

# The Status of the Employment-at-Will Doctrine in Ohio: Ohio Incorporates a Public Policy Exception

## I. INTRODUCTION

Employer-employee relations in the United States from the commencement of the industrial revolution up to the present have been governed by the "employment-at-will" doctrine. The "at-will" rule is defined as "a contract employing a person without any agreement as to the period of service [in terms of duration] will be deemed a hiring at will, subject to be terminated at the pleasure of either of the parties."<sup>1</sup> Under the at-will rule, the employer has the right to discharge a worker in his employ at any time and for any reason.<sup>2</sup> It is equally true that the employee may terminate his employment at any time without reason, regardless of any potential harm to his employer.<sup>3</sup>

Although the national statutory and judicial trend in recent times has been to create exceptions to the traditional at-will rule,<sup>4</sup> the Ohio Supreme Court has shown an entrenched reluctance at best, or an obstinate refusal at worst, to deviate from strict adherence to the rule.<sup>5</sup> Thus, the court up until 1989 had gone only so far as to establish a narrow exception to the rule founded on the contract principle of promissory estoppel. In such a case a discharged employee may allege that an employer's representations or promises of employment were relied on to the employee's detriment, and that the employer should be estopped from using the defense of the at-will rule in discharging the employee.<sup>6</sup>

However, in the recent case of *Helmick v. Cincinnati Word Processing, Inc.*,<sup>7</sup> the Ohio Supreme Court acknowledged in a footnote that statutes newly adopted<sup>8</sup> by the Ohio legislature had in effect modified the common law, creating a public policy exception to the at-will rule.<sup>9</sup> Despite the court's recognition of the legislature's expressed desire to protect employees who report their employers' violations of the law (known popularly as a "whistleblower" statute), the court refused to directly address the possible application of the new statute to the facts in *Helmick*. The court instead conformed the facts of the case to its previously established promissory estoppel exception to the at-will rule set forth in *Mers v. Dispatch Printing Co.*<sup>10</sup>

However, courts that adhere to a strict construction of the law can find themselves in a self-induced bind. Typical of such courts, the Ohio Supreme Court has espoused the view that they should not go beyond the statutory policies of the state legislature. They would not, therefore, judicially manufacture a

---

1. 39 O. JUR. 3d *Employment Relations* § 28, at 59 (1982).

2. D. MACKEY, *EMPLOYMENT AT WILL AND EMPLOYER LIABILITY* (1986).

3. O. JUR. 3d, *supra* note 1, § 28, at 59-60.

4. Annotation, *Modern Status of Rule That Employee May Discharge At-Will Employer For Any Reason*, 12 A L R.4th 550 (1982).

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

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

7. 45 Ohio St. 3d 131, 543 N.E.2d 1212 (1989).

8. OHIO REV. CODE ANN. §§ 4113.51 through 4113.53 (Baldwin 1989).

9. 45 Ohio St. 3d at 135, 543 N.E.2d at 1217 (1989).

10. *Helmick*, 45 Ohio St. 3d at 135-37, 543 N.E.2d at 1216-17.

public policy exception to the time-honored employment-at-will rule if the Ohio legislature did not first enact a statute granting them specific authority. When the legislature enacted a whistleblower statute<sup>11</sup> in 1988, the court had no choice but to disclaim recent past decisions upholding employment-at-will orthodoxy. In *Greeley v. Miami Valley Maintenance Contractors, Inc.*,<sup>12</sup> the factual dicta of *Helmick* became established precedent: public policy exceptions to the at-will rule would now be permitted in Ohio when specific statutory language so indicated.<sup>13</sup>

This Note will examine the current position of the Ohio Supreme Court regarding the adoption of a public policy exception to the at-will rule and will explore reasons why the court should use the newly enacted statute as a mandate to adopt a broad public policy exception to the rule. Part II of this Note will briefly provide a history of the employment-at-will rule. Part III will survey the legal trends among the various states, noting the extremes between those jurisdictions taking an absolutist view of the at-will rule and those jurisdictions permitting the most deviation from the rule in the form of public policy exceptions. Other theories advanced to establish exceptions of the at-will rule will be examined as well. Part IV will discuss the history and current status of the rule in Ohio giving particular attention to the effects of the passage of the Ohio whistleblower statute and the Ohio Supreme Court's stance in *Helmick* and *Greeley*. Part V will analyze the economic and policy considerations for expanding a public policy exception to the at-will rule, concluding that a broad exception founded on public policy should be adopted by the Ohio Supreme Court.

## II. HISTORY OF THE EMPLOYMENT-AT-WILL RULE

As one commentator has said, "[I]t is no mistake that . . . U.S. legal digests place this topic [of employment-at-will] under the ancient heading 'Master and Servant.' It is precisely that relationship that still colors the thinking of most Americans."<sup>14</sup> The very category "Master and Servant" suggests a relationship harkening back to the "employment" arrangement between the feudal lord and serf in Europe's Middle Ages, when the employee-serf was tied to the land and had no rights other than those which the lord of the manor dictated. As European law changed in response to the new realities of the industrial revolution, the residual thinking left over from its feudal ancestry had its impact in making the preservation of property rights a predominant goal of the law.<sup>15</sup>

Toward the end of the nineteenth century, a general theory of contract, in which the rights to property were enforced in the burgeoning employer-employee relationships of the industrial revolution, came to dominate the Ameri-

---

11. OHIO REV. CODE ANN. § 4113.52 (Baldwin 1989).

12. 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990).

13. *Id.* at 234, 551 N.E.2d at 990.

14. D. MACKAY, *supra* note 2, at 9.

15. See generally Hill, *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, 3 N. ILL. U.L. REV. 111 (1982).

can common law. Contract theory of the time emphasized the freedom of the parties to bargain and exchange promises.<sup>16</sup> The "freedom of contract" evolved naturally from the prevailing laissez-faire economic philosophy of the day. Laissez-faire as a political-economic philosophy envisioned a government that would permit the marketplace to operate free of restrictions or interventions.<sup>17</sup> The general acceptance of freedom of contract in the American common law was reinforced by the credo popular among nineteenth-century Americans that asserted the importance of the individual's self-sufficiency in securing his economic livelihood. The latter half of the nineteenth century was also a period known for the unimpeded development of capitalism in America, carrying with it a certain reverence for the opinions put forth by the captains of industry. One such axiom was that what was good for private enterprise was good for all, leaving employers a free hand in establishing wages and working conditions for their employees.<sup>18</sup>

A natural offshoot of the freedom of contract doctrine was a rule under which an employment contract (or the employment relationship without benefit of expressed contractual terms) with no expressed period of duration created a presumption that the employee was terminable from his employment at the will of either party.<sup>19</sup> Courts have generally declined to interfere with freedom of contract if the employee failed to obtain express contractual protections against termination.<sup>20</sup> Under the contract theory of consideration, courts have held that an employee's work by itself, without additional consideration, entitled him to a wage only and, therefore, could not support a promise of job security.<sup>21</sup> In addition, since the employee made no mutually exchanged promise to work for a particular employer for a fixed period of time, he could not imply a promise by the employer to retain his services.<sup>22</sup>

The actual adoption by American courts of the employment-at-will rule resulted from an error made by an influential legal scholar, H.G. Wood, the author of an 1877 encyclopedia of law.<sup>23</sup> Although the English common law had been that a hiring of an employee for no fixed period of time resulted in an implied duration of one year, Wood misinterpreted the English precedents to declare that the contract could be terminated at will by either party at any time in the absence of a fixed term of duration.<sup>24</sup> The American courts thereafter adopted the "Wood" doctrine in its orthodox form. "An analysis of early [American] case law involving the application of Wood's rule indicates judicial acceptance of the rule with little or no independent legal analysis."<sup>25</sup> Most early

---

16. D. MACKEY, *supra* note 2, at 10.

17. BLACK'S LAW DICTIONARY 876 (6th ed. 1990).

18. Hill, *supra* note 15, at 119.

19. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980).

20. *Id.* at 1818-19.

21. *Id.*

22. *Id.* at 1819.

23. D. MACKEY, *supra* note 2, at 10-11.

24. *Id.* at 11.

25. Hill, *supra* note 15, at 118 n.42.

courts generally found no agreement as to duration of employment and upheld dismissal of the plaintiff-employee's action.<sup>26</sup>

The Supreme Court elevated the at-will doctrine to a constitutional right in *Lochner v. New York*, holding that the courts could not interfere with the freedom of the master and servant to contract with each other.<sup>27</sup> The at-will rule reached its zenith of influence in *Coppage v. Kansas*:<sup>28</sup>

[S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.<sup>29</sup>

The Court upheld a requirement by employers that employees execute a "yellow dog"<sup>30</sup> contract promising to resign from or refuse to join a union while employed. The Court, thus, recognized a constitutional right to hire and fire at will.<sup>31</sup> It was not until *NLRB v. Jones & Laughlin Steel Corp.*<sup>32</sup> that the Court upheld a federal statute (the Wagner Act) prohibiting employers from discharging employees for union membership, and, thus, abrogating the Court's strict adherence to the at-will rule.

The Great Depression had a significant impact on the courts' and legislatures' views regarding the traditional at-will rule. Commencing with the New Deal, federal legislation signaled willingness on the part of lawmakers to mitigate the perceived harsh effects of the at-will rule. State legislation quickly followed.<sup>33</sup> It was also natural for the courts to reflect the changes in social and economic philosophy. Since the New Deal era, there was greater social acceptance of Keynesian economic theory which engendered permissible government control of certain economic mechanisms to achieve public policy goals. In an era when *caveat emptor* had been mitigated or eliminated under the common law by new doctrines of product liability, the courts would not be hesitant to temper the at-will rule with exceptions that would erect certain protections for the worker.

The at-will doctrine has been labeled the "American rule."<sup>34</sup> The American legal system is one of the few where the doctrine has remained generally in force despite the exceptions that have been established during the last fifty years. Among industrialized countries, American law is unique in its retention of the at-will rule. For example, Great Britain has repudiated the at-will doctrine. Under the Industrial Relations Act of 1971, employees are guaranteed

---

26. *Id.*

27. *Lochner v. New York*, 198 U.S. 45 (1905).

28. 236 U.S. 1 (1915).

29. *Id.* at 17.

30. BLACK'S LAW DICTIONARY 1449 (5th ed. 1979).

31. *Coppage*, 236 U.S. 1.

32. 301 U.S. 1 (1937).

33. Comment, *The Case for Keeping Employment-At-Will: An Analysis of Ohio's Position and the Use of Disclaimers to Avoid Wrongful Discharge Litigation*, 16 CAP. U. L. REV. 723, 725-26 (1987).

34. D. MACKAY, *supra* note 2, at 10.

the "right not to be unfairly dismissed."<sup>35</sup> The employer is required to demonstrate that an employee's disputed discharge was founded on the employee's incapability to do the work or the lack of qualification to perform the designated work.<sup>36</sup> Similarly, Germany has statutorily granted employees protection against unjust dismissal,<sup>37</sup> and their courts have upheld dismissals only if the discharge is related to the job.<sup>38</sup>

### III. THEORIES FOR PERMITTING EXCEPTIONS TO THE AT-WILL RULE GENERALLY

Two distinct theories of action have been developed by American courts to create exceptions to the at-will rule. The first is an outgrowth of contract law, a logical evolution when one considers that the at-will doctrine had its roots in freedom of contract. Therefore, some of the initial steps of reform were based on traditional contract defenses such as promissory estoppel. Under the estoppel theory, courts have held that detrimental reliance by the employee on the promise or inducements of an employer can serve as support for the supposition that employment was contractually intended to continue for a reasonable period of time,<sup>39</sup> or as separate consideration to support a promise of job security.<sup>40</sup> Typical of these cases has been the Ohio approach as seen in *Mers v. Dispatch Printing Co.*,<sup>41</sup> to be discussed below. Other jurisdictions have allowed recovery in contract, requiring an employer to terminate employment in good faith.<sup>42</sup>

The second and most influential theory of action for establishing an exception to the at-will rule is found in tort principles. Tort-based actions have presented the greatest inroads into the orthodox application of the at-will rule. A major concern of the proponents of the at-will rule is the fear of punitive damages that may accompany any litigation based on tort.<sup>43</sup>

Some courts and certain state statutes have incorporated a cause of action in tort founded on a violation of public policy. Courts have recognized several broad areas for the application of a public policy tort action: (1) where the employee is terminated for asserting a statutory right; (2) where the employee is discharged for refusing to commit or acquiesce in criminal activity; (3) where an employee is discharged for complying with a statutory duty; and (4) where the employee is fired for reporting violations of law.<sup>44</sup> The focus in these cases

---

35. Hill, *supra* note 15, at 156 (citing The Industrial Relations Act 1971, Ch. 72 § 22-23, 41 HAL. STAT. 2062 (1971 Cont. Vol.)).

36. *Id.* at 156.

37. Hill, *supra* note 15, at 157 n.217 (citing Law of August 10, 1951, An Act to Provide Protection Against Unwarranted Dismissals, 1951 Bundesgesetzblatt I 499 (W. Ger.) translated in *I.L.O. Legislative Series 1951*, Ger. F.R. 4).

38. Hill, *supra* note 15, at 158.

39. Note, *supra* note 19, at 1820.

40. *Id.*

41. 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

42. See Comment, *supra* note 33, at 729-30.

43. *Id.* at 729.

44. Note, *The Employment-At-Will Doctrine, Time to Collapse Another Citadel*, 11 U. DAYTON L. REV. 399, 402 (1986).

may properly be said to be on the wrong to the public interest rather than on the wrong to the individual.<sup>45</sup>

Out of these broad categories of exceptions to the at-will rule based on violations of public policy by the employer, distinct categories of policy violations may be identified.<sup>46</sup> The first category involves those cases where an employee has been discharged for refusing to commit a crime. The lead case is *Petermann v. International Brotherhood of Teamsters, Local 396*.<sup>47</sup> In *Petermann*, the plaintiff alleged that he had been ordered by his employer to commit perjury before a legislative committee. The court held that the discharge, which occurred after the employee testified truthfully, had as its goal the coercing of an act proscribed by a criminal statute and would give rise to a cause of action.<sup>48</sup>

A second category of cases concerns the discharge of an employee for performance by the employee of an important public obligation or upholding the law. In *Nees v. Hocks*,<sup>49</sup> the plaintiff was discharged for making herself available for jury duty after her employer had ordered her to excuse herself from such duty. Although no specific state statute applied directly to the violation alleged, the court implied a violation by the defendant-employer from statutes encouraging citizens of the state to serve on juries.<sup>50</sup>

Closely related are cases typified by *Palmateer v. International Harvester Co.*<sup>51</sup> There, the plaintiff-employee was discharged for furnishing incriminating evidence to the police of another employee's criminal activity. The court found that the employer had engaged in a retaliatory discharge; this violated a public policy encouraging citizens to report crimes.<sup>52</sup>

Of a more private nature are those cases concerning a discharge for exercising a statutory right. In *Frampton v. Central Indiana Gas Co.*,<sup>53</sup> an employee was fired for filing a worker's compensation claim. Although the statute pertaining to such claims did not bar the employer from firing the employee, the court recognized a cause of action for retaliatory discharge.<sup>54</sup>

In the category of cases that are brought because the plaintiff-employee has been discharged due to discrimination based on the employee's sex, age, race, alienage, religious beliefs, or handicap, the courts may disallow the action if an alternative remedy is available. In *Wehr v. Burroughs Corp.*,<sup>55</sup> the plaintiff alleged that dismissal based on age violated a public policy as embodied in the state statute prohibiting age discrimination. The court held that an action founded on a public policy violation required that (1) the discharge violate a

---

45. *Id.* at 410.

46. See Kauff & Weintraub, *Recent Developments in the Law of Unjust Dismissal, 1982-83*, (printed in PRACTISING LAW INSTITUTE, UNJUST DISMISSAL 1983, 15.

47. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

48. *Id.* at 188-89, 344 P.2d at 27.

49. 272 Or. 210, 536 P.2d 512 (1975).

50. *Id.* at 219, 536 P.2d at 316.

51. 85 Ill.2d 124, 421 N.E.2d 876 (1981).

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

53. 260 Ind. 249, 297 N.E.2d 425 (1973).

54. *Id.* at 252, 297 N.E.2d at 428.

55. 438 F. Supp. 1052 (E.D. Pa. 1977), *aff'd on other grounds*, 619 F.2d 276 (3d Cir. 1980).

well-established public policy and (2) there be no other remedy to protect the interests of the individual or society. Since a state statute provided an alternative administrative remedy, the court determined that the plaintiff's proposed remedy was inappropriate.<sup>56</sup>

A distinct set of cases involves the discharge of employees for disclosing alleged violations of law, the so-called whistleblower cases. In *Sheets v. Teddy's Frosted Foods, Inc.*,<sup>57</sup> the plaintiff claimed he was discharged in retaliation for efforts to insure that his company's labeling and licensing of products complied with official regulations in his role as quality control director for the company. He was fired after informing his employer of the use of substandard raw materials and underweight components. The court held that an employee should not be forced to choose between the risk of criminal sanctions and continued employment.<sup>58</sup>

In terms of those jurisdictions invoking the broadest public policy exceptions to the at-will rule, the California courts have assumed their familiar status as groundbreakers. In *Tameny v. Atlantic Richfield Co.*,<sup>59</sup> an at-will employee was fired for refusing to participate in an illegal price fixing scheme. The court held that the employee retained certain implied rights of protection against unlawful discharge under statutory and constitutional provisions. Therefore, as there were state code provisions prohibiting price fixing and collusion in criminal activity, the court stated that an employer discharging an employee who refused to acquiesce in the illegal act was liable for wrongful discharge.<sup>60</sup> Since the cause of action in cases such as *Tameny* derive from a necessarily unexpressed standard, i.e., no statute specifically imposes liability for wrongful discharge, opponents of such a broad approach might complain of inadequate notice to the employer as to what actions would confer liability and of the ad hoc nature of the adjudication of such laws.<sup>61</sup> Some opponents of the wrongful discharge exception based on implied public policy have expressed a fatalistic concern for the survival of the at-will rule. "The doctrine could now face complete collapse at the hands of private causes of action for wrongful discharge."<sup>62</sup>

To counter the inexactitudes of the *Tameny* approach, the New Hampshire court in *Cloutier v. A&P Tea Co.*,<sup>63</sup> developed a two-part test. First, the employee must show that the employer's action in discharging the employee was motivated by bad faith, malice, or retaliation.<sup>64</sup> In addition, the employee "must demonstrate that he was discharged because he performed an act that public policy would encourage, or refused to do something that public policy would condemn."<sup>65</sup>

---

56. *Id.* at 1055.

57. 179 Conn. 471, 427 A.2d 385 (1980).

58. *Id.* at 480, 427 A.2d at 389.

59. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

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

61. See Comment, *Employment At Will in Ohio: Working From Within*, 20 AKRON L. REV. 471, 475 (1987).

62. Comment, *supra* note 33, at 726.

63. 121 N.H. 915, 436 A.2d 1140 (1981).

64. *Id.* at 921, 436 A.2d at 1143.

65. *Id.* at 921-22, 436 A.2d at 1143-44.

Finally, there are those jurisdictions that steadfastly refuse to recognize any public policy exception to the at-will rule, such as the Alabama court in *Reich v. Holiday Inn*.<sup>66</sup> This court, like the Ohio courts until recently, mechanically upheld the at-will rule against the challenge posed by an employer-defendant's violation of public policy on the basis of established precedent and the failure of the state legislature to enact a public policy exception.<sup>67</sup>

#### IV. THE STATUS OF THE AT-WILL DOCTRINE IN OHIO

##### A. *Recent Cases Upholding the At-Will Doctrine*

The Ohio Supreme Court has recently purported to uphold the traditional employment-at-will rule in two cases. In *Fawcett v. G.C. Murphy & Co.*,<sup>68</sup> the court considered an allegation by the plaintiff that the employer discharged her without just cause and in contravention of a statutory policy prohibiting discrimination on the basis of age.<sup>69</sup> First, the court reviewed the issue of whether the policy codified in Ohio Revised Code Section 4101.17 requires Ohio courts to allow a private civil right of action for damages.<sup>70</sup> Section 4101.17 prohibited employers from discharging "without just cause" any employee between the ages of forty and sixty-five who were physically competent to perform the work and otherwise met the standards of the industry.<sup>71</sup> The court observed that the statute did not include a remedy for its breach.<sup>72</sup> Because the General Assembly did not intend by clear implication to create a civil action for damages for breach of the statute, and because the General Assembly invested the Department of Industrial Relations with authority to enforce the statute, the court declined to establish a private cause of action.<sup>73</sup>

The court then took up a second contention of the plaintiff:

[T]he right of employers 'to terminate the employment at will for any cause, at any time whatever, is not absolute, but limited by principles which protect persons from gross or reckless disregard of their rights and interests, willful, wanton or malicious acts, or acts done intentionally, with insult or in bad faith.'<sup>74</sup>

The court stated that malice would not make a wrong of that which is a lawful act.<sup>75</sup> In other words, the court would not transform the lawful act of discharge without cause into the unlawful act of wrongful discharge.

The court reaffirmed its strict adherence to the at-will doctrine in *Phung v. Waste Management, Inc.*<sup>76</sup> The plaintiff, Peter L. Phung, was employed as the chief chemist for the defendant-employer, Waste Management, at the com-

66. 454 So. 2d 982 (Ala. 1984).

67. *Id.*

68. 46 Ohio St.2d 245, 348 N.E.2d 144 (1976).

69. *Id.* at 246-47, 348 N.E.2d at 145-46.

70. *Id.* at 247, 348 N.E.2d at 146.

71. *Id.*

72. *Id.*

73. *Id.* at 248-49, 348 N.E.2d at 146-47.

74. *Id.* at 249, 348 N.E.2d at 147 (quoting Appellant's Brief).

75. *Id.* at 250, 348 N.E.2d at 148.

76. 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

pany's toxic disposal site for a two-year period, at the end of which the defendant terminated the plaintiff's at-will relationship.<sup>77</sup>

The plaintiff alleged that during the course of his employment, he became aware of defendant's substantial violations of its "legal and societal obligations."<sup>78</sup> Upon ascertaining the nature, extent, and duration of the violations, the plaintiff informed the defendant of the violations and demanded that they cease.<sup>79</sup> The defendant then discharged the plaintiff from its employ.<sup>80</sup> The defendant moved to dismiss plaintiff's claim of wrongful discharge, maintaining that such discharge of an at-will employee is not illegal under Ohio law.<sup>81</sup> The court stated the orthodox view of the at-will rule as controlling in Ohio: "Employment contracts can be terminated at will for any cause, at any time whatsoever, even if done in gross or reckless disregard of any employee's rights."<sup>82</sup> Echoing Wood's rule of nineteenth-century contract law, the court affirmed that "[a] fundamental policy in favor of the employment-at-will doctrine is the principle that parties to a contractual relationship should have complete freedom to fashion whatever relationship they so desire."<sup>83</sup>

The court gave several reasons for not recognizing a public policy exception to the at-will rule. Generally, Ohio had not previously recognized any public policy exceptions.<sup>84</sup> Moreover, the court, following the dictates of the Ohio Constitution, had deferred employment issues to the discretion of the legislature.<sup>85</sup> The legislature, noted the court, had enacted a statute prohibiting an employer from discharging an employee because the employee had filed a worker's compensation claim.<sup>86</sup> The legislature had also prohibited the discharge without just cause of any employee because of the race, color, sex, national origin, handicap, age, or ancestry of any employee.<sup>87</sup> Specifically, the court asserted that the plaintiff had failed to state a violation of "sufficiently clear public policy to warrant creation of a cause of action."<sup>88</sup> The court then held that "[p]ublic policy does not require that there be an exception to the employment-at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of law."<sup>89</sup> It is unclear whether the court, under its ruling, would not recognize a public policy exception unless expressly enacted by the legislature or whether a plaintiff could state in his allegations a "violation of a sufficiently clear public policy to warrant creation of a cause of action."<sup>90</sup>

---

77. *Id.* at 100, 491 N.E.2d at 1115.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 101, 491 N.E.2d at 1115.

82. *Id.* at 102, 491 N.E.2d at 1116 (quoting *Peterson v. Scott Constr. Co.*, 5 Ohio App. 3d 203, 205 (1982)).

83. *Id.*

84. *Id.* at 102, 491 N.E.2d at 1116.

85. *Id.* at 103, 491 N.E.2d at 1117.

86. *Id.*

87. *Id.*

88. *Id.* at 102, 491 N.E.2d at 1116-17.

89. *Id.* at 103, 491 N.E.2d at 1117.

90. *Id.* at 102, 491 N.E.2d at 1116-17.

Judge Brown, in his vigorous dissenting opinion, castigated the majority's refusal to recognize an exception to the at-will rule where there existed a clear violation of public policy, calling such refusal "a travesty."<sup>91</sup> He noted that the public policy exception had been adopted by a clear majority of states including the five states bordering Ohio.<sup>92</sup> "[J]ustice requires that an employer conduct business in a lawful manner."<sup>93</sup> The state had a legitimate interest in knowing that regulations protecting citizens are being followed, and any reasonable effort by an employee to serve such public interest should not be discouraged.<sup>94</sup>

Commentators have disagreed as to the implications of *Phung* concerning the public policy exception. Some insist that the case did not recognize any policy exception to the at-will rule<sup>95</sup> while a contrary view is that *Phung* left the door open for acceptance by the court of a more specific policy concern.<sup>96</sup>

### B. *Recent Cases Accepting or Implying Acceptance of Exceptions to the At-Will Rule*

*Mers v. Dispatch Printing Co.*<sup>97</sup> represented the Ohio courts' first recognition of an exception to its unqualified acceptance of the at-will rule. The plaintiff, Mers, held the position of traveling representative for the defendant, Dispatch Printing.<sup>98</sup> After working for the defendant for four years, plaintiff was arrested on charges of rape, kidnapping, and gross sexual misconduct.<sup>99</sup> Although he was suspended from his job because of the accusations, he was promised by defendant management that he would be reinstated when the criminal charges were resolved in his favor.<sup>100</sup> The initial trial resulted in a hung jury and the charges were dismissed when the alleged victim decided not to prosecute the case further.<sup>101</sup> The defendant then notified the plaintiff that he would not be reinstated.<sup>102</sup> The plaintiff alleged that he was entitled to relief based either on the theory of breach of contract or on the theory of promissory estoppel.<sup>103</sup> In defense, the employer denied any breach of an employment agreement, and asserted that Mers was an employee at will, subject to termination without cause.<sup>104</sup>

Chief Justice Celebrezze, writing for the majority, stated that employment-at-will, while subject to certain statutory limitations (citing the Ohio statutes pertaining to race and age discrimination, worker's compensation, and others)

---

91. *Id.* at 108, 491 N.E.2d at 1120.

92. *Id.* at 104, 491 N.E.2d at 1117.

93. *Id.* at 105, 491 N.E.2d at 1118.

94. *Id.*

95. Comment, *supra* note 33, at 734.

96. Comment, *supra* note 61, at 480.

97. 19 Ohio St.3d 100, 483 N.E.2d 150.

98. *Id.* at 101, 483 N.E.2d at 152.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 101, 483 N.E.2d at 152.

was still viable law.<sup>105</sup> The majority was not persuaded that the modern changes that had occurred in employment relations constituted a sufficient reason for abolishing the at-will rule.<sup>106</sup> They indicated that this would result in the "untenable" position of requiring Ohio courts to evaluate the business judgment of employers.<sup>107</sup> "The need for certainty and continuity in the law requires us to stand by precedent and not disturb a settled point unless extraordinary circumstances require it."<sup>108</sup>

The court went on to explain that they could discern two limits on the general at-will rule based in contract law. The court would scrutinize the facts and circumstances surrounding an at-will agreement to determine if there existed implied contractual provisions that may alter the terms of the discharge.<sup>109</sup> A second exception, held the court, occurs where representations or promises have been made to the employee which involve promissory estoppel.<sup>110</sup> Promissory estoppel applies when a promise that the employer should reasonably expect to induce action or forbearance on the part of the employee induced such action or forbearance.<sup>111</sup> The test was whether the employer should reasonably expect its representations to be relied on and, if so, whether the expected action or forbearance actually was detrimental to the employee.<sup>112</sup> The plaintiff alleged that he relied, to his detriment, on his employer's representation that he would be reinstated if the criminal charges were resolved favorably.<sup>113</sup>

Justice Douglas in his concurring opinion observed that he was "pleased to see the majority . . . moving away from slavish adherence to the principles enunciated in *Fawcett* . . . toward a recognition that there are and should be exceptions to the antiquated and discredited employment-at-will doctrine."<sup>114</sup> Recognizing a promissory estoppel exception to the at-will rule was, in his view, a "first step."<sup>115</sup>

The only member of the court to adhere strictly to the traditional at-will rule was Justice Holmes. The precedential comfort the court minority and majority could take from limiting the exceptions to the at-will rule to promissory estoppel was that they were still playing within the rules of contract law, the original theoretical incubator for the at-will doctrine.

In response to the court's disinclination to move beyond the promissory estoppel exception, the legislature enacted Section 4113.52, a statute prohibiting employers from discharging those employees who reported violations of federal and state law.<sup>116</sup>

Ohio Revised Code Section 4113.52 provides:

---

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

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 103, 483 N.E.2d at 154.

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

111. *Id.* at 104-05, 483 N.E.2d at 154-55.

112. *Id.*

113. *Id.*

114. *Id.* at 106, 483 N.E.2d at 156.

115. *Id.* (emphasis in original).

116. OHIO REV. CODE ANN. § 4113.52 (Baldwin 1989).

(A)(1)(a) If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance of regulation . . . and the employee reasonably believes that the violation either is a criminal offense that is . . . a hazard to public health or safety or is a felony [the employee shall notify his supervisor or if the employer fails to correct the violation, the employee may file notice with public authority] . . .

(B) . . . no employer shall take any disciplinary or retaliatory action against an employee [for conforming with these provisions] . . .

(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under [this provision] . . . the employee may bring a civil action for appropriate injunctive relief or for remedies. . . .<sup>117</sup>

The statute restricts the award to attorney's fees, litigation costs, incidentals, and back pay with interest.

Soon after the enactment of the above statute, the court decided *Helmick v. Cincinnati Word Processing, Inc.*<sup>118</sup> In that case, female employees alleged tortious interference with and breach of the employment contracts by the defendant.<sup>119</sup> The plaintiffs also alleged that throughout the course of their employment with defendant company, they were subjected to sexual abuse of a criminal nature by the company's sales manager.<sup>120</sup> When the plaintiff Helmick became dissatisfied with her work environment and began a search for another position, the defendant vice president discouraged Helmick from pursuing these new employment opportunities by informing her that a raise had been approved and that she would have a career with the company as long as her performance was good.<sup>121</sup> Helmick then halted her job search.<sup>122</sup>

The court held that a "demonstration of detrimental reliance on specific promises of job security can create an exception to the employment-at-will doctrine."<sup>123</sup> At first impression, the holding of this case appeared to be nothing more than an affirmation of promissory estoppel doctrine. The court gave no indication that it would use the employer's alleged violation of criminal law pertaining to sexual abuse to find liability based on public policy exceptions. In his concurring opinion, Justice Douglas complained:

[As the majority] applies *Mers* to a new situation, it drags along the outdated absolutist position exemplified in *Fawcett* and *Phung*. I eagerly await the time when this court tosses away the view that a party has the right to violate with malice . . . the rights of others. Since this court does not tolerate this type behavior in any other area of law, we should not condone gross disregard of rights of employees in the employment area.<sup>124</sup>

Justice Wright in his majority opinion noted the effect that Section 4113.52 will have in changing the at-will doctrine in Ohio. "[T]he legislature quite properly reviewed the holding in *Phung* and asserted its power to make public policy by passing . . . [R.C. 4113.52], which [has] the effect of modify-

117. *Id.*

118. 45 Ohio St.3d 131, 543 N.E.2d 1212 (1989).

119. *Id.* at 132, 543 N.E.2d at 1213.

120. *Id.* at 132, 543 N.E.2d at 1214.

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

122. *Id.*

123. *Id.*

124. *Id.* at 137, 543 N.E.2d at 1218.

ing the common law."<sup>125</sup> Since two members of the court had openly stated their desire to adopt a public policy exception, and three of the justices concurred in Justice Wright's majority opinion containing recognition of Section 4113.52, acceptance by the court of a public policy exception appeared imminent.

Outright recognition of the public policy exception came with *Greeley v. Miami Valley Maintenance Contractors, Inc.*<sup>126</sup> When an Ohio court ordered the employer-defendant to withhold a specified amount from the employees' wages to ensure payment of child support obligations, the employer refused to comply.<sup>127</sup> Soon after, the employer discharged the employee.<sup>128</sup> The statute the employer violated stated: "[N]o employer may use an order to withhold personal earnings . . . as a basis for discharge of . . . a person. The court may fine an employer who so discharges . . . an employee . . . not more than five hundred dollars."<sup>129</sup>

The court observed that to limit punishment for violation of the statute by an employer to a mere \$500 fine would mean that the offending corporation could ignore the legislature's policy behind the statute.<sup>130</sup> Such a fine would not deter a corporation from illegally discharging an employee in these circumstances.<sup>131</sup> "The courts must be empowered not only to punish, but to remedy such public policy violations."<sup>132</sup> To be forced to prohibit a civil remedy for violation of a statute because the statute restricts itself to an insignificant fine would be to agree, said the court, "with Mr. Bumble in *Oliver Twist* when he said: '[I]f the law supposes that . . . the law is a ass . . . .'"<sup>133</sup>

The court now proclaimed the recognition of the public policy exception to the at-will doctrine, noting that they were joining thirty-nine states which had already accepted it.<sup>134</sup> The public policy exception would extend in tort<sup>135</sup> to an employee "discharged or disciplined for a reason which is prohibited by statute."<sup>136</sup> The employment-at-will rule was no longer seen as sacrosanct. "[T]he right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy."<sup>137</sup> The orthodox adherence of the *Fawcett* court to the inviolability of the at-will rule was decisively rejected.

However, the court had only decided the issue of the public policy exception within the confines of a specific statutory authorization. The statute had prescribed that an employer could not use an order to withhold an employee's

---

125. *Id.* at 136 n.7, 543 N.E.2d at 1217 n.7.

126. 49 Ohio St. 3d 228, 551 N.E.2d 981 (1990).

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

128. *Id.*

129. OHIO REV. CODE ANN. § 3113.213(D) (Baldwin 1989).

130. 49 Ohio St. 3d at 232, 551 N.E.2d at 985.

131. *Id.* at 232, 551 N.E.2d at 984.

132. *Id.* at 232, 551 N.E.2d at 985.

133. *Id.* at 233, 551 N.E.2d at 985.

134. *Id.* at 234 & n.3, 551 N.E.2d at 986 & n.3.

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

136. *Id.* at 234, 551 N.E.2d at 986.

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

wages to discharge or discipline the employee. The question remained whether the court would embrace public policy exceptions which were not specifically mandated by statute. In a carefully worded dictum, the court stated: "This is not to say that there may not be other public policy exceptions to the doctrine but . . . such exceptions would be required to be of equally serious import as the violation of a statute."<sup>138</sup> This surely operates to expand the public policy exception to those statutes that do not specifically prohibit the discharge of the employee where the employer is in violation of the statute. For instance, if there existed a statute requiring an Ohio resident of voting age to report for jury duty when required, would it be proper for an employer to discharge an employee who complied with the law? Under the employment-at-will doctrine, the employer would be immune from the penalties of the law even though he had deliberately thwarted it by discharging the law-abiding employee. This is an egregious result. "The question thus arises, must a person called to execute the mandated duties of a citizen choose between the possible termination of employment on the one hand, or be punished for failure to execute that mandated civil obligation on the other hand? The question would seem to answer itself."<sup>139</sup>

#### V. CONCLUSION: ECONOMIC AND POLICY CONSIDERATIONS FOR AND AGAINST THE PUBLIC POLICY EXCEPTION

The opponents of the public policy exception argue that the breakdown of the at-will rule will adversely impact business.<sup>140</sup> The principal loss will be one of efficiency. The ability to discharge at will discourages employee abuse of the system by encouraging employees to exercise self-restraint. A quick termination of the employee unobstructed by cost-escalating litigation provides a clean break with minimal disruption of company operations.<sup>141</sup> Operational costs of overseeing an at-will shop are relatively inexpensive due to the absence of litigation.<sup>142</sup> Finally, the employee benefits as well. Since capricious employers will not be able to obtain the best employees or retain such employees due to a bad reputation among the workforce (because employees may resign from unpalatable jobs as they wish), the employers will damage themselves in the workplace.<sup>143</sup> Employees will benefit from working for employers who structure their operations to take into account the interests of their workers.

Opponents of the at-will rule maintain that the efficiency "benefit" is a shibboleth because the at-will rule fails to account for the transaction costs and information barriers inherent in such a system.<sup>144</sup> For the individual employee, the termination of employment incurs the expense of searching for new employment, the expense of moving, and indeterminate costs of emotional distress and loss of status. For the employer, high turnover means waste of training and re-

---

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

139. *Id.* at 232, 551 N.E.2d at 985.

140. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

141. *Id.* at 965.

142. *Id.* at 970.

143. *Id.* at 968.

144. Note, *supra* note 19, at 1830.

training, disruption of continuity and lost expertise. The at-will doctrine fosters employee insecurity and disloyalty. However, increased job security and employment participation reduces absenteeism and the turnover rate, thus possibly leading to increased productivity.<sup>145</sup>

Even the proponents of employment-at-will have acknowledged that public policy exceptions may be necessary when the at-will rule is at odds with the public interest. "Just as a contract to commit murder should not be enforceable, neither should one to pollute illegally or to commit perjury."<sup>146</sup> In a democratic society, unlike those governed by totalitarian regimes, the citizenry is expected to fully participate in the enactment of and adherence to the law. Statutes enacted by the legislature inform the citizenry and place them on notice as to which policies have been transformed into law. It is the codification of public policy. All who comprise the citizenry of a democratic society may violate the statutory law and the public policy from which they spring only if they are willing to suffer the penalties that attach to such laws.

It would be ironic if the one area of this society where citizens were either discouraged from adhering to the law or encouraged to disregard the law would be the workplace. Maintaining a separate and elite role above the law for employers alone hardly comports with judicial notions of equality and fairness. The day of the feudal lord and serf has justifiably been discarded in all other phases of democratic society. An unencumbered public policy exception to the at-will rule founded on statute would obviate such anti-egalitarian influences, requiring the employer to conform to the law in the same manner as the rest of the populace.

*Eugene N. Lindenbaum*

---

145. *Id.* at 1834-35.

146. Epstein, *supra* note 140, at 952.

