

The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?

by **Kenneth R. Swift***

I. INTRODUCTION

An armored car driver leaves his truck in violation of company rules to help save a woman from a knife-wielding attacker and is terminated.

A campus security guard is called to a scene where a man is lifting a woman; he mistakenly believes it is an attack, arrests the man, and is terminated.

A nurse is invited on a camping weekend by her supervisor, refuses to take part in a bawdy dance, and is terminated.

A woman, asked by her employer to sign a statement indicating she acted inappropriately at work, requests to meet with a lawyer first and is terminated.¹

Each of the above employees brought suit claiming they were improperly terminated. Two prevailed; two did not. All claims were based upon what is commonly known as the public policy exception to the employment at-will rule.

Among the social changes brought about by the various civil rights movements of the 1960s, 1970s, and beyond, were numerous statutory exceptions preventing employers from terminating or failing to hire

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1. Each of these cases is discussed at length in Section V of this Article.

employees based upon sex, race, age, religion, or physical disability, among other traits.² Alongside the development of these protections for employees were other protections based upon the notion that an employer should not be able to circumvent public policy by using his otherwise unfettered right to terminate. This exception, the public policy exception, is still commonly pleaded and litigated.³

Section II of this Article will briefly review the history of employment at-will in the United States and the emergence of the statutory exceptions to the doctrine. Section III will provide a history of the development of the public policy exception and explore both how the exception was the basis for many of the statutory protections available today for employees and how the exception significantly impacted the employer-employee relationship. Section IV will summarize and analyze the role that the public policy exception has played in the development of the employer-employee relationship and will also provide the framework for discussing whether the exception, in its present form, is still necessary. Section V will provide an in-depth factual and legal analysis of a sampling of public policy exception case law to explore the malleability of the exception. Section VI, the final section of the Article, will argue that the public policy exception in its current form has outlived its usefulness because many of its historical uses have been codified, leaving the exception as an unnecessary catchall provision.

II. EMPLOYMENT AT-WILL AND THE DEVELOPMENT OF STATUTORY EXCEPTIONS

Employment at-will has been the starting point in American employer-employee relationships since at least the latter part of the nineteenth century.⁴ Under this doctrine, an employer may terminate employees

2. See *infra* Section II.

3. The following Westlaw ALLCASES search [“public policy” /10 “employment” & “at-will”] returned over 1900 cases within the last ten years and over 625 within the last three years (last searched February 18, 2010).

4. See, e.g., *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895); *Henry v. Pittsburgh & Lake Erie R.R. Co.*, 21 A. 157 (Pa. 1891); *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). But see Deborah A. Ballam, *The Development of the Employment At Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. & EMP. L.J. 75, 86 (1995) (arguing that employment at-will was prevalent even at the early part of the nineteenth century); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 552 (1990) (noting that Horace Wood’s statement of the employee at-will rule was based on a well-established understanding of current labor relations).

for good cause, bad cause, or no cause at all.⁵ The doctrine goes both ways; an at-will employee is free to leave a job at any time for any reason.⁶

The origin of the American at-will rule is generally attributed to an 1877 treatise by Horace Wood.⁷ However, there has always been great academic debate as to whether Wood misinterpreted or misread the prevailing English common law rule (which set employment for a fixed term for both the employer and employee)⁸ or whether he was reporting on existing employment law practices prevailing in the country at the time.⁹

The efficacy of the doctrine has also been debated by courts and commentators, with many arguing that the flexibility afforded by the doctrine benefits both employers and employees¹⁰ and opining that “adoption of the [at-will] rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth

5. An early, oft-quoted description of employment at-will can be found in *Payne*: [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe [sic] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

81 Tenn. at 518–19.

6. See, e.g., *Trosper v. Bag 'N Save*, 734 N.W.2d 704, 716 (Neb. 2007) (Stephan, J., dissenting) (noting “an at-will employee is free to leave an employment relationship without recourse by the employer”); *McCrary v. Oklahoma Dep’t of Pub. Safety*, 122 P.3d 473, 475 (Okla. 2005) (stating that an at-will employee “is free to leave his or her employment for any reason or no reason without incurring liability to the employer”); *Summits 7, Inc. v. Kelly*, 886 A.2d 365, 375 (Vt. 2005) (Johnson, J., dissenting) (stating that an at-will employee is free to leave at any time).

7. HORACE WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* (John D. Parsons, Jr., Albany, N.Y. 1877).

8. W. Brian Hulse, Recent Developments, *The Public Policy Exception to Utah’s Employment-at-Will Doctrine*, 1993 UTAH L. REV. 227, 229 (arguing that Wood’s at-will rule was not supported by the authorities he cited) (citing Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983)).

9. But see Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976) (arguing that the employment at-will doctrine emerged in the United States not as an outgrowth of English common law, but rather as a unique development catalyzed by Wood’s treatise).

10. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 982 (1984) (concluding that “[t]he flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted . . . in conditions of technological and business change”); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098 (1989) (opining that at-will employment created greater efficiency, serving both the worker and employer).

century.”¹¹ Others have noted that it has “been applied to obtain harsh and inequitable results.”¹² Today the debate is purely academic, as employment at-will is a strongly rooted concept in American law and the starting point for employer-employee relations in forty-nine¹³ out of fifty states.¹⁴

The employer-employee relationship was likely of lesser consequence in the late 1700s and early 1800s when America had a primarily agrarian economy. It was not until the Industrial Revolution of the mid-1800s that an employee’s rights to his job, or lack thereof, began to be an issue. With the rise of large factories, employees became little more than chattel, a fungible asset like machinery and raw goods.¹⁵ Unless

11. *Coman v. Thomas Mfg. Co.*, 381 S.E.2d 445, 446 (N.C. 1989).

12. *Meredith v. C.E. Walther, Inc.*, 422 So. 2d 761, 762 (Ala. 1982); see also Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Rafael Gely, *Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law*, 53 FLA. L. REV. 669, 670 (2001) (arguing that employment at-will renders employees subservient to their employers); David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 994 (1998) (advocating the replacement of the at-will default rule with a job-security default rule); Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 872 (1994) (opining that employment at-will “is a lumbering dinosaur that can no longer be rationally defended”).

13. See, e.g., *Harper v. Winston County*, 892 So.2d 346, 351 (Ala. 2004) (observing that it is well-settled law in Alabama that employment is at-will); *Hines v. Yates*, 614 S.E.2d 385, 391 (N.C. Ct. App. 2005) (noting employment at-will is a well-entrenched doctrine); *Stumpp v. Stroudsburg Mun. Auth.*, 658 A.2d 333, 335 (Pa. 1995) (“The law in Pennsylvania is abundantly clear that, as a general rule, employees are at-will”); *Bennett v. Steiner-Liff Iron & Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992) (“The employment at-will doctrine has been a part of Tennessee’s common-law legal tapestry for more than a century.”); *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (“The long-standing rule in Texas provides for employment at will”); *Miller v. Sevamp, Inc.*, 362 S.E.2d 915, 919 (Va. 1987) (“The employment-at-will doctrine is a settled part of the law of Virginia.”).

14. Under the Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2005), an employee can only be discharged for “good cause” after a probationary period. *Id.* § 39-2-904(1)(b). Good cause is defined as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.” *Id.* § 39-2-903(5). The presumptive probationary period is six months, although the employer may explicitly waive or modify the period. *Id.* § 39-2-904(2)(b).

15. The United States Supreme Court, in a case involving the right to organize, recognized the lack of power held by a single employee:

We said that [unions] were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was

a member of a union, an employee in the first half of the twentieth century had no protection against termination.¹⁶ What the law of employer-employee relationships did provide at that time was a central precept of the American legal system—certainty in the law.¹⁷ The law was clear that an employer could terminate any employee at any time, for any reason, even for reasons that today are widely viewed as morally repugnant, such as race, sex, and religion.

That all changed with the passing of Title VII of the Civil Rights Act of 1964,¹⁸ which prohibits employment decisions based upon an individual's race, color, religion, sex, or national origin.¹⁹ Over the following decades, state legislative bodies followed suit, enacting provisions to protect employees against similar discriminatory conduct.²⁰

nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)).

16. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 354–58 (2002) (noting that the at-will sector of employees in 1950 possessed virtually no legal protections).

17. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); *State v. Lanesboro Produce & Hatchery Co.*, 21 N.W.2d 792, 795 (Minn. 1946). See generally Gregory C. Keating, *Fidelity to Pre-existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 11 (1993) (“The more clear, specific, and publicly knowable the law is, the more the rule of law . . . is achieved. The less clear, specific, and knowable the law is, the less secure liberty is, and the more dependent citizens are on the benevolence and wisdom of those charged with enforcing and interpreting the law.”).

18. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

19. *Id.* § 2000e-2(a)(1). See generally Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431 (2005).

20. Every state has enacted some prohibitions against discrimination, grouped under varying titles, such as human rights, civil rights, and unfair employment practices. See, e.g., COLO. REV. STAT. ANN. § 24-34-402 (West 2006); CONN. GEN. STAT. ANN. § 46a-60 (West 2009); FLA. STAT. ANN. § 760.10 (West 2005); IND. CODE ANN. § 22-9-5-19 (LexisNexis 1997); MINN. STAT. ANN. § 363A.08 (West 2004); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2006); N.J. STAT. ANN. § 10:5-12 (West 2002); OR. REV. STAT. § 659A.030 (2005). The exceptions noted here and throughout this Article are not meant to be an exhaustive list, a task which would be beyond the scope of a law review article. For a more comprehensive overview of the exceptions to the employment at-will rule, see TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* (2007).

Further protections were developed in the years following the Civil Rights Act, providing protection against adverse employment decisions based upon age²¹ and disability,²² among many others. Recent legislation even protects against the use of genetic testing in employment decisions.²³ This tapestry of legislation has, while by no means eliminated discrimination of this type, provided potential recourse against discrimination based upon immutable human traits and sexual and reproductive rights.²⁴ However, even alongside the development of these protections, courts recognized that certain terminations were counterproductive to the broader social welfare, and with that came the rise of the public policy exception to the doctrine of at-will employment.²⁵

21. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006). *See generally* Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, and Where It's Going*, 31 U. RICH. L. REV. 579 (1997).

22. Americans With Disabilities Act, 42 U.S.C. §§ 12101–213 (2006). *See generally* Harvey S. Mars, *An Overview of Title I of the Americans with Disabilities Act and Its Impact Upon Federal Labor Law*, 12 HOFSTRA LAB. & EMP. L.J. 251 (1995).

23. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (to be codified in scattered sections of 26, 29, and 42 U.S.C.). *See generally* Recent Legislation, *Health Law—Genetics—Congress Restricts Use of Genetic Information by Insurers and Employers*, 122 HARV. L. REV. 1038 (2009).

24. Of course, that does not mean that the law has, or even can, eliminate discrimination, particularly unobvious and unconscious bias in the workplace. *See, e.g.*, Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 758 (2000) (arguing that Title VII is unlikely to “actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them”); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–10 (2006) (discussing the importance of unconscious and subtle bias); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 560–61 (2003) (noting that plaintiffs in employment discrimination cases are less successful on average).

25. Concurrent with the development of these protections, courts started to find “implied” contracts that limited the employer’s right to terminate. These implied contracts were primarily found in employee handbooks and similar documents provided by the employer. This contract analysis is fundamentally different from the exceptions described above or the public policy exception because it is based upon the notion that the parties have entered into a contract when the employer is receiving something of value above and beyond the normal at-will employer-employee relationship. The majority of jurisdictions now recognize a “handbook exception” to the employment-at-will doctrine. *See, e.g.*, *Grayson v. Am. Airlines, Inc.*, 803 F.2d 1097, 1099 (10th Cir. 1986) (applying Oklahoma law); *Lincoln v. Sterling Drug, Inc.*, 622 F. Supp. 66, 67 (D. Conn. 1985); *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 733–34 (Ala. 1987); *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 787 (Alaska 1989); *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984); *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910, 912 (Ark. 1991); *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987); *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 115–16 (Haw. 1986); *Watson v. Idaho Falls Consol. Hosp., Inc.*,

III. THE RISE AND DEVELOPMENT OF THE PUBLIC POLICY EXCEPTION

The public policy exception holds that an at-will employee cannot be terminated if such termination would be counter to public policy. As discussed below, courts struggle with defining the term *public policy* and determining when a termination implicates and is contrary to public policy.²⁶

Historically, the public policy exception has played a significant role in ensuring that employees be allowed full participation and exercise of their rights under state and federal constitutions and statutes by prohibiting employers from terminating employees seeking to exercise their rights. Additionally, the exception was the origin of modern whistleblower statutes and similar protections.

A. *Protecting the Duties and Rights of the Citizenry*

One of the earliest judicial decisions limiting the power of an employer to terminate for any reason, and perhaps the first public policy exception case, was the case of *Petermann v. International Brotherhood of Teamsters*.²⁷ In *Petermann* (which predates the Civil Rights Act of 1964²⁸), an employee was terminated after he refused his employer's order to give false testimony before the California state legislature.²⁹ The California Supreme Court, for the first time, noted that employment at-will was subject to an exception for terminations in violation of public policy.³⁰ The court began its analysis by noting that "[t]he term 'public

720 P.2d 632, 635 (Idaho 1986); *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987); *Hunter v. Board of Trs. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 513 (Iowa 1992); *Allegri v. Providence-St. Margaret Health Ctr.*, 684 P.2d 1031, 1034, 1036 (Kan. Ct. App. 1984); *Wyman v. Osteopathic Hosp. of Maine, Inc.*, 493 A.2d 330, 335 (Me. 1985); *Staggs v. Blue Cross of Md., Inc.*, 486 A.2d 798, 801 (Md. Ct. App. 1985); *Morris v. Lutheran Med. Ctr.*, 340 N.W.2d 388, 391 (Neb. 1983); *Sw. Gas Corp. v. Ahmad*, 668 P.2d 261, 262 (Nev. 1983); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985); *Forrester v. Parker*, 606 P.2d 191, 192 (N.M. 1980); *Sadler v. Basin Elec. Power Coop.*, 431 N.W.2d 296, 297–98 (N.D. 1988); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982); *Bolling v. Clevepak Corp.*, 484 N.E.2d 1367, 1373 (Ohio Ct. App. 1984); *Yartsoff v. Democrat-Herald Publ'g Co.*, 576 P.2d 356, 359 (Or. 1978); *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 455 (S.C. 1987); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275, 277 (S.D. 1983); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984); *Ferraro v. Koelsch*, 368 N.W.2d 666, 671–72 (Wis. 1985).

26. See *infra* Sections IV and V.

27. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

28. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

29. 344 P.2d at 26.

30. *Id.* at 27.

policy' is inherently not subject to precise definition."³¹ The court settled on what has become a common definition of public policy: "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."³² The public policy was found in state statutes making it illegal to both give and solicit perjury.³³ In holding that the termination was unlawful, the court reasoned that the employer's generally unlimited right to discharge employees was secondary to the importance of truthful testimony for the public welfare.³⁴

Since *Petermann* a myriad of statutory protections, initially fueled by the public policy exception, have been passed to prevent dismissals of employees when termination would do injury to the general public welfare. Three decades later, the California Supreme Court extended *Petermann* to cooperation in civil cases as well. In *Gantt v. Sentry Insurance*,³⁵ the employee was the supervisor of a woman who was being sexually harassed. The employee supported the woman's harassment claim, both internally and in testimony to a state investigator, and was constructively terminated because of his support.³⁶ In holding that the public policy exception supported his claim, the court addressed the issue of the difficulty in defining the term *public policy*.³⁷ The court ultimately determined that "[a] public policy exception

31. *Id.* The court further elaborated on the imprecise nature of the term *public policy*: In *Maryland Casualty Co. v. Fidelity & Casualty Co.*, 71 Cal. App. 492, at page 497, 236 P. 210 [at page] 212, the court stated: The question, what is public policy in a given case, is as broad as the question of what is fraud. Also in *Noble v. City of Palo Alto*, 89 Cal. App. 47, at pages 50–51, 264 P. 529, at page 530, the court said: Public policy is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (section 546), says: It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud.

Id. (alteration in original) (internal quotation marks omitted) (quoting *Safeway Stores v. Retail Clerks Int'l Ass'n*, 261 P.2d 721, 726 (1953)).

32. *Id.* (emphasis & internal quotation marks omitted) (quoting *Safeway*, 261 P.2d at 726); see, e.g., *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 n.13 (Haw. 1982); *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1041–42 (Utah 1989); *Rich v. Allstate Ins. Co.*, 445 S.E.2d 249, 252 (W. Va. 1994).

33. *Petermann*, 344 P.2d at 27.

34. *Id.*; accord *Kistler v. Life Care Ctrs. of Am., Inc.*, 620 F. Supp. 1268, 1270 (D. Kan. 1985) (noting the public policy exception protects an employee discharged for truthfully testifying at an unemployment compensation hearing because employers cannot force employees to opt between their jobs and perjury).

35. 824 P.2d 680 (Cal. 1992), *overruled in part by* *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998).

36. *Id.* at 682–83.

37. *Id.* at 684.

carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public.”³⁸

In *Nees v. Hocks*,³⁹ an employee was terminated for refusing her employer’s request that she ask to be excused from jury duty.⁴⁰ In holding for the employee, the court reasoned that if an employer could terminate with impunity an employee for serving on a jury, the moral of the community, as demonstrated through the jury system, would be thwarted.⁴¹ The right created by this decision was later codified by the state legislature.⁴² Many other jurisdictions followed suit.⁴³

In *Novosel v. Nationwide Insurance Co.*,⁴⁴ an employee was terminated because he refused to lobby and otherwise support a bill the employer felt would be beneficial to its business. The employee brought a claim for wrongful discharge based upon the public policy exception grounded in his constitutional right to free political association and beliefs.⁴⁵ In holding for the employee, the United States Court of Appeals for the Third Circuit held that the state constitution provided the necessary public policy, emphasizing that voting “strikes at the heart of a citizen’s social right, duties and responsibilities.”⁴⁶

An early and pervasive use of the public policy exception arose in cases in which an employee was terminated for filing a workers’ compensation claim. One of the first, if not the first, of such uses can be found in the Indiana Supreme Court case *Frampton v. Central Indiana Gas Co.*⁴⁷ In *Frampton* an employee suffered an injury resulting in a thirty percent permanent loss of function in her arm; however, she was hesitant to file a claim for fear of being terminated. Nineteen months after the injury, she received a workers’ compensation settlement and

38. *Id.* at 688. The visual of a “tether” between public policy as delineated within statutes or case law and the facts of any one claim is used below while analyzing the malleability of the public policy exception. *See infra* Section V.

39. 536 P.2d 512 (Or. 1975).

40. *Id.* at 513.

41. *Id.* at 516.

42. OR. REV. STAT. § 10.090(1) (2003) (“An employer shall not discharge or threaten to discharge, intimidate, or coerce any employee by reason of the employee’s service or scheduled service as a juror on a grand jury, trial jury or jury of inquest.”).

43. *See, e.g.*, CAL. LABOR CODE § 230(a) (West 2003); N.Y. JUD. LAW § 519 (McKinney 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 122.001-003 (Vernon 2005 & Supp. 2008).

44. 721 F.2d 894 (3d Cir. 1983).

45. *Id.* at 896, 900.

46. *Id.* at 899 (internal quotation marks omitted) (quoting *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 878–79 (Ill. 1981)).

47. 297 N.E.2d 425 (Ind. 1973).

was terminated thirty days later.⁴⁸ In holding for the employee, the court first noted that the purpose of workers' compensation is "to transfer from the worker to the industry in which he is employed and ultimately to the consuming public a greater portion of economic loss due to industrial accidents and injuries."⁴⁹ The court then reasoned that even though the at-will rule allows employers to discharge without cause, workers' compensation itself provided a fundamental and well-stated public policy that could only be carried out by preventing employers from terminating employees who file claims.⁵⁰

Another protection for employees, which was created through the public policy exception, was the freedom to refuse an employer's request to commit an illegal act. In *Sabine Pilot Service, Inc. v. Hauck*,⁵¹ an employee was a deckhand and was instructed by his employer to pump the boat's bilges into the water despite a placard on the boat indicating that doing so was illegal. The employee contacted the U.S. Coast Guard and confirmed that the act was illegal, refused his employer's order, and was terminated.⁵² The court held that the employee had pleaded a cause of action under the public policy exception.⁵³ Similarly, in

48. *Id.* at 426.

49. *Id.* at 427 (internal quotation marks omitted) (quoting *Mann v. Schnarr*, 95 N.E.2d 138, 143 (Ind. 1950)).

50. *Id.* at 428. Many other courts followed *Frampton*, utilizing traditional public policy exception analysis and vernacular. *See, e.g.*, *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Serv.*, 630 P.2d 186, 192 (Ks. Ct. App. 1981); *Sventko v. Kroger Co.*, 245 N.W.2d 151, 153 (Mich. Ct. App. 1976); *Jackson v. Morris Commc'n Corp.*, 657 N.W.2d 634, 637 (Neb. 2003); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Lally v. Copygraphics*, 428 A.2d 1317, 1318 (N.J. 1981); *Brown v. Transcon Lines*, 588 P.2d 1087, 1090 (Or. 1978). One area of disagreement amongst jurisdictions, however, is the degree of causation required that an employee's act of filing a workers' compensation claim had towards later termination. Some courts require the employee to show that filing the workers' compensation claim was the "sole factor" of their termination. *See, e.g.*, *Hansome v. Nw. Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. 1984). Some jurisdictions require the employee to prove that the filing was a "determinative factor," which means that the employee would not have been terminated "but for" the filing of their workers' compensation claim, and other jurisdictions use a mere "substantial factor" test, which only requires proof that the filing the workers' compensation claim constituted an important or significant motivating factor for the discharge. *See, e.g.*, *Wallace v. Milliken & Co.*, 406 S.E.2d 358, 359-60 (S.C. 1991). *But see* *Martin v. Tapley*, 360 So. 2d 708, 709 (Ala. 1978) (refusing to recognize a public policy exception to employment at-will involving an employee terminated for filing a workers' compensation claim). The public policy exception may also apply for an employee who refuses to terminate another employee who files a workers' compensation claim. *See* *Lins v. Children's Discovery Ctrs. of Am., Inc.*, 976 P.2d 168, 173 (Wash. Ct. App. 1999).

51. 687 S.W.2d 733 (Tex. 1985).

52. *Id.* at 734.

53. *Id.* at 735.

Vermillion v. AAA Pro Moving & Storage,⁵⁴ the employer, a salvage company, stole items from a wreck and ordered the employee to conceal the theft from the customer. Instead, the employee reported the theft to the customer and was terminated.⁵⁵ The employee brought a claim for violation of the public policy exception, and the court, in reversing summary judgment for the employer, noted that the employer's conduct violated the state's public policy and "[a]ny other conclusion by this court would encourage unlawful conduct by employers and force employees to either consent and participate in a violation of law or risk termination."⁵⁶ Protection against having to commit an illegal act or be terminated is now codified in many state whistleblower protections, discussed below.⁵⁷

B. Whistleblower Protection

The public policy exception was also the origination point for another high-profile statutory exception to the at-will doctrine: whistleblower protection.⁵⁸ In an employment context, "[w]histleblowing is an

54. 704 P.2d 1360 (Ariz. Ct. App. 1985).

55. *Id.* at 1361.

56. *Id.* at 1362; *see also* Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984) (noting that an employee has a cause of action under the public policy exception when terminated for refusing to sleep with her employer, as doing so is the equivalent of committing prostitution, a criminal act); Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1331 (Cal. 1980) (ruling that an employer cannot condition employment on an employee's participation in unlawful conduct).

57. *See infra* notes 58–77 and accompanying text.

58. The term *whistleblower* is commonly believed to be derived from the practice of British police (known as bobbies) blowing whistles to alert of criminal activity. *See* Julie Jones, Comment, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1136 (2003).

In recent years the concept of a whistleblower as a hero has been pervasive in popular culture and in movies such as *A Civil Action* (Wildwood Enterprises 1998), *Erin Brockovich* (Universal Pictures and Columbia Pictures 2000), *The Insider* (Buena Vista Pictures 1999), and *Silkwood* (Twentieth Century Fox 1983). Also, Coleen Rowley (F.B.I./pre-September 11th, 2001, intelligence), Sherron Watkins (Enron), and Cynthia Cooper (Worldcom) were declared *Time* magazine's persons of the year in 2002 for their whistleblowing. Richard Lacayo and Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, available at www.time.com/time/personsoftheyear/2002. For a general overview of whistleblower protections, see Elletta Sangrey Callahan and Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000).

employee's disclosure of his supervisor's or employer's illegal activities to management or law enforcement officials.⁵⁹

One of the earliest judicial decisions using the public policy exception to create whistleblower protection is the 1981 Illinois Supreme Court decision *Palmateer v. International Harvester Co.*⁶⁰ There, an employee was terminated after alerting authorities to criminal activity by a fellow employee and agreeing to cooperate in the investigation and testify at trial.⁶¹ In reviewing the use of the public policy exception, the court noted that "unchecked employer power . . . has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole."⁶² In holding that the public policy exception applied to provide whistleblower protection for the employee, the court determined that public policy favored exposure of crime and that the cooperation of citizens having knowledge of criminal activity was essential and could not be contravened by the employer's right to terminate at-will.⁶³

Throughout the 1980s and 1990s, many jurisdictions adopted whistleblower protections, most often spurred on by a case involving the public policy exception. For example, in *Phipps v. Clark Oil & Refining Corp.*,⁶⁴ an employee was terminated for refusing to dispense unleaded gasoline into a customer's vehicle that required leaded gasoline. Doing so would have been a violation of the law. The employee brought a claim based upon the public policy exception, but the trial court rejected the claim because Minnesota had yet to adopt the exception.⁶⁵ The Minnesota Court of Appeals reversed, noting that at least twenty-five

59. Jones, *supra* note 58, at 1136. Whistleblowing is distinguishable from the types of cases discussed in the previous section when the employee was asked to commit an act that would be a crime and was terminated for refusing to do so. See *supra* notes 51–57 and accompanying text. While protections for both types of activities are often included within whistleblowing statutes, see *infra* note 68, whistleblowing itself refers to the reporting, regardless of whether the employee was implicated in the actual activities.

60. 421 N.E.2d 876 (Ill. 1981).

61. *Id.* at 877.

62. *Id.* at 878. As with other courts, the court acknowledged the difficulty of defining the public policy, noting that it is the "Achilles heel" of the exception and that

[t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.

Id.

63. *Id.* at 880.

64. 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987).

65. *Id.* at 589–90.

other jurisdictions had already adopted the public policy exception,⁶⁶ and reasoning that:

Although employers generally are free to discharge at-will employees with or without cause at any time, they are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes, and regulations promulgated pursuant to statute. The at-will employment doctrine does not depend upon the employer having such a right.⁶⁷

While the case was pending on appeal to the Minnesota Supreme Court, the Minnesota Legislature passed a whistleblower statute.⁶⁸

The adoption of whistleblower protection in various forms continued, and today numerous state and federal statutes provide formal whistleblower protection. These statutes can most often be categorized as “adjunct” statutes with protections included as part of a larger statutory act.⁶⁹

66. *Id.* at 593 n.2. One area where differing approaches exist in both statutory and common law whistleblower protections is whether the whistleblower is to be afforded protection if the report of improper actions is made only to the employer and not an outside enforcement agency. In some instances, employees who only report alleged improper or illegal activities to employers are not afforded protection under the public policy exception if they are terminated for making those reports. *Compare* *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F. Supp. 2d 1051, 1054 (N.D. Ill. 2007) (noting public policy exception does not apply to an employee who reports to company only), *with* *Stebbins v. Univ. of Chi.*, 726 N.E.2d 1136, 1145 (Ill. App. Ct. 2000) (holding that reporting to superiors as well as outside officials is protected).

67. *Phipps*, 396 N.W.2d at 592 (internal quotation marks omitted) (quoting *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877–78 (Mo. Ct. App. 1985)).

68. 1987 Minn. Laws 140, 140–41 (West) (codified as amended at MINN. STAT. ANN. § 181.932 (West 2006)). The Minnesota statute, as many state statutes do, goes beyond whistleblower activities and includes protection for employees participating in an investigation or hearing, and protection for refusing an employer’s order that the employee commit an illegal act. MINN. STAT. ANN. § 181.932.

69. *But see* False Claims Act, 31 U.S.C. §§ 3729–3733 (2006). Under the False Claims Act, individuals (not necessarily employees, although employees are the primary sources of claims) are encouraged to undertake whistleblower actions by being rewarded for the successful recovery of funds and items misappropriated from the federal government. The individual, generally known as the relator, brings a civil action, known as a qui tam action, in the name of the United States government. *Id.* § 3730(b)(1).

While the False Claims Act was actually first passed during the 1800s to help reduce fraud during the Civil War, the act was rarely utilized prior to an amendment in 1986, which greatly expanded the availability and amount of recovery for private plaintiffs. Pub. L. No. 99-562, 100 Stat. 3157–59 (codified at 31 U.S.C. § 3730(h)); *see also* Kary Klismet, *Quo Vadis, “Qui Tam”? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 IOWA L. REV. 283, 291–93 (2001). The use of qui tam actions rose greatly after the 1986 amendment,

One of the first of these statutes⁷⁰ protected employees who filed a claim of unfair labor practices against an employer under the National Labor Relations Act.⁷¹ Other federal statutory protections for whistleblowers can be found under such diverse statutory schemes as the Safe Drinking Water Act⁷² and the Federal Mine Safety and Health Act.⁷³

In 2002 Congress passed sweeping protections for corporate whistleblowers in the Sarbanes-Oxley Act.⁷⁴ The Act provides broad protec-

from 33 claims in the 1987 fiscal year to more than 360 by the year 2000; an estimated \$4.1 billion was collected due to the claims between 1986 and 2000. Klismet, *supra*, at 292 (citing Taxpayers Against Fraud, The False Claims Act Legal Center: Qui Tam Statistics, <http://www.taf.org/statistics.html> (last visited Feb. 20, 2010)). Between 1986 and 2003, an estimated \$12 billion was collected due to qui tam claims under the federal False Claims Act. Taxpayers Against Fraud, The False Claims Act Legal Center: Qui Tam Statistics, <http://www.taf.org/statistics.html> (last visited Feb. 20, 2010).

Prior to the 1986 amendment of the federal False Claims Act, no state had a qui tam statute. Following the amendment, several states have enacted similar legislation. *See, e.g.*, CAL. GOV'T CODE §§ 12650–55 (West 2005); CONN. GEN. STAT. ANN. §§ 53-440 to -445 (2007); D.C. CODE ANN. §§ 2-308.13–.21 (LexisNexis 2005); DEL. CODE ANN. tit. 6, §§ 1201–09 (2005); FLA. STAT. ANN. §§ 68.081–.092 (West 2005); 740 ILL. COMP. STAT. ANN. 175/1 to /8 (West 2002); IND. CODE ANN. §§ 5-11-5.5-1 to -4 (LexisNexis 2006); LA. REV. STAT. ANN. §§ 46:439.1–.4 (West 1999); MASS. ANN. LAWS ch. 12, §§ 5A–O (LexisNexis 2000); MICH. COMP. LAWS ANN. §§ 400.610a–.610c, 611 (Supp. 2006); MONT. CODE ANN. §§ 17-8-401 to -412 (2005); NEV. REV. STAT. ANN. §§ 357.010–.250 (LexisNexis 2002); N.H. REV. STAT. ANN. §§ 167:61-b to -e (LexisNexis Supp. 2008); N.M. STAT. §§ 27-14-1 to -15 (Supp. 2006); TENN. CODE ANN. §§ 4-18-101 to -108 (2005); TENN. CODE ANN. § 71-5-181 (2004); TEX. HUM. RES. CODE ANN. §§ 36.101–.117 (Vernon 2001).

70. 29 U.S.C. § 158(a)(4) (2006) (establishing that employees are protected against retaliation for making claims of unfair employer practices under the National Labor Relations Act).

71. 29 U.S.C. §§ 151–69 (2006).

72. 42 U.S.C. §§ 300f–300j (2006); 42 U.S.C. § 300j-9(i) (establishing that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” has commenced or is about to commence proceedings connected to the drinking water regulations or in any way participates in an investigation).

73. 30 U.S.C. §§ 801–964 (2006); 30 U.S.C. § 815(c)(1) (providing protection for an employee who “has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine”).

74. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); 18 U.S.C. § 1514A (2006). *See generally* Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN’S L. REV. 875 (2002); Robert G. Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1 (2005); Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831 (2007).

tion⁷⁵ to any corporate employee who provides information regarding possible fraud to Congress, any federal regulatory or law enforcement agency, or even the employee's supervisors.⁷⁶ The Act has been labeled the "gold standard" of whistleblower protection because it includes both criminal sanctions for the wrongdoers and monetary compensation for the whistleblowers.⁷⁷

IV. PUBLIC POLICY EXCEPTION—WHERE HAS IT BEEN AND WHERE IS IT GOING?

The above historical review of the development of the public policy exception shows cases in which an undeniably clear, broad, and necessary public good was achieved and protected through application of the exception. It is clear that there is a public policy in favor of participation in the judicial and electoral processes and that the public is better off with unfettered participation in those processes. Legislatures clearly intended to ensure that workers receive care for work-related injuries, and society benefits from ensuring that workers are not terminated for seeking treatment. We need to protect the public from corporate wrongdoing by encouraging those closest to the wrongdoing to step forward. The public policy exception was instrumental in providing the platform for these and many other protections. The exception has been an instrument of enormous change in employer–employee law.

The public policy exception has been pleaded by employees in cases in which public policy was not clearly implicated. However, because many of those clearly protected public policies that were originally litigated under the exception are now codified in whistleblower and other statutory protections, the public policy exception has become a catchall exception to employment at-will. As one court observed, the public policy exception is now "intended merely to provide a modicum of judicial protection for those who did not already have a means of challenging

75. The Act provides that a publicly traded company may not: "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee." 18 U.S.C. § 1514A(a).

76. *Id.* § 1514A(a)(1).

77. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005). *But see* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007) (claiming that only 3.6 percent of Sarbanes-Oxley whistleblowers prevailed at the initial administrative stage and 6.5 percent prevailed at the appeals stage); Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1112 (arguing that information problems still exist within a portion of Sarbanes-Oxley, which mitigate the effectiveness of the Act).

their dismissals under state law.”⁷⁸ Further, courts have repeatedly held that the public policy exception is not available if an aggrieved employee has a cause of action under a statute.⁷⁹

The issue presented now, and addressed throughout the remainder of this Article, is whether the public policy exception continues to serve a necessary purpose. Is the exception still necessary to protect significant public policy? Or because of the myriad statutory exceptions to employment at-will, are the cases applying the public policy exception outside of those now-codified exceptions almost necessarily moving away from protecting broader public policy interests and moving towards the creation of a de facto “just cause” requirement for employee dismissal? In analyzing this issue, there is a confluence of three factors:

A. The indefinable nature of the term *public policy*;⁸⁰

B. The inherent difficulty of determining, or limiting, the length of the “tether” between the public policy and an employee’s actions;⁸¹ and

C. The new and unique personal and professional conflicts that will always arise with well over 100 million employees in the United States.

To fully understand how these factors affect the application of the public policy exception, it is necessary to take a detailed look at the factual and legal reasoning in a variety of opinions analyzing the exception’s use in situations other than those when a clear mandate of public policy existed and an unmistakable tie between that purpose and dismissal could be found. The following section does so, exploring the malleability of the exception.

78. *Van Kruiningen v. Plan B, LLC*, 485 F. Supp. 2d 92, 96 (D. Conn. 2007) (internal quotation marks omitted) (quoting *Medvey v. Oxford Health Plans*, 313 F. Supp. 2d 94, 99 (D. Conn. 2004)).

79. *See, e.g., Mischer v. Erie Metro. Hous. Auth.*, 345 F. Supp. 2d 827, 832 (N.D. Ohio 2004) (public policy exception does not apply when statutory remedy for discrimination claim is available); *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 125 P.3d 119, 127 (Wash. 2005) (determining that there was no public policy exception because other remedies were available through a federal statute).

80. *See infra* notes 88–118, 164 and accompanying text.

81. *See infra* notes 119–43 and accompanying text.

V. REVIEW OF CASE LAW

In his influential article on the public policy exception, Professor Henry Perritt sets forth a four-part test to analyze the exception.⁸² To prevail under the test, the employee must prove:

1. “That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element)”;⁸³

82. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398–99 (1989). Perritt’s article has been cited in a wide variety of court opinions and other articles. See *Lower v. Elec. Data Sys. Corp.*, 494 F. Supp. 2d 770, 775 (S.D. Ohio 2007); *Raymond v. U.S.A. Healthcare Ctr. Fort Dodge, L.L.C.*, 468 F. Supp. 2d 1047, 1057 (N.D. Iowa 2006); *Leininger v. Pioneer Nat’l Latex*, 875 N.E.2d 36, 40 (Ohio 2007); Michael J. Phillips, *Toward a Middle Way in the Polarized Debate over Employment at Will*, 30 AM. BUS. L.J. 441, 447 (1992); S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 859 (1998); Marla J. Weinstein, Comment, *The Limitations of Judicial Innovation: A Case Study of Wrongful Dismissal Litigation in Canada and the United States*, 14 COMP. LAB. L.J. 478, 495 (1993).

83. Perritt, *supra* note 82, at 398. See generally *U.S. ex rel Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 730 (10th Cir. 2006) (noting that “[a] ‘clear’ public policy must be plainly defined by one of three sources: (1) legislative enactments, (2) constitutional standards, or (3) judicial decisions, and is ‘substantial’ only if it is of ‘overreaching importance to the public, as opposed to the parties only’”) (quoting *Rackley v. Fairview Care Ctrs., Inc.*, 23 P.3d 1022, 1026 (Utah 2001)); *Weaver v. Harpster*, 885 A.2d 1073, 1076 (Pa. Super. Ct. 2005), *rev’d*, 975 A.2d 555 (Pa. 2009). The court in *Weaver* defined *well-settled public policy* as follows:

It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal.

885 A.2d at 1076 (internal quotation marks omitted) (quoting *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941)).

One area of uncertainty is whether federal law may provide the public policy for a claim under the state’s public policy exception. Most courts that have addressed the issue have determined that federal law may provide the public policy basis. See *Faulkner v. United Tech. Corp.*, 693 A.2d 293, 297–98 (Conn. 1997) (holding federal law can serve as a source of public policy); *Norris v. Hawaiian Airlines, Inc.*, 842 P.2d 634, 646 (Haw. 1992) (using the Federal Aviation Act as the source of public policy), *aff’d*, 512 U.S. 246 (1994); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 377 (Ill. 1985) (finding public policy in federal nuclear safety statutes). But see *Sedlacek v. Hillis*, 36 P.3d 1014, 1019 (Wash. 2001) (opining that the public policy exception could not be based on a federal law).

2. “That dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the *jeopardy* element),”⁸⁴

3. “The plaintiff’s dismissal was motivated by conduct related to the public policy (the *causation* element),”⁸⁵ and

4. “The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).”⁸⁶

In this Section, detailed case analysis will explore how courts have addressed the first two parts of the test. First, courts’ differing approaches and outcomes to discerning whether a particular pronouncement of public policy can be found to support a public policy claim will be analyzed. Second, the jeopardy element—the “tether”⁸⁷ between a public policy and the employee’s actions—will be reviewed under a variety of factual scenarios. Finally, this Section will look at situations when application of the public policy exception seemingly is directly at odds with the statutory text that provides the basis for the public policy.

84. Perritt, *supra* note 82, at 399. See generally *Jermer v. Siemens Energy & Automation, Inc.*, 395 F.3d 655, 656 (6th Cir. 2005) (defining the jeopardy element as follows: “although complaining employees do not have to be certain that the employer’s conduct is illegal or cite a particular law that the employer has broken, the employee must at least give the employer clear notice that the employee’s complaint is connected to a governmental policy”); *Hubbard v. Spokane County*, 50 P.3d 602, 609–10 (Wash. 2002) (“To establish the jeopardy element, a plaintiff must show that he or she engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy.”) (internal quotation marks omitted) (quoting *Gardner v. Loomis Armored Inc.*, 913 P.2d 377, 384 (Wash. 1996)). In *Hubbard* the Supreme Court of Washington held that whether a particular statute contains a clear mandate of public policy is a question of law. 50 P.3d at 606.

85. Perritt, *supra* note 82, at 399. See generally *May v. Pratt Indus., Inc.*, No. 1:06CV129HEA, 2008 WL 1777409, at *5 (E.D. Mo. Apr. 16, 2008) (stating that to “meet his burden, plaintiff here must present evidence to establish an exclusive *causal connection* between his discharge and reporting violations to either his superiors or to public authorities”); *Clark v. United Emergency Servs., Inc.*, No. C0A07-592, 2008 WL 1723229, at *6 (N.C. App. Apr. 15, 2008) (holding there was no proof of causation when employer’s alleged act occurred seven months prior to employee’s termination and no further proof of a link).

86. Perritt, *supra* note 82, at 399.

87. See *Gantt v. Sentry Ins.*, 824 P.2d 680, 688 (Cal. 1992), *overruled in part by Green v. Ralee Eng’g Co.*, 960 P.2d 1046 (Cal. 1998).

A. *The Clarity Element*

In *Gardner v. Loomis Armored Inc.*,⁸⁸ the Washington Supreme Court utilized the test in a case involving a fact pattern one would think was conceived by a law professor. There, two armored car drivers made a routine stop at a bank. Per company policy, one driver went in to complete the transaction while the other driver stayed in the vehicle. Shortly thereafter, the driver in the vehicle saw the bank manager (whom he knew) run out of the bank, screaming. Following closely behind her was a man wielding a knife. The bank manager was able to make it safely across the parking lot to another building, but the attacker grabbed another woman and held the knife to her throat. The driver got out of the armored car and, along with his fellow employee, was able to subdue the attacker, likely saving the life of the potential victim.⁸⁹

The employer terminated the driver who got out of the vehicle for failing to follow company policy.⁹⁰ As the court noted, this was not a case of a persnickety employer simply enforcing a mundane rule; rather, company history showed that armored vehicles are often robbed by enticing the second driver to depart the vehicle and then overpowering him, often with deadly force.⁹¹ Thus, when the employee claimed a violation of the public policy exception, the court was faced with a difficult legal (and moral) issue: a man was terminated from his job because he acted heroically to save a life.⁹²

The court wrestled with the clarity factor, as this was not a case of a company violating a statute or requesting an employee to do so.⁹³ Rather, this employee had been terminated for violating a company policy that was well-grounded in both the safety of its employees and its own financial interest.⁹⁴ In determining that the employee's termination violated the public policy exception, the court's analysis demonstrated the malleability of the exception. Beginning with the clarity element, the employee's first proffered public policy argument focused on a quartet of Washington state statutes that encouraged citizens to

88. 913 P.2d 377 (Wash. 1996).

89. *Id.* at 378–79.

90. *Id.* at 379.

91. *Id.* at 385.

92. *Id.* at 380–81.

93. *See id.* at 382–84.

94. *Id.* at 379 (noting that the company had a “fundamental” company rule forbidding armored truck drivers from leaving the truck unattended”).

cooperate with law enforcement officials.⁹⁵ The court rejected this argument, concluding that although the statutes might create a clear public policy, it would be an “overexpansive reading” of those statutes to find a clear public policy supporting the employee’s actions in this case.⁹⁶ The court also found “weak support” for the employee’s second argument that the good samaritan law created a public policy in favor of rendering aid to criminal victims.⁹⁷ The statute provided protections for good samaritans but in no way required the employee to help here.⁹⁸

Ultimately, the court declared that society places the highest priority on the protection of human life and that this public policy was clearly evidenced by countless statutes and judicial decisions.⁹⁹ In support of this proposition, the court cited a variety of provisions that were, at best, loosely tied to this fundamental public policy.¹⁰⁰ The court first noted that the Fourth Amendment’s¹⁰¹ protection against warrantless searches is waived in situations where the search is necessary to prevent physical harm.¹⁰² The court also noted that self defense is a defense to most criminal charges.¹⁰³ Finally, the court pointed out that it is a complete defense to a prosecution for homicide if the actor can prove that he or she participated in the crime under compulsion by another who threatened death or serious bodily harm.¹⁰⁴ From this collection of statutes, the court concluded there was a clear public policy, one which was implicated by the employee’s actions.¹⁰⁵

The Iowa Supreme Court, on the other hand, concluded that a general public policy against crime and in favor of the protection of the public was too generalized to support an argument for an exception to the employment-at-will doctrine.¹⁰⁶ An employee, a campus security guard, received a call about an apparent altercation between a football player and a female student. When he appeared on the scene, the security guard saw the man holding the woman around the waist and lifting her off the ground. The man set down the woman as ordered but then lunged at the employee. The employee reacted by pepper-spraying

95. *Id.* at 381.

96. *Id.* at 383.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 383-84.

101. U.S. CONST. amend. IV.

102. *Gardner*, 913 P.2d at 383-84.

103. *Id.* at 384.

104. *Id.*

105. *Id.*

106. *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 230 (Iowa 2004).

the assailant and knocking him to the ground by hitting him in the thigh with his baton. Witnesses immediately began screaming “racist, racist.” The woman and the security guard were white and the football player was black. The case sparked controversy on the campus and caught the attention of the NAACP and student groups. After studying the incident, the university terminated the employee, concluding that he had overreacted and used unnecessary force. The university also noted that the conduct affected its relationships with a variety of constituencies.¹⁰⁷

The employee brought a claim for discharge in violation of public policy, arguing that he was fired for enforcing the criminal laws of the state.¹⁰⁸ The court utilized the same Perritt elements as the court in *Gardner* and focused its analysis on the first factor: whether there existed a clearly defined public policy that protected the activity.¹⁰⁹ The employee argued that the state’s criminal laws reflected a “general public policy against crime and in favor of the protection of the public.”¹¹⁰ Although agreeing with its basic premise, the court rejected this argument, noting that “[a]ny effort to evaluate the public policy exception with generalized concepts of fairness and justice will result in an elimination of the at-will doctrine itself.”¹¹¹

Another example of the malleability of the public policy exception can be found in the early case of *Wagenseller v. Scottsdale Memorial Hospital*.¹¹² There, the employee was a hospital nurse who had received good performance reviews and promotions during her first four years on the job. At that time, her supervisor invited her to attend a camping trip with hospital personnel and others in the medical profession. During the camping trip, the supervisor and others drank heavily and engaged in activities that are normally done in private; the employee did not partake in these activities. On the last evening of the camping trip, the supervisor and others performed a rendition of the song “Moon River,” which ended with the performers exposing their

107. *Id.* at 227–28.

108. *Id.* at 227.

109. *See id.* at 228–29.

110. *Id.* at 230.

111. *Id.* (internal quotation marks omitted) (quoting *Fitzgerald v. Salsbury Chem. Inc.*, 613 N.W.2d 275, 283 (Iowa 2000)).

112. 710 P.2d 1025 (Ariz. 1985), *superseded by statute*, Arizona Employment Protection Act, ARIZ. REV. STAT. ANN. § 23-1501 to -1502 (1995), *as recognized by* *Chaboya v. Am. Nat’l Red Cross*, 72 F. Supp. 2d 1081, 1092 (D. Ariz. 1999). The Arizona Employment Act is discussed *infra* Section VI.

buttocks to the audience. Again, the employee did not participate in this performance despite the request from her supervisor to do so.¹¹³

When she returned to work, the employee and her supervisor had a strained relationship, and the employee began to receive negative feedback from her supervisor for the first time. A few months after the camping trip, the employee was terminated. The employee sued under a public policy exception theory, claiming she was terminated for failing to partake in the activities on the camping trip.¹¹⁴ The employer was granted summary judgment.¹¹⁵

The Arizona Supreme Court was faced with an employee who was terminated from her professional job for failing to partake in what one might reasonably conclude were boorish activities. In holding that summary judgment was improperly granted, the court focused on the “Moon River” performance and the employee’s claim that she was terminated for failing to participate in the criminal activity of “moon-ing.”¹¹⁶ The court agreed, finding that exposing one’s buttocks in public was technically a violation of an Arizona statute.¹¹⁷ While acknowledging the general difficulty in ascertaining clear public policy, the court noted that nowhere is public policy more clearly stated than with the state’s criminal code.¹¹⁸

The decision in *Wagenseller* demonstrates the limitations of the public policy exception and the potential for arbitrary unfairness towards employees. It is easy to speculate that a court may not have strained so hard to find a possible violation of the public policy exception if the group of employees had been younger or in nonprofessional vocations. Further, and even more importantly, if the performance of “Moon River” had ended with the performers simply exposing their underwear, even thongs, to the audience, the public policy exception would not have applied. Such an outcome seems at odds with the basic tenet that everyone should be entitled to equal treatment under the law.

113. *Wagenseller*, 710 P.2d at 1029.

114. *Id.*

115. *Id.* at 1027.

116. *Id.* at 1035.

117. *Id.* The court did not determine that every instance of exposing one’s buttocks was necessarily a violation of the Arizona statute. *Id.* at 1035 n.5. The court left further mooning cases to be decided on a case-by-case basis. *Id.*

118. *Id.* at 1035.

B. The Jeopardy Element—How Long a Tether?

In *Porterfield v. Mascari II, Inc.*,¹¹⁹ an employee was issued a reprimand by her employer, who also requested the employee sign a document acknowledging her actions. Because the employee disagreed with the reprimand and believed the document to be libelous, she requested an opportunity to meet with a lawyer prior to signing and indicated it may take her a few days to accomplish this task. She was terminated the same day, prior to signing and prior to having an opportunity to meet with a lawyer.¹²⁰ The employee brought an action under the public policy exception, claiming a general right to consult with an attorney.¹²¹

The employee pointed to numerous statutory and common law sources for support of her proposition that Maryland public policy supported her right to obtain advice of counsel in this situation, including a portion of the state's constitution, which mandates access to counsel in criminal cases and also provides access to counsel in civil cases.¹²² The employee also cited numerous common law decisions finding a right to counsel.¹²³ Finally, the employee cited the attorney-client privilege as providing public policy in favor of the right to consult with an attorney.¹²⁴

In rejecting her claim, the court reasoned that the employee had not pointed to a clear mandate of public policy and that it is “wrong to conflate any public policy generally favoring access to counsel with a policy that is violated by the mere suggestion by an employee that he or she may want to seek advice of counsel.”¹²⁵ The court rejected the notion that the attorney-client privilege creates a public policy in favor of access to an attorney, noting that the attorney-client privilege preserves the relationship once it is formed, rather than directly fostering the formation of that relationship.¹²⁶ The court also rejected the employee's arguments that the state constitution or state statutes providing legal assistance to those unable to pay for services provided public policy that supported her claim, noting the statutes only provided

119. 823 A.2d 590 (Md. 2003).

120. *Id.* at 594.

121. *Id.* at 598.

122. *Id.* (citing MD. DECL. OF RIGHTS art. XXI, XXIV).

123. *Id.*

124. *Id.*

125. *Id.* at 606.

126. *Id.* at 608–09.

equal access, which did not equate to unrestricted legal access to all in all situations.¹²⁷

In contrast, other courts have found a much broader right to counsel in similar situations. A federal court held that Iowa law supports a general right to consult with an attorney in a civil case.¹²⁸ There, an employee alleged that she was discharged after threatening her employer that she would obtain a lawyer in connection with a dispute between the parties.¹²⁹ In holding that the employee had pleaded a cause of action under the public policy exception, the court found the necessary clear mandate of public policy by first noting that the Iowa Supreme Court has the inherent power to regulate the practice of law.¹³⁰ It then pointed to the preamble of the state's professional responsibility code, which had been adopted by the Iowa Supreme Court, noting that a "basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."¹³¹ The court further reasoned that public policy could only be carried out if members of the public are able to recognize their legal problems and are able to obtain the services of counsel.¹³² The court even addressed the notion that the clear mandate of public policy must be based upon the common good rather than the need of the individual, reasoning that "[c]onsultation with an attorney is a necessary first step in the process to discover whether an individual has a cognizable claim that will vindicate the rights of all citizens, or simply a claim for a wrong suffered by an individual."¹³³

A closer connection between the public policy enunciated in a statute and the employer's actions was required in *Shero v. Grand Savings Bank*.¹³⁴ There, an employee was named in a lawsuit brought against the employer by one of its customers, a city. The employee filed a counterclaim against the city seeking certain records and information under the state's open records law. The employer requested that the

127. *Id.* at 608.

128. *Thompto v. Coborn's, Inc.*, 871 F. Supp. 1097, 1129 (N.D. Iowa 1994).

129. *Id.* at 1103.

130. *Id.* at 1119.

131. *Id.* (citation and internal quotation marks omitted).

132. *Id.*

133. *Id.* at 1120; *see also* *Simonelli v. Anderson Concrete Co.*, 650 N.E.2d 488, 492 (Ohio Ct. App. 1994) (noting that "the act of firing an employee for consulting an attorney could serve as the basis for a public policy exception to the common-law employment-at-will doctrine").

134. 161 P.3d 298 (Okla. 2007).

employee drop his counterclaim and, when he refused, terminated him.¹³⁵ In dismissing the employee's claim under the public policy exception, the court noted that the open records law set forth a clear public policy concerning people's right to be fully informed about their government, but the court determined that the law itself was silent as to "any public policy against conditioning continued employment on the abandonment of claims pursuant to the [law]."¹³⁶

Similarly, a short tether was used in *Imes v. City of Asheville*,¹³⁷ in which an employee had worked for twenty-seven years as a bus driver. The employee was shot and seriously injured by his wife in a domestic dispute and was terminated.¹³⁸ In his complaint, taken as true by the court in the context of the employer's motion to dismiss, the employee alleged the employer had "informed him he was being terminated due to the [p]laintiff being a victim of domestic violence."¹³⁹

The employee argued that his termination violated the public policy exception on the basis that "domestic violence is a serious social problem" and that terminating someone "based on [his or her] status as a victim of domestic violence tends to be injurious to the public."¹⁴⁰ The plaintiff pointed to state statutes prohibiting domestic violence as a source for the public policy.¹⁴¹ In rejecting the employee's claim, the court recognized that domestic violence was a serious social problem but noted that all statutes designed to combat social ills such as drug abuse and child abuse "may be read to express a general public policy in favor of protection of victims" of social ills; but such a reading did not create special employment protections.¹⁴² Protections under the public policy exception, the court noted, were to be narrowly construed to prevent status-based discrimination and to aid enforcement of the law.¹⁴³

135. *Id.* at 299. The employee was ultimately successful in his counterclaim against the city. *Id.*

136. *Id.* at 301; *see also* *Goggins v. Rogers Mem'l Hosp. Inc.*, 683 N.W.2d 510, 514, 517 (Wis. Ct. App. 2004) (emphasizing the "limited scope of the exception" when the employee was not faced with a "report and be terminated" situation).

137. 594 S.E.2d 397 (N.C. Ct. App. 2004).

138. *Id.* at 398. The employee was shot on July 12 and was terminated on August 17. *Id.* It is unclear from the opinion whether the employee had returned to work at the time; but, there is no mention in the opinion that if the employee had not yet returned to work, he would not be able to return. *See id.*

139. *Id.* (internal quotation marks omitted).

140. *Id.* at 399 (internal quotation marks omitted).

141. *Id.*

142. *Id.* at 399–400.

143. *Id.* at 400; *see also* *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990). In *Borden* the court held there was no public policy exception for termination due to pregnancy, reasoning that:

C. *The Public Policy Exception v. Statutory Language*

The malleability of the public policy exception, and how two different courts can issue well-reasoned but diametrically opposed decisions under the public policy exception, can be seen in a line of cases involving a similar fact pattern: An employee believes he or she has been discriminated against but is barred from bringing a discrimination claim because the state discrimination statute requires an employer to employ a minimum amount of employees before the discrimination statute will apply. Instead, the employee brings a claim under the public policy exception based upon the public policy enunciated in the discrimination statute. Jurisdictions reach opposite conclusions, neither of which can be considered an impermissible reading of the public policy exception, which demonstrates the malleability of the exception.

In *Thibodeau v. Design Group One Architects, LLC*,¹⁴⁴ an employee claimed she was terminated from her job as a bookkeeper with an architectural firm due to missing work for pregnancy-related medical visits. If the employee's allegations were true, the termination would have violated the state's anti-discrimination statute.¹⁴⁵ However, the employee was unable to bring a claim under the statute because the employer only had two employees, and the statute only applied to employers with three or more employees.¹⁴⁶ The employee brought a claim under the public policy exception, relying upon the discrimination statute as a source of enunciated public policy.¹⁴⁷

The court did not dispute the notion that the statute enunciated public policy against discrimination in the workplace.¹⁴⁸ However, the court also determined that the statute's provision limiting the application of the statute to employers with three or more employees also enunciated a public policy—one the court could not overlook.¹⁴⁹ While the court

The courts of this state have consistently held that they will not usurp the legislative function and, under the rubric that they are the propounders of "public policy," undertake to create exceptions to the legal proposition that there can be no recovery in tort for the alleged "wrongful" termination of the employment of an at-will employee.

395 S.E.2d at 629.

144. 802 A.2d 731 (Conn. 2002).

145. *Id.* at 734, 738–39.

146. *Id.* at 733.

147. *Id.* at 734.

148. *Id.* at 740.

149. *Id.* at 741. In *Brown v. Ford*, 905 P.2d 223 (Okla. 1995), *overruled in part by* *Smith v. Pioneer Masonry, Inc.*, No. 105285, 2009 WL 3748510 (Okla. Nov. 10, 2009), the Oklahoma Supreme Court set forth the basic analytical structure followed by most courts

noted that the statute itself did not provide legislative history as to why the statute applied to employers with three or more employees, the court surmised that the legislature “did not wish to subject this state’s smallest employers to the significant burdens, financial and otherwise, associated with the defense of employment discrimination claims,” and wanted to protect the intimate and personal relationships that exist in very small businesses.¹⁵⁰

A different outcome was reached by the Pennsylvania Superior Court in *Weaver v. Harpster*¹⁵¹ when an employee alleged that she was continually sexually harassed by her employer to the point that she resigned because of the intolerable work conditions. Following a required procedure for a sexual harassment claim, the employee requested that the Pennsylvania Human Relations Commission investigate her claim. But because Pennsylvania law limited sexual harassment claims to employers with four or more employees and because the employer had fewer than four, her claim was rejected.¹⁵²

The employee commenced a claim for wrongful discharge based upon the public policy exception.¹⁵³ In concluding that the employee had a valid claim under the public policy exception, the court first determined that there was a well-established policy set forth in the state statutes.¹⁵⁴ It then determined that the statute did not provide relief for the victim in this case and that failure to provide her with a remedy

that hold a public policy exception is not allowed:

The body of our common law, which serves to supplement the corpus of statutory enactments, is powerless to abrogate the latter, either in whole or in part. Validly expressed legislative will must always control over contrary notions of the unwritten law. When in *pari materia*, statutory law and the precepts of either pre-existing or after-declared common law are to be construed together as one consistent and harmonious whole. Once an interaction of the two sources has been measured by these principles, it is clear that . . . [the plaintiff’s] common-law claim [is] not actionable as a discharge in breach of public policy because her employer, who engaged fewer than [the statutorily specified number of] employees, is outside the [a]ct’s purview.

905 P.2d at 228–29 (emphasis omitted).

150. *Thibodeau*, 802 A.2d at 740–41. In reaching these assumptions, the court noted that its determination of the legislature’s intent was consistent with federal decisions construing Congress’s intent when Congress included an employee minimum in Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e to 2000e-17 (2006); *Thibodeau*, 802 A.2d at 741 (citing *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995)).

151. 885 A.2d 1073 (Pa. Sup. Ct. 2005), *rev’d*, 975 A.2d 555 (Pa. 2009).

152. *Id.* at 1074.

153. *Id.* at 1075.

154. *Id.* at 1076–77. For the court’s explicit definition of the exception, see *supra* note 83.

would abridge that public policy.¹⁵⁵ The court dismissed the employer's argument that providing a cause of action for sexual discrimination here would contravene the legislature's intent to limit claims to employers with four or more employees by labeling such an outcome as both "quixotic" and "arbitrary."¹⁵⁶ The court further justified its opinion by differentiating public policy in the view of the legislature versus public policy in the view of the court:

Public policy, in the administration of the law by the courts, is essentially different from what may be public policy in the view of the legislature. With the legislature, it may be and often is, nothing more than expediency. The public policy which dictates the enactment of a law is determined by the wisdom of the legislature. Public policy . . . with [the legislature] . . . may be and often is, nothing more than expediency; but with [the courts], it must, and may only be a reliance upon consistency with sound policy and good morals as to the consideration or the thing to be done.¹⁵⁷

155. *Weaver*, 885 A.2d at 1077.

156. *Id.*

157. *Id.* at 1078 (alterations in original) (internal quotation marks omitted) (quoting *Mamlin*, 17 A.2d at 409); see also *Molesworth v. Brandon*, 672 A.2d 608, 612 (Md. 1996) (allowing a discrimination claim based upon the public policy exception and reasoning that the exemption for small employers merely excludes small businesses from the administrative process of the state's antidiscrimination act but not from the public policy enunciated in the act); *Collins v. Rizkana*, 652 N.E.2d 653, 658 (Ohio 1995) (finding the necessary public policy to support the employee's termination claim in statutes prohibiting sexual imposition and prostitution).

As this Article was going to press, two state supreme courts rendered decisions that set forth diametrically opposed analyses in their majority opinions. First the Pennsylvania Supreme Court, in a 5-2 decision, overturned the superior court's decision in *Weaver*, holding that there was no public policy to support the employee's exception to the at-will rule. *Weaver v. Harpster*, 975 A.2d 555, 556-57 (Pa. 2009). Interestingly, the Pennsylvania Supreme Court first determined that the statute in question announced a broad policy against discrimination applicable to "all individuals." *Id.* at 564 (internal quotation marks omitted). However, the court also determined that the legislature had specifically exempted, for "[w]hatever the reason," employers with four or fewer employees from the statute; therefore, there was no public policy to support the employee's claim. *Id.* at 569.

The vehement dissent begins as the majority opinion did, asserting that the statute provides a clear mandate against discrimination. *Id.* at 574 (Todd, J., dissenting). The dissent further argued that the exemption for small employers was only intended to relieve such employers of the administrative and economic burdens under the statute, including the "specter" of a complaint brought by the Pennsylvania Human Relations Commission. *Id.* at 575. The dissent reasoned that "[w]hile subjecting only larger employers to such burdens may be sound policy, it does not follow that, in doing so, the [g]eneral [a]ssembly intended to permit smaller employers" to discriminate. *Id.*

Interestingly, the dissent's reasoning was precisely the reasoning that the Oklahoma Supreme Court used in holding exactly opposite of the Pennsylvania Supreme Court; the

Similarly, while most courts have held that the public policy exception does not apply if a statutory scheme provides a remedy,¹⁵⁸ in *Bukta v. J.C. Penney Co.*,¹⁵⁹ the court allowed the public policy exception to provide an expansion of statutorily allowed remedies.¹⁶⁰ An employee brought claims under the Americans with Disabilities Act (ADA)¹⁶¹ and Ohio discrimination statutes, both of which provided a remedy for the employee's wrongful discharge allegation.¹⁶² Noting that the Ohio Supreme Court had not yet provided "remedies broad enough to fully compensate an aggrieved employee for an employer's violation of those statutes," the court allowed the employee's public policy exception claim, based upon the ADA and the Ohio statute, to survive summary judgment.¹⁶³

VI. ANALYSIS

The public policy exception, in its current application, has outlived the purpose for which it was developed. The exception was created at a time when courts recognized that the only way broad public policy could be adequately implemented was by preventing employers from terminating employees who committed, or refused to commit, certain acts. Unless an employee refused to dump toxic sludge in a river, or at least informed the authorities of the dumping, the public was unlikely to know. Unless an employee refused to alter financial documents, or alert the authorities

Oklahoma court overturned its own prior decision which had held that the public policy exception could be not used as the basis for a common law discrimination claim when the employer employed less than the required number of individuals to be subjected to the state statute. *Smith v. Pioneer Masonry, Inc.*, No. 64 105285, 2009 WL 3748510 (Okla. Nov. 10 2009). In *Smith* the employee had been denied the right to bring a racial discrimination claim against his employer at the trial court and court of appeals because the employer had fewer than the statutory minimum fifteen employees. *Id.* at *1. In reversing, the Oklahoma Supreme Court noted: "In reaching this conclusion, we do not disturb *Brown's* holding that the Legislature may validly excuse 'small shops' from *statutory* remedies. However, this exclusion does not affect the right of employees in 'small shops' to pursue the common law remedy of a . . . tort for the discharge based on prohibited discrimination." *Id.* at *3.

This decision fully illuminates the malleability of the term *public policy*. Each opinion is eminently reasonable in its interpretation of the public policy that emanates from the statute. This malleability is the focal point of the discussion regarding the future of the public policy exception, *infra* notes 164–75 and accompanying text.

158. *See supra* note 79 and accompanying text.

159. 359 F. Supp. 2d 649 (N.D. Ohio 2004).

160. *Id.* at 673–74.

161. 42 U.S.C. § 12101-213 (2006).

162. *Bukta*, 359 F. Supp. 2d at 673.

163. *Id.* at 674.

of the alterations, the public was not going to be protected against financial fraud. Today, those needs have been met in a variety of legislative acts. What we are left with is a catchall exception that is simply too malleable in its application to provide the necessary guidance for courts and citizens required by any law. The term *public policy* is too vague¹⁶⁴—and the maximum tether between public policy and an employer's actions is too difficult to determine—to provide a discernible and fair law to govern the relations between employers and employees and, perhaps even more importantly, between employees.

As the court in *Weaver v. Harpster*¹⁶⁵ outlined above, the public policy functions of a court and legislature are vastly different. In analyzing the issue of fairness in the context of the public policy exception today, one is faced with the fundamental dichotomy between the legislative and judicial lawmaking functions: the legislative function requires looking first and foremost at the macro concept of fairness—what is best for society as a whole—while the judicial function must focus more squarely on the micro concept of fairness—what is best for the litigants before the court. Courts, at their core, are deciding the fate of an individual in a particular case. While it may be unfair on a micro level for an individual to be terminated because she refused to participate in a “Moon River” skit with her boss, it is unfair on a macro level for this one employee to be provided protection under the law when other employees who have personality-based clashes with their supervisors are not.

What employment at-will does is provide fairness at a macro level: all employees run the risk of being treated unfairly by their employers. While terminations that can objectively be categorized as unfair will occur under the at-will system, as Richard Epstein pointed out in his 1984 article, *In Defense of the Contract at Will*,¹⁶⁶ employers will face reputational losses if they terminate employees for a bad or no reason.¹⁶⁷ This reputational factor, Epstein advances, works both negatively—employers acting arbitrarily will be less desirable for good employees—and positively—employers with good reputations will attract good employees.¹⁶⁸ The validity of Epstein's analysis has increased

164. See *Noble v. City of Palo Alto*, 264 P. 529, 530 (Cal. Dist. Ct. App. 1928) (“Public policy is a vague expression, and few cases can arise in which its application may not be disputed.”), cited in *Salter v. Alfa Ins. Co.*, 561 So. 2d 1050, 1052–53 (Ala. 1990) (quoting the definition and concluding that the term *public policy* is too vague to adopt the public policy exception to employment at-will).

165. 885 A.2d 1073 (Pa. Sup. Ct. 2005), *rev'd*, 975 A.2d 555 (Pa. 2009).

166. 51 U. CHI. L. REV. 947 (1984).

167. *Id.* at 967–68.

168. *Id.*

exponentially over the last twenty-five years due to the availability of information over the Internet.

Lawmakers have recognized employment at-will as the law by carving out exceptions to the rule while leaving it intact. Continued use of the public policy exception threatens to envelop the rule. While an argument can be made against employment at-will, such a determination should be left to a legislative body rather than the ad hoc approach that the current public policy exception allows, even demands.

The best approach at this time would be for individual state legislatures to step forward and fully codify employment at-will and limit the scope of the public policy exception. A template for doing so can be found in Arizona statutes,¹⁶⁹ modified in the proposed four-step solution below:

Part 1: Declare that the at-will relationship is the policy of the state.¹⁷⁰

One unique aspect of the employer-employee relationship law is that while state and federal legislative bodies have carved out numerous, detailed statutory exceptions to the at-will rule, the basic rules still remain a common law creation.¹⁷¹ This is no doubt a result of both an intentional approval of the at-will rule by legislative bodies, and the fact that each heretofore passed legislation is merely an exception to this rule and, therefore, inappropriate to address the general employment law. However, to limit the application of the public policy exception, the legislative body must first set forth the at-will rule as the basic law in the jurisdiction and then set forth the applicable exceptions to that basic rule. Otherwise, if the at-will rule remains a judicially created rule, courts will rightfully determine that they have the power to create exceptions to that basic rule.¹⁷²

169. ARIZ. REV. STAT. § 23-1501 (1995).

170. See *id.* § 23-1501(2) (“The employment relationship is severable at the pleasure of either the employee or the employer . . .”). This section of the statute goes on to set forth an exception for written contracts, both those intentionally created by the employer or employee and contracts created through employee handbooks. *Id.*

171. Normally, when a legislative body decides to address an area of the common law, the legislative body codifies all major components—for example, the Federal Rules of Evidence.

172. See *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (noting that “[a]lthough the [l]egislature has created those exceptions to the [employment-at-will] doctrine, this court is free to judicially amend a judicially created doctrine”).

Part 2: Set Forth the Exceptions

As various exceptions to the employment-at-will rule have developed, the exceptions themselves, as well as remedies, have been included in the statutory text. A statutory scheme could rely upon those sections individually with solely a general reference to statutory text; however, a better approach would be to specifically reference each statutorily created exception to the at-will rule.¹⁷³ For example:

All employment is presumed to be at-will, and an employee shall have no right to sue for damages for wrongful termination unless:

(1) There exists a written employment contract between the employer and employee; or

(2) Termination would be in violation of a state statute: anti-discrimination; workers' compensation; whistleblower; jury duty, and so on.

The listings would continue with all statutory exceptions. Certainly a catchall exception could be referenced at the end, but a comprehensive listing would not only provide employers and employees with a direct reference, but also alert lawmakers to consider employment implications of any future statutory schemes. The proposed statute would conclude with the public policy exception in the following paragraph.

Part 3: Limit the Public Policy Exception

The public policy exception should not be wholly discarded, but its use should be limited to direct violations of state statutory law—a very short tether. The exception is still necessary to protect against egregious action when employers terminate an employee who has refused to violate state statute. Example language, building upon the scheme set forth above, could read as follows:

The employee refuses to commit an act or omission which would directly violate the state constitution or state statute. To prove a claim of wrongful termination under this section, the employee must prove by a preponderance of the evidence that:

The act or omission would have directly violated the state constitution or state statute, and the termination was directly caused by the refusal to act or omit.

173. This is the approach generally followed by Arizona in ARIZ. REV. STAT. § 23-1501.

A related issue is whether an employee's good faith belief that an act or omission would violate the state laws should suffice to provide a basis for the claim.¹⁷⁴ While there is some merit to this notion, the goal in the revamped public policy exception should be clarity and certainty for all parties, which can only be achieved through reliance upon the direct statutory text.

Part 4: Damages

An employee's claim for violation of the public policy exception should be heard in tort, rather than contract. Damage awards calculated on a breach of contract basis¹⁷⁵ limit the employee to lost wages and benefits. The problem with calculating damages solely based upon a contractual relationship between the employer and employee is that it puts lower-paid employees at a significant disadvantage. First, lower-wage positions are generally more abundant and available, both in sheer number of positions and in the lower qualifications necessary to earn the position. This means that such employees are likely to have much lower damage totals, and therefore, employers are less cautious when terminating those employees, even in violation of a statute. Further, simply being awarded lost wages does not adequately compensate the employee who has been forced to leave coworkers and may have hardships related to transportation and scheduling. Second, because of the lower damage potential, obtaining counsel to pursue a claim against an employer would be extremely difficult. An employee earning \$2000 to \$3000 per month would need to be out of work a significant period of time before hiring an attorney would make financial sense.

With the clarity afforded by the above statutory approach to the public policy exception, employees should be entitled to greater potential damage awards against employers who violate the public policy exception. Beyond lost wages, employees should be entitled to a form of "pain and suffering" damages related to the reasonable and customary implications of losing a job, such as mental pain and anguish, expenses related to a job search, and any resulting inconvenience to the employee's lifestyle. Inconveniences include changes in location, transportation, and work hours, and the resulting changes in personal life and child care.

Additionally, there should be access to punitive damages for employers who act in reckless disregard of the employee's rights, which would

174. See, e.g., *Karch v. BayBank FSB*, 794 A.2d 763, 775 (N.H. 2002) (noting a public policy exception based upon "good faith" reporting of a perceived employer violation of a wiretapping and eavesdropping statute).

175. See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983).

require proof that the employer either knew that its actions violated the law and proceeded to act in violation of the law, or the employer failed to take reasonable steps to become knowledgeable of the law. Providing access to greater potential awards should provide greater protection for lower-paid employees.

VII. CONCLUSION

The public policy exception to employment at-will had a pronounced and important impact on shaping the employer-employee relationship from the 1970s through the 1990s. Its use led to important statutory protections, which today safeguard public policy and discourage corporate wrongdoing. However, the exception should now be curtailed because its current application threatens to engulf the at-will employment rule.