

Remedies for Employer's Wrongful Discharge of an Employee from Employment of an Indefinite Duration

I. INTRODUCTION

For nearly a century the employment at will rule¹ remained one of the most well established rules in the law.² That is no longer true. Discharged employees in virtually every state have asked courts to recognize tort exceptions or contract limits to the rule, and most courts have agreed to do so. Although the rule still has force, no longer can an employer be sure that he will successfully defend a wrongful discharge action by filing a motion to dismiss for failure to state a claim.

Under the rule, if (1) the employment contract does not bind both the employer and the employee for a definite period or (2) the employee does not give consideration other than his services or his promise to serve, then an employee cannot enforce an employer's promise that the employer will discharge the employee only if the employer has good cause. Even if the employer makes such a promise, he has the right to discharge the employee at any time for any or no reason. The employer is not liable to the employee even if the employer discharges the employee for a "morally wrong" reason.³ An at will employee has no legally protected interest in job security.⁴

¹See *infra* text accompanying note 2 for definition.

²"Few legal principles have been better settled than the at-will concept, whose roots date back to the 19th century laissez-faire policy of protecting freedom to contract." Annotation, *Right to Discharge Allegedly "At-Will" Employee as Affected by Employer's Promulgation of Employment Policies As to Discharge*, 33 A.L.R.4th 120, 123 (1984). Most commentators trace the rule to Horace G. Wood's 1877 treatise *MASTER AND SERVANT*, on the law pertaining to the relationship of master and servant. See generally Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-27 (1976). Feinman's article discusses at length the historical development of the rule. For other discussions of the historical development of the rule, see Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332-35 (1982); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-45 (1974) [hereinafter *Implied Contract Rights*].

³*Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915), *cited in* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate in Good Faith*, 93 HARV. L. REV. 1816, 1819 (1980) [hereinafter *Good Faith Duty*]. "The general rule is that an employment contract at will may be terminated by either party with or without cause or justification. This means a *good* reason, a *wrong* reason, or *no reason*." *Hinrichs v. Tranquilaire Hosp.*, 352 So.2d 1130, 1131 (Ala. 1977) (citations omitted).

⁴In this Note "job security" means freedom from arbitrary discharge. A "promise of job security" is a promise to discharge an employee only for good or just cause. If an employee has a legally protected interest in job security, the employer cannot terminate the employment at will.

The employment at will rule is relatively new. Before the Industrial Revolution, the English common law courts presumed that the employment period was one year unless the parties agreed to a different period.⁵ The rule developed in the United States near the end of the nineteenth century, and it is, at least in part, the product of laissez-faire economics and nineteenth century views of freedom of contract.⁶ The rule protected the emerging class of industrialists by permitting labor costs to vary according to economic conditions, and it shifted the risk of reduced demand for labor from the employer to the employee.⁷

The legal and philosophical foundations of the employment at will rule have probably never been stronger than they were during the *Lochner* era (1900 to the mid-1930s).⁸ During that period the Supreme Court held that an employer's right to discharge an at will employee was a fundamental property or contract right that the fifth⁹ and fourteenth¹⁰

⁵See generally Feinman, *supra* note 2, at 119-22; Murg & Scharman, *supra* note 1, at 332-33.

⁶Murg & Scharman, *supra* note 1, at 335-38.

⁷*Id.* at 335-36. Unemployment compensation absorbs some of the employee's risk and shifts some of the cost back to the employer.

⁸See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-1 to -7 (1978). During the period the Court strictly scrutinized legislation that limited economic freedom. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

⁹*Adair v. United States*, 208 U.S. 161 (1908). In *Adair* the Court said:

While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is [sic] subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. . . . It was the legal right of the [employer] . . . to discharge [the employee] because of his being a member of a labor organization In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Id. 174-75.

¹⁰*Coppage v. Kansas*, 236 U.S. 1 (1915). In *Coppage* the Court held unconstitutional a state law that made an employer who discharged an employee because of his association with a labor organization guilty of a misdemeanor. It rejected the argument that the law served the purpose of neutralizing the employer's unequal bargaining power. The court reasoned:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible

amendments protected from federal and state regulation. Eventually the Court abandoned this view;¹¹ however, long after the courts conceded that the legislative branches have the power to limit an employer's right to discharge an employee,¹² the courts continued to reject employees' arguments that the common law also ought to limit the employer's right to discharge an employee.¹³ Most states now recognize common law limits on an employer's right to discharge an employee even if the employment period is indefinite.¹⁴ Discharged employees are now prevailing on both tort and contract theories.

to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Id. at 17.

¹¹See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In *Jones & Laughlin*, the Court upheld the National Labor Relations Act and said:

[T]he cases of *Adair v. United States* and *Coppage v. Kansas* are inapplicable to [the Act]. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce employees with respect to their self-organization and representation

Id. at 45-46 (citations omitted).

Recall the quotation from *Coppage*, *supra* note 10, and compare the following excerpt from the National Labor Relations Act:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate the recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

National Labor Relations Act, ch. 323, § 1, 49 Stat. 449, 449 (1935) (codified at 29 U.S.C. § 151 (1982)).

¹²Both federal and state statutes limit an employer's right to discharge an employee. See 29 U.S.C. § 623 (1982) (unlawful for an employer to discriminate against an employee because of age); 29 U.S.C. § 158(a)(3) (1982) (unlawful for an employer to discriminate against an employee in way that encourages or discourages membership in a labor organization); IND. CODE § 22-2-2-11 (1982) (a class C infraction for an employer to discharge or discriminate against an employee because the employee asserts rights under the state's minimum wage statute); *id.* § 22-8-1.1-38.1 (1982) (unlawful to discharge or discriminate against an employee because he or she filed a complaint or exercised rights under the Indiana Occupational Safety & Health Act); *id.* § 24-4.5-5-106 (1982) (unlawful to discharge an employee because of garnishment action against employee); *id.* § 35-44-3-10 (1982) (a class B misdemeanor for an employer to knowingly and intentionally dismiss or threaten to dismiss an employee because the employee served on a jury).

¹³See *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (employee has no cause of action against employer for damages if he alleges that he was discharged because he filed a workers' compensation claim); *accord* *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950).

¹⁴See cases cited *infra* at notes 66 & 70 "To date, the common law of three-fifths

A substantial number of recent cases and commentaries discuss the employment at will rule.¹⁵ Most are concerned primarily with whether the common law should limit the rule and, if so, under what conditions it should do so. Few have discussed the remedies issues that arise if courts recognize the employee's cause of action.¹⁶ Among the few cases that have explicitly dealt with the remedies issues no single view prevails. Nevertheless, remedies issues have been important. In at least one case, one reason the court cited for its refusal to recognize the employee's action was its inability to fashion an appropriate remedy if it allowed the action.¹⁷ In another case, the court explicitly stated that it would allow a cause of action in contract but not in tort because, the court reasoned, a tort theory generally allows the plaintiff a more expansive measure of damages.¹⁸

A remedy ought to be as broad as, but no broader than, its corresponding substantive right, the underlying legally protected interest.

of the states has recognized . . . a cause of action for wrongful discharge in one form or another." Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 1 (1984) (referring to cases reported through May 21, 1984).

¹⁵See Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protections Against Unfair Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); *Good Faith Duty*, supra note 3; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter *Public Policy Exception*]; Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777 [hereinafter *Protecting Whistleblowers*]; Murg & Scharman, supra note 2; Feinman, supra note 2; Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211 (1973).

¹⁶See *Smith v. Atlas Off-Shore Boat Serv. Inc.*, 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692 (W. Va. 1982); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (1984), cert. denied, 304 Md. 631, 500 A.2d 649 (1985); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983); *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), modified on another issue, 101 N.M. 687, 687 P.2d 1038 (1984). See also Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985).

¹⁷*Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979).

Even if we were to exercise our power [to recognize the cause of action], what would be the measure of actual damages? If the employment could be truly terminated at any time for no reason at all, how would one carry the burden of proving more than nominal damages? It appears to us that the practical remedy would come, then, from recovering punitive damages. Such damages are allowable for reasons of public policy. We would thus create an action based upon an undeclared public policy where the measure of damages was governed only by the same source.

Id. at 692-93, 386 N.E.2d at 1028.

¹⁸*Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 576, 335 N.W.2d 834, 841 (1983).

Because a fundamental principle of the law of remedies is that the nature and measure of the remedy should be congruent with the underlying legally protected interest,¹⁹ it is necessary to identify that legally protected interest. One must remember that tort and contract theories protect different kinds of legal interests. Contract law protects the plaintiff's interest in a promise the defendant freely gave to him.²⁰ On the other hand, tort law protects the plaintiff from the defendant's invasion of an interest the law recognizes as worthy of legal protection apart from and despite what the defendant may have promised.²¹ Because tort and contract laws protect different kinds of interests, the tort remedy will often differ from the contract remedy even if the underlying facts are similar.²²

The purposes of this note are to identify the interests the law is protecting under the major contract and tort theories that now limit the employer's right to discharge an employee who is hired for an indefinite period and to suggest remedies theories that are consistent with these interests.

Part II discusses the traditional application of the employment at will rule. Part III discusses the predominant contract and tort theories that give an at will employee legally protected interests and limit an employer's right to discharge the employee. Part IV deals with the remedies issues and the problems raised in applying the contract and tort theories.

II. THE TRADITIONAL EMPLOYMENT AT WILL RULE.

In 1877 Horace G. Wood, a New York attorney and author of several legal treatises,²³ stated the American employment at will doctrine in unequivocal terms. Wood's statement of the rule is:

¹⁹D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES*, § 1.2, at 3 (1973).

²⁰W. PROSSER, *THE LAW OF TORTS*, § 92, at 614 (4th ed. 1971).

²¹*Id.*; *RESTATEMENT (SECOND) OF TORTS* § 1 comment d (1965).

²²*See* W. PROSSER, P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON TORTS* § 92, at 656-57 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]. One difference between tort and contract remedies is the extent to which the courts will allow the plaintiff to recover consequential damages. In contract, the "foreseeability" rule limits the recovery; in tort, proximate cause limits it. DOBBS, *supra* note 19, § 3.3, at 157-58. Generally, the foreseeability standard is more restrictive than the proximate cause standard. *See id.* § 12.3, at 803-10. Another difference between tort and contract is that courts sometimes permit punitive damages in tort; however, the courts rarely allow them in contract. *See* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 575, 335 N.W.2d 834, 841 (1983).

²³*See* Feinman, *supra* note 2, at 125-26.

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 no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.²⁴

Although the authorities Wood cited to bolster his assertions apparently did not support them,²⁵ American courts universally accepted his rule.²⁶

A. *The Definite Duration Requirement*

The rule adopted by American courts applies only if the employer and employee do not agree that the employment period will be for a definite period. If the parties specify a definite period, each party is bound for that period, and the employer has no right to discharge the employee without good cause.²⁷ Because the employer does not have the right to discharge the employee without good cause, the employee has a legally protected interest in his job during the specified period. If the employer wrongfully discharges the employee, the employee is entitled to damages for breach.

On the other hand, if the parties do not specify that the employment will be for a definite duration, the employee has no legally protected interest in his job. The employer may discharge the employee at any time for any or no reason, and the discharged employee generally cannot succeed if he sues for wrongful discharge²⁸ and the contract is too vague for the courts to enforce.²⁹

Unless the parties expressly agree that the employment will be for a definite period, the courts presume that the parties intended employment for an indefinite period.³⁰ For example, in *Buian v. J. L. Jacobs & Co.*,³¹ the court held that the employer's written statement that the

²⁴H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 136, at 283 (2d ed. 1886) restating the rule first put forth in the 1877 editions in substantially the same language. See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 601, 292 N.W.2d 880, 886 (1980).

²⁵*Toussaint*, 408 Mich. at 602-03, 292 N.W.2d at 886-87; *Implied Contract Rights*, *supra* note 2, at 341-42.

²⁶Feinman, *supra* note 2, at 126-27.

²⁷See *Pepsi-Cola Gen. Bottlers v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982).

²⁸See *id.* at 697.

²⁹*Id.* at 699.

³⁰See *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

³¹428 F.2d 531 (7th Cir. 1970).

employee's "assignment in Saudi Arabia will continue for a period of eighteen (18) months" was merely a statement of expectations and was not sufficient to create employment for a definite period.³² In a few cases courts have found that the facts were sufficient to rebut the presumption.³³ Generally, however, courts construe a promise of "permanent" employment to be nothing more than a promise of "steady" employment.³⁴ That the employee's compensation is proportioned to units of time is not, by itself, sufficient to rebut the presumption that the employment period is indefinite.³⁵

Frequently the reason the courts give for refusing to enforce an employer's promise of job security is that there is no "mutuality of obligation."³⁶ That is, the employer is bound to retain the employee, but the employee remains free to quit at any time.

B. *The Independent Consideration Requirement*

Even if the parties do not specify a definite employment period, courts will enforce an employer's promise of job security if the employee gives independent consideration to support the promise.³⁷ Independent consideration is consideration other than the employee's services or his promise to serve.³⁸ The compensation the employee receives for his services completes the exchange between the employer and the employee respecting the services, and nothing remains to support a promise of job security.³⁹

³²*Id.* at 533.

³³See generally Annotation, *Comment Note—Validity and Duration of Contract Purporting to be for Permanent Employment*, 60 A.L.R.3d 226 (1974) [hereinafter *Contract for Permanent Employment*].

³⁴*Id.* at 232-33.

³⁵*Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895); see also RESTATEMENT (SECOND) OF AGENCY § 442 comment b (1957).

³⁶See *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975); see also *Buian v. J. L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970) (a term in an employment agreement that allows the employee to quit at any time but requires the employer to retain the employee for 18 months is unenforceable because there is no mutuality of obligation). See generally *Contract for Permanent Employment*, *supra* note 33, 1A CORBIN, CONTRACTS § 152, at 13-17 (1963).

³⁷See *Ohio Table Pad Co. of Ind. v. Hogan*, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981); see also *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439, 440-41 (7th Cir. 1964). See generally *Contract for Permanent Employment*, *supra* note 33, at 237-49.

³⁸See *Hamblen v. Danners, Inc.*, 478 N.E.2d 926 (Ind. Ct. App. 1985) (to constitute independent consideration there must be a detriment to the employee and a corresponding benefit to the employer; a covenant not to compete is not independent consideration if not given in exchange for the alleged oral promise of permanent employment). See generally *Contract for Permanent Employment*, *supra* note 33, at 232-36.

³⁹*Good Faith Duty*, *supra* note 3, at 1819.

Courts have found independent consideration where a prospective employee surrendered a personal liability claim against the employer,⁴⁰ conveyed an interest in land to the employer,⁴¹ or abandoned his own competing business in exchange for the employer's promise of job security.⁴² Generally, the employee's detrimental reliance on a promise of job security will not support the promise.⁴³ It is not enough that the employee has served the employer for several years, has foregone other opportunities, and has become virtually unemployable.⁴⁴ It is also not enough that an employee who relied on the employer's promise of job security quit her previous job and relocated in order to accept the employer's job.⁴⁵ Even if what the employee has given in exchange for the promise of job security is otherwise adequate, it is not adequate unless both parties clearly understand that the employee is giving it in exchange for the employer's promise of job security.⁴⁶

C. Two Illustrative Cases

In *Shaw v. S.S. Kresge Co.*,⁴⁷ a discharged employee sued his former employer for wrongful discharge and the trial court granted summary judgment in favor of the employer. The employee alleged that the terms in an employee handbook became part of the employment contract at the time the employer hired the plaintiff. The handbook specified the grounds and procedures for discharging an employee, and the plaintiff alleged that the employer breached the contract because it did not act according to the handbook when it discharged the plaintiff. The appellate court rejected the employee's claim that the handbook terms became part of the employment contract.⁴⁸ Furthermore, the court stated, even if the handbook terms did become part of the contract:

[I]n the absence of a promise on the part of the employer that the employment should continue for a period of time that is either definite or capable of determination, the employment

⁴⁰See cases cited in *Ohio Table Pad Co. of Ind. v. Hogan*, 424 N.E.2d 144, 146 (Ind. Ct. App. 1981). See generally RESTATEMENT (SECOND) OF AGENCY § 442 comment a (1957); *Contract for Permanent Employment*, *supra* note 33, at 249-50.

⁴¹*Mount Pleasant Coal Co. v. Watts*, 91 Ind. App. 501, 151 N.E. 7 (1926).

⁴²See *Kravetz v. Merchants Distributions, Inc.*, 387 Mass. 457, 440 N.E.2d 1278 (1982).

⁴³See *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964); *Pepsi-Cola Gen. Bottlers v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982).

⁴⁴*Pearson*, 332 F.2d at 441.

⁴⁵*Ohio Table Pad Co. of Ind. v. Hogan*, 424 N.E.2d 144 (Ind. Ct. App. 1981) (merely puts the employee in a position to accept the employment).

⁴⁶*Lynas v. Maxwell Farms*, 279 Mich. 684, 687, 273 N.W. 315, 316 (1937).

⁴⁷167 Ind. App. 1, 328 N.E.2d 775 (1975).

⁴⁸*Id.* at 6-7, 328 N.E.2d at 778.

relationship is terminable at the will of the employer. There being no binding promise on the part of the employee that he would continue in the employment, it must also be regarded as terminable at his discretion as well. For want of mutuality of obligation or consideration, such a contract would be unenforceable in respect of that which remains executory.⁴⁹

According to the *Shaw* court, because there is no mutuality of obligation and no independent consideration, an employer's promise of job security is unenforceable even if the court assumes that the employer actually made the promise.⁵⁰

⁴⁹*Id.* at 7, 328 N.E.2d at 779 (citations omitted).

⁵⁰*Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975).

In *Streckfus v. Gardenside Terrace Cooperative, Inc.*, 504 N.E.2d 273 (Ind. 1987), the Supreme Court of Indiana apparently overruled this holding. In *Streckfus* the defendant Gardenside owned a housing development. Defendant Triangle managed it, and Triangle's management duties included hiring and firing employees. According to the management agreement between Triangle and Gardenside, Triangle could discharge the resident manager (1) with prior approval from Gardenside after showing a sufficient reason for discharging the manager or (2) without prior approval from Gardenside, if Triangle had good cause to immediately discharge the manager, subject to Gardenside's later approval. Triangle hired Streckfus as resident manager. Later, Triangle recommended that Streckfus be fired, and Gardenside approved. Streckfus sued both Triangle and Gardenside alleging that she could be fired only for just cause and that the defendants had no just cause to fire her. The trial court granted the defendant's motion for summary judgment, and the Indiana Court of Appeals affirmed. *Streckfus v. Gardenside Terrace Cooperative, Inc.*, 481 N.E.2d 423 (Ind. Ct. App. 1985).

The court of appeals did not consider whether the agreement contained a promise that the defendants would not fire Streckfus without just cause. Instead the court stated:

Even if Streckfus were promised that she would only be discharged for cause, she remained an employee at will. To convert employment at will to employment requiring good cause for termination, independent consideration supplied by the employee, which results in detriment to her and a corresponding benefit to the employer, must be given in return for permanent employment.

Id. at 425 (citation omitted).

The supreme court affirmed the summary judgment but vacated the court of appeals decision. *Streckfus*, 504 N.E.2d at 276. The court said:

Under the employment at will doctrine, an employment contract of indefinite duration is *presumptively terminable* at the will of either party. . . . Nevertheless, we are cognizant that *the employment at will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the formation of a contract*. Therefore, should parties to an employment contract choose to include a job security provision in the contract, enforcement of such a provision would not necessarily conflict with the employment at will doctrine.

Id. at 275 (citations omitted, emphasis added). The court scrutinized the agreement and held that, as a matter of law, the agreement did not include a job security provision; it merely required "sufficient reason" to discharge, that is, "information upon which a decision could be made." *Id.* at 276. Therefore, the court said, "[I]t is presently inap-

In *Pearson v. Youngstown Sheet & Tube Co.*,⁵¹ the employee claimed that the employer breached an implied contract for permanent employment. The employee argued that the consideration for the promise of permanent employment was the detriment he suffered as a consequence of his twenty-eight years of service for the employer and the employee's unemployability resulting from this service. The court called this claim "a novel theory, unknown to the law so far as we are aware,"⁵² and added,

This contention is a tacit admission that there was no consideration in the beginning but that at some point over the years there emerged a consideration sufficient to support the contract for permanent employment. This theory overlooks the important fact that at any time during those years either of the parties had a right to terminate the plaintiff's employment, and that he received all the compensation which defendant promised to pay.⁵³

Because the employee "received all the compensation which the [employer] promised to pay," there was no consideration remaining to support an implied contract for permanent employment even if the employee did suffer a detriment.

III. CONTRACT LAW LIMITS ON AN EMPLOYER'S RIGHT TO TERMINATE EMPLOYMENT OF INDEFINITE DURATION

Through the 1950's the employment at will rule remained almost entirely immune from attack unless the legislature expressly limited the employer's right to discharge an employee.⁵⁴ For example, in *Raley v.*

propriate for us to address the question concerning whether separate and independent consideration should continue to be a prerequisite to the enforceability of an express job security provision." *Id.* Nevertheless, what the court did in *Streckfus*, as well as what the court said, indicates that in Indiana it is no longer true that no matter what the employer promises, a promise of job security is unenforceable as a matter of law. Apparently it does matter what the employer promises; if that is not true, there would have been no reason for the court to scrutinize the agreement to see what, if anything, the employer had promised.

⁵¹332 F.2d 439 (7th Cir. 1964).

⁵²*Id.* at 440.

⁵³*Id.* at 441.

⁵⁴In *Kouff v. Bethlehem-Alemeda Shipyard*, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949), the court recognized a cause of action for wrongful discharge where an employer discharged an employee for serving as an election officer. There was, however, a statute that made such a discharge unlawful. *Id.* at 323, 202 P.2d at 1060. This note focuses on cases where the court recognizes a discharged employee's common law cause of action even though no statute expressly makes the discharge unlawful.

Darling Shop of Greenville, Inc.,⁵⁵ the court refused to recognize that an employee stated a cause of action when she alleged that the employer discharged her because she had filed a workers' compensation claim.⁵⁶ Even though the court acknowledged that the employer's conduct "might be considered reprehensible,"⁵⁷ the court refused to recognize the claim. The court reasoned: (1) because the employer could discharge the employee at any time, there was no breach of contract, and (2) because the employer was unable to prevent the employee from filing her workers' compensation claim, she suffered no legal injury.⁵⁸

In 1959 the California District Court of Appeals held that courts could find that important public policies limit an employer's right to discharge an at will employee even if the legislature has not expressly created such a limit.⁵⁹ In *Petermann v. International Brotherhood of Teamsters, Local 396*, the court held that an at will employee stated a cause of action if he alleged that he had been discharged because he refused to obey his employer's order to give perjured testimony and instead testified truthfully.⁶⁰ The *Petermann* court reasoned that allowing an employer to discharge an employee because he refused to commit perjury would seriously jeopardize the legislative policy against perjury.⁶¹ Even though the legislature did not expressly make the discharge unlawful, the court reasoned that it must recognize the employee's cause of action "in order to more fully effectuate the state's declared policy against perjury. . . ."⁶² This was the beginning of the public policy tort exception to the employment at will rule.⁶³

In *Frampton v. Central Indiana Gas Co.*,⁶⁴ the Supreme Court of Indiana became the first state court of final appeal to hold that a discharged at will employee stated a cause of action against her former employer when she alleged that the discharge interfered with an important public policy interest, i.e., she was fired because she filed a workers' compensation claim.⁶⁵ Several other courts have followed the lead of the *Petermann* and *Frampton* courts. These courts have indicated that

⁵⁵216 S.C. 536, 59 S.E.2d 148 (1950).

⁵⁶*Id.*

⁵⁷*Id.* at 538, 59 S.E.2d at 149.

⁵⁸*Raley*, 216 S.C. 536, 59 S.E.2d 148; *accord* *Petrus v. Christy*, 365 Mo. 1187, 295 S.W.2d 122 (1956).

⁵⁹*Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

⁶⁰*Id.*

⁶¹*Id.* at 188, 344 P.2d at 27.

⁶²*Id.* at 189, 344 P.2d at 27.

⁶³*See infra* text accompanying notes 183-242.

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

⁶⁵*Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

a discharged employee has a cause of action in tort if the employer discharged the employee in a way that interferes with an important public policy interest.⁶⁶

Courts have also recognized contract law limits on an employer's right to discharge an employee hired for an indefinite period. For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*,⁶⁷ the Supreme Court of Michigan held that an employee who is hired for an indefinite period can bargain for an enforceable promise of job security even if there is no "mutuality of obligation" and no independent consideration.⁶⁸ In addition, the *Toussaint* court declared that an employee who reasonably relies on the employer's promises of job security in an

⁶⁶In at least the following cases the courts have held, or have indicated that they are willing to hold, that an employee has a cause of action in tort if he alleges that the employer discharged him in a way that interferes with an important public policy interest: *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A Aug., 1981) (federal maritime tort); *Knight v. American Guard & Alert*, 714 P.2d 788 (Alaska 1986); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Parner v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983); *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97 (Me. 1984); *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981); *DeRose v. Putnam Management Co.*, 398 Mass. 205, 496 N.E.2d 428 (1986); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); *Sides v. Duke Hosp.*, 74 N.C. App. 331, 335 S.E.2d 818, *petition for review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Geary v. United States Steel Corp.*, 465 Pa. 171, 319 A.2d 119 (1978); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 733 (Tenn. 1984); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Harless v. First Nat'l Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

In *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983), the court indicated that it was willing to recognize the cause of action in contract but not in tort.

Some courts have explicitly refused to recognize the tort: *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

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

⁶⁸*Id.*

employee handbook can enforce those promises.⁶⁹ Most states have held, or have indicated that they may hold, that an employee can enforce an employer's promise of job security even if the employment period is indefinite and if the employee gives no independent consideration for the promise.⁷⁰

A. *Contract Law Limits on an Employer's Right to Discharge an Employee*

Generally, a promisee can enforce a promise if the promisee gives consideration for the promise,⁷¹ and the courts do not demand "mutuality of obligation."⁷² In addition, the same consideration can support more than one promise⁷³ Under the traditional application of the employment at will rule (discussed in Section II of this Note), the courts refused

⁶⁹*Id.*

⁷⁰In at least the following cases the courts have held, or have indicated that they are willing to hold, that an employee may enforce an employer's promise of job security even if the employment period is indefinite and the employee gives no independent consideration for the promise: *Peters v. Alabama Power Co.*, 440 So. 2d 1028 (Ala. 1983); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958 (Alaska 1983); *Leikvold v. Valley View Community Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Griffin v. Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Finley v. Aetna Life & Casualty Co.*, 5 Conn. App. 394, 499 A.2d 64 (1985); *Watson v. Idaho Falls Consol. Hosps., Inc.*, 111 Idaho 44, 720 P.2d 632 (1986); *Duldulao v. Saint Mary of Nazareth*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987); *Romack v. Public Serv. Co. of Ind.*, 511 N.E.2d 1024 (Ind. 1987); *Streckfus v. Gardenside Terrace Cooperative, Inc.*, 504 N.E.2d 273 (Ind. 1987); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97 (Me. 1984); *Staggs v. Blue Cross of Md., Inc.*, 61 Md. App. 381, 486 A.2d 798 (1985); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. Ct. App. 1983); *Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); *Woolley v. Hoffmann-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985); *Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *petition for review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 443 N.E.2d 150 (1985); *Yartzoff v. Democrat-Herald Publishing Co.*, 281 Or. 651, 576 P.2d 356 (1978); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (S.D. 1983); *Ramos v. Henry C. Beck Co.*, 711 S.W.2d (Tex. Ct. App. 1986); *Piacitelli v. Southern Utah State College*, 636 P.2d 1063 (Utah 1981); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984); *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702 (Wyo. 1985).

⁷¹RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979).

⁷²*Id.*

⁷³*Id.* § 80 comment a.

to apply these basic contract principles to the employment relationship. Instead the courts demanded mutuality of obligation or independent consideration in order to permit an employee to enforce a promise of job security. If the employee proved that the employer made the promise and that the employee detrimentally relied on the promise, the employee might recover reliance damages, but he could not enforce the promise.⁷⁴

Despite the harsh results,⁷⁵ the rule remained so firmly established that Professor Blades, in his often cited article on employer abuse of the rule, declared that it was unlikely the courts would recognize contract law limits.⁷⁶ Professor Blades was incorrect; most states will now enforce an employer's promise of job security even where the traditional employment at will doctrine would apply. Consequently, an employer who promises job security may be liable in contract if he discharges an employee without good cause. As one might expect, the two theories the courts most frequently rely on are (1) promise plus consideration and (2) promise plus the employee's reasonable reliance on the promise.

1. *Consideration Plus Promise: Bargained-For Exchange as a Basis for Enforcing an Employer's Promise of Job Security.*—In *Toussaint v. Blue Cross & Blue Shield of Michigan*,⁷⁷ the court held that a discharged employee could enforce the employer's promise of job security if the employee had bargained for it, even though the only consideration the employee gave for the promise was his promise to serve the employer.⁷⁸ The *Toussaint* court rejected the employer's argument that the promise was unenforceable because there was no mutuality of obligation and because the employee had given no independent consideration for the promise.⁷⁹ The court declared that the employment at will rule is merely a rule of contract construction⁸⁰ and "[t]he enforceability of a contract depends . . . on consideration and not mutuality of obligation."⁸¹ Furthermore, the court declared the employee has presented enough evidence

⁷⁴See *Pepsi-Cola Gen. Bottlers, Inc. v. Woods*, 440 N.E.2d 696, 699 (Ind. Ct. App. 1982).

⁷⁵"An employer might use a threat of discharge, for example, to impair an employee's freedom against self-incrimination, his political free choice or his right to speak out on the issues of the day. A threat to an employee's job might also secure his unwilling participation in almost any kind of immoral or unlawful activity." Blades, *supra* note 15, at 1407-08 (footnotes omitted).

⁷⁶*Id.* at 1421.

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

⁷⁸*Id.*

⁷⁹*Id.* at 600, 292 N.W.2d at 885.

⁸⁰See also *Streckfus v. Gardenside Terrace Coop., Inc.*, 504 N.E.2d 273 (Ind. 1987) "[T]he employment at will doctrine is a rule of contract construction, not a rule imposing substantive limitations on the formation of a contract." *Id.* at 275.

⁸¹*Toussaint*, 408 Mich. at 600, 292 N.W.2d at 885.

to overcome a directed verdict if the employee testifies that he and the employer understood, at the time they formed the contract, that the employer would not discharge the employee without just cause.⁸²

Similarly, in *Weiner v. McGraw-Hill, Inc.*⁸³ the New York Court of Appeals rejected the employer's argument that the employer's promise of job security is unenforceable unless there is mutuality of obligation or independent consideration. In *Weiner* the employee claimed that McGraw-Hill agents had assured him that it was company policy not to discharge an employee without just cause. Weiner claimed that he relied on this promise and gave up accrued fringe benefits and a promised salary increase from his previous employer in order to accept the McGraw-Hill offer. Weiner also claimed (1) an employee handbook also contained the promise not to discharge him without good cause, (2) the parties expressly incorporated the handbook in Weiner's job application that he and two McGraw-Hill agents signed, and (3) the employment application was part of his employment contract. In addition, Weiner claimed that McGraw-Hill required him to follow the handbook procedures when disciplining and discharging his subordinates and that he had rejected other job offers because he was relying on the McGraw-Hill promise. After McGraw-Hill fired him, Weiner sued for breach of contract alleging, in the court's words, that "he was discharged without the 'just and sufficient cause' or the rehabilitative efforts specified in the employer's personnel handbook and allegedly promised at the time he accepted the employment."⁸⁴

The court held that Weiner had a cause of action in contract and said

[t]hat [the fact that the discharged employee] was free to quit his employment at will, standing by itself, was not entitled to conclusory effect. Such a position proceeds on the oversimplified premise that, since the [employee] was not bound to stay on, the agreement for his employment lacked "mutuality", thus leaving the [employer] free to terminate at its pleasure. But this would lead to the not uncommon analytical error of engaging in a search for "mutuality", which is not always essential to a binding contract, rather than of seeking to determine the presence of consideration, which is a fundamental requisite. For, while coextensive promises may constitute consideration for each other, "mutuality", in the sense of requiring reciprocity, is not necessary when a promisor receives other valid consideration.

⁸²*Id.*

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

⁸⁴*Id.* at 460, 443 N.E.2d at 443, 457 N.Y.S.2d at 194.

. . .

Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.⁸⁵

In *Romack v. Public Service Co. of Indiana*,⁸⁶ the Indiana Supreme Court also found that the traditional employment at will, independent consideration and mutuality of obligation doctrines do not always apply. The court, adopting Judge Conover's dissenting opinion in the court of appeals decision, held that an employee has given independent consideration if (1) the employee is uniquely qualified for the job, (2) he gave up "lifetime employment" with the state police to take the job, (3) the employer recruited the employee, (4) the employee agreed to accept the job only if the employer offered the same permanency, and (5) the employer agreed that he would have permanent employment.⁸⁷

In both *Toussaint* and *Weiner* the courts found the employer's offers of job security were part of the bargained-for exchanges that formed the employment contracts.⁸⁸ In *Pine River State Bank v. Mettille*,⁸⁹ the Supreme Court of Minnesota went a step further and held that an employee may enforce the employer's promise of job security even if the employer offers it and the employee accepts it after the parties have established an at will employment relationship.⁹⁰ In *Mettille* the employer had distributed an employee handbook several months after the employee began working for the employer. The handbook included sections on job security and disciplinary procedures.⁹¹ The court said that, although "general statements of policy . . . do not meet the contractual requirements for an offer,"⁹² specific language in an employee handbook could be an offer of a unilateral contract.⁹³ The employee accepts the offer

⁸⁵*Id.* at 463-64, 443 N.E.2d at 444-45, 457 N.Y.S.2d at 196-97.

⁸⁶511 N.E.2d 1024 (Ind. 1987), *vacating* 449 N.E.2d 776 (Ind. Ct. App. 1986) (adopting dissenting opinion of the appellate court).

⁸⁷*Romack*, 511 N.E.2d at 1026 (incorporating by reference 449 N.E.2d at 776-78 (dissenting opinion)).

⁸⁸In both *Toussaint* and *Weiner* the plaintiff had specifically asked about job security during the pre-employment negotiations. In each case the employer's agent indicated that it was company policy not to discharge an employee without just cause.

⁸⁹333 N.W.2d 622 (Minn. 1983).

⁹⁰*Id.*

⁹¹For the text of the handbook provisions, see *id.* at 626 nn. 2 & 3.

⁹²*Id.*

⁹³*Id.* at 630. The court found that a "Job Security" provision was "no more than a general statement of policy." *Id.* A "Disciplinary Policy" provision did have sufficiently specified language to indicate an offer of a unilateral contract. *Id.* It provided for detailed pre-discharge procedures—oral reprimand, written reprimand, meeting with manager, suspension, and review by the Executive Officer. *Id.* at 626 n. 3.

if he remains on the job,⁹⁴ and “by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.”⁹⁵

2. *Employee Reliance as a Basis for Enforcing the Employer's Promise of Job Security.*—The contract doctrines of offer, acceptance, and bargained-for exchange explain the holdings in *Toussaint*, *Weiner*, and *Mettile*. The employee can enforce the employer's promise of job security because the employee has given consideration for the promise. Although generally a promise that is not supported by consideration is not enforceable, the courts will sometimes enforce a promise even if there is no consideration to support it.⁹⁶ For example, the court may enforce a promise if the promisee's justifiable reliance on the promise induces him to act on the promise, if the promisor should have expected the promise to induce the action and the court can avoid injustice only by enforcing the promise.⁹⁷ Several courts have applied this principle to the employment relationship and have enforced the employer's promise of job security.⁹⁸

In *Toussaint* the court declared that a promise of job security “may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.”⁹⁹ Thus, promises in an employee handbook may be enforceable. The *Toussaint* court stated:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever

⁹⁴*Id.* at 627.

⁹⁵*Id.*

⁹⁶RESTATEMENT (SECOND) OF CONTRACTS §§ 82-90 (1979).

⁹⁷*Id.* § 90.

⁹⁸*See* Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Forrester v. Parker, 93 N.M. 781, 601 P.2d 191 (1980); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984).

⁹⁹408 Mich. at 598, 292 N.W.2d at 885.

the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."¹⁰⁰

The employee handbook statements are enforceable because the "employees could justifiably rely on those expressions and conduct themselves accordingly,"¹⁰¹ and because the employer hopes to "benefit [from] improved employee attitudes and behavior and improved quality of the work force."¹⁰² Under such conditions "the employer may not treat its promise as illusory."¹⁰³ Several other courts have followed *Toussaint* and have held that an employee may enforce an employer's promise of job security if the employee justifiably relies on the promise.¹⁰⁴

In *Pugh v. See's Candies, Inc.*,¹⁰⁵ the California Court of Appeals declared, "the totality of the [employment] relationship" may give "rise to an implied promise [that the employer] would not act arbitrarily in dealing with its employees."¹⁰⁶ Among the circumstances that may justify a jury finding that the employer made such a promise are longevity of service, promotions and commendations, employer assurances of job security, and employer practices.¹⁰⁷ In *Cleary v. American Airlines, Inc.*¹⁰⁸ a different division of the California Court of Appeals held "that the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause."¹⁰⁹ The *Cleary*

¹⁰⁰*Id.* at 613, 292 N.W.2d at 892, (citing *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917)).

¹⁰¹*Id.* at 617, 292 N.W.2d at 893.

¹⁰²*Id.* at 619, 292 N.W.2d at 895.

¹⁰³*Id.*

¹⁰⁴*See* *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984).

[I]f an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Id. at 548, 688 P.2d at 174. *See also* *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984).

[I]f an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, these promises are enforceable components of the employment relationship.

Id. at 230, 685 P.2d at 1088.

¹⁰⁵116 Cal. App. 3d 31, 171 Cal. Rptr. 917 (1981).

¹⁰⁶*Id.* at 329, 171 Cal. Rptr. at 927.

¹⁰⁷*Id.*

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

¹⁰⁹*Id.* at 456, 168 Cal. Rptr. at 729.

court went further than most other courts and also held that there is an implied-in-law covenant of good faith and fair dealing in every employment contract.¹¹⁰ Nevertheless, the *Cleary* decision seems to rest primarily on the principle of employee reliance on the employer's promise. In both *Pugh* and *Cleary* the courts found that the employee reasonably relied on an implied promise that the employer would not discharge the employee arbitrarily.¹¹¹

B. *The Public Policy Exception: The Tort of Abusive Discharge*

Several jurisdictions have recognized that tort law limits an employer's right to discharge an at will employee.¹¹² Most have adopted what is known as the "public policy exception."¹¹³ In general, the courts allow the discharged employee's tort claim if the employee alleges that the discharge interferes substantially with an important public policy interest.¹¹⁴ To prevail, the employee must allege and prove (1) that he

¹¹⁰*Cleary* may stand for the proposition that there is an implied-in-law covenant of good faith and fair dealing in employment contracts that limits the right of the employer to terminate the employment. See the court's discussion of the *Cleary* decision in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 328-29, 171 Cal. Rptr. 917, 926-27 (1981); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 384-86, 710 P.2d 1025, 1039-40 (1985); see also *Murg & Scharman*, *supra* note 2, at 361-67.

The *Cleary* court certainly used broad language: Termination of employment without legal cause after such a period [eighteen years of continuous employment] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer . . . to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain—benefits described in the complaint as having accrued during plaintiff's 18 years of employment.

¹¹¹ Cal. App. 3d at 455, 168 Cal. Rptr. at 729.

¹¹²In *Cleary* the employee had worked for the employer continuously for eighteen years, and he had received several minor promotions. He also had a substantial interest in retirement benefits which depended on his continued employment. Additionally, the employee handbook indicated that the employer would discharge employees only for just cause. *Clearly*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

In *Pugh* the employee had been employed for thirty-two years. He started as a pots-and-pans washer and had been promoted to vice-president in charge of production. A former general manager had assured the employee that his future was secure if he did a good job. The employee also presented evidence that indicated that the employer had fired the employee because he actively resisted the employer's "sweetheart" deal with a union. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

¹¹²See cases cited *supra* note 66.

¹¹³See *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); see also *Public Policy Exception*, *supra* note 15.

¹¹⁴See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). Courts and judges disagree whether a particular public policy interest is sufficiently important. Compare, for example, the majority and dissenting opinions in *Palmateer*.

sought to or did exercise a personal right or a public obligation or refused to commit an unlawful act (2) that arises out of a sufficiently important public policy interest, and (3) that the employer discharged the employee (4) because the employee sought to or did exercise the personal right or public obligation or refused to do the unlawful act.¹¹⁵

The abusive discharge¹¹⁶ cases fall into one of three broad classes. The first class includes cases where the important public policy interest is one involving the employee's personal right and where there is either a connection between the right and the employee's status as an employee¹¹⁷ or the personal right is so important that it supersedes the employer's right to discharge an at will employee.¹¹⁸ The second class includes those cases where the public policy interest imposes an important public obligation on the employee that supersedes the employer's right to discharge an at will employee.¹¹⁹ In the third class are those cases where the employer discharged the employee because he refused to perform an

¹¹⁵*Cf. Love, Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 566-67 (1986) (the three elements of the plaintiff's prima facie case are: (1) plaintiff exercised a statutory or constitutional duty, (2) plaintiff was discharged, and (3) there is a causal link between the exercise of the right and the discharge).

¹¹⁶Courts and commentators also use the terms "retaliatory discharge" and "wrongful discharge." See *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 694 n.2 (W. Va. 1982). In this note, "retaliatory discharge" and "abusive discharge" are synonyms and apply where the employer discharged an employee because the employer wanted to retaliate against the employee who has exercised a public policy right or obligation. The term "abusive discharge" emphasizes that the employer has abused his common law right to terminate the employment. "Wrongful discharge" refers to any discharge for which the employer is or may be liable.

¹¹⁷See *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (employee fired for filing a worker's compensation claim); *accord Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *cf. Campbell v. Ford Indus.*, 266 Or. 479, 513 P.2d 1153 (1973) (plaintiff had no cause of action because there was no connection between the statutory public policy interest, protection of minority shareholder's interests, and the plaintiff's status as an employee). See generally *Protecting Whistleblowers*, *supra* note 15, at 803-05.

¹¹⁸See *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W.Va. 1984) (right of privacy; employee fired for refusing to take a lie detector test).

¹¹⁹See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (obligation to report crimes); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (obligation to serve on a jury). *But cf. Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied* 421 Ind. 1099 (1981) (FDA violations). In the following cases the courts found that the public policy obligation did not supersede the employment-at-will rule but the courts indicated that some public policy interests might supersede the rule: *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (medical ethics); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (product safety).

unlawful act.¹²⁰ In each class of cases, the essence of the employee's claim is that the employer's motive for discharging the employee was to thwart an important public policy interest, and the effect of the discharge, if the courts do not intervene, will be to thwart the public policy interest.

1. *Protecting the Employee's Personal Rights.*—*Frampton v. Central Indiana Gas Co.*¹²¹ is typical of cases in the first class. In *Frampton* the discharged employee alleged that the employer discharged her because she had filed a workers' compensation claim. The court reviewed the purpose of the workers' compensation statutes and noted that a fundamental purpose of the legislation is to avoid the difficulties employees encountered at common law in actions to recover damages for job related injuries.¹²² The court found that "[t]he basic policy behind such legislation is to shift the economic burden for employment connected injuries from the employee to the employer,"¹²³ and that the statutes give the employee a right to receive compensation for those injuries and obligate the employer to pay for them.¹²⁴ In order to effect the legislative policies, the court reasoned:

[T]he employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.¹²⁵

The court found that this particular discharge was the kind of "device" the statute prohibited¹²⁶ and reasoned that refusing to recognize the

¹²⁰See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (price fixing); *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988) (truck weight limits).

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

¹²²*Id.* at 251-52, 297 N.E.2d at 427.

¹²³*Id.* at 252, 297 N.E.2d at 427.

¹²⁴*Id.*

¹²⁵*Id.* at 252-53, 297 N.E.2d at 427.

¹²⁶"We believe the threat of discharge to be a 'device' within the framework of the [statute], and hence, in clear contravention of public policy." *Id.* at 252, 297 N.E.2d at 428. The statute provided, "No contract or agreement, . . . no rule, regulation, or other device shall, in any manner, operate to relieve any employer . . . of any obligation created by this act." IND. CODE § 22-3-2-15 (1971) quoted in *Frampton*, 260 Ind. at 252, 297 N.E.2d at 427-28.

employee's claim would not only discourage employees from asserting their rights but would also permit "coercion and other duress-provoking acts" on the part of some employers.¹²⁷

There are two major themes in *Frampton*. First, some public policy interests supersede the employment at will rule: "[W]hen an employee is discharged solely for exercising a statutorily conferred right an exception to the [employment at will rule] must be recognized."¹²⁸ Second, an employer abuses his right to discharge at will employees if he uses such right to discharge in a way that thwarts those public policy interests: "If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined."¹²⁹

These themes are typical in abusive discharge cases. Several other courts have echoed these themes and have held that despite the employment at will rule, an employer does not have the right to fire an employee because he files a workers' compensation claim.¹³⁰ Other courts have recognized a discharged employee's cause of action where the employee alleged that he had been discharged because he asked to be transferred from a job that he believed was hazardous or unhealthful,¹³¹ because the employee refused to take a polygraph test,¹³² and because the employee filed a personal injury claim against the employer.¹³³

2. *Protecting Public Obligations.*—In *Nees v. Hocks*,¹³⁴ the Oregon Supreme Court held that an employer was liable in tort because he discharged an employee who agreed to serve on a jury after the employer had instructed her to avoid jury duty.¹³⁵ According to the *Nees*

¹²⁷260 Ind. at 252, 297 N.E.2d at 428.

¹²⁸*Id.* at 253, 297 N.E.2d at 428.

¹²⁹*Id.* at 251, 297 N.E.2d 427; *cf.* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) ("The [National Labor Relations] Act does not interfere with the normal exercise of the right of the employers to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees . . .").

¹³⁰*See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Murphy v. City of Topeka-Shawnee Labor Servs., 6 Kan. App. 488, 630 P.2d 186 (1981); Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Sventko v. Kroger Co., 69 Mich. App. 644, 265 N.W.2d 385 (1978); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981); Brown v. Transcom Lines, 284 Or. 597, 588 P.2d 1087 (1978); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

¹³¹Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985).

¹³²Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984).

¹³³Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

¹³⁴272 Or. 210, 536 P.2d 512 (1975).

¹³⁵*Id.*

court, the question is whether “there [are] instances in which the employer’s reason or motive for discharging harms or interferes with an important interest of the community, and, therefore, justifies compensation to the employee?”¹³⁶ The court answered by stating that such instances do exist and found that the state’s constitution and statutes and the common law of other jurisdictions supported the court’s conclusion that the duty to serve on a jury is one of those important interests.¹³⁷ The court reasoned:

These [authorities] clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.¹³⁸

Because the court found that the public policy that created the duty to serve on a jury supersedes the public policy embodied in the employment at will rule, the court affirmed the trial court’s judgment that the employer was liable in tort.¹³⁹

Using similar reasoning, the Supreme Court of Appeals of West Virginia held that a discharged employee stated a cause of action in tort by alleging that he was discharged because he reported the employer’s violations of state and federal consumer credit statutes.¹⁴⁰ In *Harless v. First National Bank in Fairmont*¹⁴¹ the court said:

We conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer’s motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.¹⁴²

In *Romack v. Public Service Co. of Indiana*,¹⁴³ the Indiana Supreme Court held that an employee who was hired as the Operation Security

¹³⁶*Id.* at 216, 536 P.2d at 515.

¹³⁷*Nees*, 272 Or. 210, 536 P.2d 512.

¹³⁸*Id.* at 219, 536 P.2d at 516.

¹³⁹*Nees*, 272 Or. 210, 536 P.2d 512. The court reversed the trial court’s punitive damages award. *Id.*

¹⁴⁰*Harless v. First Nat’l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

¹⁴¹246 S.E.2d 270 (W. Va. 1978).

¹⁴²*Id.* at 275 (footnote omitted).

¹⁴³511 N.E.2d 1024 (Ind. 1987), *aff’g in part and rev’g in part*, 499 N.E.2d 768, 776 (Ind. Ct. App. 1986) (adopting the dissenting opinion of J. Conover from the appellate court decision urging modification of prior case law on issue of breach of employment contract).

Manager at a nuclear power plant construction site could sue his employer who fired him because he refused to ignore safety problems.¹⁴⁴ In *Romack* the court found that the public policy in the Atomic Energy Act¹⁴⁵ justified the cause of action.¹⁴⁶

3. *Protecting the Public Interest in Discouraging Unlawful Acts.*— In *Tameny v. Atlantic Richfield Co.*,¹⁴⁷ the discharged employee alleged that he was discharged because he refused to participate in the employer's gasoline price fixing scheme. In *Tameny*, the Supreme Court of California stated, "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and the employer and serve to contaminate the honest administration of public affairs."¹⁴⁸ Therefore, the court concluded, "[F]undamental principles of public policy and adherence to the objectives underlying the state's penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act."¹⁴⁹

In *McClanahan v. Remington Freight Lines, Inc.*,¹⁵⁰ the Indiana Supreme Court expressly stated no state "statute states that public policy is violated by committing an illegal act or requiring an employee to do so at the risk of his job"¹⁵¹ However, the court held that a former truck driver who alleged that he was fired because he refused to drive across another state in violation of that state's weight limit laws stated a cause of action.¹⁵² It reasoned:

Depriving [the employee] of any legal recourse under these circumstances would encourage criminal conduct by both the employee and the employer. Employees faced with the choice of losing their jobs or committing an illegal act for which they might not be caught would feel pressure to break the law simply out of financial necessity. Employers, knowing the employee's

¹⁴⁴511 N.E.2d at 1026, adopting dissenting opinion in 499 N.E.2d at 779-80.

¹⁴⁵42 U.S.C. §§ 2011-84 (1982).

¹⁴⁶*Romack*, 511 N.E.2d at 1026 adopting dissenting opinion in 499 N.E.2d at 779-80. See *supra* note 144.

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

¹⁴⁸*Id.* at 173, 610 P.2d at 1333, 164 Cal. Rptr. at 842, (quoting *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (1959)).

¹⁴⁹27 Cal. 3d at 174, 610 P.2d at 1333-34, 164 Cal. Rptr. at 843 (footnote omitted).

¹⁵⁰517 N.E.2d 390 (Ind. 1988).

¹⁵¹*Id.* at 393.

¹⁵²*McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 392-94 (Ind. 1988).

susceptibility to such threats and the absence of civil retribution, would be prompted to present such an ultimatum.¹⁵³

IV. REMEDIES FOR AN EMPLOYEE WRONGFULLY DISCHARGED FROM EMPLOYMENT HAVING AN INDEFINITE DURATION.

A. Contract Remedies

1. *Damages.*—Generally, contract law protects the promisee's interest in the benefit of the promisor's broken promise; courts usually allow the promisee to recover damages measured by his expectation interest, that is, the actual benefit the promisee would have received had the promisor fully performed the promise.¹⁵⁴ Courts often allow the promisor to show that the promisee avoided, or could have avoided, some of the harm he suffered as a result of the breach.¹⁵⁵ Thus the promisee's damages award is usually his expectation interest minus the loss he avoided or could have avoided.¹⁵⁶

Damages for an employer's breach of an employment contract follows this same general pattern. In most states, when an employer breaches an employment contract that has a definite duration, the wronged employee is entitled to receive damages measured by the value of the unfulfilled portion of the contract minus the amount the employee received or could have received from substitute employment.¹⁵⁷ In most states, substitute employment is any employment the wrongfully discharged employee actually accepts or, if the employee has not accepted other employment, substitute employment is defined as any available employment with similar conditions and rank and in the same locality as the employment from which the employee was wrongfully discharged.¹⁵⁸ The employee should also be allowed a credit for his reasonable expenses incurred in finding, or attempting to find, substitute employment.¹⁵⁹ Thus the employee's damages is the value of the unfulfilled portion of the contract minus what the employee earned or could have earned from substitute employment plus the employee's reasonable expenses in finding or attempting to find a new job.

¹⁵³*Id.* at 393.

¹⁵⁴RESTATEMENT (SECOND) OF CONTRACTS § 347 (1979).

¹⁵⁵*Id.* § 350. See generally DOBBS, *supra* note 19, § 3.7.

¹⁵⁶See generally FARNSWORTH, CONTRACTS § 12.9 (1982).

¹⁵⁷DOBBS, *supra* note 19, § 12.25.

¹⁵⁸*Id.* § 12.25.

¹⁵⁹C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 163, at 636 (1935); *cf.* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981) (tort action).

If the employment agreement has a definite duration, determining the value of the unfulfilled portion of the contract is relatively simple. It is only necessary to determine the amount of time remaining on the contract and the rate at which the employee would have been paid and would have received other benefits had the employer not breached the contract.¹⁶⁰ Even if the rate of pay and benefits depends, for example, on future profits or sales rather than being fixed, there are usually some concrete facts from which the jury can calculate the value of the unfulfilled portion of the contract. In any event, the duration of the contract limits the contract's value.

If the court enforces an employer's promise not to discharge the employee without good cause and if the employment was for an indefinite period, there is no such limit on the employee's damages award. By its terms the contract will continue until the employee quits, retires, or dies, or until the employer discharges the employee for good cause. In order to determine the unfulfilled portion of the contract, the jury must determine the earliest time that one of these events would have occurred had the employer not breached the contract. In addition, the jury must determine the rate of pay and the value of other benefits the employee would have received during this period.

The employee need not present mathematically precise evidence on either of these issues as long as the employee does present evidence to support the jury's award.¹⁶¹ The employee's past employment history, his age, his prospects for promotion, his stake in retirement benefits that depend upon continued employment and other factors may provide an adequate basis for an award. Perhaps the employee can show that but for the employer's breach the employee would have received pay raises or would have been promoted.¹⁶²

Although courts should allow an employer to show that the employee could have obtained substitute employment, it may not be clear what "substitute employment" means when the employer has discharged an employee from employment offering both job security and an indefinite duration. If substitute employment is defined as employment with similar

¹⁶⁰DOBBS, *supra* note 19, § 12.25. It is not always easy to determine the remaining unfulfilled period. In *Dixie Glass Co. v. Pollak*, 341 S.W.2d 530 (Tex. Civ. App. 1960), *aff'd per curiam* 162 Tex. 440, 347 S.W.2d 596 (1961), the court held that it was proper for the trial court to allow the jury to find that the wrongfully discharged employee would have exercised options to renew his employment contract for additional definite periods.

¹⁶¹RESTATEMENT (SECOND) OF CONTRACTS § 352 comment a (1981).

¹⁶²*Cf.* *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983) (abusive discharge tort action).

conditions, is an at will job substitute employment?¹⁶³ If it is, should the courts allow the employee to show that his new employer may discharge him long before the unfulfilled period of the original employment would have expired?¹⁶⁴

If the court decides that at will employment is not substitute employment, then the law gives the wrongfully discharged employee no incentive to accept at will employment,¹⁶⁵ thus encouraging social and economic waste.¹⁶⁶ The courts should, therefore, decide that the defendant-employer may show that acceptable at will employment was available to the discharged employee; the court would then allow a reduction of employee's damages by the amount that the employer shows the employee could have earned from the at will employment. On the other hand, the wrongfully discharged employee is entitled to the value of the employer's broken promise of job security. Thus, courts should allow the employee to show that the value of the at will employment he accepted or could have accepted is less than the value of the employment the defendant-employer promised to give. Courts should allow the jury to discount the value of the at will employment when the jury calculates the employee's damages. If the employer shows that the employee accepted or could have accepted at will employment, then the employee's damages award should be (1) the value of the unfulfilled portion of the original contract plus (2) the expenses the employee incurred while seeking other employment minus (3) the value of the other employment the

¹⁶³*Cf.* Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40 (N.Y. Sup. Ct. 1951), *aff'd*, 279 A.D. 992, 112 N.Y.S.2d 494 (1952), *aff'd*, 305 N.Y. 48, 110 N.E.2d 551 (1953) (plaintiff wrongfully discharged from employment of definite duration permitted to reject alternate at-will employment, in part, because plaintiff could be discharged from such employment arbitrarily).

¹⁶⁴The employee may find that he is in a delicate position. In order to prove that his tenure with the former employer would have been relatively long-lasting but for the wrongful discharge, the employee will probably emphasize his qualities as a good employee. If he does this, he may undermine his argument that the substitute employment is likely to be short lived, especially if the jury perceives that employers do not, as a rule, arbitrarily discharge good employees even though the specific employer may do so.

There is some support for the view that an employee cannot reject employment solely because the employment period is or may be shorter than the unfulfilled portion of the original employment contract. See generally Annotation, *Nature of Alternative Employment Which Employee Must Accept to Minimize Damages for Wrongful Discharge*, 44 A.L.R.3d 629, 653 (1972).

¹⁶⁵As a practical matter, there are probably few wrongfully discharged employees who have the financial resources to remain unemployed. Financial pressures are more likely to influence the unemployed, wrongfully discharged employee than are legal pressures.

¹⁶⁶For an article presenting an economic argument against the common law substitute employment rules because, according to the author, the rules encourage economic waste, see Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*. 56 IND. L.J. 207 (1981).

employee accepted or should have accepted (4) discounted to account for the risk that it is less valuable than the unfulfilled portion of the original employment.

This measure of damages will be appropriate if the court is enforcing a bargained-for promise of job security as in *Weiner* or *Romack*. If the court is enforcing the promise of job security because the employee justifiably relied on an unbargained-for promise, then the employee may not be entitled to such an expansive remedy. There is less reason to give the promisee his expectation interest when the promise the court is enforcing is not one that both parties freely bargained for. According to the Restatement, if the court enforces an unbargained-for promise, "[t]he remedy . . . may be limited as justice requires."¹⁶⁷ The Restatement comment indicates that the same factors creating the employee's right to a remedy are also important when determining the nature and the measure of the remedy.¹⁶⁸

A full contract remedy may be appropriate if the employee cannot readily obtain other employment or if he had a significant stake in benefits that depended upon continued employment in the original job and induced the employee to rely on the employer's promise of job security.¹⁶⁹ In many other cases the employee's loss due to reliance on the employer's promise is little more than the opportunity or the will to seek other seemingly less secure employment. In those cases the courts should limit damages to the amount the employee lost up to the time he obtains or could have obtained other suitable employment, whether it is at will or otherwise, plus the cost of finding the other employment. The courts should not allow the employee to show that any at will employment he accepted or could have accepted is less valuable than the original employment. By the time the employee accepts or could have accepted other comparable employment, even if it is at will employment, the employee has suffered all the loss he will suffer as a consequence of his reliance on the employer's promise.¹⁷⁰ In essence,

¹⁶⁷RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

¹⁶⁸*Id.* comment d.

¹⁶⁹Compare:

[T]he employee who has enough mobility to avoid the consequences of his discharge will also have enough mobility to make him an unlikely target for oppression by the employer. But where the employee's experience is of special value only in his present employment or where his advanced age makes it doubtful that he can readily obtain comparable employment, he is more susceptible to improper exertion of the employer's power and less likely to succeed in mitigating damages.

Blades, *supra* note 15, at 1426.

¹⁷⁰*Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981) (the promisee's reliance interest may be a more just measure of damages than is his expectation interest).

this measure of damages merely shifts the risks of a low demand for labor from the employee to the employer. That is all that justice requires in these cases.

2. *Reinstatement.*—When courts enforce promises of job security in employment contracts having no definite duration, damage awards are likely to be both substantial and inaccurate because they may be based on imprecise, almost speculative, evidence in order to establish the value of the promised employment minus the value of the substitute employment. Therefore, the courts reconsider their traditional dislike for specific performance—reinstatement—and give thought to it as a remedy for an employer's breach of an employment contract. If, as some believe, juries may favor the wrongfully discharged employee,¹⁷¹ then damages are not only likely to be imprecise but also substantial.¹⁷² Of course, the damages award may also be too small. That damages cannot be measured with a reasonable degree of accuracy is one reason for the courts to grant an equitable remedy such as reinstatement.¹⁷³

Courts probably have refused to order reinstatement¹⁷⁴ because they did not want to supervise a long term relationship that depends upon cooperation between hostile parties.¹⁷⁵ In addition, if the employment contract has a definite duration and a well defined value, the courts most likely believe that damages are adequate, or at least are not so inadequate that the court ought to become entangled in the parties' relationship. Even if that view is correct, it is far less correct if the employment contract has no definite duration. Damages may not be adequate. There is a substantial risk that courts will either under-compensate or over-compensate the employee, and once the court determines that the employer is liable, both the employer and the employee may prefer reinstatement over the risk that the jury will award damages that are either too high or too low. Even if the court has additur and remittitur authority, some risk remains. The employee might also prefer reinstatement over damages because other employers may be reluctant

¹⁷¹ “[T]here is the danger that the average jury will identify with, and therefore believe, the employee.” *Blades*, *supra* note 15, at 1428.

¹⁷² See *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 378 N.W.2d 558 (1985) (economic damages for breach of an employment contract \$750,000); see also *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981) (jury verdict of \$1,000,000 not supported by the evidence).

¹⁷³ See *DOBBS*, *supra* note 19, § 2.5, at 57-58.

¹⁷⁴ “Reinstatement” in this note means ordering the employer to return the wrongfully discharged employee to the same or similar employment from which the employee was discharged and ordering the employer to pay backpay and restore the employee's benefits and seniority, if any.

¹⁷⁵ See *DOBBS*, *supra* note 19, § 12.25, at 929-31; RESTATEMENT (SECOND) OF CONTRACTS § 367 comment b (1981).

to hire a "trouble-maker" who is suing his former employer.¹⁷⁶ The employer might also prefer reinstatement; at least the employer will receive the benefit of the services that the court will otherwise force him to pay. Finally, society will benefit if reinstatement avoids social and economic waste.¹⁷⁷

That reinstatement will not work in many, or even most, cases is no reason to refuse to grant it in every case. Statutes often include reinstatement with backpay as a remedy for wrongful discharge,¹⁷⁸ and the courts enforce the remedy.¹⁷⁹ There is no reason to believe that reinstatement will be more difficult to administer and enforce if it is a contract remedy than it is if it is a statutory remedy. The courts can apply the same standards in either case.

If a statute gives courts the discretionary authority to reinstate an employee, the courts often focus on two factors: (1) the likelihood that the parties will cooperate and (2) the degree of trust and cooperation the job requires.¹⁸⁰ Any hostile feelings between the parties is significant even if no objective basis exists for those feelings.¹⁸¹ That the feelings exist at all is reason to doubt that the parties will cooperate. On the other hand, not all jobs require cooperation, trust, or close supervision,¹⁸² and the situation itself may induce the parties to attempt to cooperate. An employee who seeks reinstatement probably prefers the job from which he was discharged over vengeance. Prudent, self-interested employers may decide that cooperation is better than lost profits. Rein-

¹⁷⁶*Cf.* *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983) (discharged employee unable to find work in the banking industry after employer wrongfully discharged him from his position in a bank).

¹⁷⁷*Cf.* DeFranco, *Modification of the Employee At Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, ST. LOUIS U.L.J. 65, 85 (1985) stating: "[T]he remedy of reinstatement, although difficult to implement in many situations if a union is not available to oversee implementation and protect the worker against harassment, nevertheless prevents the employee from obtaining a 'windfall' by getting paid for work never performed." (footnotes omitted).

Reinstatement is sometimes an ineffective remedy under the National Labor Relations Act. *See Chaney, The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357 (1981). According to Chaney, nearly 90% of the employees in his study who were awarded reinstatement for the employer's violation of section 8(a)(3) of the National Labor Relations Act had left within one year. *Id.* at 360. According to Chaney, one of the reasons the remedy is not effective is that the NLRB does not effectively enforce its reinstatement orders. *Id.* at 363-64.

¹⁷⁸*See, e.g.*, IND. CODE § 34-4-29-1 (1982) (employee discharged because he served on a jury may bring a civil action for reinstatement, lost wages, and attorney's fees).

¹⁷⁹*See* RESTATEMENT (SECOND) OF CONTRACTS § 367 comment b (1981); DOBBS, *supra* note 19, § 12.25, at 929-31.

¹⁸⁰*See, e.g.*, *Combs v. Griffin Television, Inc.*, 421 F. Supp. 841 (W.D. Okla.

¹⁸¹*Id.* at 846.

¹⁸²DOBBS, *supra* note 19 § 12.25.

statement will be an effective remedy in some cases; in those cases the courts ought to allow the employee to have that remedy. If the court finds that enforcing the remedy is too difficult in particular cases, the court can always dissolve the order and grant damages. In cases where one party has been particularly uncooperative, the court might reduce or increase the award.

B. *An Employee's Tort Remedies for Abusive Discharge*

1. *A Survey of the Cases.*—In his treatise on damages, Professor McCormick said this about abuse of process awards: “[T]he courts will give compensation, within limits not yet definable.”¹⁸³ We can say the same about abusive discharge awards. The courts have approved compensatory damages awards as small as a few hundred dollars and as large as several hundred thousand dollars.¹⁸⁴

Because courts have been concerned primarily with substantive issues, there are relatively few opinions dealing with remedies issues. Those courts that have dealt with remedies issues generally agree that economic harm, such as lost wages, is a proper element of the plaintiff's measure of damages,¹⁸⁵ but they do not agree whether emotional harm, loss of reputation, or humiliation are proper elements,¹⁸⁶ and they do not agree whether to allow punitive damages.¹⁸⁷

In *Smith v. Atlas Off-Shore Boat Service, Inc.*¹⁸⁸ the Fifth Circuit Court of Appeals characterized abusive discharge “as an intentional tort, entitling the [plaintiff] to compensatory damages . . . including the [plaintiff's] expenses of finding new employment, lost earnings while the [plaintiff] seeks another position, and lost future earnings. . . . In addition to these economic losses, the [plaintiff] may be entitled to recover

¹⁸³McCORMICK, *supra* note 159, § 109, at 384.

¹⁸⁴*Compare* Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1978) (\$749) and Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (\$650) with Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983) (\$270,000).

¹⁸⁵*See* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

¹⁸⁶*Compare* Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. Unit A Aug., 1981) (emotional loss is a proper element of damages) with Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984) (emotional loss is not a proper element of damages).

¹⁸⁷*Compare* Vigil, 102 N.M. 682, 699 P.2d 613 (punitive damages permitted) with Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (punitive damages not permitted).

¹⁸⁸653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

compensatory damages for mental anguish"¹⁸⁹ Because the court determined that a punitive damage award would unduly restrict an employer's ability to operate his business, it held that the plaintiff could not recover punitive damages.¹⁹⁰

In *Harless v. First National Bank in Fairmont*,¹⁹¹ the West Virginia Supreme Court of Appeals held that a discharged employee could recover damages for emotional harm by showing that he was unable to eat or sleep and that he became depressed and withdrawn as a result of the wrongful discharge.¹⁹² The court reasoned "that the tort of retaliatory discharge carries with it a sufficient indicia of intent" to justify including emotional harm as an element of the plaintiff's damages.¹⁹³ The court also indicated that the employee may recover punitive damages if "the employer's conduct is wanton, willful or malicious."¹⁹⁴ The plaintiff does not have an automatic right to receive punitive damages;¹⁹⁵ instead, "the plaintiff must prove further egregious conduct on the part of the employer."¹⁹⁶ The court indicated that punitive damages will be proper "where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment."¹⁹⁷

In *Vigil v. Arzola*,¹⁹⁸ the Court of Appeals of New Mexico declared that the objective of the tort is to encourage job security and said, "[T]he damages might include lost wages while unemployed, the cost and inconvenience of searching for a new job, moving costs for relocating, and possible punitive damages. . . . [I]n order to prevent any chilling effect on the employer's freedom in hiring . . . mental suffering and similar damages of a non-pecuniary nature will not be allowed."¹⁹⁹

In *Wiskotoni v. Michigan National Bank-West*,²⁰⁰ the Sixth Circuit Court of Appeals applied Michigan law and held that generally the

¹⁸⁹Id. at 1064.

¹⁹⁰Id.

¹⁹¹289 S.E.2d 692 (W. Va. 1982).

¹⁹²Id.

¹⁹³Id. at 702; see also *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (damages for emotional loss are permitted in Indiana if a legal right is invaded in a way that provokes emotional disturbance even if there is no physical injury; damages for emotional harm are appropriate in abusive discharge cases).

¹⁹⁴*Harless*, 289 S.E.2d at 703.

¹⁹⁵Id.

¹⁹⁶Id.

¹⁹⁷Id. n.19.

¹⁹⁸102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, P.2d 1038 (1984).

¹⁹⁹Id. at 689, 699 P.2d at 620-21.

²⁰⁰716 F.2d 378 (6th Cir. 1983).

employee may recover damages for emotional harm; however, if the employee presents no "specific and definite evidence of his own mental anguish, anxiety or distress," he cannot, as a matter of law, recover damages for emotional harm.²⁰¹ The court also held that the employee presents sufficient evidence to justify an award for loss of reputation if he shows that because of the discharge he was unable to find work in his field.²⁰²

Several courts that have recognized an action in abusive discharge have stated that punitive damages may be proper in such cases, but have refused to approve an award for punitive damages when the case before the court was the first case in which the court had recognized the cause of action.²⁰³ These courts reasoned that it would be improper to grant punitive damages because the defendant could not have anticipated that he would be liable for discharging the employee. The courts relied on this rationale in both *Nees v. Hocks*²⁰⁴ and in *Kelsay v. Motorola, Inc.*²⁰⁵ Although the *Kelsay* court refused to approve the punitive damages award in the case then before it, the court indicated that generally the plaintiff would be able to recover punitive damages:

In the absence of the deterrent effect of punitive damages there would be little to dissuade an employer from engaging in the practice of discharging an employee for filing a workmen's compensation claim. For example in this case, the plaintiff was entitled to only \$749 compensatory damages The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this state²⁰⁶

2. *Compensatory Damages.*—It is easy to state that the primary purpose of compensatory damages in tort is to provide a monetary award that will restore the plaintiff to a position that is substantially equivalent to the position he enjoyed immediately before the defendant committed

²⁰¹*Id.* at 389.

²⁰²*Id.* at 390.

²⁰³See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1984); *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (N.M. Ct. App. 1983), *modified on other issue*, 101 N.M. 687, 687 P.2d 1038 (1984); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984).

²⁰⁴272 Or. 210, 536 P.2d 512 (1975).

²⁰⁵74 Ill. 2d 172, 384 N.E.2d 353 (1978).

²⁰⁶*Id.* at 186-87, 384 N.E.2d at 359.

the tort.²⁰⁷ It is much more difficult to give those words concrete meaning particularly when the harm the plaintiff suffers is not economic. The new contract exceptions to the traditional employment at will rule recognize and protect an employee's legally protected interest in his job. For the most part the harm the wrongfully discharged employee suffers is the economic value of his lost job. The discharged employee who prevails on one of these contract theories is not an at will employee; the law recognizes that he has a legally protected interest in his job.

On the other hand, the public policy tort exception to the rule does not provide legal protection for the employee's interest in job security as such; it protects other interests. The tort is an exception to the rule only in the sense that an employer may be liable for discharging an at will employee. The employee remains an at will employee who has no legally protected interest in his job.²⁰⁸ Some courts have recognized that the employee does not have a legally protected interest in his job; some of these courts have reasoned that, therefore, the employee has suffered little or no harm.²⁰⁹ These courts have confused substantive issues with remedies issues and have failed to identify the interests the tort remedy seeks to protect.

In order to properly analyze the remedies problems, one must first distinguish "injury" from "harm." According to the Restatement, an "injury" is "the invasion of any legally protected interest of another."²¹⁰ Substantive tort law protects an interest if it is of such social importance that "imposing liability on those who thwart its realization" is justified.²¹¹ To say that the defendant has injured the plaintiff is to assert both that the plaintiff has a substantive right and that he is entitled to a remedy.

"Harm" is "the existence of loss or detriment in fact of any kind to a person resulting from any cause."²¹² It includes "impair[ment of one's] physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests."²¹³ Unless the plaintiff suffers an injury, he is not entitled to a remedy for the harm he suffers;²¹⁴ however, if the defendant causes an injury—an invasion of a legally protected interest—then harm has

²⁰⁷RESTATEMENT (SECOND) OF TORTS § 901 comment a (1977).

²⁰⁸Because tort liability exists apart from contract, the tort may also protect employees other than at will employees. See PROSSER & KEETON, *supra* note 22, § 92, at 656-57.

²⁰⁹See, e.g., *Martin v. Platt*, 179 Ind. App. 688, 692-93, 386 N.E.2d 1026, 1028 (1979) (because the employer could have discharged the employee at any time the employee could suffer no more than nominal damages).

²¹⁰RESTATEMENT (SECOND) OF TORTS § 7(1) (1964).

²¹¹*Id.* § 1 comment a.

²¹²*Id.* § 7(2).

²¹³*Id.* comment b.

²¹⁴*Id.* comment d.

legal significance. The plaintiff's measure of damages depends, in part, upon the amount of harm the defendant caused.²¹⁵ If the defendant injures the plaintiff, the plaintiff may receive damages for harm he suffers even if the harm suffered would not independently amount to a legal injury. For example, states recognizing intentional or negligent infliction of emotional distress as an independent tort only in limited circumstances will nevertheless permit the plaintiff to recover for emotional harm in many circumstances.²¹⁶

Even if the plaintiff suffers a legal injury that results in harm, determining the plaintiff's damages is not simply a matter of measuring and valuing the amount of harm. The plaintiff's damages will also depend upon what are essentially legal policy issues.²¹⁷ These policy issues determine whether the defendant is liable and, if he is, the extent of the plaintiff's measure of damages, that is, the kinds of harms the court will allow the jury to consider when it calculates the plaintiff's damages. One way the courts limit the plaintiff's damages is through the concept of proximate cause. The rule that the defendant will be liable only for the harm his tort proximately causes often merely states a legal policy conclusion that the court will allow the plaintiff to recover damages for certain kinds of harms but not for others.²¹⁸ How far the courts will go depends primarily upon two factors: (1) how culpable the defendant is and (2) the nature of the legally protected interest. Courts are more likely to expand the plaintiff's measure of damages if the defendant committed an intentional tort rather than if the defendant was merely negligent.²¹⁹ One almost intuitively expects that courts will be more likely to allow the plaintiff a broader measure of damages for redress of an invasion of a personal interest than for redress of an invasion of a property interest.²²⁰

An at will employee certainly has an interest in job security, but he does not have a legally protected interest in job security. The tort of abusive discharge does not protect that interest. Instead, the tort protects important public policy interests: "The foundation of the tort

²¹⁵*Id.* § 903. Not all harms suffered by the plaintiff are elements of his measure of damages. The plaintiff must also show that the defendant's tortious conduct was the cause in fact of the harm. In addition, rules concerning certainty of proof of damages and the concept of proximate cause also limit the plaintiff's recovery. *See* DOBBS, *supra* note 19, § 3.3; *see also* McCORMICK, *supra* note 159, § 72, at 260 (discussing the limiting effect of proximate cause).

²¹⁶*See generally* PROSSER & KEETON, *supra* note 22, § 12.

²¹⁷*See* DOBBS, *supra* note 19, § 3.3, at 157 & n.36.

²¹⁸PROSSER & KEETON, *supra* note 22, § 42, at 274-75.

²¹⁹*See* DOBBS, *supra* note 19, § 6.4, at 461.

²²⁰*Cf.* DOBBS, *supra* note 19, § 3.2, at 142 (stating that one function of general damages rules is to conform to substantive policy).

of retaliatory discharge lies in the protection of public policy.’’²²¹ The courts recognize the cause of action because allowing an employer to discharge an employee without being liable for doing so would jeopardize an important public policy interest.²²²

The employer is not liable because he discharged an at will employee; he is liable because the discharge was the means by which the employer committed the tort.²²³ The discharge is merely the means by which the employer interferes with the workers’ compensation statutes, the penal statutes, an employee’s obligation to serve on a jury, the duty to report nuclear safety violations, or any one of a number of other important public policy interests.

In addition to the important public policy interests that the tort of abusive discharge protects, the courts ought to consider the policies implicit in the employment at will rule: the belief that an employer should have considerable freedom to make business judgments and to select and retain his employees. Society has an interest in productivity as well as in protecting its public policy interests. If the plaintiff’s measure of damages is too large, the courts may hamper an employer’s legitimate hiring and firing decisions. Consequently, an employer may decide not to discharge an unproductive employee. If the measure of damages is too small, the tort will not adequately protect the important public policy interests.

Abusive discharge is an intentional tort.²²⁴ In order to establish a prima facie case, the employee must show that the employer desired to interfere with an important public policy interest or that the employer believed that it was substantially certain that his conduct would interfere

²²¹*Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981).

²²²*See supra* text accompanying notes 113-154. Courts often emphasize the significance of the public policy interest at stake. *See Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 380, 710 P.2d 1025, 1035 (1985) (“important public policy interests embodied in the law”); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981) (“clearly mandated public policy”); *Hansen v. Harrah’s*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984) (“strong public policy”); *see also Blackburn, Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 479 (1980) (“In *Nees* and *Sventko* the courts protected the underlying activity for which the employee was discharged. The jury system and the workmen’s compensation system were the legislatively expressed social interests to be protected, not society’s interest in a stable economy.”).

²²³*Cf. Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (court sustained discharged employee’s action for intentional infliction of emotional distress when the employer, suspecting that an unidentified employee was stealing, threatened to and did fire employees in alphabetical order because the thief did not confess).

²²⁴*See Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A Aug. 1981); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

with the public policy interest.²²⁵ An employer who has committed abusive discharge is in no position to complain that a damages award might interfere with his legitimate business decisions. Courts should not be too concerned that a substantial damages remedy will interfere with the employer's right to discharge at will employees. The employer's right to discharge at will employees is not the issue; it is the employer's abuse of that right.²²⁶ The courts should interfere with that kind of conduct and should provide the injured employee with a substantial remedy so that he is "fully compensated in damages."²²⁷

If the courts allow the plaintiff to recover substantial compensatory damages, certainly some innocent employers might be affected. That an at will employee can now allege an action at all increases the chances that a discharged employee will sue. It also decreases the chances that the employer will win at the pleadings stage. Consequently, an employer, who fears a lawsuit may decide not to fire an unproductive employee. Courts may also be tempted to sharply limit the plaintiff's measure of damages. The courts should avoid this temptation; the proper way to screen meritless claims and to protect innocent defendants is through the use of substantive law, not through the law of remedies. Any time the law recognizes a cause of action there is some risk that plaintiffs will file frivolous lawsuits and that an innocent defendant will lose.²²⁸ This is part of the price paid for living in an organized society. Legal truth is not always the same as absolute truth. That some innocent employers may be liable is a poor reason to limit an abusively discharged employee's damages. It is, however, a good reason for the courts to define the tort of abusive discharge as precisely as possible and to recognize the cause of action only when the important public policy

²²⁵"Intent" is defined as "denot[ing] that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1964).

²²⁶Some commentators have noted some general similarities between abuse of process and abusive discharge:

[I]t thus appears that there are some situations in which a tort will be committed by the unjustifiable use of legal and economic pressure to accomplish a collateral objective necessarily involving harm to others. . . . [Courts have] begun to limit the right of employers to discharge employees at will . . . where the exercise of [the employer's] traditional rights is contaminated by motives that are strongly inconsistent with public policy.

1 HARPER, JAMES & GRAY, THE LAW OF TORTS § 4.9, at 484-86 (2d ed. 1986). "Just as the use of legal processes as a means of extortion gives rise to a damage remedy, so too should the oppressive use of the right of discharge." Blades, *supra* note 15, at 1424.

²²⁷Frampton v. Central Ind. Gas Co., 260 Ind. 249, 253, 297 N.E.2d 425, 428 (1973).

²²⁸*Cf.* Hinrichs v. Tranquillaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977) ("The possible inundation of suits [in abusive discharge] is, of course, no reason to prevent the redress of a legal wrong.").

interest at stake outweighs the extra burden on the employer's legitimate business interests. If the public policy interest is important enough that the court ought to recognize the employee's cause of action, then it is important enough to justify a substantial damages award. If the public policy interest is not that important, the courts should not recognize the cause of action at all.²²⁹

A discharged employee may suffer virtually any kind of harm possible. The loss of employment affects a person economically; moreover, "deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress."²³⁰ Some discharged employees may suffer emotional trauma that is almost as severe as the trauma one experiences when a close relative dies. In some cases the employee's emotional distress may affect his family. An employee who prevails in an abusive discharge action should receive substantial damages for harm the employee can show resulted from the discharge including at least economic harm, emotional harm, humiliation, and loss of reputation.

3. *Punitive Damages.*—The primary purposes of punitive damages are to punish wrongdoers, deter wrongful conduct, and prevent self-help.²³¹ A punitive damages award takes tort law beyond its primary purpose by also compensating the injured plaintiff for injuries he has suffered.²³²

One difference between punitive damages and compensatory damages is the manner in which they are measured. Even though many kinds of harm for which the courts allow compensatory damages cannot be measured in terms of money, the purpose of compensatory damages is to provide a monetary substitute for the harm the plaintiff suffered.²³³ The focus is on the plaintiff's harm; the award is proportioned according to the amount of harm. When the jury awards punitive damages, it focuses on the defendant and his conduct,²³⁴ and may also consider

²²⁹Whether a particular public policy interest is important enough to justify recognizing the employee's cause of action is a hotly debated issue. Compare the majority and dissenting opinions in *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); and *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984).

²³⁰McCORMICK, *supra* note 159, § 163, at 639.

²³¹RESTATEMENT (SECOND) OF TORTS §§ 901 comment c & 908 (1977).

²³²*Id.* comment b.

²³³*Id.* § 901 comment a.

²³⁴*Id.* § 908 comment e.

the defendant's wealth.²³⁵ Consequently, punitive damages should provide the plaintiff with a total damages award that is greater than the value of the harm he suffered. An award of punitive damages is, or should be, an extraordinary remedy that courts should reserve for extraordinary cases.²³⁶

In some of the abusive discharge cases, courts have severely limited the plaintiff's measure of compensatory damages, but they have allowed the plaintiff to recover punitive damages.²³⁷ These courts are probably allowing the plaintiff to recover punitive damages as a substitute for the substantial compensatory damages the plaintiff deserves but does not receive.²³⁸ The plaintiff does not receive adequate compensatory damages primarily because these courts have not distinguished injury from harm. That an at will employee has no legally protected interest in his job prevents these courts from recognizing that the legal injury is only tangentially related to the employee's interest in his job and that the employee is entitled to compensatory damages for the harm the employer's tort proximately causes, even though that harm deserves no independent legal protection. If the courts allowed the abusively discharged employee to recover adequate compensatory damages, courts would have no reason, except in extraordinary cases, to allow the plaintiff to also receive punitive damages.

An abusively discharged employee who receives adequate compensatory damages is not automatically entitled to receive punitive damages. Unless the employer has an improper motive, the discharged employee has no cause of action; legal "malice" is an essential element of the tort. Courts should not permit the jury to award punitive damages unless the employee has shown that the employer acted with "actual malice,"²³⁹ that is, conduct or a degree of culpability that goes far beyond what is necessary to establish the employee's prima facie case. For example, courts should allow punitive damages if the employer consciously violates a statute that protects personal rights of the employee,²⁴⁰ or if he

²³⁵*Id.*

²³⁶*See Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692 (W. Va. 1982) (punitive damages in abusive discharge action is not available unless the defendant's conduct is wanton, willful, or malicious); *see also* Mallor, *supra* note 16, at 492-95.

²³⁷*See Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

²³⁸*Cf. DOBBS*, *supra* note 19, § 3.9, at 205 (stating that courts allow punitive damages where the tort is a dignitary invasion because there is little or no pecuniary loss but the courts recognize that the plaintiff is entitled to substantial damages).

²³⁹*See Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

²⁴⁰*See id.* (punitive damages will have a deterrent effect if imposed on an employer who consciously and deliberately disregards a statute prohibiting the employer from requiring employees to take a lie detector test as a condition of employment).

aggravates the employee's harm by harassing him or actively interfering with the employee's ability to find a new job.²⁴¹ Punitive damages are also proper if the employer fired the employee because the employee refused to violate the law.²⁴² The courts ought to allow the jury to fully compensate the employee for the harm he has suffered, but only when the employer's conduct is particularly egregious is it proper for the courts to allow the jury to award damages based on the defendant's wealth instead of the plaintiff's harm.

V. CONCLUSION

Now that courts are recognizing that tort and contract law should limit the employment at will rule, they must also grant remedies that correspond to the substantive interests these new causes of action protect. When the courts face these remedies issues, they should give at least as much thought to these issues as they have given to the substantive issues. It is always tempting to apply an amorphous calculus of fairness to remedies problems or to forget that a substantive right is worth little more than the remedy the court permits for that right. When courts consider the remedies issues that are certain to arise, one hopes that they will have the courage to be creative and, above all, will focus on the fundamental principles of remedies law that have guided the courts for centuries. Among these is the principle that the remedy should correspond to the substantive interest the law is trying to protect. In order to determine the appropriate remedy, it is first necessary to identify that legally protected interest.

RONALD WEISENBERGER

²⁴¹Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 703 n.19 (W. Va. 1982).

²⁴²Mallor, *supra* note 16, at 495.