Employment At Will: Overview and Recent Case Law Developments[1]

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I. INTRODUCTION

An employee will be deemed "at-will" if there is no definite term of employment. An at-will employment relationship may be terminated by either side at any time for any reason or for no reason, even an irrational reason, as long as the employee is not terminated for an illegal reason (e.g., in violation of a statute such as Title VII of the Civil Rights Act of 1964).

The employment-at-will doctrine has undergone substantial modification, particularly in the last two decades. Most, but not all, states now recognize some exceptions to the employment-at-will doctrine, which is more accurately characterized as a rebuttable presumption. Limitations sounding in contract may be express, implied in fact, implied in law or based on promissory estoppel. Implied in fact limitations arise most frequently in the context of handbooks, personnel policies and oral contracts. The most widely recognized implied in law limitation is the implied covenant of good faith and fair dealing, an exception that has been found based either in tort or contract. Limitations sounding in tort are generally those that violate public policy and may be either for abusive discharge (where the employee's knowledge of the employer's improprieties motivates the employer to terminate the employee) or retaliatory discharge (where the employee's conduct drives the termination).

The term "wrongful discharge" has become know to the general public; even practitioners in states such as New York, which recognizes virtually no exceptions to employment-at-will, receive calls from employees seeking to assert claims for "wrongful discharge." Although

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employment-at-will arises in the context of state law, there is significant fertilization across state lines as the issues and their permutations are confronted anew by various state courts. Additionally, even practitioners in states which do not generally recognize exceptions may find themselves facing a particular fact pattern that cries out for an extension of the law.

This outline provides a thumbnail sketch of the various exceptions to employment at will. In so doing, I have relied primarily on the following treatises: J. Goodman (Ed.), Employee Rights Litigation: Pleading and Practice (1992); M. Bennett, D. Polden, H. Rubin, Employment Relationships: Law & Practice (1998) and H. Perritt, Jr., Employee Dismissal Law & Practice (1998) to which the reader is referred. These and other fine treatises cover in great depth the analytical underpinnings. In addition, this outline summarizes a representational number of cases, primarily from state courts[2] reported during the past year.

Generally, two elements are required to make an employment relationship at-will: (1) an indefinite term; and (2) no limitation on the grounds for termination; however, in some jurisdictions, employment is presumed to be at-will if either element is present. Lytle v. Malady, 579 N.W.2d 906, 910 (Mich. 1998)("The presumption of employment at will is overcome with proof of either a contract provision or a definite term of employment, or one that forbids discharge absent just cause").

Both elements have been litigated. Litigation as to the definiteness of the term most frequently arises in the context of offers for "permanent" employment or employment until the occurrence of a specific event. Rooney v. Tyson, 91 N.Y.2d 685, 697 N.E.2d 571, 674 N.Y.S.2d 616 (1998). Limitations of the grounds for termination has been litigated heavily. When analyzing these cases, it is important to remember that the at-will aspect of the employment relationship governs, at most, only the right to terminate the relationship. It does not govern other terms of the relationship, such as promises regarding pay, sick days or vacation time. These are usually express terms of an employment relationship, and are often subject to state law.

[2] Many states exhibit considerable divergence between the decisions in the federal and state courts. As in other areas of law, practitioners are keenly aware of which forum is more favorable for their client. Federal courts may certify a question to the state courts, and many of the cases summarized here arose from questions certified from the federal courts. Other decisions, evidenced a tension between these courts, with some state courts noting the incorrectness of previous federal decisions.

II. CONTRACT LIMITATIONS ON EMPLOYMENT-AT-WILL

A. Express contracts

Express contracts may be written or oral. The writing may, but need not be an individual contract; handbooks or personnel policies that make it clear that termination will be only for "just cause" have been found to constitute express limitations. See, e.g., Richardson v. East River Electric Power Cooperative, Inc., 531 N.W.2d 23 (S.D. 1995)(handbook explicitly provides termination "for cause only"). Likewise, oral promises may limit the right to terminate at-will. Rooney v. Tyson, supra, 91 N.Y.2d 685 (establishing term of definite duration thereby overcoming presumption of employment at will); Ohanian v. Avis Rent-A-Car, (you have this job unless you really screw up rebuts presumption of employment at will).

B. Implied-in-Fact Contracts

Implied in fact contract terms are either expressed or inferred from the words or conduct of the parties. When so inferred -- or implied -- they become part of the contract. Implied in fact contracts have been inferred from handbooks, manuals, policies, the course of conduct, conversations. The contract terms that are important are, of course, those terms that limit the employer's right to terminate at will, those that limit the reasons for dismissal or to specify the term of duration of employment. Once these terms are accepted by the employee -- either by words or conduct -- the relationship is no longer at will but is instead governed by the terms of the contract.

Not all handbook terms create contractual promises. For example, descriptions of employment policies, such as the company's mission, opening and closing hours, and even certain benefits, may not rise to the level of contractual promise. Importantly, implied in fact promises that limit the employer's right to terminate at will may be rendered unenforceable if there is an adequate disclaimer.

1. Can an employer unilaterally change an implied-in-fact promise by changing the handbook?

Earlier cases reasoned that a handbook created a unilateral promise, i.e., offer accepted by performance. These cases reasoned that a handbook could be unilaterally modified by the employer and accepted by the employee by continued working. This is still the prevailing analysis; however, several states in the past year have rejected it.

a. DeMasse v. ITT Corporation, 1999 Ariz. LEXIS 74 (May 25, 1999)

The Supreme Court of Arizona addressed this question as it applied to an employer's promulgated seniority policy. There the en banc court answered the following question, certified to it by the United States Court of Appeals for the Ninth Circuit, in the negative:

> Once a policy that an employee will not be laid off ahead of less senior employees becomes part of the employment contract under Leikvold v. Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984), as a result of the employee's legitimate expectations and reliance on the employer's handbook, may the employer thereafter unilaterally change the handbook policy so as to permit the employer to layoff employees without regard to seniority?

The employees in DeMasse had become hourly employees of ITT at various times between 1960 and 1979. The employee handbook had gone through five editions, most recently in 1989. The 1989 handbook included two new provisions. First, it contained a disclaimer in the first page "Welcome" statement that read: "Nothing contained herein shall be construed as a guarantee of continued employment . . . . ITT Cannon does not guarantee continued employment to employees and retains the right to terminate or layoff employees." In addition, the handbook contained the following language enabling it to amend its policies: "Within the limits allowed by law, ITT Cannon reserves the right to amend, modify or cancel this handbook, as well as any or all of the various policies, rules, procedures and programs outlined in it. Any amendment or modification will be communicated to affected employees, and while the handbook provisions are in effect, will be consistently applied." The seniority provision gave more senior employees the ability to "bump" less senior employees.

In 1993, four years after it promulgated its most recent version of the handbook, ITT notified its hourly employees that it was changing the basis of its layoff guidelines for hourly employees from seniority to an assessment of each employee's "abilities and documentation of performance." Ten days later, ITT laid off three of the plaintiffs. Five days later another plaintiff was laid off, and two additional plaintiffs were laid off almost nine months later. All were laid off before less senior employees. All were laid off in accordance with the newly modified layoff policy.

The court first noted that, under the terms of the question certified, the seniority provision was in fact part of the employment contract. The court cited Restatement (2d) of Contracts ? 45 for the proposition that: "to effectively modify a contract, whether implied-in-fact or express, there must be (1) an offer to modify the

contract, (2) assent to or acceptance of that offer, and (3) consideration." 1999 Ariz. LEXIS 74, 16. The court expressly rejected the notion that continued employment was sufficient consideration for the modification because that result would mean that "the employer's threat to breach its promise of job security provides consideration for its rescission of that promise." Id. at 20. The court likewise rejected the argument that continued employment after issuing a new handbook constituted acceptance. Such a result, the court reasoned, would force employees to quit in order to preserve their rights under the original contract. The court also rejected the motion that silence constitutes acceptance.

For modification to be effective, the court reasoned, the "employee must be informed of any new term, aware of its impact on the pre-existing contract, and affirmatively consent to it to accept the offered modification." Id. at 23. Thus, the court held, the mere promulgation of a new handbook absent bargaining with the pre-1989 employees who had seniority under the old handbook is insufficient to support a finding of modification.

The court noted that an employer could avoid creating implied-in-fact relationships either by not issuing a handbook at all or by the use of a clear and conspicuous disclaimer. The court emphasized that its holding changed no law of contract: "It has always been Arizona law that a contract, once made, must be performed according to its terms and that any modification of those terms must be made by mutual assent and for consideration." Id. at 28. Disagreeing that the rule in DeMasse would "destroy an employer's ability to update and modernize its handbook," the majority noted that, in cases where there was not an effective disclaimer in effect at the time of the hiring, "permission to modify can always be obtained by mutual agreement and for consideration. In all other instances, the contract rule is and has always been that one should keep one's promises." Id. at 29.

b. Brodie v. General Chemical Corp., 934 P.2d 1263 (Wyo. 1997)

In Brodie, the court announced that, under certain conditions, an employer can modify its employee handbook if it previously included language in the handbook which reserved its right to make unilateral modifications. Moreover, an employer can reinstate the at-will employment status of employees by adding a proper disclaimer to a handbook which ostensibly provides job security to its employees; however, an employer must generally provide additional consideration to its employees when it makes such a modification. Accord Arch of Wyoming v. Sisneros, 971 P.2d 981 (Wyo. 1999) (discussed in Disclaimers, infra).

c. Doyle v. Holy Cross Hospital, 186 Ill.2d 104, 708 N.E.2d 1140 (Ill. 1999)

d. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 401 (Utah 1998)

In Ryan, the court held that an employer is entitled, unilaterally, to modify handbook terms. The court based its analysis on the continued work of the employees and reasoned that continued work with knowledge of changed employment conditions, renders previous, contradictory handbook provisions inapplicable.

2. Are employees obligated to follow the procedures in handbooks before they can sue?

DeMasse v. ITT Corporation, 1999 Ariz. LEXIS 74 (May 25, 1999)

In DeMasse, the Court of Appeals for the Ninth Circuit certified the following question to the Arizona Supreme Court: Must employees who wish to sue for breach of contract on the ground that an employer is bound by representations made in its handbook exhaust the complaint procedure described in the same handbook before bringing suit? The court assumed that the grievance procedure

was a part of the employees' contract and answered the question in the negative. The court reasoned that the procedure itself covered only employees, not terminated employees; the procedure directed employees to consult with their supervisors if they felt they were being treated unfairly but, the court reasoned, "once terminated, an employee no longer has a supervisor. Thus the designated avenue of complaints is cut off." 1999 Ariz. LEXIS 74, 46-7. Additionally, the procedure nowhere stated that it was an exclusive remedy or that it applied to breach of contract termination grievances. Therefore, the court concluded, the "handbook provision is permissive, not mandatory, and only contemplates resolution of work-related, not termination-related, grievances." 1999 Ariz. LEXIS 74, 47.

3. Are employers obligated to follow the procedures in handbooks before they terminate their employees?

a. Andrews v. Southwest Wyoming Rehabilitation Center, 974 P.2d 948 (Wyo. 1999)

Plaintiff alleged that the handbook and personnel policies created an implied-in-fact contract that permitted the employer to terminate him only for cause or after progressive disciplinary steps were taken. The handbook contained neither a progressive discipline procedure nor for cause language. Nevertheless plaintiff argued that the handbook's list of employment categories, its list of 26 behaviors that could result in immediate termination, its delineation of a probationary period and a grievance procedure together with the practices of documenting employee problems over a period of time prior to termination created an implied-in-fact limitation. The handbook contained a disclaimer, whose provisions were clear and unambiguous.

As primary author of the handbook, plaintiff had actual knowledge of the disclaimer. Therefore, the court concluded, plaintiff could not have reasonably believed he was other than an at-will employee.

b. U.S. ex rel. Yesudian v. Howard University, 14 IER Cases (BNA) 545 (D.C. Cir. 1998)

In a case where the court found the handbook disclaimer ineffective (See Disclaimers, infra), the court further held that the handbook overcame the at-will presumption because it distinguished between probationary and permanent employees by providing that the former could be discharged "at any time" but that the latter could only be terminated for cause and after specified procedure:

> [I]n the case of Regular employees, termination on grounds of unsatisfactory work performance is in order only when employees fail to make satisfactory work improvement within thirty (30) calendar days after their supervisors have given them written notice of warning ... Charges against an employee of serious neglect of duty or conduct incompatible with the welfare of the University must be substantiated by the supervisor. Failure of the employee to refute successfully such charges constitutes grounds for dismissal.

The court found that sufficient consideration to make the handbook's promises binding was found in plaintiff's continued work after receipt of the handbook.

4. When is a Contract Not a Contract? Other Grounds for Ignoring Handbook Provisions

DePhillips v. Zolt Construction Co., Inc., 136 Wash. 2d 26, 959 P.2d 1104 (1998)

The plaintiff employee brought an action against his former employer alleging that he was wrongfully terminated contrary to the terms and conditions of the employee handbook because the company did not follow its disciplinary scheme and grievance procedure when it terminated him. The handbook also contained a disclaimer. The complaint was dismissed on statute of limitations grounds and the employee appealed.

In trying to discern the applicable limitations period, the court distinguished between contract claims and an "employer promise of specific treatment in specific situations" as previously announced in Thompson v. St. Regis Paper Co., 102 Wash.

2d 219, 229-30, 685 P.2d 1081 (1984), Washington State's seminal case on the enforceability of promises in handbooks. Thompson states that "employer obligations may also arise independent of traditional contract analysis when the employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and the employee relies thereon."

The court first concluded that, while some handbooks could be contracts, the handbook in question was not a contract because it did not contain at least two of the essential elements of a contract, namely, the names of the parties to the contract and the job, job responsibilities or work hours of the plaintiff. The court also noted that, while either a contract or a promise of specific treatment in specific situations could be enforceable, the elements for these claims differed at least insofar as the latter claim had an element of justifiable reliance, an element not necessary to a traditional contract claim. The court concluded that, since the handbook was not a contract, the shorter three year statute of limitations applied and plaintiff's claim was time-barred.

5. Does an employer's breach of its promise of confidentiality limit employer's right to terminate at will?

Barmettler v. Reno Air, Inc., 114 Nev. 441, 956 P.2d 1382 (1998)

Here, the court ruled that a policy that promised confidentiality was not a limitation on right to terminate employee who had participated in substance abuse program. The court noted that handbook containing policy also had a clear disclaimer stating employees were at-will. The court ruled that the two read together did not create ambiguity sufficient to send question to jury as question of fact, and that employee was simply at-will.

6. What can be used to create an implied-in-fact contract?

Inventive plaintiff employment attorneys have used many different kinds of materials as evidence of an implied-in-fact contract. Currently, however, there was little case law on the subject.

Janda v. Madera Community Hospital, 14 IER Cases (BAN) 1362 (E.D. Cal. 1998)

Hospital by-laws can be used to create an implied-in-fact contract. Specifically, the court found that the provision in the bylaws providing that "[n]o aspect of medical staff membership or particular clinical privileges shall be denied on the basis of race, color, ethnic group, religion, national origin . .. unrelated to the ability to fulfill patient care and required medical staff obligations" created an

implied in fact contract that it would terminate an orthopedic staff member's medical privileges on in accordance with that non-discrimination provision." Id. at 1368.

C. Implied in Law Contracts: The Covenant of Good Faith and Fair Dealing

In the context of commercial law, it is well established that every contract imposes on each party a duty to deal in good faith and fairly. This covenant has made its way into the employment law context. In the employment context, it has generally meant that neither party will do anything to impair the other party from receiving the benefit of the bargain. Initially, some courts that recognized the implied in law covenant of good faith and fair dealing allowed employees to recover both contract and tort damages. This has changed. See Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988). Courts continue to grapple with these two interrelated issues.

1. Is it contract or is it tort?

a. In Wyoming, courts have recognized an implied in law covenant of good faith and fair dealing as a tort, but not a contract, claim. To assert a breach of a covenant of good faith and fair dealing as a tort, the employee must show a special relationship of trust and reliance in the particular relationship, which may be shown by the existence of separate consideration, common law, statutory rights, or rights accruing with longevity of service. VanLente v. University of Wyoming Research Corp., 975 P.2d 594 (Wyo. 1999). Longevity of service alone, however, is not enough to create the required special relationship. Anderson v. South Lincoln Special Cemetery Dist., 972 P.2d 136 (Wyo. 1999). Nor can an implied covenant of good faith and fair dealing create duties that supersede the express provisions of a written contract. Id. Thus, in Anderson, where the written contract expressly designated the plaintiff as an at-will employee, no covenant of good faith and fair dealing would be implied. Similarly, in Andrews v. Southwest Wyoming Rehabilitation Center, 974 P.2d 948 (Wyo. 1999), even if the court found that the Wyoming Nonprofit Corporation Act established the special relationship between an officer of a corporation and the corporation requisite to a good faith and fair dealing claim, which the court did not find, the employee could not use his statutory duty to assert protection from termination because the statute also expressly provided for removal of a board officer at any time with or without cause.

b. In Hawaii, the Supreme Court has now declined to recognize a claim for "tortious breach of contract" in the employment context. Specifically, the court held that:

> "Hawaii law will not allow tort recovery in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the

> breach of contract. Consistent with this rule, emotional distress damages will only be recoverable where the parties specifically provide for them in the contract or where the nature of the contract clearly indicates that such damages were within the contemplation or expectation of the parties. Therefore, in answer to the certified question, Hawaii law does not recognize tortious breach of contract actions in the employment context.

Hawaii has long recognized, and still recognizes an action for breach of an implied covenant of good faith and fair dealing in the employment context. That claim, however, sounds in contract. What this case says is that Hawaii no longer recognizes a tort claim in a breach of contract context, except in a very range of circumstances, circumstances which are not present in the employment context.

2. Does an implied covenant allow an otherwise at-will employee a claim when there are interpersonal problems at the job?

a. Era Aviation, Inc. v. Seekins, 973 P.2d 1137 (Alaska 1999)

The employee here had signed a form acknowledging her at-will employment status. When the employee was fired she sued for breach of an implied covenant of good faith and fair dealing, alleging that she was fired without good cause, that she had performed her job appropriately, and was fired merely "as the result of a personality conflict," id. at 1138, i.e., not for poor performance.

Analyzing the scope of the covenant, the court noted that it "prohibits and employer . . . to unfairly deprive an employee of a benefit contemplated by the employment contract," such as a share of future profits. Id. at 1139. Additionally, the covenant prevents termination in violation of a specific public policy (such as unwarranted intrusions into employee privacy). Id. Finally, the court noted that "a breach of the covenant can be either subjective or objective -- that an employer can violate the covenant either by acting with a subjectively improper motive or by failing to act in a manner which a reasonable person would regard as fair." Id. (citations and internal quotations omitted).

The employer argued the covenant was limited to situations where an employer has acted unfairly to deprive the employee of the economic benefits of the contract. The employee contended it imposed a general requirement on employers to act reasonably and fairly, that she had a subjective expectation that she would be terminated only for poor job performance, an expectation that was also objectively reasonable.

The court rejected the employee's argument, noting that the covenant can effectuate, not alter, the reasonable expectations of the parties and that here, the contract expressly made the plaintiff an at-will employee. As to the subjective expectation, the court clarified that that element required proof that the employer's decision was actually made in bad faith, i.e., "motivated by an improper or impermissible objective (id. at 1141), not merely by reasons unrelated to job performance.

Therefore, the court reversed the lower court's order denying the employer's motion for summary judgment.

b. See Chijide v. Maniilaq Association of Kotzebue, 972 P.2d 167 (Alaska 1999), infra

3. Does an implied covenant mean that an employee is entitled to greater benefits?

a. Coulson v. Marsh & McLennan, Inc., 973 P.2d 1142 (Alaska 1999)

The employer-seller sold its book of business to an employer-buyer. The plaintiff, who had worked for the seller, was offered a full time position with the buyer. Plaintiff declined the position. (Other employees who were not offered full time positions were offered severance; plaintiff was not offered severance because she was offered this full time position.)

After declining the offer of full time employment with the Buyer, plaintiff sued, inter alia, for breach of the covenant of good faith and fair dealing, asserting that the covenant arose in the context of the contract of sale, that she was a named beneficiary of the contract of sale and was entitled to its benefits. (The court opined that perhaps plaintiff sought some kind of severance, severance which, according to the buy/sell agreement, was not available to employees who, like plaintiff, were offered full time employment with the buyer.)

The court concluded that the only benefit required by the contract of sale was the offer of full time employment, a benefit that was offered to the plaintiff. Therefore, the court upheld the lower court's grant of summary judgment to the defendants on this issue.

b. Chijide v. Maniilaq Association of Kotzebue, 972 P.2d 167 (Alaska 1999)

Plaintiff, a physician, signed a one year employment contract with defendant to work as a staff physician. The contract was renewed twice, with the final contract

providing for termination of employment on September 30, 1993. The renewal provision gave the employer the right not to renew for any reason, upon 60 days notice. The Contract provided for termination with or without cause, with varying amounts of pay and different notice requirements. The contract also stated that the employer's personal policy would apply to the terms of the contract "except where superseded by specific contract provisions." Id. at 169. Those policies provided grievance and appeal procedures.

Plaintiff had a several year history of difficult interpersonal relations with her supervisor, during which period she employed the grievance procedure several times and during which period the supervisor issued her a letter stating that they had a big communication problem that they should discuss. Plaintiff never followed through on her supervisor's suggestion to come to her when she was ready to discuss their communication problem. Ultimately, plaintiff failed to obtain a renewal of her contract and she sued alleging, inter alia, breach of an implied covenant of good faith and fair dealing. The court noted that:

> The subjective aspect [of the covenant of good faith and fair dealing] prohibits an employer from terminating an employee for the purpose of depriving the employee of a contract benefit, and the objective aspect requires an employer to act in a manner that a reasonable person would regard as fair.

Id. at 172.

The only issue before the court was whether the defendant had violated the objective aspect of the covenant. Noting that the covenant's objective elements cannot be interpreted to prohibit what the contract expressly permits, the court concluded there was not violation because the employer had complied with the contract's 60 day notice provision.

D. Promissory Estoppel

The Restatement (2d) of Contracts defines promissory estoppel as:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

a. Goff-Hamel v. Obstetricians & Gynecologists, P.C., 14 IER Cases (BNA) 1394 (Neb. 1999)

Plaintiff worked for prior employer for 11 years. In July 1993, plaintiff was offered and accepted employment with defendant. Said employment was to begin in October. In reliance on the offer, plaintiff terminated her employment with her prior employer. She went to the new employer's office, received uniforms and a copy of her schedule. The day before she was to report for work, she was told not to work the next morning as had been planned because the wife of a part owner of defendant objected to her hiring.

Addressing an issue of first impression, the court held that an at-will employee can assert a claim based on promissory estoppel. The court defined the claim as "based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance." Id., 14 IER Cases (BNA at 1399. The court found that the material facts to the claim were not in dispute and therefore the trial court should have granted summary judgment in plaintiff's favor on liability.

As to damages, the court noted that, in a promissory estoppel cases, damages were to be awarded as justice requires, not based upon the benefit of the bargain. The court noted that damages in this case would not be based on the wages the employee would have earned in the prospective employment because that employment is terminable at-will, and remanded the case to consider its particular circumstances.

E. Disclaimers

1. How clear must a disclaimer be in order to be effective?

a. Napier v. Stratton, 1998 W. Va. LEXIS 224, 10-11 (1998)

The Supreme Court of Appeals of West Virginia found the following language in a handbook plainly precluded a finding of an implied contract or that employment was other than at will:

> Your employment relationship with Lowe's is governed by the "Employment At Will" doctrine. This simply means that the contract of employment between you and the company is terminable at the will of either party, with or without cause, at any time and for any reason. This policy cannot be modified by any statements or omissions of statements by any member of management or Company representative,

> manuals, guides, employment documents or Company materials or memorandums provided in connection with your employment, whether made pre or post employment unless approved in writing by the president of Lowe's.

b. Barmettler v. Reno Air, Inc., 114 Nev. 441, 956 P.2d 1382 (1998)

The employee informed his supervisors of his alcohol problem, and then admitted himself into a residential treatment center. Later the employee alleged that his supervisor, in violation of the company's drug and alcohol policy which expressly stated that it would retain, in strict confidence, knowledge of an employee's participation in a chemical dependency program, discussed employee's situation with a number of co-workers. Upon employee's return to work, the coworkers "jeered" him, causing him to contemplate suicide and seek additional therapy. Thereafter the employee was terminated. The company contended it terminated the employee for circulating rumors that two other employees were having an illicit affair.

The court reasoned that where a disclaimer contradicted other promissory language in a handbook, the disclaimer was to be considered, as a matter of law, ambiguous and therefore a question of fact for the jury: "The court should intervene to resolve the handbook issue as a matter of law only if the handbook statements and the disclaimer, taken together, establish beyond any doubt that an enforceable promise either does or does not exist." 956 P.2d at 1388-9. The court concluded that this was a case where the court could intervene; reading the drug and alcohol policy together with the disclaimer created no issue of fact as to whether the plaintiff was other than an at-will employee.

c. U.S. ex rel. Yesudian v. Howard University, 14 IER Cases (BNA) 545 (D.C. Cir. 1998)

To be effective, a disclaimer must state both that the manual is not a contract and that the employees may be terminated at will. The disclaimer found ineffective stated:

> The University reserves the right unto itself to maintain exclusive discretion to exercise the customary functions of management including, but not limited to, the discretion to select, hire, promote, demote . ... [or] terminate. ...."

Id at 557. The handbook also stated that "[t]his document is not to be construed as a contract." Id. The court found that this language did not clearly reserve the employer's right to terminate at will. Additionally, the court noted that the same paragraph that stated that the handbook was not a contract also stated that the

handbook is intended to "promote a better understanding of what staff employees can expect from the University and what the University can expect from them in return." Taken in its entirety, this language did "no more than produce the kind of ambiguity that creates a jury question as to whether a Handbook constitutes a promise of continued employment to [regular] employees terminable only for cause in accordance with its provisions." Id. at 558 (emphasis in original)(internal quotation marks omitted).

d. Ryan v. Dan's Food Stores, Inc., 972 P.d 395 (Utah 1998)

The disclaimer stated "Your employment at Dan's is at will and may be terminated without cause r prior notice by either you or Dan's" and "This handbook is not intended to create a contract of employment with Dan's, and nothing contained in this handbook should be construed as a contract of employment r guarantee of a job." Additionally, the employee was required to sign acknowledgment form that stated, in part, "I realize that this handbook does not constitute an employment agreement, that employment is for no definite period of time and may be terminated at will." The employee maintained that a statement by the president that he would not fire any pharmacist for following the law was sufficient to rebut presumption of employment at-will by creating implied-in-fact limitation. The court disagreed and held that the employee was at-will.

e. Arch of Wyoming v. Sisneros, 971 P.2d 981 (Wyo. 1999)

Plaintiff employee sued, alleging breach of an implied covenant based on two handbooks. The first (original) handbook, issue to the plaintiff in August 1989, contained a disclaimer on its last page that provided in pertinent part:

> In writing this handbook, management has tried to avoid legal words and phrases as much as possible. It was written for our employees as a matter of information only and is not to be construed as a contract between Arch of Wyoming -- Medicine Bow Mine and its employees. New situations develop constantly, and it is to be understood that the Company reserves the right to change, suspend, or cancel all or part of this handbook as circumstances may require.

The original handbook contained provisions relating to reductions in force and subsequent re-hires of affected employees.

Two years later, the employee received a revised handbook in which the disclaimer had been moved to the first page. The revised handbook also changed the reduction in force provisions.

The employee was laid off several months after receipt of the revised handbook as part of a reduction in force. The court rejected the employer's contention that the reservation of right to modify the handbook permitted modifications without providing separate consideration to its employees. The court concluded that, since the disclaimer and reservation of right in the original handbook was not effective, that handbook formed an enforceable contract. In the revised handbook, with its effective disclaimer and reservation of right, the employer impermissibly revoked a right to job security by failed to offer additional consideration to the affected employees.

In reaching its conclusion, the court noted that, in determining whether a disclaimer is conspicuous and unambiguous as a matter of law, the court considers" its prominence; its placement; its language; and whether the employer reserved its right to alter the language of the handbook. The court recognized that the reservation of right may be included in a disclaimer and concluded:

> If we were to allow an employer to deprive its employees of promised job security by relying on an inconspicuous reservation of the right to modify the handbook, we would be undermining the foundation of our employment handbook jurisprudence. We refuse to do that.

III. PUBLIC POLICY

Most jurisdictions now recognize a public policy exception to employment-at-will, that is, that an employee should not be fired for reasons that are contrary to a clearly established policy of the state. What is litigated now are the permutations of what is public policy, such as whether an employee who has other viable claims should also be able to recover for a violation of public policy. The public policy exceptions sound in tort, not contract, and tort damages are recoverable.

1. May an employee base a claim for wrongful discharge by claiming that an unlawful activity of the employer violates public policy?

Garner v. Retenbach Constructors, 14 IER Cases (BNA) 51 (N.C. Ct. App. 1998)

Plaintiff, an at-will employee, was discharged because of a positive result on a urine drug test that was required as a condition of employment. It was undisputed that the test was conducted inconsistently with a specific state statute. The court held that the statutory requirement that employee drug testing be performed by a laboratory certified consistent with the statute is an express policy declaration of the

legislature and any testing inconsistent with the statute violates public policy. In so holding, the court noted that while previous cases for discharge based on public policy concerned facts where the employee's discharge was the result of an employee's refusal to violate the law upon the request of the employer or was the result of the employee engaging in legally protected activity, nothing precluded a wrongful discharge claim where the discharge is "based on some unlawful activity of the employer or some activity of the employer in violation of public policy." Id. at 53. Here, the unlawful activity or violation of public policy was not the drug testing itself, but the use of a laboratory for drug testing that did not meet the statutory requirements.

2. Should the public policy exception to employment-at-will be available where the employee has other remedies for the retaliatory firing?

a. Flenker v. Willamette Industries, Inc., 266 Kan. 198, 967 P.2d 295 (Kan. 1998)

In Flenker, the Supreme Court of Kansas answered in the negative the following question certified to it by the United States Court of Appeals for the Tenth Circuit:

> Does the remedy provided by OSHA ? 11 c for employees who allege that they have been discharged in retaliation for filing complaints under that statute preclude the filing of a Kansas common law wrongful discharge claim under Kansas's public policy exception to at-will employment?

Id.,, 198 P.2d at 297.

Plaintiff alleged he was fired for reporting unsafe working conditions to his employer and to OSHA. The employer contended it fired plaintiff because of his failure to comply with the terms of the rehabilitation agreement he had signed under the company's drug and alcohol use policy.

Kansas recognizes termination in retaliation for the good faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or law pertaining to public health, safety and the general welfare as an actionable tort. Relying on earlier rulings, the court decided that the availability of the common law tort remedy depended on whether the statutory remedy -- in this case the remedy available pursuant to OSHA -- was "adequate." Therefore, the court carefully analyzed the remedy provided by OSHA. Concluding that the OSHA remedy was far more limited that than provided by common law (e.g., the OSHA gave the Secretary significant discretion over whether to pursue the claim; the OSHA representative

had informed the plaintiff that he had no claim since the defective equipment had been fixed), the court ruled that the plaintiff could proceed with his retaliatory firing claim.

b. Collier v. Insignia Financial Group, 1999 OK 49 (Okla. 1999)

The Supreme Court of Oklahoma answered the following question certified to it by the United States District Court for the Western District of Oklahoma in the affirmative:

> May a plaintiff pursue a public policy tort claim under Burk v. K-Mart Corp., 189 OK 22, 770 P.2d 24 (1989), for quid pro quo sexual harassment and retaliatory constructive discharge in light of the remedies available under federal and state anti-discrimination laws?

In reaching its conclusion, the court first concluded that constructive discharge is actionable within the Burk tort's parameters. The court then noted that quid prop quo sexual harassment was remediable under Burk because the state antidiscrimination statute did not provide the same remedies as the tort. The state anti-discrimination statute only provided an administrative forum for sexual harassment victims and, if the administrative agency found a violation, the agency was allowed to engage the parties in conciliation, require the respondent to cease and desist and seek a restraining order and an injunction. The court noted that, under state law, victims of disability discrimination had better remedies than victims of sexual harassment discrimination. The court also noted that Title VII was intended as a floor, not a ceiling; therefore, the court implied, that the Burk tort remedy should not be excluded because of the additional remedies available under the federal law.

3. Where is the "public" in the public policy exception?

Ryan v. Dan's Food Stores, Inc., 972 P.2d 395 (Utah 1998)

A pharmacist alleged he was discharged for questioning prescriptions and contacting the public authorities of suspected criminal conduct when he thought that he was presented with fraudulent prescriptions. The court held that this conduct did, in fact, implicate a substantial public interest, but that the facts did not support a claim that the conduct was a substantial cause of the termination. The case is interesting because it recognized that, "while certain conduct will almost always implicate a clear and substantial public policy, such as an employee's refusing to violate the law, there are other situations that we will have to address as they come before us -- Ryan's case is one such case."

4. Must the violation of public policy be the sole reason for the termination?

a. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 409-410 (Utah 1998)

The employee must demonstrate by a preponderance of the evidence that "an employee's engaging in protected conduct was a substantial factor in motivating the employer to discharge the employee."

b. Allum v. Valley Bank of Nevada, 970 P.2d 1062 (Nev. 1998)

In Allum, the court expressly declined to adopt a "mixed motives" analysis for public policy tort cases; rather a plaintiff must demonstrate that his or her protected conduct was the proximate cause of the discharge.

5. Must an employee prove an employer's actual illegal conduct?

Allum v. Valley Bank of Nevada, 970 P.2d 1062 (Nev. 1998)

Here, the court held that the plaintiff need only show a reasonable good faith suspicion that the employer participated in the illegal conduct.

6. Does the public policy exception extend to cases where the employee is terminated for refusal to participate in the employer's illegal activities?

Allum v. Valley Bank of Nevada, 970 P.2d 1062 (Nev. 1998)

In Allum, the Supreme Court of Nevada considered this question in light of a subquestion, namely, whether the employee must show that he was given the choice between his job and participating in the illegal conduct. The court held that a claim for tortious discharge should be available to an employee who was terminated for refusing to engage in conduct that the employee, in good faith, reasonably believed to be illegal. Id., 970 P.2d at 1068. The court reasoned that the employee need not be given an actual express choice between participating and being fired, since "the employee knows the likely consequences of refusing to perform as requested." Id.

7. Does the public policy exception extend to cases where the employee has participated in the employer's illegal activities and then is terminated in order to cover up the employer's complicity in the crime?

Coors Brewing Co. v. Floyd, 1999 Colo. LEXIS 59, 14 IER Cases (BNA) 1232 (Colo. 1999)

The complaint alleged as follows: The employee, an investigator for the Security Department of the company, conducted surreptitious narcotics investigations of Coors employees at the direction of senior Coors executives. When Coors outside legal counsel advised the company not to undertake these investigations because of unwarranted legal risks, Coors conspired with its outside legal counsel to devise a scheme for laundering funds used in the investigations by means of fraudulent billing for legal services through the law firm. The complaint further alleged that, in order to protect themselves from liability for orchestrating the drug investigations and money-laundering scheme, certain executives planned the plaintiff's termination. In short, plaintiff was set up to take the fall for the company's illegal activity.

The plaintiff sought an extension of the public policy exception in Colorado to include situations in which an employee performs the illegal act required by his or her employer and then the employer fires the employee to cover up the employer's complicity in the crime. The court declined to extend the exception, noting that its purpose was to protect an employee from being forced to choose between committing a crime and losing his or her job. Here, where the employee already engaged in conduct that violated public policy, the court could conceive of no public policy that would be served by allowing the employee to point the finger at his employer only after he has been fired. Rather, the employee should have blown the whistle instead of participating in the illegal conduct.

8. Are sources of the public policy limited to statutory and common law?
Green v. Ralee Engineering Co., 14 IER Cases (BNA) 449 (Cal. 1998)

Administrative regulations may also be a source of fundamental public policy.

9. Is the public policy exception available to an employee who has an at-will contract that contains a notice provision?

Stiles v. American General Life Insurance Co., 1999 S.C. LEXIS 92 (S.C. 1999)

The Supreme Court of South Carolina answered the following question certified to it by the District Court in the affirmative:

> May an employee who is employed under an employment contract which provides that either party may terminate the agreement "for any reason" with 30-days' notice -- i.e., an at-will contract with a notice provision -- maintain a tort action

> for wrongful discharge in violation of public policy under Ludwick v. This Minute of Carolina, Inc.[, 287 S.C. 219, 337 S.E.2d 213 (1985)]?

The court reasoned the notice provision provides no additional protection from retaliatory discharge but only provides protection with regard to the notice period. The notice provision does not protect the employee from a retaliatory discharge. The court concluded that any other conclusion would violate the spirit of the public policy exception, noting that the exception was to protect employees from the threat of retaliation for refusing to violate the law.

