach of the covenant of good faith and fair dealing in an insurance contract is that persons do not generally purchase insurance to obtain a commercial advantage, but to secure the peace of mind and security it will provide in protecting against accidental loss. That reason applies equally to the employer-employee relationship A [worker] usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self-worth in the community. It is also essential to financial security, offering assurance of future income needed to repay present debts and meet future obligations. Without a secure job a worker frequently cannot obtain a retirement pension, and often lacks access to affordable medical insurance.

Id. (Broussard, J., concurring in part and dissenting in part) (citations omitted).

121. *Id.* at 711, 765 P.2d at 409, 254 Cal. Rptr. at 247 (Broussard, J., concurring in part and dissenting in part).

122. 205 Mont. 304, 668 P.2d 213 (1983).

123. *Id.* at 306-07, 668 P.2d at 214.

124. The court previously had followed *Monge* and *Fortune* in finding that a covenant of good faith and fair dealing was implied in plaintiff's employment contract. *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 184, 638 P.2d 1063, 1066 (1982). Although it did not hold that such a covenant was necessarily present in all employment contracts, it found that the defendant's policies of uniform termination procedures gave rise to such a covenant here. The case was remanded for jury determination of whether the employer's action constituted a breach of that covenant. The jury found a breach of the covenant and awarded compensatory and punitive damages. The case was then appealed back up to the Montana Supreme Court.

breach of the covenant therefore sounded in tort, and punitive damages would be available if the defendant's conduct were sufficiently culpable.¹²⁵ The *Gates* court cautioned that "[t]he courts must vigilantly assure that employers, as well as employees, are treated fairly. The sting of punitive damages will only be sanctioned where there is evidence that the tortfeasor's [sic] conduct rose to the level of oppression, fraud, or malice."¹²⁶

While the covenant of good faith and fair dealing has potential for widespread application to employment disputes, very few jurisdictions have recognized this exception to the at-will doctrine. Even in those jurisdictions that initially recognized this exception to the at-will doctrine, the implied covenant has been subjected to judicial limits and even legislative repeal. *Monge* was subsequently limited to situations where the employee was discharged in violation of public policy.¹²⁷ *Foley* limited recovery under the covenant to contract damages.¹²⁸ In Montana, the legislature overruled *Gates* by passing the nation's only wrongful discharge statute.¹²⁹

II. THE RESPONSE OF OHIO TO NATIONAL DEVELOPMENTS

A. General At-Will Policy

Ohio has adopted the at-will doctrine in much the same manner as other jurisdictions.¹³⁰ In one of the earliest reported employment cases, *Bascom v. Shillito*,¹³¹ the Ohio Supreme Court showed its reluctance to adhere to the English rule.¹³² By 1923

125. *Gates*, 205 Mont. at 307, 668 P.2d at 215. The Montana Code provided for punitive damages for all malicious breaches of noncontractual obligations. "In any action for a breach of obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damage for the sake of example and by way of punishing the defendant." MONT. CODE ANN. § 27-1-221 (1991), cited in *Gates*, 205 Mont. at 307, 668 P.2d at 214. Section 27-2-221 was amended in 1987 but retains the same content.

126. 205 Mont. at 310-11, 668 P.2d at 216.

127. "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 296, 414 A.2d 1273, 1274 (1980).

128. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 700, 765 P.2d 373, 401, 254 Cal. Rptr. 211, 239-40 (1988).

129. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1991).

130. See *supra* notes 11-23 and accompanying text.

131. 37 Ohio St. 431 (1882).

132. The Court noted that "[t]he rule, that from the mere fact that a servant has been hired, the law will presume an employment for a year, is by no means inflexible even

Wood's Rule and the at-will doctrine were firmly established as the law of employment termination in Ohio.¹³³

B. Implied Contract Theory and Promissory Estoppel

While continuing to reject good cause as a general requirement for discharge, by 1982 Ohio courts had begun to recognize exceptions to the employment-at-will doctrine based on implied contract and promissory estoppel. In *Hedrick v. Center for Comprehensive Alcoholism Treatment*,¹³⁴ representations in an employee handbook were found to provide the basis for a breach of employment contract claim.¹³⁵ Despite the fact that the contract was for a term of indefinite duration, the at-will presumption was rebutted by the employer's representations in the handbook.¹³⁶ The court reasserted the basic contract principle that the parties' intentions govern the construction of a contract.¹³⁷ The *Hedrick* court also held that promissory estoppel was applicable to employment contracts.¹³⁸ In so doing, however, the court cited only a 1925 Ohio Supreme Court case that quoted *Corpus Juris*.¹³⁹

Subsequent Ohio court decisions, however, have relied on authority from other jurisdictions. In *Day v. Good Samaritan Hospital*,¹⁴⁰ the court considered whether employment manuals were enforceable as terms of the employment contract. Not only did the *Day* court refer to the holdings in *Toussaint v. Blue Cross & Blue Shield*,¹⁴¹ *Cleary v. American Airlines, Inc.*,¹⁴² and *Weiner v. Mc-*

in England, and perhaps a hiring for a shorter period will be more readily inferred in this country than in England." *Id.* at 433.

133. "The employment, then, was not an employment for a specified term. [I]t was a contract which could be terminated not merely by mutual consent, but at the wish of either one of the parties [Such] employment was, in other words, an employment at will." *La France Elec. Constr. & Supply Co. v. I.B.E.W., Local No. 8*, 108 Ohio St. 61, 140 N.E. 899 (1923).

134. 7 Ohio App. 3d 211, 454 N.E.2d 1343 (1982).

135. *Id.* at 214, 454 N.E.2d at 1347.

136. *Id.* at 213, 454 N.E.2d at 1346.

137. *Id.*

138. *Id.* at 214, 454 N.E.2d at 1347.

139. See *id.* (citing *London & Lancashire Indem. Co. v. Fairbanks Steam Shovel Co.*, 112 Ohio St. 136, 152, 147 N.E. 329, 334 (1925) (quoting 21 C.J. *Estoppel* § 116 (1920))).

140. No. 8062, 1983 Ohio App. LEXIS (Aug. 17, 1983). *Day* was never published despite its breadth of analysis and influence on Ohio employment law.

141. 408 Mich. 579, 292 N.W.2d 880 (1980).

142. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

Graw-Hill, Inc.,¹⁴³ it also quoted extensively from *Pine River State Bank v. Mettelle*.¹⁴⁴ In *Pine River*, the court held an employment manual to be an offer for a unilateral contract. By staying on the job, the employee both accepts the offer and provides adequate consideration. The unilateral contract then replaces the original at-will contract.¹⁴⁵ The *Day* court adopted the *Pine River* unilateral contract analysis and held that the procedures and policies in the employer's manual were enforceable as terms of the employment contract.¹⁴⁶

Day found that the hospital's employment manual created a unilateral contract enforceable at law and that the employee could only be discharged in accordance with the manual's procedures and its good cause provision. The court held that the employer derived the benefit of management flexibility with the assurance of an efficient and faithful source of personnel.¹⁴⁷ But the *Day* court noted that if the employer did not intend the manual to be binding, it need only state that the manual is of no legal significance.¹⁴⁸

In *Jones v. East Center for Community Health*,¹⁴⁹ the court refused to find that an employer's personnel manual constituted an enforceable contract, but nevertheless, enforced the promises contained within the manual under the doctrine of promissory estoppel.¹⁵⁰ In *Jones* a discharged employee maintained that the employment manual constituted an enforceable contract and required just cause for discharge. *Jones* followed *Hedrick* in holding that although an employment relationship is terminable at will, the parties are not prevented from entering into a contract that provides otherwise.¹⁵¹ The court examined the circumstances in light

143. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

144. 333 N.W.2d 622 (Minn. 1983).

145. *Id.* at 627. The *Pine River* court noted that the offer of a unilateral contract in a personnel handbook might be the employer's response to the practical problem of the transaction costs that would accrue if the employer wrote a separate contract with each employee. *Id.* Moreover, the court noted that the requirement of mutuality of obligation "although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration, an inquiry in which this court has, by and large, refused to engage." *Id.* at 629.

146. *Day*, No. 8062, 1983 Ohio App. LEXIS at 24-30.

147. *Id.*

148. *Id.*; see also *supra* text accompanying notes 45-64 (discussing the limits of the implied contract exception to the at-will doctrine).

149. 19 Ohio App. 3d 19, 482 N.E.2d 969 (1984).

150. *Id.* at 23, 482 N.E.2d at 974.

151. *Id.* at 20-21, 482 N.E.2d at 971-72.

of traditional contract principles and found consideration and mutuality of obligation to be lacking.¹⁵² Not only had the defendant not requested any benefit in exchange for the promises in the manual, the plaintiff did not suffer, nor did the defendant expect the plaintiff to suffer, any legal detriment.¹⁵³ Moreover, because the plaintiff had not given anything in return for the promises in the manual, the court held that the agreement lacked mutuality of obligation.¹⁵⁴

The court, however, enforced the promises in the manual under the doctrine of promissory estoppel.¹⁵⁵ The court noted that *Toussaint* established that an employer reaped benefits from its promise of just cause.¹⁵⁶ Although the court did not follow *Toussaint* in finding that the benefits constituted sufficient consideration for the promise, the *Jones* court did find that the employer's benefit was evidence that it had induced action or forbearance on the part of the employee in reliance on those promises.¹⁵⁷

Then-Judge Douglas concurred in the judgment but, in addition to invoking promissory estoppel, found an enforceable contract. Judge Douglas urged the court to adopt the holding in *Toussaint* and find consideration in the benefits the employer gained from its promises. Douglas wanted the case to be certified to the Ohio Supreme Court because "[t]he importance of the issues involved and the uncertain nature of the current law in this area cry out for a guiding light."¹⁵⁸

152. *Id.* at 22, 482 N.E.2d at 973.

153. *Id.*

154. *Id.*

155. *Jones*, 19 Ohio App. 3d at 23, 482 N.E.2d at 974. The court cited *Talley v. International Bhd. of Teamsters, Local No. 377*, 48 Ohio St. 2d 142, 146, 357 N.E.2d 44, 47 (1976), and quoted RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

156. *Id.* at 23, 482 N.E.2d at 974.

157. *Id.* at 23-24, 482 N.E.2d at 974. The court noted that the remedy may be limited as justice requires. *Id.* at 24, 482 N.E.2d at 974.

158. *Id.* at 24-25, 482 N.E.2d at 975 (Douglas, J., concurring). Douglas also observed:

Considering the employment-at-will doctrine, I am constrained to view the same as an anachronism in today's peripatetic society. Prospective employees often travel great distances and make substantial sacrifices in response to employers' offers of employment opportunities. In most instances, the employer endeavors to make itself attractive to the prospective employee and, understandably, the employment-at-will doctrine remains unmentioned and is often unknown to both parties. In order to maintain an efficient and loyal work force, the employer usually finds it necessary to establish personnel policies and to consistently and fairly administer the same. Personnel policies and employment manuals typically become an inextricable part of the employment relationship and are relied upon

Two months later, the same appellate court decided *Helle v. Landmark, Inc.*¹⁵⁹ In *Helle* the court explicitly stated that contemporary contract theory would also apply to termination cases involving severance pay.¹⁶⁰ Although freedom of contract has been used to justify the at-will doctrine,¹⁶¹ the *Helle* court invoked it to limit the doctrine. It bemoaned the fact that freedom of contract was being "circumscribed by an asphyxiative construction of the 'at-will' doctrine."¹⁶²

The court found that remaining on the job and continued performance provided sufficient consideration by the employee to render the employer's promises of severance pay enforceable.¹⁶³ While recognizing that an employer's disclaimer could forestall claims of legitimate expectations, the court held that an employer's representations could negate the effect of such disclaimers.¹⁶⁴ Because the court found a binding unilateral contract, the issue of promissory estoppel was held to be moot.¹⁶⁵

Once again, Judge Douglas wrote a concurring opinion. He agreed that disclaimers can preclude claims of reliance on employer promises.¹⁶⁶ Absent such a disclaimer, however, fundamen-

both by the employer and the employee to their mutual benefit. Consideration flows in both directions in such a situation as the policies bring order and predictability to the workplace and greatly benefit both parties.

Id. at 24, 482 N.E.2d at 974 (Douglas, J., concurring).

159. 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984).

160. *Id.* at 7, 472 N.E.2d at 772.

161. See *supra* text accompanying notes 8-23.

162. *Helle*, 15 Ohio App. 3d at 7, 472 N.E.2d at 772.

163. *Id.* at 10-11, 472 N.E.2d at 775.

164. *Id.* at 10, 472 N.E.2d at 775.

165. *Id.* at 13, 472 N.E.2d at 777.

166. Specifically, Judge Douglas contended:

[I]n addition to the clear contract question, I believe, further, that the employee-at-will doctrine is an issue in this case. This archaic and rapidly disappearing doctrine (applied as an absolute) needs further example of why that is so. The doctrine has long been used to terminate employees (who are without protection pursuant to a firm contract of employment and/or union protection through a collective bargaining agreement) summarily, notwithstanding reliance by an employee upon assurances of employment, either verbally or through employment manuals rising to the level of contract. Obviously, when just cause exists, the employee's employment can be summarily terminated. Likewise, if an employee is told upon employment that his or her services can be terminated with or without reason, notice or cause, than at least such employee can be "here today and gone tomorrow." When such is not delineated at the onset of the employment relationship, then it would appear that other matters, including the doctrine of fundamental fairness, should be considered.

Id. at 13-14, 472 N.E.2d at 778 (Douglas, J., concurring).

tal fairness requires that employer induced reliance be held to establish a binding employment contract.¹⁶⁷ Moreover, Douglas did not agree that the claim of promissory estoppel was moot.¹⁶⁸

In 1985 Judge Douglas was elected to the Ohio Supreme Court. In *Mers v. Dispatch Printing Co.*,¹⁶⁹ the Ohio Supreme Court, driven by the conflict between Justice Douglas's¹⁷⁰ views and the tradition of employment at will, reached an uneasy compromise. Mers was suspended from his job as a traveling representative pending resolution of criminal charges against him. When the charges were subsequently dismissed, he was terminated. Mers sought relief on breach of contract and promissory estoppel theories, based on several facts including his good employment record, various oral promises made to him by the employer at the time of hiring, suspension and dismissal of the criminal charges, provisions in the employer's handbook, and the employer's failure to follow its own published procedures.¹⁷¹

The court noted that while Ohio had long recognized the right of the employer to discharge employees at will,¹⁷² this right was limited by both state and federal legislation against various types of employment discrimination.¹⁷³ The court cautioned, however, that the employment-at-will doctrine should not be totally abolished, however, since this would place the courts in the position of second guessing the business judgment of employers.¹⁷⁴ The need for certainty and continuity in the law required the court to stand by precedent.

Although the court would not recognize a blanket "just cause" requirement,¹⁷⁵ it did recognize two narrow exceptions to

167. *Id.* at 14, 472 N.E.2d at 778 (Douglas, J., concurring).

168. *Id.* (Douglas, J., concurring).

169. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

170. Douglas was elected to the Ohio Supreme Court in 1985.

171. *Mers*, 19 Ohio St. 3d at 101, 483 N.E.2d at 152.

172. *Id.* at 103, 483 N.E.2d at 153. *Mers* also expressly held that there would be no exception to the at-will doctrine for malicious acts nor any implied duty on the parties to act in good faith. The court went on to note that Ohio did not recognize a duty of good faith and fair dealing. *Id.* at 105, 483 N.E.2d at 155. For a discussion of duty of the good faith and fair dealing, see *infra* text accompanying notes 84-129.

173. *Mers*, 19 Ohio St. 3d at 103, 483 N.E.2d at 153.

174. *Id.*

175. One commentator has suggested that the *Mers* court initially had decided to overrule *Fawcett*, which upheld the employment-at-will doctrine:

In the official opinion document released by the Supreme Court on August 9, 1985, following the review of *Fawcett*, there is a twenty-four line gap. After the gap, the opinion states in a new paragraph: "Having come a full circle in our

the at-will doctrine.¹⁷⁶ Employee handbooks, company policy, and oral representations might, in some situations, provide evidence from which an implied contract altering the terms of discharge might be inferred.¹⁷⁷ The court also held that the doctrine of promissory estoppel is applicable to oral employment-at-will agreements.¹⁷⁸ The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.¹⁷⁹

Between the expansive view of contract and consideration set forth in *Toussaint* and the absolutist view of employment at will, the court chose vague notions of implied contract and promissory estoppel. In separate opinions, Justice Holmes and Justice Douglas defined the two poles. Justice Holmes wrote for the absolutist tradition declaring that "[t]he law of Ohio is well documented in support of the principle that employment is presumed to be at-will unless other contractual provisions expressly or impliedly provide otherwise."¹⁸⁰ For Justice Holmes, rebuttal of the at-will presumption would be a difficult test.¹⁸¹

Justice Douglas welcomed the move from "slavish adherence

discussion of the at-will employment doctrine, we now arrive at the essential question of whether the trial court improperly sustained appellees' motion for summary judgment." Despite this language, the opinion never discussed employment-at-will. It discussed promissory estoppel and led into a twenty-four line gap with a mention of *Fawcett*, which bore no relationship to the path of the *Mers* analysis. It is submitted that *Fawcett* was originally to be overruled, but that this section was deleted from the opinion before release.

Note, *The Case for Keeping Employment-At-Will: An Analysis of Ohio's Position and the Use of Disclaimers to Avoid Wrongful Discharge Litigation*, 16 CAP. U.L. REV. 723, 736 (1987). The author quoted an attorney involved in the case and an unnamed supreme court justice as agreeing that the court initially had decided to recognize a requirement of good faith and fair dealing. *Id.* at 736 n.109.

176. *Mers*, 19 Ohio St. 3d at 103, 483 N.E.2d at 154.

177. *Id.* at 103-104, 483 N.E.2d at 154. The court listed several factors that could contribute to a finding of an exception:

the facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning the discharge.

Id. at 104, 483 N.E.2d at 154.

178. *Id.* at 108, 483 N.E.2d at 155.

179. *Id.*

180. *Id.* at 106-07, 483 N.E.2d at 156 (Holmes, J., dissenting).

181. *Id.* (Holmes, J., dissenting).

to the principles [of employment at will] enunciated in *Fawcett*, . . . which case on its face is unfair, toward a recognition that there are and should be exceptions to the antiquated and discredited employment-at-will doctrine."¹⁸² Justice Douglas hoped that the "courageous *first* step" of *Mers* would be followed by consideration of "other challenges to the employment-at-will doctrine, as have a multitude of other enlightened jurisdictions, based on public-policy considerations, contract principles, and/or tort theories, where unfair and unjust violations of the employment relationship have occurred."¹⁸³

The court struck an uneasy compromise position in *Mers*. In order to avoid the modern contract remedy of *Toussaint*, the court posited an amorphous mix of implied contract and promissory estoppel. The court supplied no substantive direction to the appellate courts. It left unanswered a host of questions concerning consideration, intent, disclaimers, and detrimental reliance. After *Mers* the appellate courts continued to decide wrongful discharge cases utilizing a variety of inconsistent theories.¹⁸⁴

Four years later in *Helmick v. Cincinnati Word Processing, Inc.*,¹⁸⁵ the Ohio Supreme Court revisited the question of promissory estoppel. The court issued a narrow ruling that a genuine issue of material fact existed as to whether the employer had made specific promises to the plaintiff, Helmick, on which she had detrimentally relied.¹⁸⁶ Helmick decided to discontinue her search for another job on the basis of her employer's promise of a career with the company as long as her job performance was satisfactory.¹⁸⁷ While the court stated that this particular set of facts could establish detrimental reliance, it proposed no general test that could be easily applied. Thus, the court failed to define the standards for detrimental reliance.

Justices Douglas and Holmes again wrote separate opinions, essentially repeating their arguments in *Mers*. In dissent, Justice Holmes advocated the at-will doctrine,¹⁸⁸ while Justice Douglas

182. *Id.* at 106, 483 N.E.2d at 156 (Douglas, J., concurring).

183. *Id.* (Douglas, J., concurring).

184. *See, e.g., infra* text accompanying notes 198-218.

185. 45 Ohio St. 3d 131, 543 N.E.2d 1212 (1989).

186. *Id.* at 136, 543 N.E.2d at 1217.

187. *Id.*

188. *Id.* at 139, 491 N.E.2d at 1219-20 (Holmes, J., concurring in part and dissenting in part); *see supra* text accompanying notes 241-42. Holmes added that "[t]his court has preserved the doctrine of employment-at-will for sound public policy reasons" but de-

waited for the day when the court would progress beyond promissory estoppel.¹⁸⁹ Douglas was looking to the expansion of the at-will exceptions when he stated:

While in the case now before us the court applies *Mers* to a new situation, it drags along the outdated absolutist position exemplified in *Fawcett* and *Phung*. I eagerly await the time when this court tosses away the view that a party has the right to violate with malice aforethought the rights of others. Since this court does not tolerate this type of behavior in any other area of the law, we should likewise not condone gross disregard of the rights of employees in the employment area.¹⁹⁰

Three weeks after *Helmick*, in *Worrell v. Multipress, Inc.*,¹⁹¹ the court took up the question of remedies for the breach of an employment contract. In *Worrell* a corporate president was fired in spite of a promise by the owner that the president would have a position as long as he performed satisfactorily. The validity of the finding of wrongful discharge was not appealed. The main issue on appeal was the damage award. The court held that an employee who had been wrongfully discharged as a result of a breach of an employment contract may be awarded front pay as compensation for lost future wages between the date of discharge and reemployment in a position of equal or similar status.¹⁹² Unlike *Mers* and *Helmick*, the court in *Worrell* went on to define the factors to be considered in determining front pay damages: (1) the age of the employee and his or her reasonable prospects of obtaining comparable employment elsewhere; (2) salary and other tangible benefits, such as bonuses and vacation pay; (3) expenses associated with finding new employment; and (4) the replacement value of fringe benefits, such as automobile and insurance for a reasonable time until new employment is obtained.¹⁹³

In *Kelly v. Georgia-Pacific Corp.*,¹⁹⁴ the court further attempted to clarify the meaning of *Mers*. In *Kelly*, a sales repre-

clined to specify those reasons. *Id.* at 139, 543 N.E.2d at 1219 (Holmes, J., concurring in part and dissenting in part). Ironically, although Douglas had previously stated that the supreme court should provide guidance in such cases, it is Holmes who attempted some further definition of detrimental reliance. *Id.* at 140, 543 N.E.2d at 1220 (Holmes, J., concurring in part and dissenting in part).

189. *Id.* at 137, 543 N.E.2d at 1218 (Douglas, J., concurring).

190. *Id.* (Douglas, J., concurring).

191. 45 Ohio St. 3d 241, 543 N.E.2d 1277 (1989).

192. *Id.* at 247, 543 N.E.2d at 1283.

193. *Id.*

194. 46 Ohio St. 3d 134, 545 N.E.2d 1244 (1989).

sentative was fired after his company was acquired by Georgia-Pacific. Kelly maintained that representations made to him in performance reviews, discussions regarding the employee manual, and correspondence from management officials created an implied contract for continued employment conditional upon his acceptable job performance. He further claimed that he relied on these representations in forbearing from seeking alternative employment.¹⁹⁵ The court held that these questions could not be resolved on summary judgment. It stated that these questions, as noted in *Mers*, were for a jury to decide.¹⁹⁶ The court indicated that *Mers* was to be read broadly in determining whether a modification of the at-will contract may be inferred from the surrounding circumstances.¹⁹⁷

Though recent Ohio Supreme Court decisions have begun to broaden the use of implied contract and promissory estoppel theories, the effect of these decisions on the appellate courts cannot be assumed. In the last few years appellate decisions in wrongful discharge cases have been thoroughly inconsistent.¹⁹⁸ All opinions begin with the *Mers* list of factors to be considered¹⁹⁹ but utilize a wide range of theories to justify disparate results.

Under one line of case, some courts have followed the traditional at-will doctrine.²⁰⁰ These courts are reluctant to enforce

195. *Id.* at 140, 545 N.E.2d at 1250.

196. *Id.*

197. The *Kelly* court quoted *Mers*: "[T]he character of the employment, custom, the course of dealing between the parties, or other facts which may throw light upon the question' can be considered by the jury in order to determine the parties' intent." *Id.* at 139, 545 N.E.2d at 1249 (quoting *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 104, 483 N.E.2d 150, 154 (1985)).

198. One court complained that:

Rather than clearing the air and establishing plain guidelines for both employers and employees on issues surrounding employment-at-will, *Mers* . . . and *Phung* . . . have spawned a plethora of cases leading to numerous, often inconsistent cases from courts of appeals . . . Briefs have become enlarged by the attachment of unreported cases arguably supportive of each party's perspective.

Parsons v. Denny's Restaurants, No. CA-2608, 1988 Ohio App. LEXIS 5109, at 9 (Dec. 9, 1988), *reh'g denied*, 46 Ohio St. 3d 717, 546 N.E.2d 1335 (1989).

199. *Mers* established:

A priori, the facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge.

19 Ohio St. 3d at 104, 483 N.E.2d at 154.

200. See *Brandenburger v. Hilti, Inc.*, 52 Ohio App. 3d 21, 24-25, 556 N.E.2d 212, 216-17 (1989); *Uebelacker v. Cincom Sys.*, 48 Ohio App. 3d 268, 271, 549 N.E.2d 1210,

vague assurances of continued employment²⁰¹ and generally hold that a handbook alone is not sufficient to create a contract.²⁰² Oral or written modifications to an original employment agreement must be accompanied by the fundamental elements of contract formation—offer, acceptance, and consideration.²⁰³ Without this mutual assent or a clearer expression of the requisite intent of the parties to be bound, an employer's handbook is viewed as merely a unilateral statement of employer rules and policies.²⁰⁴

Some of these courts have held that an employee handbook can create obligations on the part of the employer but have limited this rule in various ways. For instance, in *Stokes v. Worthington Industries, Inc.*, the court held that there can be no contractual intent if the employee was not aware of the handbook at the time of termination.²⁰⁵ Other courts have refused to enforce promises in an employment manual where the employee was not aware of the specific provision within the manual.²⁰⁶ The court, in *Karnes v. Doctors Hospital*,²⁰⁷ held that a handbook promulgated after the employee was hired was not part of the employment agreement.²⁰⁸

These courts have also upheld disclaimers and attestation clauses in employee contracts, holding that a disclaimer in a handbook is sufficient evidence of the lack of contractual intent.²⁰⁹ A

1215 (1988).

201. See *Pyle v. Ledex*, 49 Ohio App. 3d 139, 145-46, 551 N.E.2d 205, 211-12 (1988); *Seymour v. ITT Corp.*, No. 3-87-4, 1988 Ohio App. LEXIS 2148 (June 2, 1988).

202. See *Hoops v. United Tel. Co.*, No. WD-87-62, 1988 Ohio App. LEXIS 3457 (Aug. 26, 1988), *aff'd*, 50 Ohio St. 3d 97, 553 N.E.2d 252 (1990).

203. *Id.* at 7-8; *Faykosh v. Jewish Community Center*, No. L-87-335, 1988 Ohio App. LEXIS 3377, at 9 (Aug. 19, 1988); *Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 8, 472 N.E.2d 765, 773 (1984).

204. *Ferguson v. Massillon Community Hosp.*, Nos. CA-7770, CA-7823, 1989 Ohio App. LEXIS 4744, at 4 (Dec. 18, 1989); *Uebelacker v. Cincom Sys.*, 48 Ohio App. 3d 268, 272, 549 N.E.2d 1210, 1216 (1988); *Curak v. Cleveland Clinic Found.*, No. 54822, 1988 Ohio App. LEXIS 5281, at 13 (Dec. 22, 1988), *dismissed*, 43 Ohio St. 3d 701, 539 N.E.2d 164 (1989); *Miscoi v. Summit County Community Drug Bd.*, No. 13444, 1988 Ohio App. LEXIS 2873, at 4 (July 20, 1988); *Mosely v. Warrensville Heights*, No. 53930, 1988 Ohio App. LEXIS 1898, at 7 (May 19, 1988); *Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 24, 492 N.E.2d 867, 870 (1985).

205. No. 88AP-583, 1989 Ohio App. LEXIS 2636, at 14 (June 28, 1989).

206. *Id.* at 18-19 (employee had to be aware of disciplinary procedures in order for the handbook to be a binding contract).

207. No. 87AP-1028, 1988 Ohio App. LEXIS 4317 (Oct. 27, 1988).

208. *Id.* at 10.

209. See, e.g., *Beamon v. Bennett Management Corp.*, No. L-88-334, 1989 Ohio App. LEXIS 1819, at 8 (May 19, 1989); *Etengoff v. Robert Half, Inc.*, No. 56116, 1989 Ohio App. LEXIS 1579, at 3 (Apr. 27, 1989); *Tedesco v. Glenbeigh Hosp., Inc.*, No.

signed attestation clause in which the employee acknowledges his or her status as an at-will employee has also been held to be evidence of an at-will relationship.²¹⁰ In addition to demonstrating a lack of intent to contract, disclaimer and attestation clauses may make any reliance on handbook promises unreasonable, and thus make the doctrine of promissory estoppel inapplicable.²¹¹ Separate consideration is then necessary to make any promise by an employer binding; the employee's continued work is not sufficient or independent consideration.²¹²

Under another line of cases, some courts have taken less traditional approaches to the employment contract, holding that employment manuals may create rights that the employer may not abridge without creating liability.²¹³ Some courts have followed ordinary rules of contract construction in strictly construing the terms of an employment manual against an employer that was responsible for drafting the manual.²¹⁴ Employment manuals or employer representations may constitute offers for the formation of a unilateral contract.²¹⁵ The acceptance of the employer's offer

54899, 1989 Ohio App. LEXIS 899, at 5 (Mar. 16, 1989); *Gaumont v. Emery Air Freight Corp.*, No. 11199, 1989 Ohio App. LEXIS 494, at 15-16 (Feb. 16, 1989); *Tohline v. Central Trust Co.*, 48 Ohio App. 3d 280, 549 N.E.2d 1223 (1988); *Uebelacker v. Cincom Sys.*, 48 Ohio App. 3d 268, 272, 549 N.E.2d 1210, 1216 (1988); *Parsons v. Denny's Restaurant*, No. CA-2608, 1988 Ohio App. LEXIS 5109, at 7 (Dec. 9, 1988); *Dougan v. St. Joseph Hosp.*, No. 4332, 1988 Ohio App. LEXIS 3408, at 6 (Aug. 17, 1988); *Taylor v. Research Laboratories, Inc.*, 51 Ohio App. 3d 15, 15, 554 N.E.2d 114, 114 (1988); *Wargo v. ITT Lester Indus., Inc.*, No. 53637, 1988 Ohio App. LEXIS 1362, at 4-5 (Apr. 14, 1988); *Assmus v. Bettcher Mfg. Co.*, No. 53527, 1988 Ohio App. LEXIS 881, at 4-5 (Mar. 17, 1988).

210. See, e.g., *Gaumont*, 1989 Ohio App. LEXIS at 16; *Kiel v. Circuit Design Technology*, 55 Ohio App. 3d 63, 66, 562 N.E.2d 517, 520 (1988); *Taylor*, 51 Ohio App. 3d at 15, 554 N.E.2d at 114; *Uebelacker*, 48 Ohio App. 3d at 271, 549 N.E.2d at 1216; *Straka v. K Mart Corp.*, No. 3926, 1988 Ohio App. LEXIS 2742, at 3-4 (July 8, 1988).

211. See, e.g., *Beamon v. Bennett Management Corp.*, No. L-88-334, 1989 Ohio App. LEXIS 1819, at 9-10 (May 19, 1989); *Etengoff*, No. 56116, 1989 Ohio App. LEXIS at 2; *Tedesco v. Glenbeigh Hosp. Inc.*, No. 54899, 1989 Ohio App. LEXIS 899, at 6 (Mar. 16, 1989); *Uebelacker*, 48 Ohio App. 3d at 273-74, 549 N.E.2d at 1217-18.

212. See, e.g., *Pyle v. Ledex, Inc.*, 49 Ohio App. 3d 139, 146, 551 N.E.2d 205, 212 (1988); *Welser v. General Tel. Co.*, No. 9-86-13, 1988 Ohio App. LEXIS 3878, at 5-6 (Sept. 20, 1988); *Wilson v. Riverside Hosp.*, No. L-87-172, 1988 Ohio App. LEXIS 899, at 4-5 (Mar. 18, 1988); *Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 25, 492 N.E.2d 867, 871 (1985).

213. *Getto v. Board of Comm'rs Stark Metro. Hous. Auth.*, No. CA-7135, slip op. at 7 (Ohio Ct. App. Aug. 10, 1987).

214. *Adams v. Harding Mach. Co.*, 56 Ohio App. 3d 150, 153, 565 N.E.2d 858, 860 (1989); *Mastroianni v. Marymount Hosp.*, No. 52178, slip op. at 3 (Ohio Ct. App. Nov. 26, 1986).

215. See, e.g., *Ault v. St. John Medical Center*, No. 86-J-22, slip op. at 5 (Ohio Ct.

is effective where the employee remains with the employer after learning of the employer's new policy.²¹⁶ By foregoing the pursuit of other employment opportunities and continuing performance, the employee gives adequate consideration to render the new policy enforceable.²¹⁷ A disclaimer, by itself, does not necessarily establish at-will status.²¹⁸

There is little to explain the inconsistencies among the lower and appellate courts. The Ohio Supreme Court has yet to address most of the issues responsible for the lower courts' confusion. The decisions in *Helmick*, *Worrell*, and *Kelly*, however, suggest a new willingness to address these issues.

C. Public Policy Exception

Even more indicative of a new spirit in the court is the decision in *Greeley v. Miami Valley Maintenance Contractors, Inc.*²¹⁹ In *Greeley* the Ohio Supreme Court recognized a cause of action in tort where an employee is discharged in violation of public policy. This recognition of a public policy exception to the employment-at-will doctrine was a significant departure from Ohio's absolutist tradition.²²⁰

The first recognition of this public policy exception to the employment-at-will doctrine came in *Phung v. Waste Management, Inc.*²²¹ In *Phung* a Sandusky County appellate court broke with the at-will tradition and held that a cause of action for wrongful discharge could be brought in tort.²²² Phung was a chemist for the

App. Aug. 10, 1987); *King v. Hospital Care Corp.*, No. 1-85-1, slip op. at 12 (Ohio Ct. App. May 13, 1986).

216. *King*, No. 1-85-1, slip op. at 13.

217. *See, e.g.*, *Nichols v. Waterfield Fin. Corp.*, 62 Ohio App. 3d 717, 577 N.E.2d 422 (1989).

218. *See, e.g.*, *Dougan v. St. Joseph Hosp.*, No. 4332, 1988 Ohio App. LEXIS 3408, at 7 (Aug. 17, 1989) (Mahoney, J., dissenting); *Pond v. Devon Hotels, Ltd.*, 55 Ohio App. 3d 268, 269, 563 N.E.2d 738, 740 (1988). The employer may not unilaterally amend the contract by subsequently inserting a disclaimer. *King v. Hospital Care Corp.*, No. 1-85-1, 1986 Ohio App. LEXIS at 17 (May 13, 1986).

219. 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990).

220. *See, e.g.*, *Peterson v. Scott Constr. Co.*, 5 Ohio App. 3d 203, 205, 451 N.E.2d 1236, 1239 (1982) (While the "court recognize[d] the trend of other jurisdictions which impose public policy limitations on an employment contract . . . it is likewise apparent that Ohio has not deviated from the traditional rule of law.") (quoting *Wolf v. First Nat'l Bank*, 20 Ohio Op. 3d 262, 263 (1980)).

221. No. S-84-4, 1984 Ohio App. LEXIS 1 (Oct. 19, 1984).

222. *Id.* at 16; *see Goodspeed v. Airborne Express, Inc.*, 121 L.R.R.M. (BNA) 3216 (Ohio Ct. App. 1985); *Merkel v. Scovill*, 570 F. Supp. 133 (W.D. Ohio 1983), *aff'd in part*

defendant, Waste Management, which operated a toxic waste disposal facility. Phung was dismissed for reporting to his employer that it was operating its business in violation of the law. Plaintiff was terminated and then brought an action for wrongful discharge. The plaintiff argued that the court should recognize a public policy exception to the general employment-at-will rule.²²³ Justice Douglas, writing for the appellate court, agreed:²²⁴

Admittedly, defining "public policy" presents difficulty, and in that respect, it would be easier for us to interpret public policy as only those areas where the legislature has indeed spoken.

. . . [B]ut simply because the legislature has not acted in this area does not mean that this court should ignore the recent judicial developments in our sister states. "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected."²²⁵

On appeal the Ohio Supreme Court refused to recognize a public policy exception and held that Phung's claims were nothing more than "broad, conclusory allegations that Waste Management, Inc. was violating certain unspecified legal and societal obligations"²²⁶ The court held that these allegations failed to state a violation of a sufficiently clear public policy to warrant the creation of a cause of action.²²⁷ The court maintained that because the Ohio Constitution delegated to the legislature the primary responsibility for protecting the welfare of employees, the judiciary would defer in matters of employment and retaliatory discharge.²²⁸

In dissent, Justice Brown echoed the concerns of the appellate

and *rev'd in part*, 787 F.2d 174 (6th Cir.), *cert. denied*, 479 U.S. 990 (1986); *West v. Roadway Express*, No. 10263, 1982 Ohio App. LEXIS 1 (April 12, 1982).

223. *Phung*, No. S-84-4, 1984 Ohio App. LEXIS at 3.

224. Not long after writing the opinion in *Phung*, Justice Douglas was elected to the Ohio Supreme Court. When *Phung* came up on appeal, Justice Douglas recused himself.

225. *Phung*, 1984 Ohio App. LEXIS at 10-11 (quoting *O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N.J. Super. Ct. 1978)).

226. *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 102, 491 N.E.2d 1114, 1116 (1986).

227. *Id.* at 102, 491 N.E.2d at 1116-17. "Public policy does not require that there be an exception to the employment-at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of law." *Id.* at 103, 491 N.E.2d at 1117.

228. *Id.*

opinion, noting the court's constitutional duty, in the absence of legislative action, to provide remedies where rights have been violated, and called for the court to recognize a cause of action for wrongful discharge in violation of public policy.²²⁹ Moreover, Justice Brown argued that because the doctrine of employment at will was a judicially created rule, the court's duty to provide a remedy was even more compelling.²³⁰ Furthermore, Justice Brown noted that the dissent in the appellate opinion never stated that Phung's allegations were so vague and conclusory as to be insufficient to state a cause of action.

Alarmed by the court's inaction and indifference to employees' rights and large public policy concerns, the Ohio legislature passed a whistleblower's protection act.²³¹ The statute provides remedies for retaliatory discharge that may include reinstatement, back pay, reinstatement of seniority, and fringe benefits.²³² Attorney's fees are available if the party bringing the action prevails.²³³ No punitive damages, however, are available under the statute.²³⁴

In *Greeley*, the Ohio Supreme Court was not as reluctant to recognize a public policy exception to the at-will doctrine as it was in *Phung*. Moreover, the *Greeley* decision acknowledged that tort remedies would be available for an employee wrongfully discharged in violation of public policy.²³⁵

Appellant *Greeley* had been fired when his employer received an order to withhold child support payments from *Greeley*'s wages.²³⁶ The employer was fined five hundred dollars for violating section 3113.213(D) of the Ohio code, which prohibits such a discharge. The statute, however, did not provide for reinstatement. The lower courts dismissed *Greeley*'s tort claim for wrongful discharge finding that Ohio did not recognize this cause of action.²³⁷

The Supreme Court determined that the legislature did not intend that employers should be able to violate the underlying purposes of the statute by paying a minimal fine.²³⁸ It found that,

229. *Id.* at 107, 491 N.E.2d at 1120 (Brown, J., dissenting).

230. *Id.* (Brown, J., dissenting).

231. OHIO REV. CODE ANN. §§ 4113.51-53 (Anderson 1991).

232. *Id.* § 4113.52(E).

233. *Id.*

234. *See id.*

235. *Greeley*, 49 Ohio St. 3d at 239, 551 N.E.2d at 987.

236. *Id.* at 229, 551 N.E.2d at 982.

237. *Id.*

238. *Id.* at 232, 551 N.E.2d at 984. The employer's fine was suspended when it complied with the court order to pay the child support the employer had refused to withhold.

although the statute did not expressly provide for a civil remedy, there was little to indicate that the General Assembly intended to foreclose other remedies.²³⁹ According to the court the statute provided a sufficiently clear statement of public policy to warrant an exception to the employment-at-will doctrine.²⁴⁰ Attempting to harmonize *Greeley* with past decisions, the court declared that employment at will was still "alive and well" in Ohio; the court's ruling was merely a modification of that doctrine.²⁴¹ The right of employers to terminate at will, however, for "any cause" no longer included the right to discharge an employee where the discharge would violate a statute and thereby contravene public policy.²⁴² The court also acknowledged that other public policy exceptions might be recognized if the discharge were "of equally serious impact as the violation of a statute."²⁴³

Despite the majority's assurances that the at-will doctrine was alive and well, *Greeley* marked a significant departure from earlier adherence to the at-will doctrine. Traditionally, courts were reluctant to play a significant role in the development of employment termination law. *Greeley*, albeit cautiously, accepted the court's role in shaping the common law. Noting the change of tone, lower courts have extended the public policy exception to the at-will doctrine. One appellate court extended the exception to prohibit the discharge of an employee and her mother in retaliation for the employee missing work to attend jury duty.²⁴⁴

D. Duty of Good Faith and Fair Dealing

Ohio courts have consistently refused to impose a duty on the employer to only terminate employees only in good faith. In

Id. at 229, 551 N.E.2d at 982.

239. *Id.* at 233, 551 N.E.2d at 986. In dissent, Justice Holmes interpreted the legislative history differently. The legislature had amended the statute in 1986 to eliminate a provision for reinstatement of the discharged employee. Justice Holmes found this to be a clear indication that the legislature did not intend to create a civil cause of action for damages in violation of the statute. *Id.* at 236, 551 N.E.2d at 988-89 (Holmes, J., dissenting).

240. *Id.* at 233, 551 N.E.2d at 986. The court stated that it was adhering to *Phung*, in which it "held that public policy does not require that there be an exception to the employment-at-will doctrine, absent a sufficiently clear public policy" *Id.*

241. *Id.* at 234, 551 N.E.2d at 987.

242. *Id.*

243. *Id.* at 235, 551 N.E.2d at 987.

244. *Schaffer v. Frontrunner, Inc.*, 57 Ohio App. 3d 18, 566 N.E.2d 193 (1990).

Fawcett v. G.C. Murphy & Co.,²⁴⁵ the court held that an employer could lawfully dismiss at-will employees even if the termination was willful, wanton, malicious, and done with intentional bad faith.²⁴⁶ The court, in *Mers v. Dispatch Printing Co.*,²⁴⁷ refused to recognize an exception for malicious acts or to impose a duty to act in good faith.²⁴⁸ *Phung v. Waste Management, Inc.*²⁴⁹ reaffirmed *Fawcett* and refused to recognize a public policy exception to the at-will doctrine.²⁵⁰ Without a public policy exception to the at-will doctrine, courts summarily refused to entertain a cause of action for breach of the duty of good faith and fair dealing in employment termination. Appellate opinions dismissed these claims with little or no discussion.²⁵¹ While the decision in *Greeley* acknowledged that there may be a number of public policy exceptions to the at-will doctrine, it is not clear whether the court will find a similar exception to the at-will doctrine in the duty of good faith and fair dealing.

E. Summary

Although the majority in *Greeley* stated that employment at-will was "alive and well" in Ohio,²⁵² a better characterization would be that it is alive but "wounded and limping."²⁵³ Various court decisions have landed hobbling blows to the at-will doctrine.

245. 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

246. *Id.* at 250, 348 N.E.2d at 147.

247. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

248. *Id.* at 105, 483 N.E.2d at 155.

249. 23 Ohio St. 3d 100, 491 N.E.2d 114 (1986).

250. *Id.* at 102, 491 N.E.2d at 1116 (employment contracts can be terminated at anytime, regardless of any gross or reckless disregard for the employee's rights).

251. See, e.g., *Brandenburger v. Hilti, Inc.*, 52 Ohio App. 3d 21, 556 N.E.2d 212 (1989); *Kuhn v. St. John & West Shore Hosp.*, 50 Ohio App. 3d 23, 552 N.E.2d 240 (1989); *Pyle v. Ledex*, 49 Ohio App. 3d 139, 551 N.E.2d 205 (1988); *Curak v. Cleveland Clinic Found.*, No. 54822, 1988 Ohio App. LEXIS 5281 (Dec. 22, 1988); *Kelly v. Georgia-Pacific Corp.*, No. 1645, 1988 Ohio App. LEXIS 1994 (May 4, 1988), *rev'd on other grounds*, 46 Ohio St. 3d 134, 545 N.E.2d 1244 (1989). But see *Dax v. Meck*, No. CA85-05-046, slip op. (Ohio App. June 30, 1986) (allowing a claim for breach of implied covenant of good faith).

252. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 233, 551 N.E.2d 981, 986 (1990); see Note, *supra* note 175, at 743.

253. *Parsons v. Denny's Restaurants*, No. CA-2608, 1988 Ohio App. LEXIS 5109, at 3 (Dec. 9, 1988). This case was decided before *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E. 2d 981 (1990), *Worrell v. Multipress Inc.*, 45 Ohio St. 3d 241, 543 N.E.2d 1277 (1989), *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St. 3d 131, 543 N.E.2d 1212 (1989), or *Kelly v. Georgia Pacific Corp.*, 46 Ohio St. 3d 134, 545 N.E.2d 1244 (1989).

Helmick reasserted the validity of *Mers* over the absolutism of *Phung*.²⁵⁴ *Worrell* expanded the remedies for breach of an employment contract to include front pay.²⁵⁵ *Kelly* held that *Mers* is to be read broadly and precluded summary judgment where there is some evidence that employer representations may have modified the at-will contract.²⁵⁶ Finally, *Greeley* recognized a cause of action in tort for wrongful discharge in violation of public policy.²⁵⁷ In spite of the new found enthusiasm of courts to find common law exceptions to the at-will doctrine, limited applicability of the exceptions and the ever-shrinking numbers of employees covered by collective bargaining agreements leave the vast majority of employees unprotected from capricious employers.

III. CATCHING UP WITH THE TWENTIETH CENTURY

We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.²⁵⁸

The Ohio Supreme Court has ruled that "[a] fundamental policy in favor of the employment-at-will doctrine is the principle that parties to a contractual relationship should have the complete freedom to fashion whatever relationship they so desire."²⁵⁹ Thus, Ohio employment law still clings to a nineteenth century doctrine that fails to provide justice to twentieth century employees. The formalism of "freedom of contract" that gave rise to employment at will is still used to justify employment contracts of adhesion.²⁶⁰ Modern contract law, however, has moved beyond formalism to accommodate conceptions of fairness and public policy.²⁶¹ Courts

254. See *supra* text accompanying notes 185-90.

255. See *supra* text accompanying notes 191-93.

256. See *supra* text accompanying notes 194-97.

257. See *supra* text accompanying notes 219-44.

258. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis omitted).

259. *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 103, 491 N.E.2d 1114, 1116 (1986) (citations omitted).

260. See *id.*

261. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 205 (1979):

§ 178. When a Term Is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of

in many jurisdictions have attempted to adapt the judge-made doctrine of employment at will to the realities of modern employment relations.²⁶² This common law process has involved a balancing of the interests of employees, employers, and the public.²⁶³ The balance in Ohio up to this point, however, has emphasized the need for continuity and certainty at the expense of justice.²⁶⁴

A. A Modern Approach to Employment Contracts

Ohio presently recognizes two narrow exceptions to employment at will:

implied contract and promissory estoppel.²⁶⁵ Neither of these exceptions has been consistently applied, however, and much of the case law in both areas should be redirected to conform to modern employment law.

1. Implied Contract

The most common approach to employment contracts in Ohio sees the contract as a standard bilateral contract that must meet the requirements of offer, acceptance, and consideration.²⁶⁶ Most

public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

§ 205. Duty of Good Faith and Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

See also *id.* §§ 175-177 (effect of duress and undue influence on enforceability of contracts); *id.* §§ 206-208 (rules of construction, unconscionable contracts).

262. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 71, 417 A.2d 505, 511 (1980) ("This Court has long recognized the capacity of the common law to develop and adapt to current needs.").

263. "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two." *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

264. The Ohio Supreme Court admitted as much in *Mers*:

[W]e are not persuaded that modern developments which have taken place in employment relationships constitute a sufficient basis for us to now totally abolish the employment-at-will doctrine. Such an action would, among other things, place Ohio's courts in the untenable position of having to second-guess the business judgments of employers. The need for certainty and continuity in the law requires us to stand by precedent and not disturb a settled point unless extraordinary circumstances require it.

Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153 (1985).

265. See *supra* text accompanying notes 134-218.

266. Curiously, many courts holding this view have cited *Helle v. Landmark, Inc.*, 15

cases involve an employee alleging that the original at-will agreement was modified by the provisions of an employee handbook or oral representations by the employer. The modifications are usually alleged to permit termination only for cause or to provide certain procedural rights.

Courts that apply the bilateral contract standard require separate independent consideration to support any oral promise or handbook provision that might modify an at-will agreement.²⁶⁷ The intent of the parties to be bound by such promises or representations is also required.²⁶⁸ Judged by these standards, few handbooks or oral representations qualify as enforceable contracts and the employees are then subject to the employment-at-will doctrine. Summary judgment is often granted to the employer because of the absence of independent consideration or intent to contract, or because of the presence of a disclaimer.²⁶⁹

However, these are the wrong standards to apply. Few employment agreements are actually bargained for as bilateral contracts. Most employment applicants are faced with a "take it or leave it" situation. In some cases of upper level management employees, actual bargaining does take place and the bilateral model is appropriate.²⁷⁰ In the vast majority of employment agreements,

Ohio App. 3d 1, 472 N.E.2d 765 (1984), in support of a traditional view of employment agreements as standard bilateral contracts: "When such oral or written modifications of the original employment contract satisfy the paradigm elements essential to contract formation—i.e., offer, acceptance, consideration—binding obligations arise". *Id.* at 8, 472 N.E.2d at 773. This is a highly selective use of the case, as the next sentence in *Helle* states that "[g]iven this perspective, the present contractual analysis is ill-served by mechanical references to the employment-at-will doctrine." *Id.* *Helle* then goes on to posit a unilateral contract theory.

267. See *supra* text accompanying notes 45-64.

268. One of the most frequently cited authorities for this position is *Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 492 N.E.2d 867 (1985). "[I]n order for such manuals to be considered valid contracts, there must be a 'meeting of the minds.' The parties must have a distinct and common intention which is communicated by each party to the other." *Id.* at 24, 492 N.E.2d at 870 (citations omitted). *Cohen*, however, is distinguishable from the typical employee manual case. In *Cohen*, the employer sued the employee for breach of an alleged agreement by which an employee leaving the firm would compensate the firm for any clients he or she took along. The alleged agreement was unilaterally imposed by the employer after the employee had been hired. *Id.* at 22-23, 492 N.E.2d at 869. When the court called for evidence of a meeting of the minds, therefore, it was protecting the employee against a bad faith effort by the employer to impose a contract. These facts hardly fit the situation where an employee seeks in good faith to enforce terms of discharge promulgated by the employer.

269. See, e.g., *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985).

270. See, e.g., *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 543 N.E.2d 1277

however, the adhesion outweighs the bargaining.

Some courts have applied a unilateral contract analysis to employment contracts.²⁷¹ *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y. Supp. 2d 193 (1982); *Day v. Good Samaritan Hospital*²⁷² and *Helle v. Landmark, Inc.*²⁷³ rejected an "asphyxiative construction of the 'at-will' doctrine" and sought to protect the legitimate expectations of employees created by employer policy statements and personnel manuals.²⁷⁴ The unilateral analysis eliminates the problem of consideration. The employee's retention of employment and continued work performance should be sufficient consideration to make any handbook provision or oral representation an enforceable modification to the original at-will agreement.²⁷⁵ However, the employee would have to be aware of the handbook provisions for there to have been acceptance by performance.

Although the unilateral analysis holds that the employer may not make illusory promises, its solution of the consideration problem proves equally illusory. Most courts proposing a unilateral theory have stated that disclaimers of contractual intent would relieve the employer of liability for its promises.²⁷⁶ Thus the insertion of the proper magic words of disclaimer would once again render any handbook promises illusory.

At first blush, *Toussaint v. Blue Cross & Blue Shield*²⁷⁷ seemed to advance unilateral theory. But as the Michigan Supreme Court later explained, "the analysis employed in *Toussaint* . . . focused upon the benefit that accrues to an employer when it

(1989); *State ex rel. Robertson v. Board of Trustees of Clark Technical College*, No. 2416, 1988 Ohio App. LEXIS 1810 (May 13, 1988).

271. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983) (procedural safeguards in employee handbook are binding); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 443 N.E. 2d 441, 457 N.Y. Supp. 2d 193 (1982).

272. No. 8062, 1983 Ohio App. LEXIS (Aug. 17, 1983).

273. 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984).

274. *Id.* at 7, 472 N.E.2d at 772.

275. See *id.* at 10-11, 472 N.E.2d at 775; *Day*, No. 8062, 1983 Ohio App. LEXIS at 10.

276. "All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual . . . regardless of what the manual says or provides . . ." *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 309, 491 A.2d 1257, 1271 (1985); see, e.g., *Helle*, 15 Ohio App. 3d at 28, 472 N.E.2d at 774; *Day*, No. 8062, 1983 Ohio App. LEXIS at 24-30.

277. 408 Mich. 579, 292 N.W.2d 880 (1980).

establishes desirable personnel policies."²⁷⁸ Written personnel policies are not enforceable because they have been "offered and accepted" as a unilateral contract, rather their enforceability arises from the benefit the employer derives by establishing such policies.²⁷⁹ The employer derives benefit from a cooperative and loyal work force.²⁸⁰ Additionally, handbooks may enable the employer to avoid the installation of a union.²⁸¹

The formalistic view of disclaimers as necessarily dispositive of the question of employer liability is part of a nineteenth century anachronism that Ohio must discard. *Toussaint* held that disclaimers could effectively relieve the employer of liability for its promises in a manual.²⁸² Yet this is inconsistent with the benefit analysis expounded by the Michigan Supreme Court. The benefits accruing to the employer are not extinguished by the use of a disclaimer. The employer's intent is to continue to reap the benefits that handbooks provide yet escape responsibility for the promise that gave rise to those benefits.²⁸³ The employer often knows that employees will not notice or understand the effect of disclaimers.

Ohio courts have held that disclaimers can be negated by other provisions of the manual or by oral representations.

The handbook must be read as a whole, not by isolated parts. Repeated assurances of continued employment unless discharged for just cause coupled with an isolated disclaimer or reservation of termination at will, requires a factual determination as to the provisions that are understood and enforced, and an effort should be made to reconcile the provisions of the handbook.²⁸⁴

278. *In re Certified Question*, 432 Mich. 438, 453, 443 N.W.2d 112, 119 (1989).

279. *Id.*; see also *supra* text accompanying notes 200-18.

280. *Certified Question*, 432 Mich. at 439, 443 N.W.2d at 119.

281. See *Spring v. A & D Foodarama*, No. CA-7095, slip op. (Ohio Ct. App. Sept. 8, 1987).

282. *Toussaint*, 408 Mich. at 612, 292 N.W.2d at 891 (1980).

283. One Ohio judge has expressed concern that:

[W]e have over-emphasized the weight and effect to be given disclaimers in employer's work manuals on the employment-at-will doctrine. While employers have promised tenure for good behavior in accordance with a manual, we have permitted employers to deny the existence of a contract and fire employees . . . even though they complied with the manual.

As a matter of public policy, we should not permit employers to hide behind disclaimers, but rather we should look to the manuals, etc. to determine if there is in fact a contract.

Dougan v. St. Joseph Hosp., No. 4332, 1988 Ohio App. LEXIS 3408, at 7 (Aug. 17, 1988) (Mahoney, J., dissenting).

284. *Pond v. Devon Hotels, Ltd.*, No. 88AP-62, 1988 Ohio App. LEXIS 4607, at 12-

Thus the context of the manual itself is capable of negating the disclaimer.

Oral representations can also negate the effects of written disclaimers.²⁸⁵ *Mers v. Dispatch Printing Co.* held that "the facts and circumstances surrounding an oral employment-at-will agreement . . . can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge."²⁸⁶ The optional "can be considered" is precisely the type of statement that has resulted in the inconsistency of Ohio employment law. Any realistic assessment of the effect of a disclaimer should require that the facts and circumstances be considered by the trier of fact.

The employer's continued enjoyment of the benefits of the handbook provisions argues against the recognition of employer disclaimers. The general rule of construction that an ambiguity in a contract will be construed against the drafter "applies to employment contracts"²⁸⁷ and undermines the effect of the disclaimer. Disclaimers are necessarily ambiguous and create material issues of fact precluding summary judgment.²⁸⁸ The weight and effect of disclaimers is continually overemphasized by Ohio courts.

2. Promissory Estoppel

Ohio has also recognized that the doctrine of promissory estoppel is applicable to employment contracts.²⁸⁹ The effect of this recognition has been to relieve the pressure on the Supreme Court to provide a theoretical basis and practical standards for determining whether there has been a modification of an at-will contract. In providing a by-pass in the form of promissory estoppel,

13 (Nov. 10, 1988).

285. See *Helle*, 15 Ohio App. 3d at 10, 472 N.E.2d at 775; *Kochis v. Sears, Roebuck & Co.*, No. CA-2175, 1984 Ohio App. LEXIS 1 (Feb. 23, 1984).

286. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 104, 483 N.E.2d 150, 154 (1985).

287. See *Adams v. Harding Mach. Co.*, 56 Ohio App. 3d 150, 565 N.E.2d 857 (1989); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App. 3d 220, 515 N.E.2d 632 (1986); *Bolling v. Clevepak*, 20 Ohio App. 3d 113, 484 N.E.2d 1367 (1984).

288. See *Pond*, 55 Ohio App. 3d at 268, 563 N.E.2d at 739. The disclaimer can be interpreted as denying only that the handbook alone was the employment contract. This does not preclude the handbook from constituting a part of the employment contract, supplying terms along with other representations, circumstances, and customs. *Id.* at 274, 563 N.E.2d at 744.

289. See *supra* text accompanying notes 134-218.

the court has avoided the issue of implied contract theory. Rather than taking on the responsibility of a common law court to adapt the law to modern conditions, the Ohio Supreme Court chose to fall back on the equitable powers of the courts. Problems of consideration, intent, and disclaimers were left to the lower courts to decide with little more than a vague exhortation.²⁹⁰

Promissory estoppel has often been used to prevent injustice where consideration requirements are not satisfied.²⁹¹ However, the relaxed consideration requirement is more than offset by the introduction of new hurdles: the reasonableness of the reliance and the detrimental nature of that reliance. In practice, the question of whether the reliance was reasonable often boils down to the same question that arises in an implied contract inquiry: was there a clear promise? Many courts, upon finding no clear promise that would enable an implied contract, deny the promissory estoppel claim without any additional inquiry.²⁹²

Disclaimers have also been held to make reliance on handbook promises or employer representations unreasonable²⁹³ and

290. The Ohio Supreme Court gave the doctrine of promissory estoppel as applied in the employment context the following articulation:

[T]he doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements. . . . The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.

Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 105, 483 N.E.2d 150, 155 (1985). One court has formulated the essential elements of promissory estoppel in a far more restrictive manner than *Mers*: "There must be a promise, clear and unambiguous in its terms, reliance by the party to whom the promise is made, the reliance must be reasonable and foreseeable, and the party claiming estoppel must be injured by the reliance." *Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 26, 492 N.E.2d 867, 872 (1985). However, *Cohen* dealt with a situation where an employer was seeking to enforce a handbook provision to the detriment of an employee. Its strict requirements were intended to protect the employee. *Id.* That has not deterred some courts from citing *Cohen* to require a clear unambiguous promise from the employer before his promise can be enforced. *See, e.g., Manofsky v. Goodyear Tire & Rubber Co.*, No. 14548, 1990 Ohio App. LEXIS 4434 (Oct. 3, 1990).

291. *See Uebelacker v. Cincom Sys.*, 48 Ohio App. 3d 268, 273-74, 549 N.E.2d 1210, 1217 (1988); *Blackwell v. U.A.W.*, 9 Ohio App. 3d 179, 183, 458 N.E.2d 1272, 1276 (1983); *Talley v. International Bhd. of Teamsters, Local No. 377*, 48 Ohio St. 2d 142, 146, 357 N.E.2d 44, 47 (1976).

292. *See, e.g., Kiel v. Circuit Design Technology*, 55 Ohio App. 3d 63, 67, 562 N.E.2d 517, 521 (1988); *Curak v. Cleveland Clinic Found.*, No. 54822, 1988 Ohio App. LEXIS 5281, at 15 (Dec. 22, 1988); *Parsons v. Denny's Restaurant*, No. CA-2608, 1988 Ohio App. LEXIS 5109, at 13 (Dec. 9, 1988); *Turner v. SPS Technologies, Inc.*, No. 51945, slip op. at 13, (Ohio Ct. App. June, 4, 1987); *Cohen & Co. v. Messina*, 24 Ohio App. 3d 22, 26, 492 N.E.2d 867, 872 (1985).

293. *See, e.g., Beamon v. Bennett Management Corp.*, No. L-88-334, 1989 Ohio

may supply the basis for summary judgment in favor of the employer on a claim of promissory estoppel.²⁹⁴ The disclaimer creates just as much of an issue for the trier of fact in a promissory estoppel claim as it does with implied contract, however. Summary judgment is equally inappropriate in either case.

With no standards from the Ohio Supreme Court governing detrimental reliance, the appellate courts have created widely divergent standards of their own. Some courts have required the plaintiff to have turned down other job offers.²⁹⁵ This requirement leads to the anomalous result that the employee who relies heavily on employer representations and does not look for other employment will have no other job offers and thus will be unable to show detrimental reliance. The employee who relies less on employer representations will be more likely to seek other work, garner other job offers, and show detrimental reliance. Other courts have held that foregoing the search of other employment is sufficient to demonstrate detrimental reliance.²⁹⁶ There is little predictability for either employers or employees. The existence of an equitable safety net such as promissory estoppel is certainly appropriate, but this often proves illusory in the absence of clear standards for its application. An extraordinary remedy for the unusual case should not be used to avoid providing a coherent theory and remedy for the typical case.

B. Beyond Contract: The Necessity of Tort Remedies

The second common issue presented is [the] contention that the right of employers "to terminate employment at will for any cause, at any time whatever, is not absolute, but limited by principles which protect persons from gross or reckless disregard of their rights and interests, wilful, wanton or malicious acts or acts done intentionally, with insult, or in bad faith."²⁹⁷

App. LEXIS 1819, at 9-10 (May 19, 1989); *Uebelacker*, 48 Ohio App. 3d at 272, 549 N.E.2d at 1216-17; *Tedesco v. Glenbeigh Hosp. Inc.*, No. 54899, 1989 Ohio App. LEXIS 899, at 5 (Mar. 16, 1989).

294. See, e.g., *Uebelacker*, 48 Ohio App. 3d at 273-74, 549 N.E.2d at 1217-18.

295. See *McKenney v. Structural Fibers, Inc.*, No. 89-L-14-018, 1989 Ohio App. LEXIS 2980, at 12 (July 28, 1989); *Wilson v. Riverside Hosp.*, No. L-87-172, 1988 Ohio App. LEXIS 899, at 7-8 (Mar. 18, 1988).

296. *Spring v. A & D Foodarama*, No. CA-7095, slip op. at 9 (Ohio Ct. App. Sept. 8, 1987); *Hedrick v. Center for Comprehensive Alcoholism Treatment*, 7 Ohio App. 3d 211, 214, 454 N.E.2d 1343, 1346-47 (1982).

297. *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 249, 348 N.E.2d 144, 147 (1976).

Although fundamental fairness, social policy, and basic tort principles might have made the above contention appear self-evident, the Ohio Supreme Court found otherwise. In the face of appellate activism, the court in *Phung v. Waste Management, Inc.*,²⁹⁸ reasserted the *Fawcett v. G.C. Murphy & Co.*²⁹⁹ tradition. It effectively foreclosed the possibility of either a public policy exception or tort remedies in general. The narrow measure of equitable relief provided by the whistleblower's protection statute³⁰⁰ does not go far enough. By only allowing for back pay, the statute may make it profitable for the employer to fire the employee and pay the statutory price. The employer would be rid of the troublesome employee and would chill any activity by the remaining employees. The statute lacks the teeth that only punitive damages can provide.

*Greeley v. Miami Valley Maintenance Contractors, Inc.*³⁰¹ reinvigorates these possibilities—but only marginally. Even the strongest public policy exception directly affects only a very small number of cases. Its indirect effect, however, can be much larger. The public policy exception is a general barometer of the climate for employment rights. Historically, it has created the grounds for more substantial recognition of employee rights.³⁰² The public policy exception can be seen as a special case of the implied covenant of good faith and fair dealing where a violation of a statute or regulation is taken as a per se violation of the covenant. Recognition of this covenant is the next step after *Greeley*. Without such a step, *Greeley* is an empty gesture that will have little if any effect on employee rights in Ohio.

It is a basic tort principle that a malicious or intentionally harmful act towards another gives rise to a cause of action in tort.³⁰³ Both the *Restatement (Second) of Contracts*³⁰⁴ and the Uniform Commercial Code³⁰⁵ impose a duty of good faith and fair

298. 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

299. 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

300. OHIO REV. CODE ANN. § 4113.51 (Anderson 1991); see *supra* text accompanying notes 231-34.

301. 49 Ohio St. 3d 288, 551 N.E.2d 981 (1990).

302. See *supra* text accompanying notes 65-83.

303. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984).

304. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

305. "Every contract or duty within this Act imposes an obligation of good faith in

dealing on all contracts. Jurisdictions that have recognized an implied covenant of good faith and fair dealing in employment contracts have found that it sounds in tort as well as contract.³⁰⁸ The analogy to the implied covenant in insurance contracts has been persuasive.³⁰⁷

Ohio has long recognized that insurance companies have a duty to act in good faith toward their insureds and that a breach of this duty will give rise to an action in tort.³⁰⁸ Punitive damages may be recovered against an insurer who has breached this duty upon a showing of actual malice, fraud, or insult.³⁰⁹ The inequality of bargaining power between employer and employee is just as great as that between the insurer and insured.³¹⁰ The conflict of interest between the employer and employee is just as great as that between the insurer and insured. In each case a tort remedy is essential to protect against arbitrary and malicious conduct. Insurance contracts are not merely contracts entered into for commercial gain, but agreements designed to provide for security against accidental loss. Employment provides far more. It provides status, income, future income security, and benefits such as medical insurance, life insurance, and pension.³¹¹ One can do without insurance, but one cannot do without employment.³¹² The reliance and dependence of the employee upon the employer is every bit as great as the reliance in the insurance context.³¹³ Often the wrongfully discharged worker cannot mitigate damages by finding other employment.

its performance or enforcement." U.C.C. § 1-203 (1978).

306. See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 454-55, 168 Cal. Rptr. 722, 728-29 (1980).

307. See *id.* at 454, 168 Cal. Rptr. at 728.

308. See *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983). For wrongful discharge cases rejecting an extension of the insurance analogy to the employment context, see *Brandenburger v. Hilti, Inc.*, 52 Ohio App. 3d 21, 27-28, 556 N.E.2d 212, 219 (1989); *Kuhn v. St. John & West Shore Hosp.*, 50 Ohio App. 3d 23, 25, 552 N.E.2d 240, 242 (1989).

309. See *Hoskins*, 6 Ohio St. 3d at 277-78, 452 N.E.2d at 1320-21 (distinguishing conduct that gives rise to tort liability from conduct sufficiently egregious to justify punitive damages); cf. *Columbus Fin., Inc. v. Howard*, 42 Ohio St. 2d 178, 183-84, 327 N.E.2d 654, 658 (1975) (malice required for punitive damages may be inferred from surrounding circumstances).

310. See *supra* text accompanying note 24.

311. See *supra* note 120 and accompanying text.

312. See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 709, 765 P.2d 373, 407, 254 Cal. Rptr. 211, 245 (1988) (Broussard, J., concurring in part and dissenting in part).

313. See *id.* (Broussard, J., concurring in part and dissenting in part).

The implied covenant of good faith and fair dealing in employment contracts is a duty imposed by law, not one arising from the terms of the contract.³¹⁴ It is "non-consensual in origin and reflects the values of society as a whole and society's interest in protecting its members from harm on account of non-consensual conduct."³¹⁵ It also reflects society's interest in fully compensating those members who have been injured by intentional employer conduct.³¹⁶ While contract damages are limited to lost wages and benefits, tort remedies allow compensation for the full scope of injuries that a wrongful discharge causes. Thus pain and mental anguish and loss of reputation, seniority, career opportunity, and job security should be compensable in tort. Tort remedies also would enable deterrence of socially abhorrent conduct through the award of punitive damages.

Fawcett rejected the proposition that society could limit the right of the employer to maliciously discharge employees.³¹⁷ It is time to reject *Fawcett*. Its holding offends public policy, logic, and fundamental fairness.³¹⁸ It has always been "the function of the

314. See *id.*, 47 Cal. 3d 654, 710, 254 Cal. Rptr. 211, 246-47, 765 P.2d 373, 408 (1988) (Broussard, J., concurring in part and dissenting in part); *id.* at 716, 254 Cal. Rptr. at 251, 765 P.2d at 413 (Kaufman, J., concurring in part and dissenting in part); *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 307, 668 P.2d 213, 214-15 (1983).

315. *Foley*, 47 Cal. 3d at 716, 765 P.2d at 413, 254 Cal. Rptr. at 251 (Kaufman, J., concurring in part and dissenting in part).

316. See *id.* (Kaufman, J., concurring in part and dissenting in part).

317. *Fawcett*, 46 Ohio St. 2d at 250, 348 N.E.2d at 147-48.

318. *Foster v. McDevitt*, 31 Ohio App. 3d 237, 511 N.E.2d 403 (1986), shows how far *Fawcett*'s condonation of malicious conduct can be taken. There, an employer had admitted her dislike of the employee and her intention to force him to quit. The employer knew that the employee had a heart condition, but she often berated him without justification in the presence of others, reduced his pay and responsibilities, and forced him to do heavy physical labor. The employer then terminated the employee while he was recuperating from his hospitalization for angina pectoris. The employee's condition continued to worsen after his discharge, and he died some months later. His widow brought an action for wrongful discharge, intentional infliction of emotional distress, and wrongful death. The wrongful discharge claim was dismissed in accordance with *Fawcett*. *Id.* at 238, 511 N.E.2d at 405.

Even more shocking is the effect of *Fawcett* on the infliction of emotional distress claim. Since the *Fawcett* view of employment at will made the discharge lawful, it could not be used as evidence in the emotional distress claim. *Id.* at 239, 511 N.E.2d at 406. However, the court held that the other evidence of the employer's outrageous behavior was sufficient to overrule the directed verdict for the defendant on the emotional distress issue. *Id.* at 240, 511 N.E.2d at 407-08.

Foster now is cited for the proposition that "conduct which may at times be extreme and outrageous is in some circumstances privileged. In an at-will employment situation, the employer will not be liable where the act does no more than involve the legal right held by the employer." *Brzozowski v. Stouffer Hotel Co.*, No. 55865, 1989 Ohio LEXIS 3591, at 6

common law 'to protect the weak from the insults of the stronger.'"³¹⁹ Recognition of the implied covenant of good faith and fair dealing is the next step in that common law tradition.

IV. BEYOND EXCEPTIONS: JUSTIFYING JUST CAUSE

[I]t is clear that the employment-at-will doctrine in Ohio is today alive and well in an employment relationship which is, without more, clearly at will. Such a relationship permits termination of employment for no cause or for "any cause" which is not unlawful, at any time and regardless of motive.³²⁰

In *Greeley*, the Ohio Supreme Court changed the face of Ohio employment law when it recognized a public policy exception to employment at will. Justice Douglas, writing for the majority, downplayed the significance of the decision, emphasizing its narrowness.³²¹ Justice Wright's dissent warned that the exception may open the door to far greater erosion of the doctrine.³²² Both may have been correct. In fact, *Greeley* will not have much practical effect on Ohio employment relations. *Fawcett* has only been "modified,"³²³ and the number of employees affected by the narrow public policy exception is minuscule.³²⁴ However, if Holmes's prediction for the future is borne out, the effects of *Greeley* may extend far beyond its immediate holding.

Yet even total rejection of *Fawcett* and recognition of the covenant of good faith and fair dealing would only provide a remedy for those employees who could prove malicious intent. For the vast majority of wrongfully discharged employees whose discharge cannot be characterized as malicious, there is no protection.³²⁵

(Sept. 14, 1989).

319. *Foley*, 47 Cal. 3d at 715, 765 P.2d at 412, 254 Cal. Rptr. at 250 (Broussard, J., concurring in part and dissenting in part) (quoting 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 1765)).

320. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 234, 551 N.E.2d 981, 986-87 (1990) (emphasis omitted) (citation omitted). Compare *id.* at 235, 551 N.E.2d at 987 (Holmes, J., dissenting) ("The majority of this court again bashes the long-standing employment-at-will doctrine in its continuing desire to annihilate it.").

321. *Id.* at 234-35, 551 N.E.2d at 987.

322. *Id.* at 237, 551 N.E.2d at 989 (Wright, J., dissenting).

323. *Id.* at 234, 551 N.E.2d at 987.

324. There has not been a single recorded appellate case dealing with the whistleblower protection act, OHIO REV. CODE ANN. §§ 4113.51-53 (Anderson 1991), since it went into effect on June 29, 1988.

325. A continuum of employee rights exists:
at-will >> public policy >> good faith/fair dealing >> just cause >> implied

The time has come to confront openly the rule and assess its viability. After six years of wrestling with the issue of employment at will, the debate in Ohio courts has never gone beyond the question of exceptions to the at-will framework. The Ohio Supreme Court has yet to address substantively the underlying issue of the at-will framework. In *Mers v. Dispatch Printing Co.*,³²⁶ three sentences in the text and two in a footnote are devoted to the rationales underlying the employment-at-will doctrine.³²⁷ Likewise, *Phung v. Waste Management, Inc.*³²⁸ provides only one perfunctory sentence justifying employment at will.³²⁹ Other recent employment-at-will decisions contain no discussion whatsoever of the rationales or current viability of the at-will doctrine.³³⁰

contract.

As one moves to the right on the scale, the exceptions increasingly limit the unfettered discretion of employment at will. The step from at will to a public policy exception represents the abolition of the absolutist conception of employment at will, a major qualitative change. Little changes, however, in employment relations as a whole. Recognition of the implied covenant of good faith and fair dealing further decreases the scope of the at-will rule. This step changes the level of employer misbehavior needed to establish a wrongful discharge claim from willful and malicious conduct that violates public policy to all willful and malicious conduct. Just cause changes the standard even further, from willful and malicious conduct to unjust conduct. The step to just cause also changes the burden of proof. For example, in union contexts, where the just cause standard is generally used, the burden rests on the employer to show that the discharge was for a just (business) cause.

326. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

327. They read:

However, we are not persuaded that modern developments which have taken place in employment relations constitute a sufficient basis for us to now totally abolish the employment-at-will doctrine. Such an action would, among other things, place Ohio's courts in the untenable position of having to second-guess the business judgments of employers. The need for certainty and continuity in the law requires us to stand by precedent and not disturb a settled point unless extraordinary circumstances require it.

Id. at 103, 483 N.E.2d at 153.

The presumption is grounded on a policy that it would otherwise be unreasonable for a man to bind himself permanently to a position, thus eliminating the possibility of later improving that position. Moreover, a contract of permanent employment is by its very nature indefinite, and thus any effort to interpret the duration of the contract and assess the amount of damages becomes difficult.

Id. at 102 n.1, 483 N.E.2d at 153 n.1 (quoting *Henkel v. Educational Research Council of Am.*, 45 Ohio St. 2d 249, 255, 344 N.E.2d 118, 122 (1976)).

328. 23 Ohio St. 3d 100, 491 N.E.2d 1115 (1986).

329. "A fundamental policy in favor of the employment-at-will doctrine is the principle that parties to a contractual relationship should have complete freedom to fashion whatever relationship they so desire." *Id.* at 102, 491 N.E.2d at 1116.

330. See, e.g., *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990); *Kelly v. Georgia-Pacific Corp.*, 46 Ohio St. 3d 134, 545 N.E.2d 1244 (1989); *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 543 N.E.2d 1277 (1989); *Helmick v. Cincinnati Word Processing*, 45 Ohio St. 3d 131, 543 N.E.2d 1212

An at-will employment relationship can no longer be presumed. The need to carve more and more exceptions out of this antiquated rule demonstrates the wisdom of reevaluating it. A broader analysis is essential for the construction of more equitable and efficient remedies.

A. Basic Fairness

The employment-at-will doctrine should be abandoned in favor of a standard of "just cause" for termination. A rule that allows an employer to terminate an employee "for good cause or for no cause, or even for bad cause"³³¹ violates the most basic principles of fundamental fairness. A rule that permits the "gross or reckless disregard of [employee] rights and interests, [and] wilful, wanton or malicious acts"³³² against them contravenes basic standards of decency. On a conceptual level, there is little to justify an unfettered employer right to treat employees unfairly.³³³

Employment at will ignores principles of equal treatment and due process that our society upholds in almost every other area of law. Ironically, these principles are upheld in every area of employment law except employment at will. For instance, just cause protection from unfair discharge is the rule for unionized employees.³³⁴ A large portion of civil service employees also enjoy substantial protection from unfair discharge.³³⁵ Federal³³⁶ and state³³⁷ legislation protects employees who are members of certain

(1989).

331. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915).

332. *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 249, 348 N.E.2d 144, 147 (1976).

333. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 66 (1988) (reviews the foundations of the at-will presumption and calls for statutory solutions in response to legitimate employee expectations).

334. "[A]pproximately ninety-five percent of the collective bargaining agreements contain grievance and arbitration provisions, and approximately eighty percent of the agreements specifically require that there be cause or just cause for a discharge." Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979) (citations omitted).

335. "Over ninety percent of these federal civilian employees are tenured and enjoy the procedural safeguards that Congress and the Civil Service Commission have provided against "adverse action" taken by supervisors . . . [A] conservative estimate would be that more than half of [state employees] are so protected." *Id.* at 8-9.

336. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1988); see *supra* text accompanying notes 35-40.

337. For example, the Ohio Civil Rights Act prohibits discharge on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry. OHIO REV. CODE ANN. §

classes from discriminatory discharge.

"The United States is one of the few industrial countries which does not provide general legal protection against unjust dismissals."³³⁸ About sixty-five nations now impose a statutory requirement of just cause for discharge, including the European Common Market countries, Sweden, Norway, Japan, Canada, and others in Africa, Asia, and Latin America.³³⁹

In 1963 the International Labor Organization ("ILO") adopted a recommendation declaring that there should be a "valid reason for [a job] termination connected with the capacity or conduct of the worker or based on the operational requirements [of the employer]."³⁴⁰ In 1982 the ILO called a special convention that reaffirmed this recommendation and called for increased substantive and procedural safeguards in termination cases.³⁴¹

In today's industrial society, employment plays a central role in defining one's self-image.³⁴² Stable employment allows employees to enjoy present income, future income security through pensions, and job preferences and career opportunities through seniority. A job also provides a sense of identity and status in the community. Discharge may mark an employee's record and prevent future employment. The older worker may be at a particular disadvantage from discharge.

Because of its ramifications, an employment contract is not just another commercial transaction. Nevertheless, our employment law treats it like an agreement for the sale of goods. In fact, the at-will doctrine treats the employment contract worse. Contracts for the sale of goods are governed by the Uniform Commercial Code, which attempts to bring the law of commercial contracts into accordance with modern business practices.

4112.02(A) (Anderson 1991).

338. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 508 (1976).

339. AMERICAN BAR ASS'N, *supra* note 13, at 18-19.

340. *Id.* at 18.

341. See Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207, 211-16 (1983).

342. As one commentator has noted:

One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status.

Gould, *The Idea of Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892.

Employment contracts are governed by a theoretical model that is over one hundred years old and ill-suited to twentieth century employment relations and expectations.³⁴³

B. Theoretical Arguments: Freedom of Contract v. Contractual Justice

Employment at will has found few academic defenders. The main advocate of the doctrine, Richard Epstein, has grafted an economic analysis onto the basic nineteenth century model of the employment contract.³⁴⁴ Epstein believes that the complete freedom of contract that exists under employment at will provides the best possible arrangement to promote individual autonomy and the efficiency of markets.³⁴⁵ Epstein argues that the at-will presumption is the best rule of construction for employment contracts.³⁴⁶ By contrast, proponents of a just cause standard for termination maintain that employment-at-will freedom of contract arguments mask a de facto denial of the individual freedom of the employee, and that the benefits of the at-will scheme to employees as well as the costs of a just cause regime to employers have been greatly overstated.³⁴⁷ In addition, proponents argue that the at-

343. See Silard, *Rights of the Accused Employee in Company Disciplinary Investigation*, in PROCEEDINGS OF N.Y.U. 22D ANN. CONF. ON LAB. 217, 219-26 (1970), reprinted in D. ROTHSCHILD, L. MERRIFIELD & H. EDWARDS, COLLECTIVE BARGAINING AND LABOR ARBITRATION 560 (1979).

We have long passed the era of employment fluidity where a worker fired by one employer could simply saddle his horse and settle in the next county in a new job. With modern record keeping and employer cooperation systems the opprobrium of discharge may follow the employee wherever he goes. Moreover, in many callings a man's job is his permanent career. Job seniority is the key to preferred work and wages, and an employee with seniority can ill afford to start afresh with another employer. Accumulated pension rights representing an enormous capital asset for the employee are imperilled if he is discharged and must begin new employment without pension crediting years of service.

Id.

344. See Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). Epstein has argued on behalf of Ohio employers. See Brief of Amicus Curiae The Ohio Manufacturers Ass'n, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (No. 84-1909); Brief of Amicus Curiae The Ohio Chamber of Commerce, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (No. 84-1909).

345. Epstein, *supra* note 344, at 951.

346. *Id.* at 952.

347. See generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (the at-will rule magnifies the inherently greater power of the employer and threatens workers' individual freedom); Summers, *supra* note 26 (where there is inequality of bargaining power, such

will presumption is a fundamentally incorrect rule of construction for employment contracts.³⁴⁸

Epstein's twentieth century version of the nineteenth century doctrine holds that the freedom to enter into a contract is as basic as freedom of religion or freedom of speech.³⁴⁹ Government intervention into the free choice of the parties is an unwarranted substitution of the judgment of a court or a legislature for the judgment of the parties.³⁵⁰ "Any limitation upon the freedom to enter into [at-will] contracts limits the power of workers as well as employers."³⁵¹ According to this view, the at-will scheme is one of mutual benefit that provides for the freedom of the employer to terminate at will and the freedom of the employee to quit at will.

These arguments from the defenders of at-will theory ignore the fact that the employer starts with much greater power than the employee in an at-will system. Additionally, they rest on a mutuality concept³⁵² that many courts have abandoned.³⁵³ The necessity of government intervention into employment relations was a basic premise of the National Labor Relations Act and subsequent remedial legislation.³⁵⁴ The Act rejected the laissez-faire formalism of the *Lochner* era when it expressly recognized the difference between abstract freedom of contract and actual liberty of contract.³⁵⁵

One of the main arguments of both academics and employers is that the at-will system works in practice.³⁵⁶ "It is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers."³⁵⁷ According to this view, the at-will presumption is an economically efficient framework for providing mutual

as in employment contracts, the law should protect the weaker party).

348. See, e.g., Blades, *supra* note 347; Summers, *supra* note 26.

349. See Epstein, *supra* note 344, at 953.

350. *Id.* at 954.

351. *Id.*

352. See *id.* at 957.

353. See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 600, 292 N.W.2d 880, 885 (1980). Epstein does not discuss the questions of consideration and intent that have been the focus of judicial and academic debate. See *supra* text accompanying notes 45-64.

354. See *supra* text accompanying note 24.

355. See *id.*

356. "Employment at-will has functioned well for decades and will continue to do so." Brief of Ohio Manufacturers Ass'n at 1, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986)(No. 84-1909).

357. See Epstein, *supra* note 344, at 955.

benefits to the parties.³⁵⁸ Employers gain an efficient disciplinary scheme. Firing and quitting are cheap means of resolving employment problems since this renders expensive monitoring unnecessary³⁵⁹ and eliminates litigation costs.³⁶⁰ Defenders of employment at will also maintain that employees benefit from at-will contracts.³⁶¹ They may simply quit at any time that the employment arrangement is not advantageous. As there is no implied term for the contract, they will incur no litigation expenses as a result of quitting.³⁶² The at-will contract provides for limitations on the employer's power since arbitrary action by the employer will cause workers to begin to look elsewhere for employment security.³⁶³ Epstein argues that because there are powerful correctives against capricious discharge, the chance of arbitrary dismissal of innocent employees is quite remote.³⁶⁴ The stigma of dismissal is less troublesome when it is understood that discharge under an at-will contract does not necessarily imply misconduct.³⁶⁵

Epstein professes to conduct "a full analysis of the relevant costs and benefits" of the at-will contract.³⁶⁶ His conception of relevance, however, is quite limited. It centers on the costs and benefits to the employer and fails to see the costs an at-will regime imposes on wrongfully discharged employees. The loss of income, benefits, security, and status that accompany termination do not appear on Epstein's balance sheet. The realities of the job market make it far easier for the employer to find another employee than for the employee to find another job.³⁶⁷ Epstein's model ensures

358. *See id.* at 957.

359. *See id.* at 965.

360. *See id.* at 970 (a just cause rule would make summary judgment difficult to grant, since motive would be a critical element).

361. *See id.* at 966.

362. *Id.* at 967.

363. *Id.* at 968.

364. *Id.* at 970.

365. *Id.*

366. *Id.* at 982.

367. As Justice Kaufman expressed it:

Indeed, I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee. And, ironically, the relative imbalance of economic power between employer and employee tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. Marketplace? What market is there for the factory worker laid-off after 25 years of labor in the same plant, or for the middle-aged executive fired after 25 years

that the more powerful party in the market will dictate the terms of employment. In the employment context, the employer is, in nearly all cases, the more powerful party.³⁶⁸

Employers themselves take a more practical approach than the theoretical justification offered by Epstein. They are more concerned with litigation costs and loss of management prerogatives than with abstract economic analysis. Employers object that further limitation or abolition of employment at will would make the law increasingly complex³⁶⁹ and worry that just cause would require an elaborate structure for administration or arbitration.³⁷⁰ Yet problems of complexity stem from the at-will doctrine itself. In order to relieve some of the harshest effects of employment at will and still preserve the rule, the courts have been forced to create a complex web of exceptions. Abolition of the rule and its exceptions would enable the construction of a far simpler system. It is unlikely that any system would be as complex and entangled as the one currently in place. Just cause achieves simplicity while increasing overall fairness.

It is argued that abolishing the doctrine would require courts, arbitrators, or administrators to second-guess the business judgment of employers.³⁷¹ Limitations on the employer's freedom to terminate would lead to limitations on the right to demote, transfer, and discipline.³⁷² This could negatively affect the efficiency of the operation.³⁷³ Companies, however, were able to live with the costs of collective bargaining, of which just cause was a minor component. It is significant that when employers were demanding

with the same firm?

Foley v. Interactive Data Corp., 47 Cal. 3d 654, 718, 765 P.2d 373, 414-15, 254 Cal. Rptr. 211, 253 (1988) (Kaufman, J., concurring in part and dissenting in part).

368. Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1429-31 (1983) (Epstein's model promotes employer economic power by guaranteeing legal climate of mere formal freedom of contract).

369. See Epstein, *supra* note 344, at 953; Brief of Ohio Manufacturers Ass'n at 2, Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (No. 84-1909).

370. See Brief of Ohio Manufacturers Ass'n at 8, Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (No. 84-1909) (abolishing employment at will would create "a morass of confusion among . . . administrative enforcement agencies").

371. This fear was expressed in *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153 (1985).

372. See Epstein, *supra* note 344, at 972.

373. Brief of Ohio Manufacturers Ass'n at 2, Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (No. 84-1909).

concessions from unions in the early 1980s, employers did not press for elimination of the just cause standard for discharge.³⁷⁴ Not only was this because the costs of just cause were minimal, it was also because the benefits were substantial. "Marked correlations have been observed between a secure work force and high productivity and quality output."³⁷⁵

Employers fear an avalanche of litigation resulting from the limitation or abolition of employment at will. Even the recognition of a narrow public policy exception would create litigation that could "flood the court system,"³⁷⁶ "spawn vexatious litigation and create judicial administrative chaos."³⁷⁷ Although wrongful discharge litigation has increased over the last decade, this may merely mean that more of the 150,000 employees that are wrongfully discharged every year³⁷⁸ decided to seek redress.

Employment is one of the most important aspects of one's life. As our society becomes increasing litigious, it should come as no surprise that employment decisions become a prime focus of litigation. The causality must be properly understood, however. The basic injustice of the at-will rule has caused an increasing number of wrongfully discharged employees to turn to the courts for relief. It has also brought pressure to bear on the common law courts to respond to the harshness of the rule. The declining membership of unions and the lower percentage of workers covered by grievance arbitration procedures³⁷⁹ increases the pressure on the courts. Indeed, as the unionized percentage of the work force shrinks, our society is increasingly becoming a two-tiered system of employment rights. More and more employees are at the mercy of employment at will. The need to forge a new common law of wrongful discharge increases as the ranks of the unprotected swell.

374. St. Antoine, *supra* note 333, at 68.

375. *Id.* at 69.

376. Brief of Ohio Chamber of Commerce at 14, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (84-1909); *see also* Brief of Ohio Manufacturers Ass'n at 2, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (84-1909).

377. Brief of Ohio Chamber of Commerce at 83, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986)(84-1909).

378. Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985).

379. *See supra* text accompanying notes 33-34.

C. The Presumption Itself

Employment at will presumes that an employment contract of indefinite duration is terminable at the will of either party. This presumption was born of defective scholarship and an absence of policy analysis.³⁸⁰ The presumption of employment at will has operated as the rule of construction in employment contracts of an indefinite duration when there has been no explicit agreement as to the terms for discharge.³⁸¹ "[A] rule of construction is normally chosen because it reflects the dominant practice in a given class of cases and because that practice is itself regarded as making good sense for the standard transactions it governs."³⁸² The presumption must reflect the reasonable expectations of the parties to such agreements. The at-will presumption fails to meet this standard.

The general understanding in most employment situations is that, after a reasonable probationary period, the employee will continue to be employed unless that employee fails to perform adequately on the job, violates reasonable rules of conduct, or the company has to eliminate that position for economic reasons.³⁸³ This general understanding should form the basis of the presumption that governs the common law of employment termination, not a harsh, formalistic rule from another century. The common law process would then refine the new presumption in subsequent decisions. This did not occur in *Mers v. Dispatch Printing Co.*³⁸⁴ but

380. See Feinman, *supra* note 8, at 126 (discussing the lack of legal authority for early statements of the employment-at-will rule).

381. See, e.g., *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 102, 491 N.E.2d 1114, 1116 (1986); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153 (1985); *Henkel v. Educational Research Council of Am.*, 45 Ohio St. 2d 249, 255, 344 N.E.2d 118, 121-22 (1976).

382. Epstein, *supra* note 344, at 951.

383. This has been the common wisdom of arbitrators for decades. Roger Abrams and Dennis Nolan have deemed this the "fundamental understanding" that inheres in most modern employment relations:

This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do "satisfactory" work. "Satisfactory" work, in this context, has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully. The common phrase, "a fair day's work for a fair day's pay," attempts to capture the essence of this understanding.

Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 597.

384. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

is shown in the guidelines of *Worrell v. Multipress, Inc.*³⁸⁵

Employment contract analysis would treat the new presumption as rebuttable in light of express and implied understandings. The employee would have to make an initial showing that the "job continued after her dismissal and that she remained suitable for the job."³⁸⁶ The employer, then, would have to present a credible justification for the termination. The burden of production would be on the employer since it is the party most likely to possess the necessary information.³⁸⁷ "As in any civil litigation when the plaintiff alleges an injury by the defendant, the ultimate burden of persuading the trier of fact . . . should rest with the employee."³⁸⁸

The problem of disclaimers will crop up again under a presumption of just cause. Some of the most progressive decisions in the implied contract exceptions have held that express affirmations of an at-will relationship are dispositive.³⁸⁹ Some commentators contend that at-will attestations are binding since they are presumably exchanged for some form of increased compensation.³⁹⁰ Yet this ignores the great inequality of bargaining power that is present in the vast majority of employment contracts. The use of disclaimers could effectively negate any just cause standard. A strong presumption against the legitimacy of such disclaimers is essential if the just cause standard is to have any meaning.

The at-will presumption has little foundation in theory or policy. It claims legitimacy on the basis of its track record. Defenders of employment at will say it has worked well, but they only find employer concerns relevant.³⁹¹ Proponents of just cause reply that the costs of employment at will to employees are staggering.³⁹² The question that remains is whether a just cause presumption is an effective basis for adjudicating termination disputes.

A just cause standard would not create an avalanche of liti-

385. 45 Ohio St. 3d 241, 543 N.E.2d 1277 (1989).

386. Leonard, *supra* note 22, at 682.

387. *Id.* at 683.

388. *Id.*

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

390. See Leonard, *supra* note 22, at 682 n.299; see also Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1382 (1983) (discussing the yellow dog contract and employer paternalism).

391. See *supra* text accompanying notes 356-68.

392. See, e.g., Stieber, *supra* note 378, at 558 (two million workers are discharged each year without the right to a hearing; of these, 150,000 may have been unjustly discharged).

gation. The more likely effect of a just cause standard would be not an increase in the number of claims brought but a decrease in the number of dismissals and summary judgments granted to employers in these actions. More claims would be heard on the merits.³⁹³ The common law system already has a screening device to limit the number of claims presented, the high cost of bringing legal action. Most employees are unable to afford litigation costs, and "most claims are too small to produce a viable contingent fee."³⁹⁴ Employees that do bring actions are usually overwhelmed by the employer's high-priced counsel.³⁹⁵

The concern for unreasonably high jury awards is legitimate. However, the judicial recognition of a just cause standard will not inexorably produce "a lottery with a few big winners and many losers."³⁹⁶ Punitive damages are necessary for general deterrence and for actual punishment in the very small number of particularly egregious cases.³⁹⁷ The court must establish clear standards that limit punitive damages to extreme cases. Ohio law has done this with emotional distress damages in the case of intentional infliction of emotional distress.³⁹⁸ The same can be done to restrict the award of punitive damages. The Supreme Court can also encourage the use of remittitur to enforce its standards. Thus predictability in the size of awards can be achieved under a just

393. In 1988 Ohio appellate courts decided 46 wrongful discharge cases. Thirty-two of these involved summary judgment in favor of the employer. Of these, 26 (81%) were upheld. In 1989, 19 summary judgments in favor of the employer were appealed, and 15 (79%) were affirmed. In 1990, 34 summary judgments in favor of the employer were appealed, and 22 (65%) were affirmed.

394. Summers, *supra* note 26, at 25.

395. Roel, *Advances in Campaign for Workers' Rights: Laws, Court Rulings Offer Protection in Areas Where Bill of Rights Doesn't*, *Newsday*, Jan. 10, 1988, at 92 (Nassau & Suffolk ed.).

396. Summers, *supra* note 26, at 25-26.

397. See *supra* text accompanying note 80.

398. In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983), the Ohio Supreme Court first recognized that tort and established standards which have limited its application to a small number of examples of outrageous conduct. The *Yeager* court described with great specificity the standards that should be used in evaluating a claim for the tort of intentional infliction of emotional distress. See *id.* at 374-75, 453 N.E.2d at 671-72. These standards have been applied to limit the use of this cause of action in wrongful discharge cases. See, e.g., *Brzozowski v. Stouffer Hotel Co.*, No. 55865, 1989 Ohio App. LEXIS 3591 (Sept. 14, 1989); *Hines v. Center for Human Serv.*, No. 54021, 1988 Ohio App. LEXIS 2540 (June 16, 1988); *Moore v. Middletown Regional Hosp.*, No. CA86-11-166, slip op. (Ohio Ct. App. June 22, 1987); *Foster v. McDevitt*, 31 Ohio App. 3d 237, 511 N.E.2d 403 (1986); *Jenkins v. Goodyear Atomic Corp.*, No. 389, slip op. (Ohio Ct. App. Aug. 27, 1986) (Ohio LEXIS).

cause regime.

Predictability in outcomes must be obtained by defining the standards for just cause through the selection of proper cases for review. Just cause will never be governed by bright line distinctions but that should not be any more a bar to its use than the imprecision of the term "negligence." Labor arbitrators have not found the lack of a specific definition for just cause to hinder its application to concrete cases.³⁹⁹

Adequate compensation would be provided by the award of back pay and front pay as defined in *Worrell*.⁴⁰⁰ Reinstatement should be an option if the circumstances warrant. The lack of a union to prevent harassment may make this impossible in many cases. Punitive damages should only be permitted in cases of actual malice. Emotional distress should be dealt with as an independent tort.

D. Common Law Process or Judicial Legislation?

Defenders of employment at will in Ohio have argued that major changes in the common law of employment discharge should be left to the legislature.⁴⁰¹ The Ohio Supreme Court's position has varied. In *Mers v. Dispatch Printing Co.*, where the appellant had called for the abolition of the doctrine, the court indicated it had the power to abolish employment at will but that the circumstances did not warrant such an action.⁴⁰² In *Phung v. Waste Management, Inc.*, the court abdicated responsibility to the legislature.⁴⁰³ *Greeley v. Miami Valley Maintenance Contractors, Inc.* implicitly rejected the deference of *Phung* and put the court back in the business of forging the common law of employment termination.⁴⁰⁴

The Ohio Supreme Court need not limit its role to fashioning exceptions to employment at will. Although the General Assembly has never spoken on the question of the viability of employment at

399. See *Abrams & Nolan*, *supra* note 383, at 597.

400. 45 Ohio St. 3d at 245-48, 543 N.E.2d at 1282-83.

401. See Brief of Ohio Manufacturers Ass'n at 9, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (84-1909); Brief of Ohio Chamber of Commerce at 19, *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (84-1909).

402. 19 Ohio St. 3d at 103-04, 483 N.E.2d at 153-54.

403. 23 Ohio St. 3d at 103, 491 N.E.2d at 1117.

404. 49 Ohio St. 3d at 233-34, 551 N.E.2d at 989-90 (public policy considerations warrant carving an exception to employment at will).

will, the doctrine was the creation of the common law courts, not the legislatures.⁴⁰⁵ Its limitation or abolition is certainly a legitimate function of those same courts. "Section 16 [of Article I of the Ohio Constitution] requires Ohio courts to 'be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . .'"⁴⁰⁶ The Ohio Supreme Court has recognized "the primary duty" to uphold this right to a judicial remedy for every legitimate injury.⁴⁰⁷ The dissent in *Phung* noted that this right was especially applicable to a judicially created doctrine such as employment at will.⁴⁰⁸

Invalidating the at-will presumption would be no more inappropriate than the common law courts' declaration that privity of contract was no longer required in products liability suits.⁴⁰⁹ This holding upset the nineteenth century rule of privity established in *Winterbottom v. Wright*.⁴¹⁰ Like today's defenders of employment at will, the *Winterbottom* court maintained that a flood of litigation and outrageous consequences would follow without its harsh requirement of privity.⁴¹¹ By the second half of the nineteenth century, the rule had gained general acceptance.⁴¹² The harshness of this principle led to the creation of a number of exceptions to the privity rule. For example, there was an exception for products that were imminently dangerous to the lives of innocent third parties.⁴¹³ In *MacPherson v. Buick Motor Co.*, Judge Cardozo effectively abolished the privity requirement by expanding an exception

405. See *supra* text accompanying notes 9-23.

406. *Phung*, 23 Ohio St. 3d at 107, 491 N.E.2d at 1120 (Brown, J., dissenting) (quoting OHIO CONST. art. I, § 16).

407. *Id.* (Brown, J., dissenting) (quoting *Kintz v. Harringer*, 99 Ohio St. 240, 244, 124 N.E. 168, 169 (1919)).

408. *Id.*

409. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

410. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). The privity rule was later shown to be based on a misinterpretation of *Winterbottom*. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 303, §96, at 681.

411. The *Winterbottom* court declared:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

Winterbottom, 10 M. & W. at 114, 152 Eng. Rep. at 405.

412. See, e.g., *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N.E. 482 (1907).

413. See, e.g., *Devlin v. Smith*, 89 N.Y. 470 (1882); *Thomas v. Winchester*, 6 N.Y. 397 (1852).

so as to swallow the rule.⁴¹⁴ The *MacPherson* holding was rapidly accepted and is hornbook law today.⁴¹⁵

Cardozo declared that "[p]recedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day."⁴¹⁶ Employment at will also dates from the days of stagecoach travel. The nineteenth century has passed and the twentieth is in its last decade. Current conditions, expectations, and social needs make it entirely appropriate for a common law court to reject anachronistic doctrine.

The recognition of a just cause standard for termination can provide a fair and effective system for adjudication of employment termination disputes. Though it might bring some increase in litigation, there are some costs that society must bear to provide justice. The just cause standard would provide a means of redress to those employees who are presently without any recourse or remedy.⁴¹⁷ The new presumption would reflect a proper adjustment of the common law to current employment relations and to the reasonable expectations of the parties. When compared to the present regime of employment at will, recognition of just cause represents a giant step forward from freedom of contract to contractual justice. It is both proper and necessary for the Ohio Supreme Court to take this step.

E. Beyond Litigation

There are ways to administer a just cause regime that could even further lower adjudicative costs, produce more uniform outcomes, and lessen the imbalance of power between the parties. A statutory system of administrative screening and mediation combined with final arbitration would improve upon the advances of a judicial recognition of just cause.⁴¹⁸

414. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *supra* note 303, §96, at 683.

415. *See id.* at § 96; RESTATEMENT (SECOND) OF TORTS § 395 (1964).

416. *MacPherson*, 217 N.Y. at 391, 111 N.E. at 1053.

417. *See supra* text accompanying notes 42-43.

418. *See generally* Bellace, *supra* note 341, at 232-33 (advocating the implementation of laws regarding unfair termination through existing government agencies); Blades, *supra* note 347, at 1433 (fair employment practices commissions should be exclusive tribunals for wrongful discharge cases); Gould, *supra* note 342, at 908 (discussing the utility of the arbitration system in applying the just cause standard); St. Antoine, *supra* note 333, at 77 (notes that adopting an arbitration system for unjust discharge cases would make a wide range a arbitral precedent available concerning substance and procedure); Summers, *supra* note 338, at 521 (argues that the "substantial cadre" of experienced arbitrators coupled with state administered forums would provide a flexible solution to any increase in

Many proposals for such statutory systems have been advanced in journals.⁴¹⁹ In 1987 Montana's Wrongful Discharge from Employment Act⁴²⁰ was passed, effectively abolishing employment at will in that jurisdiction. The Act created a cause of action for termination without just cause and made arbitration of termination disputes a voluntary option.⁴²¹ The draft Uniform Employment Termination Act of the National Conference of Commissioners on Uniform State Laws provides for a just cause standard that is administered solely by arbitration.⁴²² Statutory arbitration provides a greater measure of justice, uniformity, and economy, yet its realization involves a far greater social and political mobilization than do common law solutions.

However, it is not likely that the General Assembly will consider wrongful discharge legislation in the near future. There is no wrongful discharge crisis in Ohio courts at present. Ohio employers feel no need to engage in legislative compromise when the courts generally grant summary judgment against employee wrongful discharge claims.⁴²³ In addition, employers have well-financed and organized lobbies to prevent such legislation. No corresponding organization exists to press for a just cause statute. Although organized labor has gone on record as favoring wrongful discharge legislation, it has done little to support this position.⁴²⁴

The Ohio judiciary need not wait for the legislature to act. In fact, the courts may serve as a catalyst for the legislature. Mon-

unjust discharge cases).

419. Summers first advocated a statute to provide for a just cause standard for termination enforced by arbitration. See Summers, *supra* note 338, at 531. Gould and St. Antoine have made similar proposals. See Gould, *supra* note 342, at 911; St. Antoine, *supra* note 333, at 71. One commentator has proposed using state unemployment compensation boards as an administrative structure for deciding employment termination claims. See Bellace, *supra* note 341, at 232.

420. MONT. CODE ANN. §§ 39-2-901 (1991).

421. See *id.* §39-2-904(2).

422. UNIF. EMPLOYMENT TERMINATION ACT (Draft Mar. 11, 1990).

423. See *supra* note 393.

424. The AFL-CIO Executive Council announced its position on employment at will in 1987, proposing the following minimum elements for a statute:

- A prohibition on discharges without cause.
- Financing to assure that discharged employees will be able to enforce their statutory rights.
- Prompt review of discharge decisions by an independent tribunal.
- Mandatory reinstatement for any employee who is found to have been discharged wrongfully.
- Full compensation for losses sustained as the result of a wrongful discharge.

AFL-CIO EXECUTIVE COUNCIL, THE EMPLOYMENT-AT-WILL DOCTRINE 44, 46 (1987).

tana's Wrongful Discharge From Employment Act came in response to judicial action.⁴²⁵ Other proposed wrongful discharge legislation has come in jurisdictions that have recognized exceptions to employment at will.⁴²⁶ The courts have the right and the duty to abolish a harsh, unfair, ill-conceived, and inefficient rule that "simply persists from blind imitation of the past."⁴²⁷

CONCLUSION

A rational and fair system of dealing with employment termination is possible. The first step is replacing the anachronistic employment-at-will presumption with reasonable presumptions for employment contract termination. Recent Ohio Supreme Court decisions have returned to the sense of promise and possibility of the mid-1980s. The continuation of this common law momentum and analysis of the fundamental assumptions of employment law can enable future legislation to better serve all the interests involved. The Ohio Supreme Court has the authority in logic, law, and equity to do so.

TODD M. SMITH

425. See Tompkins, *Legislating the Employment Relationship: Montana's Wrongful Discharge Law*, 14 EMP. REL. L.J. 387 (1988).

426. See St. Antoine, *supra* note 333, at 71-81 (citing proposed wrongful discharge legislation in California, Michigan, and New Jersey).

427. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id.

