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PUNITIVE DAMAGES FOR WRONGFUL DISCHARGE OF AT WILL EMPLOYEES

JANE P. MALLOR*

Once a rarely invoked means of condemning outrageous conduct, the doctrine of punitive damages¹ has become one of the primary tools courts use to enlarge the accountability of those who hold power over the welfare of the community. Because of the marked rise in the size and incidence of punitive damages awards in recent years,² the doctrine has come to play an increasingly important role in modern settlement negotiations and trial practice.³ The doctrine also has been the subject of extensive analysis by courts⁴ and commentators.⁵

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1. Punitive or exemplary damages are imposed on a defendant as an item of damages apart from any compensatory remedy to punish him for malicious, wanton, oppressive, or reckless conduct and to deter him and others from committing such conduct in the future. D. DOBBS, REMEDIES § 3.9, at 204-06 (1973); see also RESTATEMENT (SECOND) OF CONTRACTS § 908 (1979).

All but four states—Louisiana, Nebraska, Massachusetts, and Washington—permit the imposition of punitive damages in some form. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 8 n.38 (1982) [hereinafter cited as Owen, *Problems in Assessing Punitive Damages*].

2. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 n.6 (1982); Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 271 n.6 (1983).

3. See, e.g., Gordon & Crowley, *Defending the Punitive Damages Claim*, 49 INS. CO. J. 300, 307-08 (1982).

4. The Supreme Court decided a number of cases involving punitive damages in recent years. See, e.g., *Silkwood v. Kerr McGee Corp.*, 104 S. Ct. 615 (1984) (award of punitive damages against federally licensed nuclear facility for violation of Oklahoma tort law not preempted by federal law); *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages available in appropriate 42 U.S.C. § 1983 actions); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages may not be imposed against municipality in § 1983 actions); *IBEW v. Foust*, 442 U.S. 42 (1979) (punitive damages may not be imposed on a union for breach of its duty of fair representation).

5. See, e.g., Ellis, *supra* note 2; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L. J. 639 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV.

The increased incidence of punitive damages awards is due in part to judicial expansion of the circumstances under which punitive damages are available. Courts have expanded the applicability of the remedy to include cases involving wrongs as diverse as violations of civil rights,⁶ sales of defective products,⁷ bad faith breaches of contract,⁸ violations of state security laws,⁹ and breaches of extracontractual duties by landlords.¹⁰

103 (1982) [hereinafter cited as Owen, *Civil Punishment*]; Owen, *Problems in Assessing Punitive Damages*, *supra* note 1; Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257 (1976) [hereinafter cited as Owen, *Punitive Damages*]; Priest, *supra* note 2; Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, A COMMENT 56 S. CAL. L. REV. 133 (1982); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977); see Wheller, *supra* note 2.

6. See, e.g., *Smith v. Wade*, 103 S. Ct. 1625 (1983); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 233-34 (1970) (Brennan, J., concurring); *Merritt v. De Los Santos*, 721 F.2d 598 (7th Cir. 1983); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978); *Fountila v. Carter*, 571 F.2d 487 (9th Cir. 1978). But see *La Reau v. Manson*, 383 F. Supp. 214, 219 (D. Conn. 1974). See generally *Smith v. Wade*, 103 S. Ct. 1625 (1983); Note, *Civil Rights—42 U.S.C. § 1983—Punitive Damages are Available under Section 1983 when the Defendant's Conduct Involves Reckless or Callous Indifference of the Plaintiff's Federally Protected Rights*, 13 U. BALT. L. REV. 187 (1983).

7. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980); Owen, *Problems in Assessing Punitive Damages*, *supra* note 1; Owen, *Punitive Damages*, *supra* note 5; Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 FORDHAM L. REV. 37 (1983); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. CO. J. 402 (1979); Note, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333 (1981).

8. See, e.g., *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482, appeal dismissed, 445 U.S. 912 (1979); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. App. 1976). See generally Sullivan, *supra* note 5; Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975) [hereinafter cited as Note, *Punitive Damages in Contract Actions*]; Note, *Punitive Damages in Contract Actions—Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980) [hereinafter cited as Note, *Punitive Damages Exceptions*].

9. See *Anvil Inv. Ltd. Partnership v. Thornhill Condominiums*, 85 Ill. App. 3d 1108, 407 N.E.2d 645 (1980); cf. *Stowell v. Ted S. Finkel Inv. Serv. Inc.*, 489 F. Supp. 1209 (S.D. Fla. 1980) (punitive damages not available for violation of state security statute, but are available for accompanying common law fraud). See generally Comment, *Punitive Damages and the Federal Securities Act: Recovery Via Pendent Jurisdiction*, 47 MISS. L.J. 743, 759-65, 767 (1976).

10. *Kipsborough Realty Corp. v. Goldbetter*, 367 N.Y.S.2d 916 (N.Y. Civ. Ct. 1975) (breach of warranty of habitability); *Brewer v. Erwin*, 61 Or. App. 642, 658 P.2d 1180 (1983) (violation of Oregon Residential Landlord and Tenant Act); cf. *Hall v. Consolidated Edison Corp.*, 104 Misc. 2d 565, 428 N.Y.S.2d 837 (N.Y. Supp. Ct. 1980) (punitive damages permitted in action by tenant against electric utility for wrongful disconnection of electricity that

One context in which the application of a punitive remedy is particularly controversial is the new and rapidly expanding area of law granting rights of action for the wrongful discharge of employees whose job security is not guaranteed by express contract, collective bargaining agreement, statutory provision or tenure system. Such employees comprise the majority of the American workforce¹¹ and commonly are called "at will" employees because traditional legal principles hold that their employment is terminable at will.

The creation of a remedy for wrongfully discharged at will employees is in itself one of the most dramatic legal developments of the past decade.¹² Before that time, an employer in virtually all cases could discharge an at will employee without notice for almost any reason.¹³ While the termination at will rule often worked harsh results,¹⁴ it promoted economic growth by according business own-

resulted in injury from fall on unlighted stairway).

11. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 322 n.6, 171 Cal. Rptr. 917, 921 n.6 (1981) (less than 28% of the nonagricultural workforce are employed under terms of a union agreement); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 n.2 (1980) (60-65% of the American workforce governed by employment at will rule).

12. Numerous law review articles examine the development of this cause of action. See, e.g., *Blades, Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Friedman, Exposed Nerves: Some Thoughts on Our Changing Legal Culture*, 17 SUFFOLK U.L. REV. 529, 544 (1983) (discussing the social and historical factors that led to the emergence of this doctrine); *Krauskopf, Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); *Murg & Scharman, Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1983); *Peirce, Mann & Roberts, Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1982); Note, *Protecting at Will Employees*, *supra* note 11; Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981).

13. The Supreme Court of Tennessee made a classic statement of the termination at will rule in *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884), *rev'd sub. nom. Hutton v. Watlers*, 132 Tenn. 527, 179 S.W. 134 (1915): "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." See also *Johnson v. B. & N. Steakhouse*, 443 So. 2d 924 (Ala. 1983); *Henry v. Pittsburg & L.E.R. Co.*, 139 Pa. 289, 21 A. 157 (1891). For more complete compilation of cases approving the employment at will rule, see *Employment Coordinator (RIA)* ¶ EP-22,681 n.3 (1984). See also *RESTATEMENT (SECOND) OF AGENCY* § 442 (1957); 9 S. WILLISTON, *CONTRACTS* § 1017 at 129-30 (W. Jaeger ed. 1967).

14. See, e.g., *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980) (plaintiff discharged for serving on a grand jury had no right of action against employer); *Comerford v. International Harvester*, 235 Ala. 376, 178 So. 894 (1938) (plaintiff had no cause of action when discharged in revenge for supervisor's unsuccessful attempts to alienate affections of plaintiff's wife); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977) (plaintiff had

ers maximum control over the workplace.¹⁵

Confronted with high levels of unemployment and an increasingly wage-dependent population, however, courts began to question some of the basic assumptions of the termination at will rule. Concerns about protecting public interests inherent in the employment relationship and controlling the abuse of managerial power have gradually eroded the at will rule through the enactment of statutory restrictions and the creation of a private cause of action for wrongfully discharged employees. At least twenty-nine jurisdictions now recognize some form of this right of action.¹⁶ The development of a wrongful discharge action has proceeded at a cautious pace, however, because courts are balancing important and subtle countervailing interests. No singular theory of recovery is accepted by all states, nor do the various state courts agree whether the action lies in contract or tort.¹⁷

The applicability of punitive damages has been at issue in a number of wrongful discharge cases, with predictably mixed results.¹⁸ No court has analyzed thoroughly the propriety of using a punitive remedy in wrongful discharge cases, although the conjunction of these two expanding areas of law warrants careful analysis. The imposition of punitive damages in wrongful discharge cases could become a powerful force for deterring the abuse of manage-

no cause of action when terminated after announcing intent to attend law school at night).

15. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 320, 171 Cal. Rptr. 917, 921 (1981); see also *Feinman, The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 133-34 (1976).

16. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983). The table published in *Employment Coordinator (RIA)* ¶ EP-22,684, at 82-685-86 (1984) illustrates the jurisdictions recognizing exceptions to the at will rule and indicates the theories of recovery recognized.

17. Compare *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878-79 (1981) (wrongful discharge action sounds in tort) with *Vandegrift v. American Brands Corp.*, 572 F. Supp. 496, 499 (D.N.H. 1983) (wrongful discharge action a hybrid between contract and tort) and *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 334 N.W.2d 834, 841 (1983) (wrongful discharge action based on violation of public policy is a contract action).

18. Compare *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1064 (5th Cir. 1981) (punitive damages not allowable) and *Yartzo v. Democrat-Herald Publishing Co.*, 281 Or. 651, 576 P.2d 356, 360 n.1 (1978) (same) with *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213, 216 (Mont. 1983) (punitive damages approved) and *Lally v. Copygraphics*, 173 N.J. Super. 162, 169, 413 A.2d 960, 968-69 (1980) (same), *aff'd*, 428 A.2d 1317 (1981). See *infra* notes 160-219 and accompanying text.

rial discretion, or it could result in undue chilling of business decisionmaking and lead to the retention of unproductive employees.

This Article evaluates whether public policy favors the use of punitive damages in cases involving the wrongful discharge of at will employees. The Article begins by tracing the development of the wrongful discharge action and by discussing the various theories of recovery recognized by courts. Part Two examines the purposes and the doctrinal contours of the punitive damages remedy and evaluates the treatment of punitive damages in existing wrongful discharge cases. Finally, in Part Three, the Article analyzes the policies that militate for and against the use of punitive damages in such cases and proposes guidelines for an accommodation of those policies.

I. THE DEVELOPMENT OF RIGHTS OF ACTION FOR AT WILL EMPLOYEES

A. Rise of the At Will Doctrine

The American¹⁹ rule that employment of uncertain duration is terminable at will is in itself a relatively recent judicial creation. The traditional English rule, premised on a view of employment as a status-based relationship replete with customary rights and duties,²⁰ presumed that employment of unspecified duration was for a term of one year²¹ and could not be terminated during that time without just cause or reasonable notice.²² Prior to the middle of the

19. See Peirce, Mann & Roberts, *supra* note 12, at 15-19 (contrasting American law regarding termination of employment with that of other industrialized democracies).

20. See P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 123-31 (1969) (contains an excellent discussion of the characteristics of the traditional English law of master and servant).

21. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320, 171 Cal. Rptr. 917, 921 (1981); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 567, —, 334 N.W.2d 834, 837 (1983). For a detailed treatment of English law regarding employment termination, see Feinman, *supra* note 15, at 119-22.

22. [I]f the hiring be general without any particular time limited, the law construes it to be a hiring for a year; . . . and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of this term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace, but they may part by consent, or make a special bargain.

1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 425-26 (5th ed. 1872); see also Feinman, *supra* note 15, at 121.

nineteenth century, American courts appear to have followed the English rule.²³ In the latter half of the nineteenth century, however, fueled by the rise of industrial capitalism and emerging notions of freedom of contract, American courts repudiated the English rule in favor of a contract-based approach to the problem.²⁴ This approach emphasized the parties' freedom (or obligation) to define their own relationship.²⁵ The new rule presumed that either party could terminate the employment relationship absent express agreement to the contrary.²⁶

By the turn of the century, the at will rule was solidly entrenched in American law.²⁷ This policy of nonintervention was and sometimes still is justified by a formalistic approach to the doctrine of consideration. Courts reason that because at will employees are free to quit at any time, the creation of a right to continued employment would destroy mutuality of obligation.²⁸ A

23. Feinman, *supra* note 15, at 122-29.

24. P. SELZNICK, *supra* note 20, at 130-31.

25. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 319-20, 171 Cal. Rptr. 917, 921 (1981).

26. Parnar v. Americana Hotels, Inc., 652 P.2d 625, 628 (Hawaii 1982). Commentators date the birth of the American employment at will rule to the publication of Horace Gray Wood's 1877 treatise on the law of master and servant, which stated that "[a] general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877); see Feinman, *supra* note 15, at 125-27; Note, *supra* note 11, at 1825 n.51; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974) (noting that Wood's declaration was unsupported by the cases he cited as authority) [hereinafter cited as Note, *Implied Contract*].

For a thorough discussion of the development of the at will rule in the United States, see Feinman, *supra* note 15, at 122-29; Note, *Implied Contract*, *supra* at 340-46.

27. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, —, 335 N.W.2d 834, 837 (1983). The power to terminate at will received constitutional protection for a time. See *Coppage v. Kansas*, 236 U.S. 1 (1915) (state statute outlawing contracts whereby employee agrees not to join union held unconstitutional); *Adair v. United States*, 208 U.S. 161 (1908) (federal statute barring dismissal of employees because of union membership held unconstitutional). These cases subsequently were discredited. See *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

28. See, e.g., *Jones v. Keogh*, 409 A.2d 581, 582 (Vt. 1979); cf. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 448-49, 168 Cal. Rptr. 722, 725 (1980) (noting that the requirement of mutuality of obligation is the basis for the employment at will rule). But see *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 629 (Minn. 1983) (mutuality is "[s]imply a species of the forbidden inquiry into the adequacy of consideration"); *Weiner v. McGraw-*

more convincing explanation is that courts adopted the termination at will rule because it dovetailed with prevailing ideological convictions and economic needs.²⁹

Whatever its purported justification, the at will doctrine granted to employers absolute sovereignty over the workplace. The right to discharge employees at will effectively deprived employees of bargaining power in negotiations for wages, rules, and conditions of the workplace.³⁰ It also shifted to employees the risks of disturbances in the business cycle.³¹ Perhaps most important, the doctrine gave employers maximum flexibility to select and retain employees who best furthered their objectives³² and to discharge easily unproductive or troublesome employees.

As the number of employees in the workforce increased and the power of large corporations became secure, however, Congress and state legislatures responded to the shifting balance of political power and the need for stability in labor relations³³ by enacting statutes promoting collective bargaining. These statutes limited management's ability to terminate most employees covered by collective bargaining agreements.³⁴ Naturally, the strong federal commitment to collective bargaining does little to facilitate job security for the vast majority of American workers who cannot or do not belong to unions.

Hill, Inc., 57 N.Y.2d 458, —, 443 N.E.2d 441, 444 (1982) (mutuality in the sense of reciprocity not required when promisor receives other valid consideration).

29. See Note, *Implied Contract*, *supra* note 26, at 343.

30. Feinman *supra* note 15, at 132-33; see also P. SELZNICK, *supra* note 20, at 134-37 (noting that the contract of employment becomes "a mode of submission, if provision is not made for employee participation in the continuing process of rule-making and administration") (emphasis in original).

The employer's unfettered discretion to hire and fire was an important reason for the rise of labor unions. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320, 171 Cal. Rptr. 917, 921 n.5 (1981); see also Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1448 (1975).

31. See Feinman, *supra* note 15, at 133-34.

32. Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976) (large corporation must be accorded wide latitude in determining whom to hire for sensitive managerial position).

33. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 67, 417 A.2d 505, 509 (1980).

34. Approximately 80% of collective bargaining agreements require just cause for dismissal. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320-21 n.5, 171 Cal. Rptr. 917, 921 n.5 (1981) (citing Peck, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979)).

More widely applicable restraints on an employer's power to terminate were achieved by the enactment of state and federal statutes outlawing discharges for specified reasons, such as discrimination,³⁵ absence because of jury service,³⁶ garnishment of wages,³⁷ filing workers' compensation claims,³⁸ and refusing to submit to polygraph examinations.³⁹ These diverse statutes reflect a common concern that employers' power of termination should not subvert important public policies.

This same concern, together with changing philosophies of contract law, stimulated a period of judicial initiative in the mid-1970's, unparalleled in employment law since the development of the at will rule itself, that resulted in the development of private rights of action for wrongfully discharged at will employees. Courts recognize three distinct formulations of a private-damage remedy for wrongfully discharged at will employees: breach of implied-in-fact contract, violation of public policy, and breach of implied covenant of good faith and fair dealing.

B. Theories of Recovery

1. Breach of Implied-in-Fact Contract

Because the termination at will rule was derived from the parties' lack of express consent to be bound for a term, courts quickly began to enforce employers' assurances that employment would be terminated only for cause. For example, in *Toussaint v. Blue Cross & Blue Shield*,⁴⁰ the Michigan Supreme Court found that an employer had bound itself contractually not to discharge the plaintiff except for just cause because the employer had told the plaintiff when it hired him that he would be with the company "as long as

35. See, e.g., 42 U.S.C. § 2000e-2 (1981) (prohibiting discrimination because of race, color, sex, religion, or national origin).

36. See, e.g., WIS. STAT. § 756.25(1) (1981); see also [1980] LAB. L. REP. (CCH) (State Laws) ¶ 43,035 (listing statutes).

37. See, e.g., 15 U.S.C. § 1674(a) (1982); WIS. STAT. § 812.235 (1977).

38. See, e.g., OR. REV. STAT. § 659.410 (1981); TEX. REV. CIV. STAT. ANN. art. 8307(c) (Vernon Supp. 1984).

39. See, e.g., PA. STAT. ANN. tit. 18, § 7321(a) (Purdon 1983); see also Herman, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 97-102 (1971).

40. 408 Mich. 579, 292 N.W.2d 880 (1980).

he did his job."⁴¹

Integrating employer assurances into the contract requires modification of the traditional rule that promises of continued employment require independent consideration to be binding.⁴² A frontal assault on the at will rule, however, is unnecessary. The implied-in-fact contract approach merely permits courts to adjudicate consistently with a traditional contract principle: protect the parties' manifest expectations. In a number of cases, as in *Toussaint*, the employees derived their expectations from express verbal assurances of continued employment or of dismissal only for just cause.⁴³ In other cases, employees derived expectations from em-

41. *Id.* at 581-82, 292 N.W.2d at 891.

42. See Note, *Implied Contract*, *supra* note 26, at 351-52 ("In terms of 19th-century contract law, employees exchanged their labor and services for the salary they earned. If they wanted added job security, they had to pay the employer additional consideration to make the arrangement mutual and binding."). This view still exists in some jurisdictions. See, e.g., *Page v. Carolina Coach Co.*, 667 F.2d 1156 (4th Cir. 1982) (applying Maryland Law); *Ohio Table Pad Co. of Indiana v. Hogan*, 424 N.E.2d 144, 146 (Ind. App. 1981); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 895, 568 P.2d 764, 769 (1977).

The rule has been roundly criticized as being an incorrect analysis of consideration doctrine and a number of courts have rejected this rule. See, e.g., *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487, 492-93 (W.D. Ark. 1982); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 925 (1981) (independent consideration a rule of construction, not of substance); see also Note, *Implied Contract*, *supra* note 26, at 351-56; cf. *Yartzo v. Democrat-Herald Publishing Co.*, 28 Or. 651, 657, 576 P.2d 356, 359 (1978) (consideration to support post-employment handbook assurances of continued employment supplied by fact that employee had the right to quit but did not); *Pine River State Bank v. Mettile*, 333 N.W.2d 622, 629 (Minn. 1983).

43. See *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Peters v. Alabama Power Co.*, 440 So.2d 1028 (Ala. 1983); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629 (Nev. 1983); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982).

In some of these cases, parties asserted the statute of frauds as a defense. Because New York's Statute of Frauds requires written evidence of contracts for a lifetime, N.Y. GEN. OBLIG. § 5-701(a)(1) (McKinney 1978), courts applying New York law have held that claims of oral assurances of employment for the remainder of a career are unenforceable under the Statute of Frauds. See *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1116 (D. Mass. 1980) (applying New York law because of a choice-of-law clause in the employment contract); *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 824 (E.D.N.Y. 1980). In jurisdictions applying other states' laws, courts have rejected the statute of frauds defense because the contract could be performed within a year. See *Frazier v. Colonial Williamsburg Found.*, 574 F. Supp. 318, 320 (E.D. Va. 1983); *Stone v. Mission Bay Mortgage Co.*, 672 P.2d at 630-31. In *Mayer v. King Cola of Mid American Inc.*, 660 S.W.2d 746 (Mo. App. 1983), an oral contract of employment for a three-year term was held unenforceable under the statute of

ployment manuals, policies, or handbooks unilaterally developed, published, and distributed by employers.⁴⁴

Although the implied contract approach is a step in the direction of satisfying employees' expectations, it may be a fleeting solution only. As employers—particularly the larger and more sophisticated employers—receive legal advice about this source of potential liability, they are likely to insert disclaimers about job security in their personnel literature and instruct their recruiting staff to refrain from giving any verbal assurances that the company will terminate employees only for cause.⁴⁵ Even in the absence of explicit

frauds.

44. See, e.g., *Wiskeotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Frazier v. Colonial Williamsburg Found.*, 574 F. Supp. 318 (E.D. Va. 1983); *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978); *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (S.D. 1983). Some employees have been permitted to maintain their implied contract actions in cases in which personnel manuals, handbooks, and policies were published or distributed after employment had begun. See, e.g., *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Yartsoff v. Democrat-Herald Publishing Co., Inc.*, 281 Or. 651, 576 P.2d 356 (1978). But see *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976) (post-employment manual did not create contract rights in employee); *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982) (post-employment handbook assurances did not create implied contract but were treated as relevant to the ultimate finding of an implied-in-law covenant of good faith and fair dealing).

Some courts have rejected the notion that published statements of employer policies create implied contract rights. See *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. App. 1981) (handbook did not entitle plaintiff to any specific term); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536 (Tex. App. 1982) (policies published in handbook state general guidelines and do not create agreement because employer can unilaterally amend or withdraw contract).

45. In *Batchelor v. Sears, Roebuck & Co.*, 114 L.R.R.M. (BNA) 3467 (E.D. Mich. 1983), the plaintiff signed an application for employment that contained a term expressly stating that the employer had the right to discharge at will. The court held that the provision became part of the employer's offer and thus part of the contract when plaintiff accepted it. *Id.* at 3470. The court noted that the disclaimer was a policy statement of the employer and that if a statement of policy can bind the employer to an implied contract, as in *Toussaint*, it also should be possible for an employer to protect itself by a statement of policy. *Id.* If the statement is uncontradicted by other assurances, the court concluded that it would preclude the development of expectations that the employer would discharge only for cause. *Id.* at 3471.

In two cases in which the disclaimer of job security was alleged to have been controverted by contrary assurances, plaintiffs' claims survived summary judgment. In *Stone v. Mission Bay Mortgage Co.*, 672 P.2d 629 (Nev. 1983), a statement on an application for employment that the employment was for no definite period and might be terminated at any time without notice did not necessarily preclude the employee from proving the existence of an oral contract for one year. The court noted that the application was for informational purposes and that the parties should have the opportunity to prove whether it was intended to be-

assurances of discharge only for just cause, it seems unrealistic to presume that employees do not develop expectations of some job security.⁴⁶

2. Discharge in Violation of Public Policy

A second exception to the at will rule makes employers accountable, generally in tort,⁴⁷ for discharging an employee for a reason that contravenes public policy. To maintain such an action, the discharged employee must prove a connection between the reason for his termination and an acknowledged public policy other than the general policy favoring employment and stability in labor relations.⁴⁸ Like the statutory restrictions on discharge, this approach focuses on enforcing independent public policies that conflict with parties' employment relationships.⁴⁹ Only incidentally are the employee's interests furthered.⁵⁰

The "Achilles heel" of the public policy exception is the imprecise

come part of their contract. *Id.* at 630; *see also* *Arie v. Intertuerm, Inc.*, 648 S.W.2d 142 (Mo. App. 1983).

46. *See* Note, *supra* note 11, at 1831-32 (noting that employees frequently fail to bargain for job security because, lacking information, they discount risk of wrongful discharge).

47. *E.g.*, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (applying Pa. law); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984). *But see* *Vigil v. Arzola*, 22 N.M. St. B. BULL 868, 874 (1983); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, —, 335 N.W.2d 834, 841 (1983) (only contract remedies available).

The use of more traditional tort causes of action in wrongful discharge cases is controversial. *Compare* *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (employee had an action for intentional infliction of emotional distress) *with* *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 303, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232, 236 (1983) (no action for intentional infliction of emotional distress, which would evade court's refusal to recognize cause of action for wrongful discharge) *and* *Daniel v. Magma Copper Co.*, 620 P.2d 699, 703 (Ariz. App. 1980) (no recovery for intentional infliction of emotional distress because termination was lawful). *See* *Krauskopf*, *supra* note 12, at 223-32 (discussing recovery under traditional theories of intentional infliction of emotional distress, interference with prospective advantage, and *prima facie* tort).

48. *Cloutier v. Great Atlantic & Pacific Tea Co.*, 436 A.2d 1140, 1143 (N.H. 1981); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

49. *See* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981) ("The foundation of the tort of retaliatory discharge lies in the protection of public policy. . . ."); Note, *supra* note 12, at 158 (concluding that courts will not intervene unless "the employer's conduct implicates something that the public has at stake. . . .").

50. *See* *Krauskopf*, *supra* note 12, at 235.

sion inherent in the term "public policy."⁵¹ A few courts have rejected the public policy theory altogether, out of discomfort with the theory's imprecision or out of deference to legislative prerogatives.⁵² Most courts that have adopted the public policy theory require that the employee be able to point to "a clear mandate of public policy" as expressed in existing law.⁵³ Other courts define public policy more narrowly, requiring that the policy exist in some specific statutory or constitutional provision.⁵⁴ Courts have been

51. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981).

52. See *Johnson v. B & N Steakhouse*, 443 So. 2d 924 (Ala. 1983); *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Murphy v. American Home Prods.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. App. 1981); *Maus v. National Living Centers*, 633 S.W.2d 674 (Tex. App. 1982).

The at will doctrine also survived a public policy attack in two cases involving bank employees. Federal banking laws stating that banks shall have the right to dismiss employees "at pleasure" were held to have preempted any state remedy. See *Inglis v. Feinerman*, 114 L.R.R.M. (BNA) 3481 (9th Cir. 1983); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981).

53. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); cf. *Jones v. Keough*, 137 Vt. 562, 409 A.2d 581 (1979) (court unwilling to recognize suits for wrongful discharge absent clear and compelling public policy).

A few courts have employed a broad construction of public policy, rejecting the necessity for an explicit statutory declaration. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Petrik v. Monarch Printing Co.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982); *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981).

The New Hampshire Supreme Court held the determination of public policy to be a proper issue to submit to a jury. *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. at —, 436 A.2d at 1145. *Contra*, *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, —, 335 N.W.2d 834, 841 (1983).

54. See, e.g., *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. App. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981); *Delaney v. Taco Time Int'l, Inc.*, 65 Or. App. 160, 670 P.2d 218 (1983), *rev'd*, 681 P.2d 114 (1984); *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

When the statutory policy is found in a statute that supplies its own remedies, however, courts disagree about whether the statutory remedy precludes an independent action for wrongful discharge. This question has arisen concerning the exclusivity of statutory remedies for employment discrimination. Alternative actions for wrongful discharge are particularly attractive to plaintiffs in such cases because of the short statutes of limitation and

careful to distinguish matters implicating the public interest from those "menial mendacities"⁵⁵ involved in purely private disputes.⁵⁶

The standard used to restrain employers from violating the public interest must meet two criteria that are not easily accommodated. First, the standard must identify public interests that are sufficiently important to override employers' interests in conducting their business as they see fit. Second, courts must be able to administer the standard with sufficient consistency to provide predictable results. Articulating a standard that meets both criteria has proved a challenging task for courts. An expansive conceptualization of public policy promotes just results by providing courts with the ability to determine on a case-by-case basis whether the policy involved is of sufficient importance to justify limitations on the power of termination. Such an approach, however, threatens legitimate managerial discretion⁵⁷ because it gives business owners little means of determining in advance whether a given decision to terminate would be lawful.⁵⁸

A broad public policy exception also can result in high litigation costs and the corresponding burden on judicial resources that often attend nebulous causes of action.⁵⁹ In addition, a case-by-case approach that eases the requirements for a *prima facie* showing may

limited damage remedies that are characteristic of statutory discrimination actions. *Compare* *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982) (statutory remedy exclusive for discrimination on the basis of handicap) *and* *Bachand v. Connecticut Gen. Life Ins. Co.*, 101 Wis. 2d 617, 305 N.W.2d 149 (1981) (same) *with* *Holien v. Sears, Roebuck Co.*, 66 Or. App. 911, 677 P.2d 704 (1984) (statutory remedy for sex discrimination did not preclude wrongful discharge action) *and* *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982) (recovery under Age Discrimination in Employment Act did not preclude action for wrongful discharge), *cert. denied*, 459 U.S. 859 (1982). *Cf.* *Frazier v. Colonial Williamsburg Found.* 574 F. Supp. 318 (E.D. Va. 1983) (Title VII did not preclude employee's action for breach of implied contract); *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (termination of plaintiff because of age violated implied covenant of good faith and fair dealing).

55. *Delaney v. Taco Time Int'l, Inc.*, 65 Or. App. 160, 167, 670 P.2d 218, 222 (1983).

56. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 131, 421 N.E.2d 876, 879 (1981); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811, 812 (Ky. App. 1977); *Nees v. Hocks*, 272 Or. 210, 218, 536 P.2d 512, 515 (1975).

57. *See* *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 510-11 (1980).

58. Note, *Limiting the Right to Terminate At Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 226-28 (1982).

59. *See* *Geary v. United States Steel Corp.*, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

promote vexatious lawsuits and large damage awards by permitting employees with marginal claims to submit their cases to sympathetic juries.⁶⁰ Although important public policies exist that are not stated expressly in constitutional or statutory provisions, caution about basing the wrongful discharge action on judicial declarations of public policy⁶¹ is understandable.

The public policy cases can be viewed along a continuum. Plaintiffs are most likely to prevail when two factors are present: the public policy is clear, that is, both specific and based on written law, and the discharge presents a clear threat of frustrating that policy.⁶² Exemplifying the extreme on the continuum in which judicial intervention is most likely to occur are the cases in which employees are discharged for refusing to commit an illegal act.⁶³ In the earliest public policy case, *Petermann v. International Brotherhood of Teamsters*,⁶⁴ the California Supreme Court recognized a cause of action for an employee dismissed after refusing to commit perjury.⁶⁵ Similarly, courts have recognized rights of action for em-

60. See *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 397 (Tenn. Ct. App. 1981); see also Note, *supra* note 58, at 229.

61. See *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Hawaii 1982) (courts should proceed cautiously in declaring public policy in the absence of statute); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 456 (Iowa 1978) (courts should not declare conduct violative of public policy unless clearly so).

62. This analysis is suggested in Note, *Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 635-41 (1981). The author identifies substantiality of public policy and impact of the discharge on public policy as the two major variables influencing courts in public policy cases. *Id.* at 622, 635.

63. Not every discharge for refusal to perform a "wrongful" act gives rise to a wrongful discharge action. See *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976) (plaintiff's termination for complaints about employer's practices and refusal to provide false information to government not actionable); *Hinrichs v. Tranquillaire Hosp.*, 352 So.2d 1130 (Ala. 1977) (no cause of action for employee discharged for refusing to falsify medical records); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (no cause of action for employee allegedly discharged for age, reporting improper accounting practices and refusing to engage in accounting improprieties); *Delaney v. Taco Time Int'l Inc.*, 65 Or. App. 160, 670 P.2d 218 (1983) (reversing judgment for plaintiff discharged for refusing to sign a false statement about another employee's termination).

These results may be explained by the clarity factor. None of the plaintiffs in these cases identified a specific statutory declaration outlawing the act which they were discharged for refusing to perform. In *Delaney*, the court noted that no statute makes the signing of a false statement illegal. *Delaney v. Taco Time Int'l Inc.*, 650 Or. App. at 167, 670 P.2d at 221.

64. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

65. *Id.* at 190, 344 P.2d at 28.

ployees discharged after refusing to participate in a price fixing scheme,⁶⁶ refusing to perform a medical procedure for which she was not licensed,⁶⁷ and refusing to falsify a state-required pollution control report.⁶⁸

In such cases involving a refusal to commit an illegal act, the public policy stated in criminal and regulatory statutes is clear, and a high degree of public interest exists in enforcing those statutes. The public interest in enforcing the statute would be frustrated if an employee, forced to elect between losing his job or violating the law, chose the latter. The recognition of a private remedy for wrongful discharge in such cases promotes obedience to the law on the part of employees by removing the strong incentive to disobedience (loss of employment) that would exist otherwise.

Other relatively clear examples of cases on this part of the continuum include cases in which employees are discharged for performing a legal duty such as jury service,⁶⁹ or for taking advantage of some right granted by statute. Cases abound in which employees have been granted a remedy when they were discharged for filing workers' compensation claims.⁷⁰ In two cases, employees were held

66. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

No judicial consensus exists concerning whether an employee who is discharged for refusing to violate antitrust laws has standing to sue her employer under section 4 of the Clayton Act. Compare *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982) (employee had standing) with *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982) (employee did not have standing), cert. denied, 103 S. Ct. 1261 (1983). See generally Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 MICH. L. REV. 1846 (1983). See also Krauskopf, *supra* note 12, at 220-21.

67. *O'Sullivan v. Mallon*, 160 N.J. Super 416, 390 A.2d 149 (1978).

68. *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978).

69. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); cf. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983) (plaintiff had case for wrongful discharge on implied contract and public policy theories when discharged for appearing before grand jury, pursuant to subpoena, regarding a matter about which he was under suspicion). But see *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980) (employee had no cause of action when discharged for serving on grand jury).

70. See, e.g., *Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983); *Kel-say v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 425 (1979); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730 (Ky. 1983); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Lally*

to have stated a cause of action when they were discharged in violation of a state law that prohibited employers from conditioning employment on the taking of a polygraph examination.⁷¹ De facto frustration of the statutory objective would result if no private remedy were available in such cases.

Occupying the middle range of the continuum are the "conscientious objector" cases, in which employees are discharged for their efforts to bring their employers into compliance with some law, regulation, or code, and "whistleblower" cases,⁷² in which employees are discharged for alerting legal authorities or corporate management to incidents of wrongdoing by their companies or fellow employees. Such cases are less deserving of judicial intervention than are the first group of cases because the employee is discharged for performing an act he has no duty or even a specific legal right to perform. Nevertheless, a court in this type of case may be tempted to sacrifice the certainty of the "clear public policy" rule for the flexibility of a more expansive approach.

In *Palmateer v. International Harvester Co.*,⁷³ for example, an employee was discharged for supplying information to police about a fellow employee's possible involvement in a crime and for agreeing to assist in the investigation and trial if needed. The Illinois Supreme Court defined public policy broadly as what is "right and just and which affects the citizens of the State collectively."⁷⁴ The court identified the public policy involved as the enforcement of

v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (en banc); cf. *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. 1981) (seaman discharged in retaliation for filing Jones Act claim has cause of action under maritime law); *Wiley v. Missouri Pacific R.R. Co.*, 430 So.2d 1016 (La. App. 1982) (employee discharged for filing FELA claim against employer had cause of action for wrongful discharge). But see *Johnson v. B & N Steakhouse*, 443 So. 2d 924 (Ala. 1983); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Bottijliso v. Hutchison Fruit Co.*, 635 P.2d 992 (N.M. 1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978).

71. *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982).

72. See generally Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based on Determinants of Public Policy*, 1977 Wis. L. REV. 777.

73. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

74. *Id.* at 130, 421 N.E.2d at 878.

the state criminal code,⁷⁵ although it acknowledged that no specific provision of state law required private individuals to ferret out crime.⁷⁶ Stating that public policy favored the plaintiff's conduct, the court held that the plaintiff had stated a cause of action for retaliatory discharge.⁷⁷

Palmateer and similar cases⁷⁸ represent a minority approach, however. In other cases along the middle of the continuum, the clarity of the public policy promoted by the employee's efforts retains predictive value. Courts are much more sympathetic to employees discharged for advocating compliance with some specific statute or regulation than to employees whose discharges were occasioned by disagreements over personal interpretations of good business practice.⁷⁹ Whistleblowers reporting instances of violations of clearly specified laws have enjoyed greater success than have those reporting ill-defined instances or patterns of wrongdoing.⁸⁰ With one notable exception,⁸¹ courts have refused to recog-

75. *Id.* at 132, 421 N.E.2d at 879.

76. *Id.* at 132, 421 N.E.2d at 880.

77. *Id.* at 133, 421 N.E.2d at 880.

78. See *Petrik v. Monarch Printing Co.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (employee discharged for reporting his suspicions of a superior's embezzlement of corporate funds had an actionable claim for retaliatory discharge).

79. Compare *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (employee discharged because of efforts to correct variation between employer's label and requirements of the Connecticut Food and Drug Act) and *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978) (employee discharged for attempting to correct bank's illegal practice of overcharging customers) with *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (physician employee who opposed development of drug on belief that her continued participation would violate her Hippocratic oath had no cause of action) and *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (sales employee voiced misgivings about one of the employer's products; no cause of action despite praiseworthiness of his motives) and *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978) (nurse objected to cyclic staffing practice, arguing that resulting poor patient care would violate broad terms of state nursing statute had no cause of action) and *Maus v. National Living Centers*, 633 S.W.2d 674 (Tex. App. 1982) (nurse's aide who complained about poor patient care had no cause of action despite Texas statute requiring nursing home employees to report abuse; recognition of a cause of action for legislature or higher court).

80. Compare *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982) (secretary stated issue of triable fact in allegation that she was discharged after interview with company attorney about her knowledge of a superior's antitrust violations to induce her to leave the jurisdiction; public policy found in antitrust statutes) with *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981) (plaintiff's complaint that he was discharged for reporting to internal authorities numerous improper and possibly illegal practices within

nize the right of employees to voice complaints or objections to employers' practices⁸² as a public policy giving rise to an action for wrongful discharge.

Judicial intervention is highly unlikely at the extreme end of the continuum where cases have involved private disputes or internal matters in which no clearly expressed public interest is implicated. Courts have rejected claims of wrongful discharge when employees were discharged for complaining about personnel policies⁸³ and poor internal management,⁸⁴ for announcing the intention to at-

corporation was too vague and conclusory to state a claim) and *Martin v. Platt*, 179 Ind. App. 688, 386 N.E.2d 1026 (1979) (plaintiff discharged for reporting to company officials that an employer was taking kickbacks did not state a claim; court declined to provide a remedy for a discharge that violates general public policy).

A few states have statutes that prohibit discharge or discipline of whistleblowers in the private sector. These statutes provide a remedy only when the employee reports a violation or suspected violation of a state or federal law or regulation or municipal ordinance or regulation to a public body. See CONN. GEN. STAT. ANN. § 31-51m (West. Supp. 1983); MICH. COMP. LAWS ANN. § 15.362 (West 1981); see also *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982). Washington's whistleblower statute provides a broad scope of protected disclosure for public employees, who are permitted to report without loss of employment a variety of ill-defined wrongs such as abuse of authority, commission of an act that substantially threatens public health or safety, or gross waste of public funds. See WASH. REV. CODE §§ 42.40.010-42.40.050 (West. Supp. 1984).

81. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983), the plaintiff was asked to participate in a lobbying effort for no-fault reform. When he refused and privately stated his opposition to the company's position, he was discharged. The court found that political and associational freedoms constituted a significant public policy and reinstated plaintiff's claim. *Id.* at 898-900.

Connecticut recently enacted a statute providing that any employer who subjects an employee to discipline or discharge on account of the employee's exercise of first amendment rights is liable for damages including punitive damages and costs of the action, providing that the employee's exercise of rights does not substantially or materially interfere with job performance or working relationships. See 1983 CONN. PUB. ACTS 83-578.

82. See, e.g., *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 620 P.2d 699 (Ariz. Ct. App. 1980) (employee, discharged for filing suit naming employer as defendant, had no cause of action for wrongful discharge); *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ariz. Ct. App. 1977) (employee, discharged for refusal to submit to psychological stress evaluation test required of all employees, had no right to refuse to follow company policy); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978) (nurse who objected to staffing practices of hospital employer had no cause of action for wrongful discharge); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982) (no public policy offended by discharge of employee who discovered and reported poor internal management).

83. *Boresen v. Rohm & Haas, Inc.*, 526 F. Supp. 1230 (E.D. Pa. 1981).

84. *Suchodolski v. Michigan Consol. Gas. Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).

tend law school at night,⁸⁵ for destroying a pair of work gloves,⁸⁶ for smoking marijuana in the presence of company personnel and having an affair with a secretary,⁸⁷ and for testifying truthfully and becoming a party to a lawsuit against the employer.⁸⁸

The policy favoring employer discretion in matters related to the efficient operation of the workplace is most apparent in courts' "hands-off" approach to these cases. Included in this category are the conscientious objector and whistleblower cases, in which employees are discharged for reporting or complaining about practices that violate their personal judgment or moral code but do not violate any specific statute, regulation, or ordinance. Situations in which employees become embroiled in disputes with management about issues open to interpretation are fraught with internal political ramifications, and judicial intervention in such cases could unduly burden managerial discretion. Absent the existence of a clear expression of public policy, it is difficult to articulate a legal standard that would grant a remedy to employees acting reasonably and in good conscience but that would not also create a cause of action for almost any disruptive or disloyal employee. These cases demonstrate courts' conviction that employees' individual freedoms and any general policy favoring the promotion of job security do not justify judicial intervention.⁸⁹

3. Breach of The Implied Covenant of Good Faith and Fair Dealing

The third, and most malleable, formulation of the action for wrongful discharge is breach of the implied-in-law covenant of good faith and fair dealing.⁹⁰ The implied covenant approach

85. *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977).

86. *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668 (Ind. App. 1984).

87. *Brockmeyer v. Dun & Bradstreet*, 113 Wisc. 2d 561, 335 N.W.2d 834 (1983).

88. *Meredith v. C.E. Walther, Inc.*, 422 So. 2d 761 (Ala. 1982).

89. *See Shapiro v. Wells Fargo Realty Advisers*, 152 Cal. App. 3d 530, 199 Cal. Rptr. 613 (1984).

90. Four states recognize an implied covenant of good faith and fair dealing in employment contracts: *Alaska*: *Mitford v. Lasala*, 666 P.2d 1000 (Alaska 1983); *California*: *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Massachusetts*: *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Montana*: *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063 (Mont. 1982).

A fifth state, New Hampshire, originated the theory in *Monge v. Beebe Rubber Co.*, 114

blends the underlying objectives of the other two approaches. It is directed at policing undesirable conduct, a traditional concern of public policy, and at preventing the bad faith frustration of an employee's expectations; it is essentially an extremely broad public policy approach in which judicially declared policies become incorporated in the employment contract.⁹¹

This approach is an extension of the development of implied duties of good faith and fair dealing on the part of insurance companies, a trend that began in the late 1960's.⁹² Its development in employment contracts can be traced to the 1974 New Hampshire case, *Monge v. Beebe Rubber Co.*⁹³ In *Monge*, a press machine operator was discharged in retaliation for her refusal to date her foreman. The New Hampshire Supreme Court stated that the public had an interest in maintaining a proper balance between the employee's interest in maintaining employment and the employer's interest in running his business as he sees fit.⁹⁴ It concluded that terminations motivated by bad faith, malice, or retaliation contravene the interests of the economic system and the public good, and constitute a breach of contract.⁹⁵ Although the court did not mention the implied covenant of good faith and fair dealing by name, its finding of an extracontractual duty not to terminate in bad faith accomplishes the same result.⁹⁶

N.H. 130, 316 A.2d 549 (1974), but more recent New Hampshire cases have restricted substantially the holding of *Monge*. See *infra* note 96.

91. See Note, *supra* note 58, at 216-22.

92. See *Crisci v. Security Pacific Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). The development of the duty of good faith and fair dealing is traced in J. MCCARTHY, PUNITIVE DAMAGES IN BAD FAITH CASES § 1.15, at 31-40 (1983); see also Note, *Good Faith and Fair Dealing in Insurance Contracts*: Gruenberg v. Aetna Insurance Co., 25 HASTINGS L.J. 699 (1974). Several courts deciding wrongful discharge cases have alluded to the insurance cases as authority for the implication of a duty of good faith and fair dealing. See, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980); *Gates v. Life of Montana Ins. Co.*, 618 P.2d 1063, 1066 (Mont. 1982).

93. 114 N.H. 130, 316 A.2d 549 (1974).

94. *Id.* at 133, 316 A.2d at 551.

95. *Id.*

96. More recent New Hampshire cases restrict the *Monge* approach by requiring both bad faith and a violation of public policy for a wrongful discharge cause of action. See *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981). Although *Monge* was decided on a contract theory and limited damages to lost wages, New Hampshire's new two-pronged cause of action now is analyzed as a hybrid between contract and tort. *Vandegrift v. American Brands Corp.*, 572 F. Supp. 496, 499 (D.N.H. 1983). It is unclear whether a suc-

The breach of the implied covenant of good faith and fair dealing cause of action was articulated expressly in *Fortune v. National Cash Register Co.*,⁹⁷ a 1977 Massachusetts case. In *Fortune*, a salesman alleged that his employer discharged him in bad faith to decrease the commission he would otherwise have received for a large sale. Pointing to a variety of contracts in which courts have applied the duty of good faith and fair dealing, and citing *Monge* as authority for the extension of the duty to employment contracts, the court observed that good faith and fair dealing are pervasive requirements in the law.⁹⁸ Though the court recognized an employer's need to control its work force and its right to act in its own legitimate business interests, the Supreme Judicial Court of Massachusetts stated that, when commissions are paid for work performed by an employee, the decision to terminate an at will employee should be made in good faith.⁹⁹ Although the court found a breach of contract on the facts before it,¹⁰⁰ it refused to speculate whether it would apply the implied covenant of good faith and fair dealing to all contracts for at will employment.¹⁰¹

The United States District Court for the District of Massachusetts applied Massachusetts law and extended the holding in *Fortune* to an at will employee when the avoidance of payment of benefits was not an issue. In *McKinney v. National Dairy Council*,¹⁰² the district court held the dismissal of an employee because of his

cessful plaintiff in New Hampshire would still be restricted to contract damages.

97. 373 Mass. 96, 364 N.E.2d 1251 (1977).

98. *Id.* at 102-04, 364 N.E.2d at 1256-57.

99. *Id.* at 104, 364 N.E.2d at 1256.

100. *Id.* at 104, 364 N.E.2d at 1257.

101. *Id.* Similar results have been reached in subsequent cases where employees were discharged to avoid the payment of commissions and other benefits. See *Mitford v. Lasala*, 666 P.2d 1000 (Alaska 1983); *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); cf. *Cappiello v. Ragen Precision Indus., Inc.*, 192 N.J. Super. 523, 471 A.2d 432 (1984) (recovery on express contract, not employing covenant of good faith and fair dealing).

In *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980), an employee was discharged two years before his pension rights were to vest to avoid the expense of paying into the pension plan. The District Court held that this gave rise to a cause of action for wrongful discharge under New York law as a violation of the public policy favoring the integrity of pension plans. The precedential value of this case is doubtful, however, because New York rejected the cause of action for wrongful discharge three years later in *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86 (1983).

102. 491 F. Supp. 1108 (D. Mass. 1980).

age violated the implied covenant of good faith and fair dealing.¹⁰³ In *Gates v. Life of Montana Insurance Co.*,¹⁰⁴ the Montana Supreme Court held that an employer who obtains plaintiff's resignation by deceptive means breaches the covenant of good faith and fair dealing¹⁰⁵ even though the facts of the case indicate that the employer would have had ample cause for discharging the plaintiff.

Several courts have refused to apply the covenant of good faith and fair dealing in employment contracts on the ground that it would require an employer to prove just cause for every termination.¹⁰⁶ This concern is unfounded because good faith is not the equivalent of good cause. A good cause standard permits the trier of fact to find a discharge wrongful if the facts of the case do not demonstrate a fair and honest reason for the discharge.¹⁰⁷ Conversely, to satisfy a good faith standard, a good reason for the discharge need not exist. Instead, only the absence of a bad faith motive or conduct need exist.¹⁰⁸ An employee's discharge for reasons of personal dislike or as a result of sloppy, negligent, or unfair business practice does not constitute a breach of the covenant of good faith.¹⁰⁹

The closest any implied covenant case has come to treating good faith as being equal to good cause is *Cleary v. American Airlines, Inc.*¹¹⁰ In *Cleary*, an employee of eighteen years was discharged, ostensibly for infractions of company regulations. The plaintiff alleged that no complete or honest investigation preceded his dis-

103. *Id.* at 1121-22.

104. 638 P.2d 1063 (Mont. 1982).

105. *Id.* at 1062; see also *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213 (Mont. 1983) (a subsequent appeal on the issue of damages).

106. See, e.g., *Daniel v. Magma Copper Co.*, 129 Ariz. 320, —, 620 P.2d 699, 703 (Ariz. Ct. App. 1980); cf. *Rozier v. St. Mary's Hospital*, 88 Ill. App. 3d 994, 999, 411 N.E.2d 50, 54 (1980) (declining to accept general public policy approach); *Delaney v. Taco Time Int'l, Inc.*, 65 Or. App. 160, 165, 670 P.2d 218, 222 (1983) (same).

107. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 927-28 (1981).

108. See *Krauskopf*, *supra* note 12, at 215.

109. *Magnan v. Anaconda Indus., Inc.*, 37 Conn. Supp. 38, 429 A.2d 492 (1980); *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981); *Siles v. Travenol Laboratories, Inc.*, 13 Mass. App. 354, 433 N.E.2d 103 (1982); cf. *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 530, 199 Cal. Rptr. 613 (1984) (unless case came within one of three theories for wrongful discharge recognized in California, employee had no cause of action).

110. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

charge and that the discharge was actually in retaliation for his unionizing activities. The California Court of Appeals held that the plaintiff had stated a cause of action under the public policy theory but that he was entitled to his day in court under the implied covenant of good faith and fair dealing theory even if his public policy allegations were later stricken.¹¹¹ The court stated that termination of employment without legal cause after eighteen years of service offends the implied covenant, which requires that the employer do nothing to deprive the employee of the benefit of the employment bargain.¹¹² *Cleary* is a case unusual in both its facts and its approach. In most implied covenant cases, courts have not inferred bad faith from the absence of good cause. Bad faith has not meant the *use* of the power of termination without good reason, but rather the *abuse* of the power of termination.¹¹³ Courts have found abuse in the use of the power of termination for ulterior reasons unrelated to job performance¹¹⁴ and in reprehensible conduct surrounding the termination.

A more meritorious concern that has led other courts to reject the implied covenant approach is that the concept of good faith is even more amorphous than the concept of public policy.¹¹⁵ Although a good faith standard would not render an employer liable for every unjustified discharge, it would subject employers to unpredictable lawsuits in which sympathetic juries would be permitted to decide whether the employer's conduct comported with an inherently nebulous and subjective standard.¹¹⁶ The implied covenant theory represents a flexible standard that can facilitate employees' expectations and police wrongful conduct that is not necessarily illegal, but it suffers from obvious deficiencies in certainty and predictability.

The three wrongful discharge theories place substantial limita-

111. *Id.* at 455-56, 168 Cal. Rptr. at 729.

112. *Id.* at 455, 168 Cal. Rptr. at 729.

113. See Krauskopf, *supra* note 12, at 215.

114. *Id.*

115. See, e.g., *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Hawaii 1982); *Brockmeyer v. Dun & Bradstreet*, 113 Wisc. 2d 561, 335 N.W.2d 834, 838 (1983).

116. Cf. *Rozier v. St. Mary's Hosp.*, 88 Ill. App. 3d 994, 998-99, 411 N.E.2d 50, 53-54 (1980) (general public policy standard would result in increased possibility of litigation, harassment of employers, and life tenure regardless of job performance).

tions on employers' power to dismiss at will employees. These theories merely define the outer limits of the employer's discretion, however, and leave undisturbed the right to terminate at will in all but exceptional situations. The determination of whether punitive damages should be available in wrongful discharge cases is complicated by the lack of consensus concerning the theories of recovery recognized and the approaches used within a given theory. Any formulation of guidelines for the use of punitive damages in wrongful discharge cases must consider the purposes to be served by both punitive damages and wrongful discharge doctrines.

II. THE DOCTRINE OF PUNITIVE DAMAGES

Punitive civil remedies are of ancient origin, dating as far back as the Code of Hammurabi in 2000 B.C..¹¹⁷ In the common law system, the development of punitive damages was largely an historical accident. In a period in which clear damages formulae had not yet been established, English courts rationalized their reluctance to disturb jury verdicts by stating that the jury could impose an extra measure of damages by way of example to a defendant whose conduct had been especially wrongful.¹¹⁸ American jurisdictions readily adopted the doctrine of punitive damages,¹¹⁹ and it quickly became so well-engrained in American law that in 1851, the United States Supreme Court remarked that the availability of punitive damages "will not admit of argument."¹²⁰

Although one commentator has argued that punitive damages are anachronistic in an era of well-developed damages law,¹²¹ the expansive application of such damages indicates that the contin-

117. See K. REDDEN, PUNITIVE DAMAGES § 2.2(a)(1), at 24 (1980); Igoo, *Punitive Damages: An Analytical Perspective*, TRIAL, Nov. 1978, at 48, 50.

118. For an extensive discussion of the historical development of punitive damages in the common law, see Sullivan, *supra* note 5, at 208-14.

119. See, e.g., *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791); *Genay v. Norris*, 1 S.C. (1 Bay. 6) 3 (1784).

120. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). Recently the United States Supreme Court stated, "Although there was debate about the theoretical correctness of the punitive damages doctrine in the latter part of the last century, the doctrine was accepted as settled law by nearly all state and federal courts, including this Court." *Smith v. Wade*, 461 U.S. 30 (1983).

121. Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in *THE CASE AGAINST PUNITIVE DAMAGES* 4 (Defense Research Institute 1969).

ued existence of a punitive civil remedy is not due to mere judicial inertia, but rather to the reality that the doctrine serves useful purposes in modern law. All damage remedies perform a compensatory or reparative function and, to the extent that liability for damages depends on a finding of the defendant's failure to comply with some duty supplied by law or contract, all damage remedies perform an admonitory function.¹²² Although the doctrine of punitive damages serves a compensatory purpose, its primary purpose is to strengthen the admonitory force of the civil law.¹²³

A. Purposes Served by Punitive Damages

One obvious purpose of punitive damages is to punish the defendant for his wrongful act.¹²⁴ This institutionalized retribution expresses society's disapproval of the act and thus operates as moral education of the defendant.¹²⁵ It reduces tensions aroused by a flouting of social order and decreases the likelihood that victims of wrongful conduct will resort to violent means of self-help.¹²⁶

Another major purpose of punitive damages is to deter the defendant and others like him from engaging in similar future misconduct.¹²⁷ As a practical matter, this purpose is inseparable from the punitive purpose because deterrence is the hoped-for by-product of the punishment. The use of punitive damages is especially valuable in cases where, because of small compensatory damages or the absence of other sanctions, the defendant would have little else to lose by committing the wrongful act.¹²⁸ A defendant contemplating a breach of duty under these circumstances would have a strong temptation to breach if the benefit to him exceeded the cost of breaching. The threat of becoming subject to a punitive damages award in an uncertain sum, however, renders such a cal-

122. See Morris, *supra* note 5, at 1173-76.

123. *Id.*

124. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); see also Ellis, *supra* note 2, at 6-8; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 876-77 (1976).

125. See Owen, *Civil Punishment*, *supra* note 5, at 109.

126. See Morris, *supra* note 5, at 1198-99; see also Mallor & Roberts, *supra* note 5, at 650.

127. *E.g.*, *Zarcone v. Perry*, 572 F.2d 52, 55 (2d Cir. 1978); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 159 (Mo. Ct. App. 1983).

128. See, *e.g.*, *Harris v. Wagshal*, 343 A.2d 283, 288-89 n.13 (D.C. App. 1975).

culated cost-benefit analysis impossible.¹²⁹ Thus, the availability of punitive damages can have a powerful tempering effect on the behavior of certain types of defendants.¹³⁰

Another method by which punitive damages furthers the enforcement of civil law is by creating an incentive for private individuals to bring wrongdoers to justice.¹³¹ The financial incentive of recovering punitive damages can be an important factor in motivating a plaintiff to press a claim,¹³² particularly one for which only a small compensatory remedy is available. Because a wide range of socially undesirable behavior is not defined as a crime or likely to be punished criminally, private lawsuits may be the only opportunity for courts to punish such behavior. The more extreme the misconduct, the greater is society's interest in having the wrongdoer brought to justice.

Finally, punitive damages serve a compensatory function by compensating the plaintiff for transactional expenses such as attorneys' fees that generally are not recoverable in the American legal system.¹³³ Absent the availability of a punitive remedy, the victim

129. For example, punitive damages have been used to deter bad faith patterns of conduct by insurers. *See, e.g.,* *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 582 P.2d 980, 148 Cal. Rptr. 389 (1978).

130. *See* Owen, *Civil Punishment*, *supra* note 5, at 105-06 (suggesting that punitive damages have a greater deterrent impact on institutional and professional defendants than on individual defendants).

131. *See, e.g.,* *Brown v. Coates*, 253 F.2d 36, 40 (D.C. Cir. 1958); *Kink v. Combs*, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965); *see also* D. DOBBS, *supra* note 1, § 3.9, at 205. The same desire to stimulate law enforcement by private individuals underlies statutory treble-damage remedies available under the antitrust laws. *Brown*, 253 F.2d at 40 n.16.

132. In his text on punitive damages, Professor Kenneth Redden states that proposed legislation in California giving punitive damages awards to public interest organizations would have a "chilling" if not a fatal effect" on punitive damages. K. REDDEN, *supra* note 117, § 1.1(c), at 13.

133. For a discussion of the American rule regarding attorneys' fees and judicially created exceptions to that rule, *see* generally Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. Rev. 613 (1983).

In a minority of jurisdictions, punitive damages are awarded to compensate plaintiffs for mental anguish and other intangible harms. *See* *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 389 (6th Cir. 1983) (applying Michigan law); *LeBlanc v. Specter*, 378 F. Supp. 301, 306 (D. Conn. 1973); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922); *Bixby v. Dunlap*, 56 N.H. 456, 462 (1876); *Fay v. Parker*, 53 N.H. 342 (1872); *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980). In Connecticut the amount of punitive damages awarded is limited to plaintiff's attorney's fees. *See* *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966).

of extreme misconduct would not be made whole by a compensatory award because that award would be diminished by the amount necessary to pay litigation expenses. Although most successful plaintiffs in the American system obtain the same results, the need to sanction persons who have acted outrageously renders incomplete compensation less tolerable in actions brought by victims of aggravated misconduct.

B. Negative Aspects of Punitive Damages

The doctrine of punitive damages can be justified as a useful tool for promoting adherence to the law, but it has serious flaws. A number of legal writers have urged reform, limitation, or even abolition of punitive damages. The imposition of punitive damages does not involve the same stigma or threatened loss of liberty as does criminal punishment, but such an award does duplicate some of the functions of the criminal law without the same procedural safeguards and constitutional guarantees.¹³⁴ Because courts sitting in different cases involving the same defendant lack coordination, a defendant upon whom punitive damages are imposed may be subjected to multiple punishment. He may be punished by the assessment of punitive damages, by the mental anguish item of the compensatory award, and by the imposition of a criminal sanction.¹³⁵

The standards and procedures used in the administration of punitive damages also have been criticized. Generally, evidence concerning a defendant's wealth is admissible at trial when punitive damages are sought so that the damages assessed may be in reasonable proportion to the defendant's ability to pay.¹³⁶ Such evi-

134. Duffy, *supra* note 121, at 9; Ghiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 ABA PROCEEDINGS, SECTION OF INS., NEGLIGENCE, AND COMPENSATION LAW 282, 287-88; Long, *supra* note 124, at 885; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1161-62 (1966).

It also has been argued that a reform of punitive damages procedures is constitutionally compelled. See Ford, *The Constitutionality of Punitive Damages*, in *THE CASE AGAINST PUNITIVE DAMAGES* 15 (Defense Research Institute 1969) (arguing that punitive damages are unconstitutional). See generally Wheeler, *supra* note 2.

135. Duffy, *supra* note 121, at 10; Morris, *supra* note 5, at 1195-98.

136. *E.g.*, *Coy v. Superior Court*, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393 (1962); *Joseph Schlitz Brewing Co. v. Central Beverage Co.*, 359 N.E.2d 566, 581 (Ind. App. 1977).

dence may induce a "Robin Hood" attitude on the part of jurors, leading them to compromise doubts about liability or to render excessive verdicts.¹³⁷ Loosely defined standards of conduct and the absence of clear guidelines about the amount of damages to be assessed¹³⁸ heighten the danger of unfair or inefficient results.¹³⁹

These weaknesses of punitive damages demonstrate the problems that the doctrine can cause absent careful judicial supervision. Several commentators have advocated changes in the administration of the remedy, such as bifurcated trials separating the questions of liability and punishment,¹⁴⁰ clear articulation of the conduct warranting punitive damage awards,¹⁴¹ and statutory ceilings for punitive damage awards,¹⁴² that would ameliorate most of the flaws inherent in the doctrine.

C. Conduct Warranting the Application of Punitive Damages

Courts use a plethora of adjectives to describe the type of conduct that warrants a punitive damages award.¹⁴³ One court listed "willful, wanton, malicious, reckless, oppressive, grossly negligent," "fraudulent, and . . . bad faith" conduct as giving rise to a punitive damages award.¹⁴⁴ Courts frequently note that a defendant's state of mind separates conduct for which no punitive remedy should be imposed from that which warrants such a remedy.¹⁴⁵ This focus accords with the retributive purpose of punitive dam-

See generally Note, *Punitive Damages: An Exception to the Right of Privacy?*: Coy v. Superior Court, 5 PEPPERDINE L. REV. 145 (1977).

137. DuBois, *Punitive Damages in Personal Injury Products Liability and Professional Malpractice Cases: Bonanza or Disaster?*, 43 INS. CO. J. 344, 353 (1976); see also Morris, *supra* note 5, at 1191; Owen, *Punitive Damages*, *supra* note 5, at 1320-21.

138. Duffy, *supra* note 121, at 10; Ghiardi, *supra* note 134, at 287; Owen, *Civil Punishment*, *supra* note 5, at 119.

139. Ellis, *supra* note 2, at 39-46; Owen, *Civil Punishment*, *supra* note 5, at 114.

140. See Mallor & Roberts, *supra* note 5, at 663-66; Owen, *Punitive Damages*, *supra* note 5, at 1320-25; Wheeler, *supra* note 2, at 300-02, 320-22.

141. See Ellis, *supra* note 2, at 34-40; Mallor & Roberts, *supra* note 5, at 651-63; Owen, *Civil Punishment*, *supra* note 5, at 114-17.

142. See Owen, *Civil Punishment*, *supra* note 5, at 119; Wheeler, *supra* note 2, at 314-20.

143. One author remarked that punitive damages are used in an "astounding range of conduct from 'oppression, fraud, or malice' on the one extreme to 'rudeness' or 'mere caprice' on the other." Long, *supra* note 124, at 881.

144. Ruiz v. Southern Pacific Transp. Co., 97 N.M. 194, 201, 638 P.2d 406, 413 (1981).

145. See, e.g., W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 2, at 11 (5th ed. 1974).

ages because an act done with subjective perception of the risks to the plaintiff's interests is more abhorrent than the same act committed inadvertently. It also conforms to the deterrent purpose of punitive damages because the threat of compensatory damages obviously has failed to deter a defendant who intentionally inflicts harm or who inflicts harm after reflection on the risks attending his conduct. By contrast, it is not appropriate to levy punitive damages for merely negligent conduct.¹⁴⁶ To the extent that negligent conduct can be deterred at all, compensatory damages performs this function satisfactorily. In addition, although negligence may be wrong, it is an understandable, everyday event that does not warrant retribution.¹⁴⁷

Actual malice or intent to harm is not required for a defendant's state of mind to be considered culpable, however.¹⁴⁸ Culpability sufficient to merit punitive damages also is found in conduct in which the "entire want of care [raises] the presumption of a conscious indifference to the consequences."¹⁴⁹ In this state of mind, the actor may not intend to cause harm; nevertheless, he chooses to advance his interests over those of the plaintiff.¹⁵⁰ Where his choice was wrong and he should have appreciated that it was wrong, punitive damages will lie.¹⁵¹

The conscious indifference standard has been used to impose punitive damages on powerful industries to halt harmful methods of doing business. The recent application of punitive damages to cases involving bad faith breaches of duty by insurance compa-

146. *E.g.*, *Prudential Ins. Co. of America v. Executive Estates, Inc.*, 194 Ind. App. 674, 369 N.E.2d 1117, 1130-31 (1978); *see also* K. REDDEN, *supra* note 117, § 4.2, at 79. Courts have awarded punitive damages, however, when the defendant's conduct constitutes gross negligence, as exemplified by cases involving drunken driving. *See* *Taylor v. Superior Court of Los Angeles County*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979); *Nichols v. Hocke*, 297 N.W.2d 205 (Iowa 1980); *see generally* Comment, *Punitive Damages and the Drunken Driver*, 8 PEPPERDINE L. REV. 117 (1980); Note, *Tort Damages—Punitive Damages Properly Awarded Against Intoxicated Drivers—Taylor v. Superior Court*, 20 SANTA CLARA L. REV. 1013 (1980).

147. *Owen, Civil Punishment*, *supra* note 5, at 107. The author notes that this state of mind might be sufficient to justify punitive damages against institutional and professional defendants who are granted greater power by society.

148. *Smith v. Wade*, 103 S. Ct. 1625 (1983).

149. *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 495 (1875).

150. *See* *Owen, Civil Punishment*, *supra* note 5, at 107.

151. *Id.*

nies¹⁵² demonstrates the attenuation of the state of mind requirement. Courts sometimes state that the insurer's bad faith, standing alone, is insufficient to warrant punitive damages.¹⁵³ Courts appear to have difficulty perceiving the distinction between bad faith and conduct giving rise to punitive damages, such as oppression¹⁵⁴ or conduct that is an extreme deviation from the norm.¹⁵⁵ Numerous cases exist in which courts imposed punitive damages on insurers when the tenor of the insurer's wrongdoing was an unjustifiable breach of duty.¹⁵⁶ Evidently, courts are really distinguishing between inadvertent or good faith conduct and conduct that is calculated to exploit the superior power of the insurance company at the expense of the interests of a weaker party.¹⁵⁷

This line of cases supports the suggestion of Professor David Owen that the essence of conduct warranting a punitive damages

152. See J. MCCARTHY, *supra* note 92, §§ 1.41-1.42, at 90-97; K. REDDEN, *supra* note 117, § 84.4(c), at 113-14. See generally Geck, *Outrage, Punitive Damages, and the Insurance Industry*, 29 FED. INS. CO. Q. 97 (1979); Comment, *Egan v. Mutual of Omaha Insurance Co.: The Expanding Use of Punitive Damages in Breach of Insurance Contract Actions*, 15 SAN DIEGO L. REV. 309 (1978).

153. See, e.g., *Escambia Treating Co. v. Aetna Cas. & Surety Co.*, 421 F. Supp. 1367, 1371 (N.D. Fla. 1976); *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981); *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974).

154. See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 608-609, 349 N.E.2d 173, 180-81 (1976).

155. *Continental Re-Ins. Co. v. Spanton*, 667 F.2d 1289, 1291 (9th Cir. 1982); *Linscott v. Rainier Nat'l Life Ins. Co.*, 100 Idaho 854, 860, 606 P.2d 958, 962 (1980).

156. See, e.g., *Miller v. Elite Ins. Co.*, 100 Cal. App. 3d 799, 161 Cal. Rptr. 322 (1980) (unwarranted refusal to accept reasonable settlement justified punitive damages instruction); *Riverside Ins. Co. v. Pedigo*, 430 N.E.2d 796 (Ind. App. 1982) (insurer's failure to inform insureds of arson investigation and unjustified refusal to pay claim gave rise to punitive damages); *Lipinski v. Title Ins. Co.*, 655 P.2d 970 (Mont. 1982) (defendant's bad faith failure to disclose easement and provide defense justified punitive damages, though case was remanded for redetermination of amount of damages); *First Security Bank of Bozeman v. Goddard*, 181 Mont. 407, 593 P.2d 1040 (1979) (malice inferred from fact that defendant's actions were unjustified).

157. See *Brown v. Coates*, 253 F.2d 36, 40 (D.C. Cir. 1958) (breach of contract by real estate broker); see also *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976) (punitive damages not available if defendant has merely exercised a right to disagree or has been guilty of substandard business conduct); *Nationwide Mut. Ins. Co. v. Neville*, 434 N.E.2d 585, 595 (Ind. App. 1982) (more than good faith dispute which leads to a breach of contract needed for award of punitive damages); *Continental Cas. Co. v. Novy*, 437 N.E.2d 1338, 1356 (Ind. App. 1982) (lack of diligent investigation alone not sufficient basis for imposition of punitive damages); *Consolidated Am. Life Ins. Co. v. Touche*, 410 So. 2d 1303, 1305 (Miss. 1982) (no punitive damages if good faith dispute).

award is the abuse of power.¹⁵⁸ When society has granted to an entity a high degree of power over the welfare of others, it maintains correspondingly high expectations for the responsible use of that power.¹⁵⁹ The traditional state-of-mind test, which is based on human emotions, fits uncomfortably into the context of identifying and punishing destructive patterns of behavior on the part of large corporations. In such cases, the culpable conduct involved is the exploitation of power with organizational indifference to the consequences.

III. THE APPLICATION OF PUNITIVE DAMAGES TO CASES INVOLVING WRONGFUL DISCHARGES OF AT WILL EMPLOYEES

A. *The Current Case Law*

Most of the appellate decisions regarding wrongful discharge of at will employees have focused on the recognition of a right action. It is not surprising, then, that decisions about damages in such cases are both sparse and inconsistent.¹⁶⁰ No consensus exist—even within a given theory—about the items to be included in the compensatory remedy,¹⁶¹ and there is wide disagreement about the applicability of punitive damages. Courts employ three general approaches.

1. *Punitive Damages Approved*

Courts have approved the use of punitive damages in a number

158. Owen, *Civil Punishment*, *supra* note 5, at 104-07.

159. *Id.* at 105; *see also* Central Armature Works, Inc. v. American Motorists Ins. Co., 520 F. Supp. 283, 292 (D.D.C. 1980) (stating in its discussion of punitive damages that "an insurer has additional obligations to its insured which subject it to more stringent standards of conduct than those normally imposed on parties to a contract").

160. For example, in *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 700 (W. Va. 1982) (*Harless II*), a second appeal was necessary to determine the extent of damages available for the retaliatory discharge action first recognized in West Virginia four years earlier in *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978) (*Harless I*). The court in *Harless II* noted that the law regarding damages in such cases is "rather sparse." *Harless II*, 289 S.E.2d at 700.

161. *Compare* *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 388 (6th Cir. 1983) (compensatory remedy includes damages for past and future lost wages, mental anguish, loss of professional reputation, and moving expenses) *with* *Brockmeyer v. Dun & Bradstreet*, 113 Wisc. 2d 561, 335 N.W.2d 834, 841 (1983) (compensatory remedy limited to reinstatement and back pay).

of wrongful discharge cases.¹⁶² Not surprisingly, all but three of these cases were decided under a public policy tort theory. The exceptions were grounded in breach of the implied covenant of good faith and fair dealing.¹⁶³ Courts justified awarding punitive damages in this latter group of cases by recasting the implied covenant into an action sounding in tort.¹⁶⁴

Courts primarily justify the use of punitive damages by citing the need for an extra measure of deterrence in light of petty compensatory remedies or criminal sanctions.¹⁶⁵ As the Supreme Court of Illinois stated in *Kelsay v. Motorola, Inc.*,¹⁶⁶ "[t]he imposition on the employer of that small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public

162. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rep. 722 (1980); *Kouff v. Bethlehem-Alameda Shipyard, Inc.*, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421, N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d (1979); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. App. 1983); *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213 (Mont. 1983); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.H. 58, 417 A.2d 505 (1980); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (1980); *Vigil v. Arzola*, 22 N.M. ST. B. BULL. 868 (N.M. App. 1983); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980); *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692 (W. Va. 1982).

All of these cases approve punitive damages in principle. A number of them occurred at the pretrial stage. Others held that, although they would be available in future cases, punitive damages were inappropriate under the facts presented. Actual awards of punitive damages were affirmed in *Cancellier* (age discrimination), *Gates* (deceptive conduct in termination process), *Carnation* (retaliation for filing workers' compensation claim), and *Arie* (same).

163. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982); *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213 (Mont. 1983); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); cf. *Vigil v. Arzola*, 22 N.M. ST. B. BULL. 868, 874 (N.M. App. 1983) (compensatory remedies for a tort cause of action for wrongful discharge were limited to contract remedies, but the use of punitive damages in appropriate cases was approved).

164. *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 457, 168 Cal. Rptr. 722, 729 (1980); *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213, 215 (Mont. 1983).

165. See, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 185-87, 384 N.E.2d 353, 358-59 (1979); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Lally v. Copygraphics*, 173 N.J. Super. 162, 179-80, 413 A.2d 960, 968-69 (1980); *Vigil v. Arzola*, 22 N.M. ST. B. BULL. 868, 874 (N.M. App. 1983).

166. 74 Ill. 2d 172, 384 N.E.2d 353 (1979).

policy of this State. . . ."¹⁶⁷ The importance of the social policy threatened by the discharge is proportionately related to the need for deterrence.¹⁶⁸ In *Lally v. Copygraphics*,¹⁶⁹ a case in which an employee was discharged for filing a workers' compensation claim, the Superior Court of New Jersey stated that the policy inherent in the statute outlawing retaliatory discharge was "so firmly grounded in the public interest as to require assiduous protection and enforcement."¹⁷⁰

One issue that has arisen is whether the conduct that justifies the compensatory remedy would automatically justify the imposition of punitive damages. Although a few of the wrongful discharge cases have stated that punitive damages should be available in future cases without requiring particularly aggravated conduct,¹⁷¹ *Lally* comes closest to suggesting that the violation of public policy in itself would justify punitive damages. The court indicated its agreement with a commentator who stated that employer conduct that undermines an employee's right to receive workers' compensation benefits is a matter of "opprobrium" that is "particularly repellant."¹⁷² For the most part, however, the courts have indicated that they will not award punitive damages automatically,¹⁷³ but rather will limit punitive damage awards to cases in which the employer's misconduct is willful, malicious, wanton, fraudulent, or oppressive.¹⁷⁴ If the court applies the conscious indifference standard, an employer could be considered sufficiently culpable to warrant

167. *Id.* at 187, 384 N.E.2d at 359.

168. See *Nees v. Hocks*, 272 Or. 210, 219-20, 536 P.2d 512, 516 (1975) (punitive damages appropriate to deter wrongful discharge when there is a violation of a strong public policy).

169. 173 N.J. Super. 162, 413 A.2d 960 (1980).

170. *Id.* at 179, 413 A.2d at 968.

171. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

172. *Lally v. Copygraphics*, 173 N.J. Super. 162, 180, 413 A.2d 960, 968 (1980) (citing 2A A. LARSON, WORKMEN'S COMPENSATION LAW (Sept. 1979 Supp.), § 68.36, at 13-40, 13-42).

173. See *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 702 (W. Va. 1982); see also *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 457, 168 Cal. Rptr. 722, 729 (1980) (punitive damages appropriate where plaintiff's proofs comport with standards developed under state law); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (punitive damages available in appropriate cases).

174. See *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213, 216 (Mont. 1983); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 703 (W. Va. 1982).

punitive damages if it uses its power of termination, without some justification, to violate a clear right of the employee.

Courts also have considered whether they should award punitive damages in cases of first impression. A number of courts have approved the use of punitive damages in future cases but have refused to impose them when the case arose before the right of action for wrongful discharge was established in that jurisdiction.¹⁷⁵ The leading authority for this proposition is *Nees v. Hocks*,¹⁷⁶ a 1975 Oregon case in which an employee was discharged for jury service. In reversing the punitive damages awarded to plaintiff at trial, the Supreme Court of Oregon stated that "[t]he assessment of punitive damages has some of the same functions as the sanctions of criminal law."¹⁷⁷ For criminal punishment to satisfy constitutional mandates, the defendant must have had knowledge of the criminality of the conduct.¹⁷⁸ The court noted that unlike other types of misconduct, discharges in retaliation for jury service were not yet so common and recurrent as to warrant an extra measure of deterrence.¹⁷⁹

This approach emphasizes the punitive aspect of punitive damages and, borrowing from the criminal law, essentially states a notice requirement as a prerequisite for the imposition of such damages.¹⁸⁰ Although the analogy between punitive damages and criminal punishment is superficially appealing, the piecemeal application of substantive and procedural protections of the criminal law to punitive damages cases¹⁸¹ is questionable. A notice requirement is useful for preventing the chilling of legitimate business decisionmaking,¹⁸² but the *Nees* approach is too narrow and mechanical to achieve a desirable level of deterrence.

175. *Palmtree v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Kel-say v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984); *Vigil v. Arzola*, 22 N.M. St. B. Bull., 868 (N.M. App. 1983); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

176. 272 Or. 210, 536 P.2d 512 (1975).

177. *Id.* at 221, 536 P.2d at 517.

178. *Id.*

179. *Id.*

180. See *Ellis*, *supra* note 2, at 5-6.

181. See generally *Wheeler*, *supra* note 2 (discussing reforms in the administration of punitive damages which the author argues are constitutionally mandated).

182. See *infra* text accompanying notes 229-35.

Rather than requiring a preexisting case declaring the actionability of wrongful discharge, courts should inquire whether the employer had any means of appreciating that its conduct was wrongful. A statute prohibiting the discharge would certainly put the employer on notice that such conduct is wrongful, even if no private cause of action is specified in the statute. For example, in *Kouff v. Bethlehem-Alameda Shipyard*,¹⁸³ another case of first impression, the California District Court of Appeals for the First Circuit permitted a plaintiff who was discharged in violation of a California statute that forbade discharge of persons for serving as elections officers to maintain an action for wrongful discharge. The court held his allegation of malice sufficient as a matter of pleading to state his claim for punitive damages.¹⁸⁴ In *Brown v. Transcon Lines*,¹⁸⁵ however, where a state statute provided that discharging employees for filing workers' compensation claims was an unlawful employment practice, the Oregon Supreme Court rejected the plaintiff's claim for punitive damages because his dismissal occurred only eighteen days after the *Nees* case was decided.¹⁸⁶ The court stated that eighteen days was not an adequate amount of time for the employer to have known and understood the application of *Nees*.¹⁸⁷ It seems absurd to argue that when a statute forbids the conduct involved, punitive damages should be withheld merely because the employer did not know that it would be subject to civil liability for the discharge. The implication that employers are not aware of statutes but are aware of appellate court decisions strains credulity.

A court also might find that the employer had notice that a given discharge would be wrongful when the discharge interferes with a well-known and clearly established personal right or public interest. A defendant who knows or has good reason to know of an established right held by the plaintiff (such as the right to claim workers' compensation benefits for on-the-job injuries) might expect that interference with that right is wrongful, regardless of whether a court of that jurisdiction has expressly held it to consti-

183. 90 Cal. App. 2d 322, 202 P.2d 1059 (1949).

184. *Id.* at 325, 202 P.2d at 1061.

185. 284 Or. 597, 588 P.2d 1087 (1978) (en banc).

186. *Id.* at 613-14, 588 P.2d at 1095.

187. *Id.* at 614, 588 P.2d at 1095.

tute a tort.¹⁸⁸

Notice also could result from well-known legal duties and standards of conduct. For example, the Supreme Court of Montana, in *Gates v. Life of Montana Insurance Co.*,¹⁸⁹ awarded \$50,000 in punitive damages against an employer whose agent had induced the plaintiff to resign by promising to write a letter of recommendation, when in fact he did not intend to do so, and had breached his promise to return her letter of resignation. The court justified the punitive damages award, even though they were being imposed in a case of first impression, because the court did not assess punitive damages against the employer for his decision to terminate the plaintiff.¹⁹⁰ Rather, the court assessed punitive damages because the employer's conduct in obtaining the letter of recommendation formed the basis for fraud, oppression, or malice.¹⁹¹

Because of the rapid proliferation of wrongful discharge actions, only a limited number of cases of first impression remain. Nevertheless, risks exist in applying an overly mechanical test for notice. These risks include the reduction in incentives for a plaintiff to institute and pursue the first case in a jurisdiction, the sacrifice of those who have acted as private attorneys general, and the creation of an unfortunate precedent for future cases involving newly recognized causes of action.

2. Punitive Damages Not Available Because the Action Lies in Contract

In several wrongful discharge actions brought on contract theories, courts have rejected punitive damages claims without any explanation beyond a restatement of the general rule that punitive damages are not available in contract actions.¹⁹² The rule that pu-

188. If this reasoning were used, the punitive damages issue in *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984) (per curiam), was decided wrongly. In *Hansen*, the Supreme Court of Nevada recognized a cause of action for wrongful discharge on the part of an employee terminated for filing a workers' compensation claim. The court approved the use of punitive damages in future cases but declined to impose them in this case because it would be inappropriate to punish the defendant for conduct he could not have known was actionable beforehand.

189. 668 P.2d 213 (Mont. 1983).

190. *Id.* at 216.

191. *Id.*

192. *Fincke v. Phoenix Mut. Life Ins. Co.*, 448 F. Supp. 187-91, (W.D. Pa. 1978); Yartsoff

nitive damages will not lie in contract cases¹⁹³ always has been subject to a number of exceptions. Traditionally, courts have imposed punitive damages in cases involving breach of promise to marry, breach of fiduciary duty, breach of duty by a public utility, breach of contract accompanied by fraud, or breach of contract that constitutes some independent tort.¹⁹⁴

Current developments in contract law suggest the likelihood of further erosion of the rule disallowing punitive damages in contract cases.¹⁹⁵ Courts have become more receptive in recent years to the use of punitive damages in cases involving abuse of power in contractual relationships,¹⁹⁶ and this new willingness reflects changing views about the responsibilities of those who wield a high degree of economic power. One way of making punitive damages available in such cases is by creating contractual duties that sound in tort, thus expanding the independent tort exception. A majority of states expanding the independent tort exception have imposed a duty of good faith and fair dealing on insurance companies.¹⁹⁷

Some courts have taken a more direct approach and have permitted punitive damages in contract cases when public policy favors the use of a punitive remedy. In *Vernon Fire & Casualty Insurance v. Sharp*,¹⁹⁸ the Supreme Court of Indiana held that

v. Democrat-Herald Publishing Co., Inc., 281 Or. 651, 576 P.2d 356, 360 n.1 (1978); *Wood v. Hahemann Medical College & Hosp.*, 1 Pa. D. & C.3d 674 (1976); see also *Brockmeyer v. Dun & Bradstreet*, 113 Wisc. 2d 561, 335 N.W.2d 834, 841 (1983) (punitive damages would be available in tort actions but that its public policy approach lay in contract, and no tort actions could be maintained); cf. *Fogleman v. Peruvian Assoc.*, 127 Ariz. 504, 622 P.2d 63, 65 (1980) (no punitive damages for breach of express contract of employment for two-year term).

193. See, e.g., *White v. Benkowski*, 37 Wis. 2d 285, 290-92, 155 N.W.2d 74, 77 (1967); *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 486 (Ky. Ct. App. 1978); see also J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14-3 (2d ed. 1977); 5 A. CORBIN, *CORBIN ON CONTRACTS* § 1077, at 438 (1964); 11 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1340 (W. Jaeger 3d ed. 1968); Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959); see also Sullivan, *supra* note 5, at 221 (stating that it is not clear why punitive damages were disallowed in contract cases).

194. For thorough discussions of the traditional exceptions to the rule that punitive damages were not recoverable in contract, see Sullivan, *supra* note 5, at 223-36, and Note, *Punitive Damages Exceptions*, *supra* note 8, at 93-96.

195. See generally Note, *Punitive Damages in Contract Cases*, *supra* note 8.

196. Sullivan, *supra* note 5, at 248.

197. See J. MCCARTHY, *supra* note 92, § 2.4, at 116.

198. 264 Ind. 599, 349 N.E.2d 173 (1976).

punitive damages may be imposed in a contract case when "a serious wrong, tortious in nature, has been committed . . . [even though] the wrong does not conveniently fit the confines of an independent tort"¹⁹⁹ if it appears that "the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated."²⁰⁰

The *Vernon* approach has been used in contract cases outside of the insurance context.²⁰¹ For example, in *Art Hill Ford, Inc. v. Calender*,²⁰² the Supreme Court of Indiana awarded punitive damages against an automobile dealer who took six months to complete repairs on a new truck while ignoring the plaintiff's inquiries about the status of the truck and falsely informing plaintiff that needed parts were unavailable.²⁰³ In *Jones v. Abriani*,²⁰⁴ the Indiana Court of Appeals for the First District affirmed a punitive damages award against a mobile home dealer who sold a defective mobile home, failed to repair it despite continued assurances, refused to refund plaintiff's downpayment upon rejection, and concealed the limited warranty until the warranty period had elapsed.²⁰⁵

Although *Vernon* and its progeny currently represent a minority approach,²⁰⁶ that approach can be justified by the policies underlying punitive damages. When the behavior of the breaching party warrants punitive damages, an additional deterrent is needed in contract cases even more than in tort cases because of the comparatively limited measure of compensatory damages recoverable in contract cases. A defendant who can calculate in advance the extent of his liability will have little incentive not to breach when the

199. *Id.* at 608, 349 N.E.2d at 180.

200. *Id.*; accord *Riverside Ins. Co. v. Pedigo*, 430 N.E.2d 796, 804-05 (Ind. 1982); *State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798, 800 (1974). But see, e.g., *Higgins v. Blue Cross*, 319 N.W.2d 232, 235 (Iowa 1982); *Bliss v. Equitable Life Assurance Soc'y*, 620 F.2d 65, 68-69 (5th Cir. 1980) (applying Texas law).

201. See, e.g., *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979) (applying Indiana law), *cert. denied*, 445 U.S. 917 (1980); *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958); *Whitfield Constr. Co. v. Commercial Dev. Corp.*, 392 F. Supp. 982 (D.V.I. 1975); *Lou Leventhal Auto Co. v. Munns*, 164 Ind. App. 368, 328 N.E.2d 734, 742 (1975); *Eakman v. Robb*, 237 N.W.2d 423 (N.D. 1975).

202. 423 N.E.2d 601 (Ind. 1981).

203. *Id.* at 604.

204. 169 Ind. App. 556, 350 N.E.2d 635 (1976).

205. *Id.* at —, 350 N.E.2d at 652.

206. See J. McCARTHY, *supra* note 92, § 1.42, at 92-97.

benefits to him of breaching far exceed the damages he will be required to pay. The compensatory function of punitive damages is heightened in contract cases because intangible injuries such as mental anguish would not otherwise be recoverable, and because transactional expenses would have to be paid out of damages awarded for actual pecuniary losses.

Naturally, punitive damages are not appropriate in every instance of a breach of contract, just as it would be inappropriate to impose punitive damages for every tort committed. Courts should not, however, withhold punitive damages merely because the action lies in contract if the defendant's conduct warrants punishment and deterrence.

3. Punitive Damages Rejected as Unjustifiable

Generally, punitive damages are not available in actions brought under federal labor laws,²⁰⁷ including actions for wrongful discharge of union members.²⁰⁸ Courts have rejected punitive damages because they conflict with the remedial and conciliatory goals of federal labor policy²⁰⁹ and because they upset the balance of power in labor relations that the statutes seek to protect.²¹⁰ This reasoning would not apply to actions by unorganized employees who have no well-developed and legally recognized administrative systems through which to assert their interests and no representative entity to prevent abuses.²¹¹ Moreover, some courts have held that federal labor law does not preclude the institution of wrongful discharge suits premised on state law.²¹² If state law permits,

207. *Brotherhood of Ry. Carmen v. Delpro Co.*, 579 F. Supp. 1332 (D. Del. 1984). See generally Shaller, *The Availability of Punitive Damages in Breach of Contract Actions Under Section 301 of the Labor Management Relations Act*, 50 GEO. WASH. L. REV. 219 (1982). But see *Sidney Wanzer & Sons v. Milk Drivers Union, Local 753*, 249 F. Supp. 664, 671 (N.D. Ill. 1966).

208. See *Holodnak v. Avco Corp.* 514 F.2d 285, 291-93 (2d. Cir. 1975), cert. denied, 423 U.S. 892 (1975); *Dian v. United Steelworkers of America*, 486 F. Supp. 700, 706-07 (E.D. Pa. 1980).

209. See, e.g., *Dian v. United Steelworkers of America*, 486 F. Supp. 700, 703-04 (E.D. Pa. 1980). Contra Shaller, *supra* note 207, at 231.

210. See, e.g., *Brotherhood of Ry Carmen v. Delpro Co.*, 579 F. Supp. 1332, 1335-36 (D. Del. 1984).

211. See *Brown v. World Airways, Inc.*, 539 F. Supp. 179, 181 (S.D.N.Y. 1982).

212. *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); cf. *Bertling v. Roadway Express*, 121 Ill. App. 3d 60, 459 N.E.2d 265, 268 (1984) (adverse arbitration decision pre-

courts may impose punitive damages in such cases.²¹³

Only one of the cases recognizing a tort cause of action for wrongful discharge of at will employees has squarely rejected the application of punitive damages. In *Smith v. Atlas Off-Shore Boat Service, Inc.*,²¹⁴ a seaman who suffered an ankle injury on a vessel was discharged when his attorney notified his employer of his intention to file a claim for personal injuries under the Jones Act. Stating that "[t]he right to discharge at will should not be allowed to bar the courthouse door,"²¹⁵ the United States Court of Appeals for the Fifth Circuit recognized for the first time a cause of action under maritime law for the intentional tort of retaliatory discharge.²¹⁶ The court made available a broad range of compensatory damages.²¹⁷ It stated, however, that the employer should not be penalized further by the imposition of punitive damages, because the additional deterrent that such damages would provide would not justify their imposition.²¹⁸ Thus, although the balance of respective rights weighed in favor of the seaman in the retaliatory discharge action, the court believed that it weighed in favor of the employer on the issue of punitive damages.²¹⁹ While its rationale for rejecting punitive damages is not articulated, the *Jones* court apparently believed that it could accomplish without the threat of punitive damages the objectives of the cause of action it recognized, or at least that public policy favored limiting the risks of wrongful discharge to the employer.

cludes maintenance of retaliatory discharge action on same factual basis); *Wyatt v. Jewel Comp. Inc.*, 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982) (employee not required to exhaust remedies under collective bargaining agreement before asserting claim for tort of retaliatory discharge); *Thompson v. Monsanto Co.*, 559 S.W.2d 873 (Tex. Cir. App. 1977) (same).

213. See *Wyatt v. Jewell Cos., Inc.*, 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982); *Carnation Co. v. Borner*, 610 S.W.2d 450, 454-55 (Tex. 1980); Shaller, *supra* note 207, at 229 n.83.

214. 653 F.2d 1057 (5th Cir. 1981).

215. *Id.* at 1062.

216. *Id.* at 1063.

217. The court stated that the plaintiff may recover expenses such as finding a new job, lost earnings, lost future wages, and damages for mental anguish. *Id.* at 1064.

218. *Id.* at 1064.

219. *Id.*

B. Justifications for the Use of Punitive Damages in Wrongful Discharge Actions

To determine whether the use of punitive damages is justified, one must return to the policies furthered by the creation of a cause of action for wrongful discharge. Objectives of wrongful discharge actions include protecting the public interest from interference with important public policies, facilitating some individual expectations, and policing unsavory conduct. Fundamentally, however, the objective of these actions is to correct the imbalance of power which results from the practical inability of unorganized employees to bargain individually for job security. Courts probably would not have undertaken the massive modifications of tort law and contract principles that have made the creation of these rights of action possible if they did not perceive unorganized employees as a vulnerable group in need of the law's protection.

To a modest extent, then, courts are performing for at will employees the power-enhancing function that labor unions perform for organized employees. Yet, courts are unwilling to prescribe a "just cause" standard for discharge,²²⁰ probably because of concern about the inefficiencies such a standard would engender. As a practical matter, courts are unable to prescribe a just cause standard because they are ill-equipped for the avalanche of litigation that would result from such a standard. They instead have created a cluster of theories that modify the balance of power presently existing in the relationship between employers and unorganized employees without unduly stressing judicial resources.

Just as courts have awarded punitive damages to correct imbalances of power in the context of insurance²²¹ and product liability cases,²²² these damages also can be a useful means of deterring the abuse of power in the employment context. Although there is no empirical proof that the threat of punitive damages deters undesirable behavior,²²³ one can presume that the higher the risks of misconduct, the more likely that persons contemplating such conduct,

220. *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 669-70, 429 N.E.2d 21, 26 (1981).

221. See *supra* notes 152-57 and accompanying text.

222. See *supra* note 7.

223. See *Owen, Civil Punishment*, *supra* note 5, at 111 (calling for an empirical study of the deterrent effect of punitive damages).

especially corporate defendants,²²⁴ will be deterred from engaging in it.

If compensatory damages in a wrongful discharge case are relatively small, an employer has little to lose by committing a wrongful discharge. Likewise, in the absence of punitive damages, many employees would gain little by instituting an action for compensation. Because of the need for deterrence, it is in the public interest to encourage meritorious litigation instituted by private individuals. The need for the extra measure of deterrence and the incentive for private enforcement provided by punitive damages is even more compelling in jurisdictions that limit compensatory remedies to reinstatement and back pay, particularly when an employer's action contravenes some strong, independent public policy. Courts should not expect the employee, who is in a highly vulnerable position, to protect the public interest by, for example, resisting an employer's request to commit a crime on pain of loss of employment. Instead, the courts should assume responsibility for discouraging violations of public policy.

The absence of an administrative framework for resolving disputes in wrongful discharge cases and the corresponding need to conserve judicial resources makes it desirable for courts to employ a remedy designed to prevent future incidents of wrongful discharge. The prevention of wrongful discharge is especially important because at will employees in lower-paying positions who have little opportunity for advancement are less likely to resort to the legal system for a remedy than are at will employees in middle and upper management positions.²²⁵ The imposition of a punitive remedy also can be a strong and justifiable statement of moral disapproval of a defendant's abuse of his power.

Finally, punitive damages serve a compensatory function in wrongful discharge cases. In jurisdictions that limit compensatory remedies to back pay and reinstatement, the assessment of punitive damages serves to compensate deserving plaintiffs for intangible but nonetheless real injuries such as mental anguish and loss of status or professional reputation that attend discharge from em-

224. See *id.* at 107.

225. See Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1042-45 (1983).

ployment. Even in jurisdictions that permit a full panoply of tort remedies, some harmful effects of wrongful discharge, such as social stigma and loss of identification, status and marketability,²²⁶ could remain unremedied. Moreover, even a plaintiff awarded a full measure of compensatory damages would not be made truly whole because she would not be compensated for transactional expenses such as attorney's fees.

The purposes underlying the doctrine of punitive damages are served by the use of punitive damages in appropriate wrongful discharge cases. They enhance the admonitory force of wrongful discharge actions, thus facilitating the objectives that militated for the creation of such actions.

C. Dangers to be Avoided in the Use of a Punitive Remedy

Punitive damages are not appropriate in all successful wrongful discharge actions, nor should they be applied in an unrestrained manner. Courts must avoid several dangers in fashioning and administering a punitive remedy.

First, if the deterrence to wrongful discharge is too great, employers may be chilled in the exercise of legitimate authority over the workplace. Fearing liability for damages, they may elect to retain an employee whose performance is substandard. Such a result would redound to the detriment of the employer, the morale of the workplace, and ultimately the consuming public. Deterrence would be too great if employers were unable to determine in advance what conduct would give rise to punitive damages, if punitive damages were used in an unprincipled manner, or if trial judges did not exercise close supervision over the calculation of the punitive damages award. The danger of overdeterrence especially would be great if punitive damages were imposed in the cases involving violations of ill-defined public or private interests.

A second danger lies in the intense hostility that an employer is likely to encounter from jurors. If the use of punitive damages is not closely supervised, jurors acting out of passion and prejudice may return extraordinary verdicts against defendant-employers. Bifurcated trials, in which questions of liability and punishment

226. See Blades, *supra* note 12, at 1413-14 (discussing the emotional repercussions of loss of employment).

would be separated,²²⁷ and the exercise of close scrutiny in the imposition of punitive damages could lessen this danger.

A third danger involves the application of punitive damages to employers with few employees.²²⁸ These employers likely are less sophisticated about the nascent rights of employees, and thus are more likely to commit legal mistakes. Moreover, employers with few employees do not enjoy the bargaining power over at will employees that large corporate employers experience. Finally, litigation expenses or excessive punitive damages awards might cripple small employers because they have less ability than a larger employer to absorb and redistribute the costs. Courts could avoid the danger of imposing excessive or undue liability on small employers by considering the size of the employer as a factor in mitigation of punitive damages.

Courts can address these concerns by the manner in which they formulate and administer the punitive remedy in wrongful discharge cases. Clear definition of the circumstances warranting punitive damages and procedures that protect employers from unprincipled use of the remedy can avoid the dangers discussed above while still furthering the purposes for which punitive damages were designed.

D. What Conduct Should Warrant the Imposition of Punitive Damages?

In defining the range of conduct that gives rise to an award of punitive damages in wrongful discharge cases, courts must balance the risks discussed above against the objectives of both the punitive remedy and the wrongful discharge action. To avoid the risk of chilling legitimate personnel decisions, courts should limit punitive damages to cases in which the employer has some means of appreciating that his conduct is wrongful. Notice of the wrongfulness of a contemplated discharge could be supplied by a statute or decision outlawing discharge for a specified reason. Notice also could be found in commonly held moral or legal principles or in the ap-

227. See *supra* note 140.

228. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 192, 384 N.E.2d 353, 362 (1978) (Underwood, J., dissenting); *Lally v. Copygraphics*, 173 N.J. Super. 162, 183, 413 A.2d 960, 970 (1980) (Antell, J.A.D., dissenting), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981).

preciation of a clear and specific right held by the plaintiff that is established by law or contract.

Where there is a reasonable doubt about the extent of the employee's right, courts should resolve these doubts in favor of the employer on the punitive damage issue. For example, while employees may have certain personal freedoms of speech and association, the extent of these rights are ill-defined. An employer who discharges an employee for objecting to a product or policy of the employer may be liable for compensatory damages if state law permits but should not be subjected to punitive damages. By contrast, an employer aware of a definite right or obligation on the part of the employee should be expected to appreciate the wrongfulness of interference with that right or duty. Thus, an employer who discharges an employee for refusing to commit a crime has notice, derived from general moral principles and common knowledge that all persons have the obligation not to violate the criminal law, that the discharge is wrongful. The threshold inquiry should be, then, whether the employer had the means of appreciating that its conduct was wrongful. This test would exclude punitive damages in cases involving violations of personal rights that are not clearly established, such as most implied-in-fact contract cases and cases using the more attenuated definition of public policy, which occur without additional personal misconduct of the employer.

Second, in view of the retributive aspect of punitive damages and the danger of exposure to excessive liability, courts should reserve the use of punitive damages for cases involving an element of outrage or aggravated misconduct. These courts could use the state-of-mind test to identify the type of aggravated misconduct warranting punishment, but should be mindful that outrage may also be present in conduct that offers an unjustifiable insult to the public interest. Two basic categories of cases can be identified in which courts could justifiably find that the employer's conduct was an extreme deviation from its obligation and, therefore, deserving of punishment.

1. Reprehensible Behavior Toward an Individual Employee

In *Harless v. First National Bank in Fairmont*,²²⁹ the Supreme

229. 246 S.E.2d 270 (W. Va. 1978).

Court of West Virginia held that an employee discharged because of his efforts to bring the employer into compliance with certain federal and state banking laws stated a cause of action.²³⁰ Following this decision, the trial court awarded the employee \$62,500 in punitive damages.²³¹ On appeal from the punitive damages award, the court held that punitive damages were not justified because the facts did not demonstrate willful, malicious, or wanton conduct.²³² The court held that punitive damages are appropriate if the employer circulated false rumors about the employee, engaged in concerted efforts of harassment to induce the employee to resign, or actively interfered with the employee's efforts to find other employment.²³³ Conversely, in *Gates*,²³⁴ the employer's deceptive conduct in inducing the employee to resign gave rise to punitive damages.²³⁵

Thus, the necessary element of outrage can exist in conduct independent of the decision to discharge, when the employer inflicts gratuitous and unnecessary harm on the employee, adding insult to injury, or when the employer overreaches acceptable boundaries to accomplish a desired goal. The use of punitive damages in such cases fits neatly into the traditional pattern of employing punitive damages in cases involving dignitary torts. When one offers an extreme and unnecessary insult to one in a vulnerable position, punishment and deterrence are justified.

Courts should not limit punitive damages to incidents in which employers have maliciously or callously mistreated employees, however. Because the two most prevalent theories of wrongful discharge are designed for the protection of the public interest, courts should examine the wrongfulness of the defendant's conduct in relation to the public interest or a clear private interest.

230. *Id.* at 277.

231. *Harless v. First Nat'l Bank*, 289 S.E.2d 692, 695 (W. Va. 1982).

232. *Id.* at 703.

233. *Id.* at 703 n.19.

234. *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213 (Mont. 1983); see *supra* notes 189-91 and accompanying text.

235. *Id.* at 216.

2. Outrageous Conduct in Relation to a Strong Public Interest or a Clear Personal Right

When an employer violates a strong public interest with conscious indifference of the consequences, its conduct is outrageous in a different sense. Society grants to those persons engaged in business a wide range of benefits, such as the right to operate in the corporate form, the right to engage in professional or other regulated practices, and indeed, the right to discharge employees at will. It has the corresponding right to expect that the power thus acquired will not be used to gain an end that would flout a strong public interest. In determining the culpability of the defendant's conduct, courts should consider the defendant's state of mind toward the public interest as well as the defendant's state of mind toward the plaintiff. An employer who uses the power to terminate in wanton disregard of a strong public interest of which he is or should be aware has committed an outrage sufficient to warrant punishment and deterrence. This type of forbidden conduct goes to the reasons for termination rather than to the manner in which the termination is accomplished. The best example of this type of conduct exists when an employer discharges an employee for refusing to commit a crime. The interests of the employee are clearly affected in such cases, but the greater threat is to the public interest.

Similarly, courts can find the requisite culpability to support an assessment of punitive damages in the use of the power of termination to inhibit or retaliate for the exercise of a clearly defined right. In such circumstances, courts can conclude that the employer acts in conscious disregard of the harm threatened to the plaintiff and other employees. The need for deterrence in such cases is especially strong because, absent the threat of a stern civil sanction, the employer's conduct may become an insidious pattern adversely affecting the rights of other employees as well as the public interest. Courts, then, can appropriately consider the actor's purposes and state of mind toward all affected parties.

CONCLUSION

The development of rights of action for wrongfully discharged at will employees reflects the general trend toward increasing the ac-

countability of those who possess power over the lives of others. Courts have recognized that some uses of the power of termination adversely affect important public policies and that at will employees lack the political and bargaining power to curb even the most flagrant abuses of the power of termination.²³⁶ Yet, the fragmentation that characterizes American employment law in general²³⁷ also pervades the expanding body of law regarding termination of at will employees. The crazy-quilt of theories and approaches for recovery by at will employees signifies a war of policies in which the need to enlarge the power of unorganized workers is pitted against the need to conserve judicial resources and the need to retain business owners' ultimate control of the workplace. Courts have resolved this conflict by creating outer limits on the power of termination, in which only employees who have been the victims of exceptional abuses are compensated.

An employer has little incentive to respect these newly created rights, however, when abusive discharge will result in isolated litigation by individuals who may recover only relatively small sums in compensatory damages. The use of punitive damages in appropriate wrongful discharge cases expresses society's disapproval of the exploitation of superior power and creates a strong incentive for employers to conform to newly created legal duties. As in other types of cases in which courts have imposed punitive damages to enforce society's expectations regarding the legitimate use of power, a remedy that provokes the attention of people in the boardroom and the personnel office is needed in wrongful discharge cases to halt abusive employment practices that threaten public and private interests.

236. See Blades, *supra* note 12, at 1433-34 (noting that legislative reform is unlikely because there is no strong lobby to promote it and because employers and labor unions would be likely to oppose general statutory limitations on the power of termination).

237. See P. SELZNICK, *supra* note 20, at 121 (noting the "curious bifurcation between the law of employment and labor law" and observing that "[t]here is no integrated 'law of employment'").