EMPLOYMENT-AT-WILL DOCTRINE: AN INVESTIGATION OF IT'S EVOLVEMENT AND IT'S INFLUENCE ON BUSINESS

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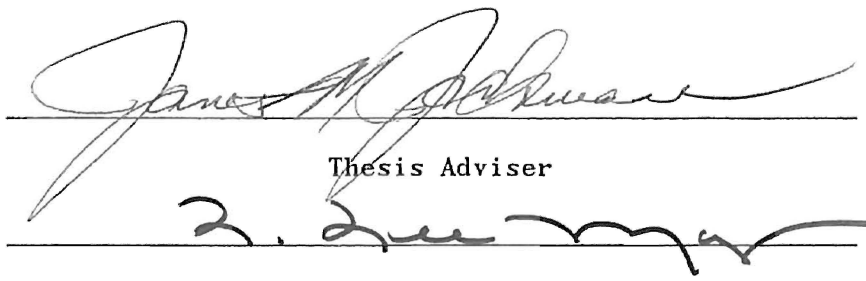

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PREFACE

Terminating an employee is a chore that most managers want to put behind them as quickly and as painlessly as possible. Many managers and workers involved in employment termination are ignorant of the legal rights of employees and are unaware that the rules are changing.

I chose the subject of employment dismissals, because I wanted to know what, if any, legal rights I have as an employee in a nonprotected group. I know that the law protects certain groups because of race, sex, religion, and age, but does the law protect employees that are not in a protected group?

I want to thank Dr. Roy Bennett, outplacement counselor, and Greg D. Bledsoe, labor relations attorney, for assisting me in my work.

I wish to express my sincere gratitude to the Business College of Oklahoma State University in providing a means for me , an off campus student, to receive an MBA. I want to thank my major advisor, Dr. James Jackman, for his guidance, concern and help with this work.

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CHAPTER I

INTRODUCTION

You're fired!!" "I'm sorry, but you don't have a job here anymore." What's a poor, young, white, anglo-saxon protestant,male to do?

Until recently the American law provided no protection for anyone who is not a member of a union or in a protected group (descriminated groups because of race, religious creed, sex or age). The laws governing employment held that both employer and employee were without any form of binding obligation to each other and that each was free to terminate the employment relationship at any time and for any reason. This laissez faire type relationship between employee and employer is known as the employment-at-will doctrine. Recent exceptions to the strict employment- at-will doctrine reveals a national shift in judicial decisions regarding employment dismissals. The employer now has to prove just cause in discharging employees. Now because of recent changes in the employment-at-will doctrine a company will not only have to be fearful of the courts in disciplining minorities, but all employees.

This paper examines the evaluation of the employment-at-will doctrine. Chapter two explains the creation of the employment-at-will doctrine. Chapter three examines the forces that are influencing the shift from dismissal-at-will toward dismissal for just cause. The fourth chapter takes a detailed look at recent court exceptions to the employment-at-will doctrine. Chapter five recommends actions the employer should take to avoid a wrongful discharge suit.

CHAPTER II

THE BEGINING OF
EMPLOYMENT-AT-WILL DOCTRINE

Years ago, under American Common Law, an employer had the absolute right to discharge an employee for whatever cause he might choose or for no cause at, without incurring liability. Employees could be terminated at will. It was a harsh rule, born in the days when workers were regarded as a commodity to be purchased or rented as business required. Even when the employer had been brutal, the courts would support the action. The common law was clear: unless an employee could show that the discharge violated a specific statue, a worker could be discharged at anytime, for any reason, without legal recourse.

A "typical" firing goes like this: the worker is called into the boss's office. He stands alone, facing two management representatives. His immediate supervisor is not there. One of the executives tells him that he would be better off somewhere else. It would be sensible for him to leave voluntarily, with a severance payment and good references. If the worker objects or asks questions, he is told that the offer may be withdrawn. They refuse to give him anything in writing.

- The employee is alone.
- The atmosphere is coercive.
- The reasons for discharge are vague and undocumented.
- There is no opportunity for the employee to confront supervision.

- Severance payment is nonnegotiable.

Employment-at-will is a doctrine that was formulated by employer dominated courts during the early days of industrial capitalism. It was a harsh economy then. In the words of the United States Supreme Court it was taken for granted that "either party could terminate an employment relationship for any or no reason" (Geary v. U.S. Steel Corporation, 539 F.2D 1126, 380 US 560)

Prior to the termination-at-will doctrine employment was assumed to be on a year to year basis unless otherwise agreed. Employment could be terminated only after reasonable notice unless there was good reason for canceling the relationship. In an 1849 case, Truesdale v. Young,(1849 125 FD 621) a pilot on the Hudson River was fired without cause. A federal court upheld the discharge. An "industrial" theory of employment crept into the national law. Laissez-faire attitudes toward workers began to appear in court decisions.

In 1877, a law professor named Horace Gay Wood published a textbook on the "Law of Master and Servant," popular with the employers of his time. He confirmed the termination-at-will doctrine. "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if a servant seeks to make it out a yearly hiring the burden is upon him to establish it by proof... It is an indefinite hiring and is determinable at will of either party, and in this respect, there is no distinction between domestic and other servants."

After the new rule was accepted by the New York Courts in 1895, it was adopted by other courts throughout the United States. Termination-at-will became embedded in the law.

The most fundamental rule of the law of master and servant is that which recognizes that absent any applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause.

A worker could not question a discharge. The employer was not required to provide a grievance procedure or do anything more than point toward the gate. No importance was attached to the employer's motive. He could give a reason for the discharge or not give a reason. In no case was the employer was not required to show that his reason was justifiable.

In 1908, in Adair v. United States (111 US 115), the U.S. Supreme Court justified the rule on the grounds of mutuality, "The right of the employee to quit the service of the employer for whatever reason is the same as the right of the employer, for whatever reason, to dismiss with the services of such employee". The court argued that it would violate the fifth amendment of the constitution to compel an employer to retain the services of an employee. It would be "slavery".

In Geary v. U.S. Steel Corporation (ibid., p.3.) a salesman had been fired after fourteen years of service. He claimed that he was being punished for telling his superiors that the steel tubes the company was selling were defective and would be dangerous in high-pressure installations. After he communicated his misgivings to a top sales executive, the company took the tubes off the market. But, he was fired. The Supreme Court of Pennsylvania dismissed Geary's suit. "The law has taken for granted the power of either party to terminate an employment relationship for any or no reason".

Until recently the doctrine of employment-at-will had been unchallenged in the United States. But in some courts there is now a change in attitude from the harsh employment-at-will concept to a just cause concept. Courts are now protecting employees from being fired for arbitrary reasons. The courts are forcing employers to show just cause for dismissing their employees. Employers are being forced into formal termination procedures. These termination procedures include progressive discipline where the employee is warned several times in writing. The procedure also provide due process for the employee. The employee has the (a) right to tell his story to a review board within the company.

CHAPTER III

THE INFLUENCES ON EMPLOYMENT-AT-WILL DOCTRINE

One of the forces that has influenced the move toward just cause has been the enactment of federal and state discrimination laws. While these statutes do not legislate a just cause standard for the group they protect they have forced employers to defend a broad range of employment decisions before administrative agencies and courts. Not unexpectedly, one of the best and most frequently used defense in discipline discharge cases has come to be that of just cause.

Another force in influencing the swing toward just cause has been the unions. For years labor agreements have required the employer to justify any discipline done to a union employee. It has been the assumed by the work force in general that the same rights provided to the union employee also apply to the non-union employee.

Foreign labor laws are also influencing America's labor laws. Throughout Europe, national laws provide direct protection against unjust dismissal. The French call it a principle of "stability of employment," meaning job security. This concept is not limited to Europe. Countries as varied as Algeria, Canada, Egypt, Japan, and Korea provide similar protection.

These employment-protection laws have some features in common. They apply to all employees who have completed a probationary period. They require the employer to give advance notice before dismissal, except in

unusual cases. Most laws require the employer to pay money damages rather than to reinstate the employee. Usually, an employee is not free to quit without giving notice to the employer. Examples of some of the typical foreign laws follow.

England

Since 1971, British laws have provided comprehensive protection for employees who have been unfairly dismissed. The burden is on the employer to demonstrate the fairness of the dismissal. The legislation came as a result of the Donovan Commission report in 1968 and was intended to forestall strikes over individual dismissals.

The individual rights provisions are contained in the Employment Protection Act. Complaints by employees must first be submitted to a government conciliation service, which disposes of more than a third of the cases. The conciliators not only try to settle the cases, they advise employers on how to improve their dismissal procedures. About ninty percent of the workload of the 200 British conciliation officers is concerned with unfair dismissal complaints. Their work with the employer and the discharged worker is confidential, and is conducted mainly through separate meetings at which the conciliator tries to arrange a satisfactory settlement.

A code of practice has been developed by the Advisory Conciliation and Arbitration Service which has been widely adopted by employers. It provides for prior warning, uniform disciplinary rules and an internal review procedure. If the complaint is not settled, it must be presented to an industrial tribunal, a tripartite body made up of appointed officials. The chairman is a lawyer. The tribunal handles cases from more

than a dozen labor laws; but four out of five cases concern unjust dismissals.

The determination as to whether a dismissal is fair depends on whether or not the employer can persuade the tribunal that the employer has a valid reason for dismissing the employee.

The tribunal may order reinstatement, but monetary awards are far more common. In calculating an appropriate award, the tribunal takes into account voluntary severance payments and unemployment benefits. The statute contains a formula for the basic award to which something is added for the loss sustained as a consequence of the dismissal. Thousands of cases are heard by industrial tribunals. About one-third of the dismissal cases result in decisions for the employee. Average awards are surprisingly low. For example, the median award in 1980 was $1000.

The hearing itself is informal, similar to arbitration proceedings in the United States. Neither party is likely to be represented by an attorney. An average case will take about six months. Only a few cases are appealed although it is possible to take an appeal all the way to the House of Lords.

France

Toward the end of the nineteenth century, French courts began to protect employees. Employers were held liable for terminating an employment contract if they acted with malicious intent, culpable negligence, or capriciousness.

In 1928 the abuse of right doctrine became part of the law. An employer could not discharge an employee for illness, industrial injuries, pregnancy, political beliefs, exercising rights of citizenship,

engaging in a strike, personal dislike, or if seniority procedures had not been followed.

After submitting the dispute to conciliation, an employee has the right to bring the employer to a labor court. The burden of proving an abuse of right is on the employee. The French labor courts lack authority to reinstate. Again, the usual remedy is compensation.

Germany

In 1951 West Germany provided that a worker could be dismissed only if the action was "socially justified." The employer has the burden of proving the facts upon which the dismissal is based. The employer must show that it is not possible to keep the worker. As the law has been implemented by the German labor court, the reason for discharge must be job related. Dismissal must be necessary for effective operation of the business. The standard is similar but more demanding than the "just cause" requirement applicable to union contracts in the United States.

In 1972 the law was strengthened. Now a German employer must consult with the plant Work Council before giving notice of dismissal. The Work Council represents all of the workers, union and nonunion. If the employer discharges a worker and the Work Council contradicts the decision, the employer must retain the employee until the case is decided. An employer seldom risks a real conflict with the Work Council. Rather than trying to prove justification for a discharge, employers will try to invent an economic reason for eliminating the position.

People from both management and labor sit on the Labor Court with a professional, lifetime judge. This is the case not only at first level but also on the Court of Appeals. Conciliation is required before the

cas can come to hearing. If dissolution is sought by an employer, up to one year's salary may be awarded to the worker.

Sweden

In 1974 Sweden enacted a law which provided that employment would be "until further notice," unless otherwise agreed. Dismissal can only be for "an objective cause" to be proven by the employer. Valid reasons for discharge include unexcused absence, insubordination, and negligence. The employer must consider not only the cause for dismissal but the employee's future usefulness. Dismissal without notice is allowed only for serious neglect of duty.

An employee challenging a dismissal can sue in the Labor Court if he is a union member or in the regular courts if he is not. Most Swedish workers are non union. If dismissal is judged improper, it is declared invalid, but the courts cannot order reinstatement.

Japan

Japan's Labor Standard Law requires employers and unions to formulate rules of employment which define the occasions upon which workers may be dismissed and to provide prior procedural due process. These rules govern adjudication of discharge cases, particularly in the larger companies. The larger Japanese firms take responsibility for their permanent employees during their entire working careers, granting them substantially more job security than in this country. This is done voluntarily and not because of legislative compulsion.

Mexico

Mexican labor law requires an employer to pay a termination indemnity to an employee whose employment is ended. There are two types of indemnities. The basic coverage is equal to three months pay, plus

twenty days pay for each year of service. Thus, for an employee whose service is terminated after thirty-five years, the indemnity would equal about two years earnings. The indemnity is not paid if the employee quits. If the employee is forced to retire, is fired, or is disabled, the employee is paid.

An additional seniority indemnity which is paid to employees with fifteen or more years of service, is equal to twelve days pay per year of covered service, but is limited to twice the minimum wage. This benefit is payable if the employee dies, is disabled, voluntarily retires, or quits. Both indemnities are paid in a lump sum and are based on final pay.

CHAPTER IV.

EXCEPTION TO THE
EMPLOYMENT-AT-WILL DOCTRINE

This section examines in detail specific court actions within the United States that have taken exception to the employment-at-will doctrine as it pertains to employee dismissals.

The courts have now recognized two exceptions to discharge under employment-at-will. Discharges of at-will employees arising as a result of an employee exercising a public policy right that has been voided by the courts. In these cases an employer can be liable if his conduct is in retaliation for an employee's use of a protected public policy. For example, the courts have protected employees from wrongful discharge under this exception for refusing to commit perjury(1), for filing a workers compensation claim(2), and for accepting jury duty.(3)

Exceptions for malice and bad faith can also protect an at-will employee from discharge. Under this defense discharges which are motivated by bad faith, malice, or retaliation, violate an expressed or implied covenant of good faith and fair dealing between employer and employee. The courts have revoked discharges using this exception when

(1) Petermann v. International Brotherhood of Teamsters, 174 CalApp2d 184, 344 P2d 25 (Cal DC App, 1959), 38 LC P 65,861.
(2) Frampton v. Central Indiana Gas Co., 260 Ind 249 (Ind, 1973), 297 NE2d 425.
(3) Nees v. Hocks, 272 Ore 210 (Ore, 1975), 536 P2d 512.

sexual harassment (4), depriving an employee of commissions (5), and refusing to commit unlawful conduct were the motivation for for dismissals.(6)

Recently courts in several states have established an additional exception to dismissal of at-will employees. Courts in sixteen states (Alabama, Alaska, California, Connecticut, Idaho, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, Oklahoma, Oregon, and Washington) have taken the position that implied contracts for employment can be established through employer handbooks, manuals, oral statements, and preemployment interviews which can legally bind the employer.

In these cases, the plaintiff alleges that the discharge violates an implied contract between the employer and employee that gave assurances of job security or just cause for dismissal. An implied contract can be established if company policies, handbooks, or oral promises which create expectations of treatment which the company does not follow. This study discusses the development of an enforceable implied contract concept, and how courts in three prominent, industrial states have used the implied contract exception in deciding at-will discharge cases which have established precedents for other jurisdictions.

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(4) Monge v. Beebe Rubber Co,. 114 NH 130 (NH 130 (NH, 1974), 316 A2d 549.

(5) Fortune v. National Cash Register, 373 Mass 96 (Mass. 1977), 364 NE2d 1251.

(6) Tameny V. Atlantic Richfield Co,. 27 Cal3d 167, 164 CalRptr 839 (Cal, 1980), 510 P2d 1330.

Several courts have held that an employer loses his right to terminate at will when the employer agrees to discharge employees only for good or just cause, gives assurances of job security, or has prescribed procedures for discharge. The above actions by the employer establishes an expectation to employees for their treatment within the organization. When an employer fails to follow his promises, the employee has been denied an expected right which the courts can enforce and the employer has lost the right to terminate at-will.

The courts are been recognizing that at-will employee may have an implied contractual right to job security which can be substantiated by reference to the circumstances of employment.(7) Thus when an employee can show either implied promises of employment for a specific duration or reliance on job security courts have recognized contract rights which employers must follow. By establishing such implicit rights, employees can challenge their discharge on the presumption that it violates the implicit rights of the individual in the employment relationship.

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(7) Perry v. Sindermann (US Sct, 1972), 408 US 593. The relevant section the court's holding is: "absence of . . . an explicit contractual provision (on tenure) may not . . . foreclosure the possibility that a teacher has a property interest in re-employment . . . . The law of contracts. . . long has employed a process by which agreements, though not formalized in writing, may be 'implied.' Explicit contractual provisions may be supplemented by other agreements implied from the promiser's words and coduct. . ."

Utilizing this approach necessitates the identification and definition of factors that support the assertion of implied rights governing at-will employment. Through the adjudication of at-will employment cases, the courts have crafted from contract theory three categories of factors that are applicable to conflicts between implied rights and employment at-will.

Categories of Factors

The rule has developed that regardless of the the employee's promise to perform, a contract of work for an unspecified period is indefinite and terminable at will by either party. However, consideration can be used to bind the employer to grant greater employment security under some circumstances. The employee must show additional consideration above that normally found in employment, thereby establishing a reciprocal obligation by the employer not to terminate at will.

There are two categories of additional consideration that can create expectations regarding job security under at-will employment. Added benefits given to the employer by the employee may support an expressed or implied promise of job security. The courts have recognized several types of added benefits by the employee that qualify as additional consideration. Surrender of tort claims against employers,(8) contributions to the business by employees(9), job training where the The availability of workers' compensation has caused this type of separate consideration agreement to cease being used as a way of establishing stronger employee entitlement to job security. costs are borne by the employee,(10) and turning down other offers of

(8) Pierce v. Tennessee Coal, Iron, & R.R. (US SCt, 1898), 173 US 1.
(9) Downes v. Poncet (NY City Ct, 1902), 78 NYS 883.
(10) Ward v. Consolidated Foods Corp. (Tex CivApp, 1972), 480 SW2d 483.

employment(11) have established additional consideration by the employee to the employer sufficient to justify claims of job security beyond the at-will level.

Additional consideration can also be established when the employee has forfeited something other than normal work or effort to get the job. Situations that can create special reliance on additional job security by the employee include the selling of a business by people who then become employees of the buyer (12), moving when tied to promises or indications of lengthy employment (13), and implied or expressed promises about job security made during recruitment(14).

Longevity also can create an implied contract. Longevity establishes an employment right which of itself may prevent wrongful discharge. Discharging a worker before he collects retirement benefits provides an economic windfall to the employer which some courts have argued must be counterbalanced by the employee's implied contractual right to the compensation.(15) Employers can establish expectations of job security

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(11) Fulton v. Tennesse Walking Horse Breeders' Association of America (Tenn AppCt, 1971), 476 SW2d 644; Maloney v. E. I. DuPont de Nemours & Co. (CA DofC, 1965), 352 Fd 936, cert denied (US SCt, 1966), 383 US 948.

(12) Stater v. Walnut Grove Prod. (Iowa, 1971), 188 NW2d 305.

(13) Brawthen v. H&R Block, Inc., 28 Cal App3d 131 (Cal, 1972), 104 CalRptr 486; Ward v. Consolidated Foods, cited at note 10.

(14) Hamilton v. Stockton Unified School District, 245 CalApp2d 944 (Cal, 1966), 54 CalRptr 463; Weiner v. Mcgraw-Hill (NY CtApp, 1982), 457 NYS2d 193.

(15) Stopford v. Boonton Molding Co., 56NJ 169 (NJ, 1970), 265 A2d 657; Ebling v. Masco Corp. (Mich Sct, 1980), 292 NW2d 880.

through expressed or implied expressions of satisfaction with an employee's work. Thus, statements of good work, salary increases, promotions, or permission to participate in special compensation programs have been used by courts to infer employment rights for at-will employees that can end only for just cause reasons.(16)

(16) Greene v. Howard Univ. (CA DofC, 1969), 412 F2d 1128; Pugh v. See's Candies (Cal, 1981), 171 CalRptr 917; Neth V. General Electric Co., 65 Wash2d 652. 399 P2d 314 (Wash SCT, 1965), 51 LC P 19,581; Toussaint v. Blue Cross and Blue Shield of Michigan(Mich SCt, 1980), 292 NW2d 880.

Characteristics of Relationships

The characteristics of the employment relationship may determine the terms of contract. Both company policies and, in some cases, the nature of the job have been used to indicate what the parties expected.

The express or implied personnel policy of a company may create the terms and conditions of the employment contract. The policy of the employer as expressed in a handbook (17), memoranda to employees (18), or oral statements(19) undermines the argument that the contract was terminable at will. For a handbook to be enforceable courts have held that it must be known to employees in general (20). In interpreting company policy, the courts have applied the standard rules of contract construction so that ambiguities and omissions go against the party that created it.

The courts have therefore established a methodology to examine at-will employment relationships from an implied contract perspective. Courts in several states have applied elements of this methodology to wrongful discharge cases which allege implied contract violations by the employer.

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(17) Greene v. Howard Univ., cited at note 16; Toussaint v. Blue Cross. Cited at note 16; and Cleary v. American Airlines (Cal AppCt, 1980), 168 CalRptr 772.

(18) Brawhten v. H&R Block, cited at note 13.

(19) Hamilton v. Stockton Unified School Dist., cited at note 14; Toussaint v. Blue Cross; and Weiner v. McGraw-Hill, cited at note 14.

(20) Cedarstrand v. Lutheran Bldg. (1962), 117 NW2d 213; Stewart v. Albert Einstein College of Medicine, N.W.L.J., March 15, 1983, p. 1 (sic).

In the following sections, the significant court decisions in California, Michigan, and New York which were based on the implied contract exception. These states have been selected because cases decided in these states have had a precedent setting impact. Analyzing them will show how the implied contract exception has been evolving at the leading edge of judicial action.

Court Decisions in California

The California courts have shown an increasing reluctance to allow the unrestricted termination of at-will employees when public policy or good faith covenants are violated.(21) The courts have restricted discharge at will where evidence shows an expressed or implied limitation on terminations.(22)

In Cleary v. American Airlines, Inc.,(23) the California Appeals Court made significant inroads into employment at-will based on implied contract theory. The court found that the company had violated both an implied good faith obligation and an expressed contract provision binding the employer to discipline and discharge in accordance with a stated procedure. Cleary's eighteen years of service, the court said, created a good faith covenant that the company must discharge only for good cause because of the accrued benefits and rights earned by such a senior employee. Thus, employment longevity and expressed restrictions could void termination at-will without good cause. Longevity and the expressed employer policy established an implied contractual right to job security which made Cleary's employment other than at will.

The Cleary holding was further solidified in Pugh v. See's Candies, Inc. (24) The fact situation in this case is as follows. Pugh began working at

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(21) Patterson v. Philco Corp., 252 CalApp2d 63 (Cal, 1967), 60 CalRptr 110; Petermannv. Teamsters, cited at note 1; and Tameny v. Atlantic Richfield, cited at note 6.

(22) Drzewiecki v. H&R Block, 24, ;CalApp3d 695 (Cal, 1972), 101 Cal Rptr 169; Rabago-Alvarez v. Dart Industries, Inc., 55 CalApp2d 91 (Cal, 1976), 127 CalRptr 222.

(23) Cited at note 17.

(24) Cited at note 17.

See's in January, 1941 and after a period of wartime service continued his employment until discharged in 1973. He received a number of promotions, the last in 1971 when he was given the position of Vice President in charge of Production. In 1973, Pugh was abruptly discharged by the president of the company without formal, stated reason.

When he was hired in 1941, Pugh had been told by the company's president that, "If you're loyal and do a good job, your future is secure." The next two presidents as well followed a policy of not terminating administrative personnel except for good cause. During his tenure at See's, Pugh had received no formal or written criticisms, complaints, or warnings of work deficiencies, nor word of contemplated disciplinary action. He had received regular raises and bonuses. It was Pugh's contention, that his discharge was due to his opposition to the labor relations policy of the new president,

The court reached this conclusion by looking for evidence in the employment relationship that would establish a good cause for dismissal policy. It noted that such factors as personnel policies, employee's longevity of service, actions of the employer indicating good performance, and assurances of continued employment could establish an implied guarantee.

The Cleary decision also was used by the court to support Pugh. If Cleary's eighteen years of service breached the implied covenant of good faith and fair dealing contained in all contracts, then "that covenant would provide protection to Pugh, whose employment is ... twice that duration "(25). Pugh's promotions, awards, lack of direct criticism,

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(25) Pugh v. See's Candies.

assurances given by past company presidents, and the company's policy toward discharging administrative employees established an implied promise not to act arbitrarily against employees.The arbitrary manner in which the company fired Pugh breached this implied promise.

The leading California cases have recognized three ways of establishing an implied contract exception to employment at will. These are: 1)where the employer has given oral assurances to the employee that he has a job as long as his work is satisfactory, 2)where the employer has written or expressed policies which say the company discharges for cause or follows a specified procedure in discharge cases; and 3)where an implied covenant of good faith and fair dealing in the employment contract can be shown. Evidence such as longevity and oral or written promises not to deal arbitrarily with employees may also establish a wrongful discharge.

Court Decisions in Michigan

Two Michigan Supreme Court cases in 1980 established implied contract limitations based on handbooks and manuals. The two cases involved these facts.

In Toussaint v. Blue Cross, (26) the plaintiff brought action for wrongful discharge from his job by Blue Cross and Blue Shield of Michigan. When Toussaint inquired during preemployment interviews about job security, he was told that he would be employed as long as he did his job. A manual of personnel policies given to him the day he was hired in 1967 reinforced the oral assurances of job security. The manual said that the disciplinary procedures applied to all employees who had completed their probationary periods and that it was company policy to discharge only for just cause. In 1972 Toussaint was told by his supervisor to resign.

In the companion case, Ebling v. Masco, Ebling, Director of Marketing for the Molloy Manufacturing Division of Masco, claimed that an oral contract of employment provided that the employer could discharge him only for good cause after review by the company's executive vice president. Ebling asserted that the actual reason for his dismissal before the third anniversary of his employment was to prevent him from qualifying for a company stock option that by then had substantially increased in value.

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(26) Cited at note 17; Ebling v. Masco Corp., cited at note 16.

In both cases the Michigan Supreme Court held that plaintiffs had established valid cause of actions for their assertions of wrongful discharge and upheld jury decisions which had awarded $75,000 and $300,000 in damages to Toussaint and Ebling, respectively. The court decisions turned on whether oral or written assurances that discharge will be for just cause can create implied contract rights which provide added job security to those hired under employment contracts for an indefinite period.

The court analyzed whether consideration and distinguishing features of the employment relationship supported the existence of an implied contract exception. The court stated that consideration by itself does not limit the enforceability of a contract to those situations in which the employee provides consideration above that of the services rendered to the employer. If the employer made other job-related promises to the employee, the court said, the employee would not have to show additional consideration as a prerequisite for the employer to act on those promises.

To determine the terms and conditions of the implied contract, the court had to draw upon the characteristics of the employment relationship between the parties. Thus, the task for the court became one of discovering and implementing the intent of the parties as revealed by the distinguishing features of the employment relationship.

The court reached several important conclusions. An employee hired at will with the provision that discharge shall not occur except for cause cannot then be discharged without cause. In both Toussaint and Ebling, the respective employers agreed not to discharge except for good cause, and Toussaint had the further assurances contained in the employ-

er manual. The court felt that the oral statements made to Toussaint and Ebling by the companies provided sufficient evidence of a mutual understanding between the parties of just cause for discharge instead of at-will termination.

According to the evidence presented in Ebling, the plaintiff had verbal assurances during contractual negotiations from the conpany's executive vice president that he would be subject only to discharge for cause and not at will and that if his immediate supervisor felt his work to be unsatisfactory termination would occur only after the executive vice president had reviewed his performance and given him opportunities to correct his deficiencies. If the executive vice president still found his performance wanting after these latter two steps, he could then be discharged. In both Toussaint and Ebling, these verbal assurances limited the right of management to discharge at will.

About the personnel policies in Toussaint, the court said that, when an employer establishes and makes known to employees such policies, the employer gains order, cooperation, and loyalty while the employee gets assurance that he will be treated fairly and have some job security. In its decision, the court commented: "the Blue Cross...manual...can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights...and although the policy statement is signed by neither party, can be unilaterally amended by the employer without notice to the employee, his job description, or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his hiring."

The court further held that policies in force at a given time must be applied uniformly to all, and that the employer cannot depart from the policy in effect because it suits his purposes. Thus, having established a policy to dismiss for cause, Blue Cross could "not treat its promise as illusory."

The court did say, however, that employers could avoid litigation such as that in Toussaint and Ebling by requiring prospective employees to recognize that they serve at the will of the company.

The Michigan courts essentially have concluded that when companies establish objectives in regard to the employment relationship, they cannot then void these legitimate expectations by arbitrarily departing from the established objectives. Legally enforceable policies can be established by oral or written statements on job security or by having a specific procedure for discharge. In Michigan, employers can retain the right to terminate at will where express provisions in the employment contract say mutual termination without cause is allowed and that is not contradicted by other oral or written statements.(27)

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(27) Schwartz v. Michigan Sugar Co., 106 MichApp 471 (Mich, 1981). 308 NW2d 459; Bachelor v. Sears, Roebuch & Co., US Eastern District (November 3, 1983), No. 83-1143. In this case the court said that a statement saying that employment is terminable without cause, if not contradicted by other statements, can be construed as a policy statement of the employer, need not be mutually agreed upon to affect the parties' contractual relationship, and precludes the employee from having expectations that the employer would discharge only for cause.

Court Decisions in New York

The leading New York case on employment at will, Weiner v. McGraw-Hill, Inc.,(28) dealt with the effect of preemployment promises and handbook provisions on management's right to terminate at will. Weiner was recruited from another publishing house in 1969. During preemployment discussions, the company representative assured Weiner that McGraw-Hill had a just cause for discharge policy which gave job security to its employees. Weiner also specified on the job application form that his employment would be subject to provisions of the employee handbook which included a provision stating that dismissal is for just cause only and will occur only after rehabilitative efforts have been taken and failed. This job application form was signed by the interviewer and a supervisor.

Weiner was hired and served eight years at McGraw-Hill. During that time he was promoted and given raises, and he received no complaints about his work. Nonetheless, in 1977 he was abruptly discharged for lack of application. Weiner alleged that this was a wrongful discharge in breach of his employment contract. The employer asserted that, since the employee retained the right to quit at will, mutuality of obligation was absent and the employer

(28) Cited at note 14.

could terminate at will. The court did not see mutuality as the key factor in determining a contract but turned instead to determine if the presence of consideration by the employee established evidence of a contract. The pivotal decision made by the court was that consideration as shown by the parties need not be equivalent in value "as long as it is acceptable to the promise." Thus, Weiner's rendering of services and their acceptance by McGraw-Hill was sufficient consideration to enable a contract to exist between the parties.

The second prominent issue dealt with the promises and employee handbook. The court maintained that these guarantees to discharge only for cause after efforts to rehabilitate had failed limited management's right to terminate at will. Thus, evidence supporting the establishment of a contract limiting the employer's at-will termination right and a breach of it were present.

In two recent cases, New York courts have not recognized wrongful discharge where the fact situation deviated from McGraw-Hill. In Stewart v. Albert Einstein College of Medicine,(29) the New York Supreme Court of Bronx County rejected a wrongful discharge claim based on an implied contract. The court said that the circumstances in Stewart differed from McGraw-Hill in some significant ways which led the court to dismiss the case. The personnel manual which the laid-off supervisor relied upon was not an employee handbook per se but an administrative guide issued to supervisors only and used to handle typical personnel problems. The manual was not issued until twelve years after Stewart's

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(29) Cited at note 20.

hire, nor did his job description mention or assure job security. Unlike Weiner, Stewart did not forego benefits or salary inducements from another employer to accept his job with the college. Thus, the court said the manual and whatever oral promise made were insufficient to restrict the employer's at-will rights by implied contract.

In Murphy v. American Home Products Corp.,(29) the New York Court of Appeals rejected the argument that there is in all employment contracts of an indefinite duration a limitation on termination rights. Murphy argued that all employment contracts create an implied obligation exposing the employer to liability for breach of contract. The court repudiated that argument because it would be a contradiction of logic to assume the employer implicitly agreed to a provision that limits his unrestricted right to discharge which the law recognizes under at-will employment.

The situation in New York regarding implied contracts has not been advanced as far as California and Michigan courts have taken it. Dependence on oral statements by supervisors or vague statements in handbooks without allowing personal reliance on such statements may not be sufficient to establish cause of action for breach of an implied contract involving termination of an at-will employee in New York.

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(30) 71 DLR D-1 (April 12, 1983).

CHAPTER V

SUMMARY

The right to terminate at-will employees has been abridged by public policy, malice and bad faith, and now the implied contract exception. The implied contract doctrine enables the courts to enforce rights that employers have promised to an employee who was hired under at-will conditions. The courts have ruled implied contract rights exist in the employment relationship where the employee/plaintiff has been able to show longevity, promises oral or written of just cause for dismissal, promise of job security. Employee handbooks or manuals which have specific procedures and principles followed for discharge. Can also establish an implied contract. When the courts have found an implied contract, employer actions which deviate from the contractual promises create stability for the employer and rights for the employee that the courts can enforce.

The three states examined in depth in this study have accepted the implied contract exception to employment at will with one modification in each jurisdiction. In California, oral assurances of discipline for cause and job security and an implied covenant of good faith and fair dealing in employment contracts founded on length of service and written procedures can establish an implied contract limitation on termination at will. New York courts have required oral statements of job security and fairness to be tied to a showing of reliance by the employee on such

statements prior to hire to enforce an implied contract limitation. However, an expressed limitation such as an employer's handbook does create legally enforceable procedures that the employer must follow.

Michigan perhaps has gone further than the two other states in recognizing the implied contract exception. Its courts have accepted both employee handbooks and oral assurances of job security to affirm as an expressed agreement which binds employers to such policies.

The differences in the way each state approaches the implied rights exception are more of degree than kind. Each has accepted the fundamental principle that expressed or implied promises can establish legally enforceable contract rights.

At this time, the significant differences between these three states and, as well, the other states that have accepted the implied contract exception are the evidentiary weight of oral statements and of other types of supporting information in establishing an implied contract. When oral statements are supported by expressed policy in handbooks or manuals or can be shown, for example, to have persuaded an employee to leave another job or stay with the firm, the courts have seen this as sufficient evidence of reliance for the establishment of an implied contract.

The implied contract exception provides another protective framework for at-will employees. Under the implied contract exception, explicit or implied promises about job security can impose limitations on the traditional unrestricted right of employers to terminate at-will employees. Especially noteworthy has been the increasing acceptability of this approach to the courts. It has only been in the last three or four years that this once narrow limitation on at-will employment has begun

to have greater impact. Trends already established by to public policy and bad faith exceptions indicates further spread of this doctrine as well. While the at-will employment concept still enjoys the preponderant support to the state judiciaries, current court behavior suggest that its legal sanctity will be steadlily whittled down.

CHAPTER VI

RECOMMENDATIONS TO THE EMPLOYER

Most large legally informed companies are doing the following to limit its liability against wrongful dismissals: 1) Company will avoid terms such as "permanent", "full time" or "regular," when advertising a job vacancy. The advertisement will also note that continued employment is subject to economic conditions and satisfactory job performance. 2) Job applications of the company should state that "employment is terminable at will by either party." 3) Job interviewers have been instructed not to say anything that overstates job security, such as "if you do a good job, you'll always have a place to work here." 4)Firms have eliminated language in personnel handbooks and policy manuals informing employees that they will be disciplined only for cause. If the manual includes specific infractions for which an employee can be fired the manual will also have a statement saying that the list is not inclusive. 5) Firms such as Xerox Corp., have assumed that just cause must be proven to dismiss an employee.

Xerox 's action that other companies are also adopting maybe the best defence against a suit for wrongful dismissal. Also, if a company takes the position of having to prove just cause now, it may not have to rush something into place when the courts force them to. If a company decides to take such a position, it must adopt policies and procedures that will prevent terminations for arbitary reasons.

Most companies that have termination procedures rely on progressive discipline. Progressive discipline requires that the employee be coun-

seled first about the specific problem. If the problem persist the employee will receive a written reprimand. If the problem continues past the point of a series of written reprimands a final warning, is given. If unsatisfactory behavior recurs after the final warning then the employee is dismissed.

Counseling

The manager should show a genuine interest in identifying and correcting the cause of the unsatisfactory performance.

Written Reprimand

Any reprimand should be in writing. If the unsatisfactory performance has not been corrected by counseling, the written reprimand should emphasize the importance of the situation, describe the particular deficiency, review any previous discussions on the subject, define the standards of performance that are expected, and specify a period of time to correct the deficiency.

The consequences of the employee's continuing failure to maintain satisfactory performance should be noted; deferral of salary increase; lack of promotional opportunities; possible loss of job. The manager should give a copy to the employee. A copy also should be placed in the employee's personnel file. The manager should fix an appropriate follow-up date to determine if improvement is achieved. If the employee subsequently achieves a satisfactory level of performance, an appropriate memo should be placed in the file.

Final Warning

In giving a final warning, a manager should make it clear that the responsibility for remaining with the firm rests entirely in the employee's hands. The final warning should contain the following elements.

1. Copies of previous written warnings.
2. Specific areas in which the employee must improve.
3. A period of time within which to correct the unsatisfactory performance.
4. A statement that this is the final opportunity to bring performance up to the required level. Continuing failure will result in the employee being terminated. A copy of the warning should be givin to the employee and placed in his file.

If the employee corrects the unsatisfactory behavior, a memo should be prepared by the manager indicating that the employee is removed from final-warning status on the understanding that the acceptable level will be maintained. Copies of this should be given to the employee and placed in the file. If unsatisfactory behaviour recurs. The manager should decide whether to issue a new final warning.

Dismissal:

Before concurring in a termination, the department head should determine that the employee is not meeting performance standards established for the job, has been informed of such shortcoming, has been counseled on the improvements required, and has been warned that dismissal will result if performance does not improve. The manager supervising the employee is responsible for informing the employee of termination.

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Scope of Study: This report Examines the evalution of the Employment-At-Will Doctrine. It looks at the creation of the doctrine and the current influences that are changing the Employment-At-Will Doctrine It also examines in detail recent court exceptions to the Employment-At-Will Doctrine.

Findings and Conclusions: Eventhough the Employment-At-Will concept enjoys support in the state courts, current court behavior suggest that its legal sanctity will be steadily whittled down. The court has taken exception to the At-Will Doctrine by judging that implied job security constitutes an implied contract. This report also has included sugestions to employers on avoiding a wrongful dismissal suit.

ADVISER'S APPROVAL