EMPLOYMENT-AT-WILL: HAS THE DEATH KNELL OFFICIALLY SOUNDED?

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THE DOCTRINE: AN OVERVIEW

> *All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong without being thereby guilty of legal wrong.*[1]

With that declaration, the Tennessee Supreme Court placed its judicial imprint on a concept first discussed by Horace G. Wood in his 1877 publication *A Treatise on the Law of Master and Servant*. Under this "employment-at-will" doctrine,

> [Employers] have the right to discharge their employees…the employer or employee may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty.[2]

The notion that an employee without an employment contract was an "at-will employee" who could quit or be legally terminated for *any* reason caught on with the various courts throughout the country, ultimately becoming a fixture of employment-related common law. By 1908, the United States Supreme Court recognized the doctrine.[3]

Well into the twentieth century, employers could, and frequently did, exercise total control over their employees, including firing at whim. With the courts providing judicial cover for the doctrine, many terminated employees were left with little, if any, recourse, even when the circumstances attendant to the loss of their jobs reeked of unfairness or employer caprice. Over time, legislators recognized that employers and employees were clearly not on equal footing. In 1938, the Fair Labor Standards Act was passed. Later, Title VII of the Civil Rights Act of 1964 provided the groundwork for protecting employees from discriminatory work practices.

Courts also became more active in protecting employees. One approach entailed carving exceptions into common law at-will employment. The three most prevalent themes to emerge focused on "public policy," "implied contracts," and "good faith covenants." As discussed below, these exceptions have taken root, to varying degrees, not only in the case law but also through legislative enactment.

As a consequence of this increased judicial and legislative activity, many legal analysts now conclude that the at-will employment doctrine has suffered significant erosion. Some commentators

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have argued that the exceptions have practically swallowed the rule, rendering employment-at-will a relic of the twentieth century. For example, in her article entitled "Employment-At-Will: The Impending Death of a Doctrine," Deborah A. Ballum concluded that:

> The future of employment-at-will, then, is that it has no future. One of the most important developments in employment law in the first decade of the new millennium will be the express acknowledgement of the death of this doctrine.[4]

Similarly, in his 2001 article, "The Employment-At-Will Doctrine: Three Major Exceptions," Charles Muhl observed:

> The employment relationship is forever evolving…Accordingly, nowadays employers must be wary when they seek to end an employment relationship for good cause, bad cause, or, most importantly, no cause at all.[5]

Almost seven years later, the question lingers: Has the death knell for employment-at-will officially sounded? In this article, we examine the present status of the doctrine, with a view toward determining whether its major exceptions remain exceptions, or whether their composite impact, combined perhaps with other factors, has effectively eliminated the rule.

THE PUBLIC POLICY EXCEPTION

> *Public policy…is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.*[6]

Many states have seized on this principle to craft exceptions to the at-will doctrine, particularly with respect to employment termination. But, in this context, what exactly is "public policy?" The majority of states have based their definition of public policy on their state constitutions, statutes, and administrative rules. Some state courts have recognized exceptions not explicitly anchored to those sources, while others have applied narrow exceptions limited to statutes expressly declaring they are exceptions to the state's employment-at-will doctrine.

California was the first state to recognize a public policy exception to at-will employment. In its 1959 *Petermann* decision,[7] the California appellate court held that an employer could not discharge an employee-at-will for refusing the employer's direction to commit perjury. *Petermann's* judicially crafted public policy exception, however, failed to ignite any immediate sparks in other jurisdictions. Recognition of the exception elsewhere came slowly. By the early 1980's, only twenty-two states had addressed the issue.[8] During that decade, public policy exceptions gained momentum. State courts in Illinois[9] and Wisconsin,[10] for example, relied on public policy created by the courts themselves, as well as legislative provisions and administrative rules. Today, nearly every state has adopted a statutory and/or common law public policy exception to the employment at-will doctrine.[11] Maine has yet to expressly adopt such an exception, but the Maine Supreme Court has suggested a willingness to recognize a wrongful discharge cause of action based on public policy if presented with an appropriate factual context. [12]

THE IMPLIED CONTRACT EXCEPTION

As of October 2000, according to Muhl, 38 states recognized some form of implied-contract exception.[13] The exception derives primarily from employer representations to employees. Courts scrutinize those representations to determine whether they create an implied contract for employment, regardless whether a written employment contract already exists. For example, statements contained in an employment handbook may give rise to judicially enforceable implied contractual obligations. [14]

One of the leading implied-contract cases is *Toussaint v. Blue Cross & Blue Shield of Michigan,*[15] decided by the Michigan Supreme Court in 1980. The employee was terminated after working for five years as a manager for Blue Cross. He sued for wrongful discharge. Though he had not executed an employment contract for a definite term, he argued that certain representations made by Blue Cross in its employment manual created an implied contract for employment. The court agreed, holding that the "just cause" provision gave rise to an enforceable implied contract if it created legitimate expectations of job security in an employee.[16]

In many, if not most, jurisdictions that recognize the implied contract exception, employers can preserve the at-will nature of employment relationships by specifically disclaiming the existence of any implied contract, express-

ly providing that the content of their employee handbooks does not alter the at-will relationship, and unequivocally declaring that the handbook's content may be changed unilaterally by the employer at any time.

THE COVENANT OF GOOD FAITH EXCEPTION

The covenant-of-good-faith exception implies a promise of good faith and fair dealing into every employment relationship. The California appellate court was the first to recognize this exception. In *Cleary v. American Airlines, Inc.*,[17] the court held that "the longevity of service by the plaintiff—18 years of apparently satisfactory performance," and "the expressed policy of the employer…regarding specific procedures for adjudicating employee disputes" gave rise to a duty on the part of the employer "to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain…*precluding any discharge of such an employee by the employer without good cause.*"[18]

This sweeping proposition posed a threat to the continued existence of any employment-at-will, because it would engraft a "just cause" or "good faith" requirement for all terminations. Perhaps for this reason, very few other states have followed California's lead. [19] Even California itself has retreated somewhat. Its supreme court has, on at least two occasions, curtailed the appellate court's *Cleary* rule. In *Foley v. Interactive Data Corp.*,[20] the court subsequently disapproved of Cleary's holding to the extent it permitted tort remedies in contract-based wrongful termination actions. Later, in *Guz v. Bechtel National, Inc.*,[21] the court held that while the covenant of good faith and fair dealing is implied by law in every contract, it exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. Given the less-than-resounding support it has received, the covenant of good faith exception is, without question, the weakest of the "three major exceptions." However, it remains the law in at least several of the states.

THE CURRENT STATUS OF THE LAW IN SEVERAL MAJOR STATES

Having outlined the principal exceptions to the employment-at-will doctrine, we now briefly focus on the status of the law in several of the more populous states.

California

In the absence of a written employment agreement stating otherwise, employment in California is statutorily presumed to be at-will[22] and may be ended at any time without cause or reason, subject to the statute's requirement of notice.[23] The presumption can be overcome by the public policy exception and the implied contract exception.

Under California's public policy exception, an at-will employee may pursue a tort action when he or she is discharged for performing an act that public policy would encourage, or for refusing to do something that public policy would condemn.[24] In *Tameny v. Atlantic Richfield Co.*,[25] the supreme court reasoned that an employer's obligation to refrain from discharging an employee who refused to commit a criminal act does not depend upon any express or implied promises set forth in the employment contract, but rather reflects a duty imposed by law on all employers to implement the fundamental public policies embodied in the state's penal statutes.[26]

California courts will apply the implied contract exception when there is proof that the employer and employee have impliedly agreed that the employee will be terminated only for good cause.[27] The factors relevant to determine whether this agreement exists include the employee's length of service, the employer's personnel policies and practices, actions or communications by the employer indicating assurances of continued employment, and industry practices.[28] While proof of an implied-in-fact contract can overcome the statutory presumption of at-will employment, it cannot overcome an at-will provision specified in a written agreement. In *Dore v. Arnold Worldwide*,[29] the California Supreme Court held that the agreement in question was unequivocal in describing the relationship as employment at will, and that Plaintiff could be terminated at any time, just as he could have left at any time, for any reason or for no reason. The court held that even though the phrase "at any time" did not expressly speak to whether cause was required, "[a]s a matter of simple logic…, such a formulation ordinarily entails the notion of 'with or without cause.'"[30]

Being a unanimous ruling from the state's highest court, *Dore* stands as a strong endorsement of the continued viability of the at-will doctrine. But given California's historical role in the recognition and development of exceptions to the doctrine, it re-

mains to be seen whether, or how long, this decision will effectively halt the judicial erosion of at-will employment in California.

Illinois

Illinois is an employment-at-will state.[31] Consequently, either the employer or the employee may terminate the relationship at any time with or without cause and without incurring liability.[32] However, this general rule is subject to independent contract or statutory provisions and concepts of retaliatory discharge.[33] Illinois has adopted both the public policy and implied contract exceptions to the employment-at-will doctrine.

In Illinois, the public policy exception is interpreted narrowly and confined principally to tort claims for retaliatory discharge. The Illinois Supreme Court first recognized this cause of action in *Kelsay v. Motorola, Inc.*, [34] holding that employers could not terminate employees in retaliation for filing worker's compensation claims. The court noted that the public policy underlying the state's Workers' Compensation Act would be seriously undermined if employers were allowed "to discharge, or threaten to discharge" employees who sought relief under the Act.[35] Moreover, the court held that compensatory damages under contract law were ineffective in deterring the employer's otherwise absolute power to terminate at-will employees. Thus, claimants would be allowed to seek punitive damages.[36] Following *Kelsay*, the court extended the tort of retaliatory discharge to provide a remedy to employees fired for whistleblowing activity.[37] After that, however, the court has declined to extend this remedy to other specific claims.[38]

Illinois law allows the implied contract exception to be applied based on an employee handbook or other policy statement, but only if the traditional requirements for contract formation are present.[39] The language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. The policy statement must be disseminated to the employee in a manner that the employee is aware of its contents and reasonably believes it to be an offer. Finally, the employee must accept the offer by commencing or continuing to work after learning of the policy statement.[40] When all of these conditions are present, the employee's continued work constitutes consideration for the promises contained in the statement, and under traditional principles, a valid contract is formed.[41]

Under Illinois precedent, no action for tortious breach of an implied covenant of good faith and fair dealing exists in the employment-at-will setting.[42]

New York

In New York, the employment-at-will doctrine is a judicially created common-law rule "that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even no reason."[43] State courts have recognized exceptions only in very limited circumstances.

When the particular employment relationship at issue is that between a law firm and its associates, the court of appeals has recognized a cause of action based on implied contractual obligations arising from the prevailing rules of conduct and ethical standards of the profession. In *Wieder v. Skala*,[44] the employee, a law firm associate, was discharged shortly after he had insisted that the firm's partners report the misconduct of another associate to the pertinent professional disciplinary authority. Before terminating him, the firm's partners attempted to dissuade him from making the report himself. Two of the partners later berated him for causing the firm to make the report. Recognizing that the employee had a professional ethical duty to report lawyer misconduct, that he could personally be suspended or disbarred for failing to comply with that requirement, and that his firm was placing him in the position of having to choose between continued employment and his own potential disciplinary action, the court found it necessary to craft "a different rule regarding the implied obligation of good faith and fair dealing from that applied in [other cases]."[45] The court reasoned that parties occasionally have understandings or expectations that are so fundamental that they do not need to negotiate about them.[46] Furthermore, it was intrinsic to this particular employment relationship that in conducting the firm's legal practice, both the employee and the firm would do so in compliance with the rules of conduct and ethical standards. The firm's insistence that the employee act unethically, and in violation of the rules, amounted to "nothing less than a frustration of the only legitimate purpose of the employment relationship."[47] Thus, the employee was permitted to sue under a

breach-of-contract theory based on an implied-in-law obligation in his relationship with his firm.[48] The court, however, declined to recognize a tort action for abusive discharge, declaring that such "significant alteration of employment relationships…is best left to the Legislature," and further noting that New York has enacted a "whistleblower" statute.[49]

Aside from instances involving express handbook language or employment relationships among lawyers, New York courts have generally been hesitant to allow breach-of-contract actions in termination situations based on legally implied obligations requiring the employer to deal fairly and in good faith with at-will employees.[50]

When an employment handbook expressly limits the employer's right to discharge the employee at-will, an implied contract of employment may exist. In W*einer v. McGraw Hill* [51], the employee brought suit against his employer for breach of contract, *inter alia*, following his discharge. The employee was allegedly induced to leave his former publishing job based upon oral representations that the employer had a policy of not terminating employees without cause. Further, the job application executed by the parties contained language that the employee's employment would be subject to the employment handbook which expressly provided that the employer would only terminate for "just and sufficient cause". In addition, in reliance on these promises, the employee allegedly rejected other offers of employment during his tenure. Moreover, on several occasions when the employee suggested dismissing other employees, the employer instructed him to strictly adhere to the handbook's provision regarding just cause dismissals. In recognizing the employee's breach of contract claim, the court held that, despite the employee not being hired for a fixed duration, based on the totality of the circumstances, a binding contract existed. As a result of the *Weiner* holding and subsequent decisions recognizing at-will disclaimers in employment handbooks[52], cautious employers now include express statements in handbooks disclaiming the existence of an employment contract and specifying that the employment is at-will and that the employment may be terminated at any time and for any reason.

Pennsylvania

Pennsylvania first subscribed to the at-will employment doctrine in 1891,[53] and continues to adhere to the general presumption that all non-contractual employment is at-will. Its supreme court has recognized the public policy exception,[54] while its superior court has rejected the implied covenant of good faith exception.[55]

Pennsylvania courts use a case-by-case analysis to determine whether public policy affords an employee a cause of action for wrongful discharge.[56] To overcome the at-will presumption, an employee must point to a clear public policy articulated in the state's constitution, legislation, administrative regulations, or a judicial decision.[57] For example, in *Weaver v. Harpster*,[58] the superior court agreed with the employee's argument, based in part on the state constitution and on the Pennsylvania Human Relations Act, that "there is a clear mandate of public policy against sexual discrimination and/or sexual harassment in the workplace."[59] The court reasoned that it would be "difficult to believe that the Legislature would first define certain acts as illegal via both the Constitution and statute, thus establishing a public policy unequivocally condemning such conduct, and then remove all judicial recourse for the victims of that conduct."[60] The court refused to construe the Legislature's decision to regulate only those employers with more than four employees as a tacit endorsement of sexual discrimination by those employing fewer than four. Instead, "there remains a clear public policy to prevent sexual discrimination in the workplace," regardless of employer size.[61]

Regarding the implied contract exception, Muhl had included Pennsylvania among the states that did not recognize the exception as of 2000.[62] Recent appellate cases, however, signal a change. The exception may be triggered when either: (1) the employer has expressed an intent, through an employee handbook or corporate policy, to offer employment for a definite time period or to terminate the employee only for just cause, and the employee accepts the offer,[63] or (2) the employee provided a special benefit or service to the employer beyond the scope of the employee's job duties ("additional consideration").[64]

The superior court will now recognize an implied contract emerging from an employee handbook when "…a reasonable person in the employee's position would interpret [the handbook's] provisions as evidencing the employer's intent to supplant the at-

will doctrine and be bound legally by its representations in the handbook."[65] However, an employee handbook does not overcome the at-will presumption unless the handbook's language clearly expresses the employer's intent to do so. In *Grose v Procter & Gamble Paper Prods.*,[66] for example, the handbook specifically stated that the plaintiff was an at-will employee. Similarly worded disclaimers negating the creation of contractual obligations generally defeat any claim that a handbook is a contract.[67]

The superior court has also considered implied contracts based upon "additional consideration." A court may find additional consideration when an employee affords the employer a substantial benefit other than the service that the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform. In *Rapagnani v. The Judas Company*,[68] for example, the court acknowledged that the at-will presumption may be rebutted when representations by the employer concerning the term or nature of the employment cause the employee to take extraordinary action such as quitting his/her prior employment and/or moving his or her family.[69]

In 2004, the court again examined the role of additional consideration to analyze the existence of an implied contract. In *Janis v. AMP. Inc.*,[70] the employer had asked the employee if he would be interested in an expatriate assignment to Mexico, and offered several inducements, including a promotion, extra payments and a special bonus incentive plan. The offer letter stated that the Mexican assignment was "expected to last three years but no more than five years."[71] The employee accepted the position, sold his Pennsylvania home, and moved to Mexico. Approximately seven years later, the employee was laid off. He subsequently filed suit. The court found that the three-to-five years recited in the offer letter constituted a definite term. However, the court also noted that the employee's move to a foreign, economically deprived country posed a substantial hardship, and thus additional consideration.[72]

Consequently, it now appears the implied contract exception is recognized at the appellate level, though it remains to be seen whether the state supreme court will agree.

Texas

Texas maintains a fairly strict interpretation of the employment-at-will doctrine and recognizes only public policy exceptions. Those exceptions are narrowly construed, as the Texas Supreme Court recently demonstrated in *The Ed Rachal Foundation v. D'Unger*.[73] There, the court revisited its previous ruling in *Sabine Pilot Service Inc. v. Hauck*[74] making it unlawful to terminate an employee if the sole reason for the termination was the employee's refusal to perform an illegal act.[75] Mr. D'Unger claimed he was unlawfully terminated for reporting alleged wrongdoing on a ranch commonly used as a crossing point by migrant workers from Mexico. He believed that the ranch foreman illegally harassed the migrants (a claim later proved to be untrue) and, despite being instructed to the contrary, reported certain instances to various authorities. He was then terminated, and subsequently brought suit. The court of appeals held that the jury could have found that the instructions not to make any further reports could be discerned as attempts to engage in a conspiracy to cover up criminal activity.[76]

The supreme court disagreed, holding that *Sabine Pilot* established a limited public policy exception protecting employees who are required to commit a crime, not employees who are asked not to report a crime.[77] The court reasoned that extending the exception would create a common law whistleblower claim. This refusal to extend the public policy exception is consistent with the Texas courts' general reluctance to allow exceptions to the at-will doctrine, as further demonstrated by Texas' longstanding refusal to recognize the implied-contract exception.[78]

CONCLUSION: NO DEATH KNELL YET

Despite dire predictions of the demise of at-will employment in the early years of the twenty-first century, it appears from the foregoing discussion that "funeral arrangements" may still be a bit premature. Without question, the doctrine has undergone considerable modification after its infancy over one hundred years ago. Beginning with legislative initiatives to protect employees from abuse, discrimination, and retaliation, and continuing through the judicial creation of exceptions based on public policy, implied covenants, and implied duties, the doctrine no longer affords employers the absolute power that they once held over the conduct of their business enterprises. Certain recent trends suggest con-

tinued erosion of the doctrine. For example, of the eight states cited by Muhl as not recognizing a public policy exception as of 2000, only Maine persists.

Employees and those representing their interests are continuing in their efforts to chip away at what remains. Will they find some new crease to exploit? Ballum, for one, cited "the increasing concern with privacy rights" as "[p]erhaps the most significant development with the potential to destroy the employment-at-will doctrine," and predicted "it is not likely that legislatures and courts will reverse the trend toward privacy protections."[79]

That may eventually prove true. However, for now, there remains a strong undercurrent, at least in some states, to hold fast to the notion that "at-will" still means something. Consequently, it is still too soon to sound the death knell.

NOTES

1. Payne v. Western & Atlantic R. Co., 81 Tenn. 507, 1884 WL 469 (1884) (overruled on other grounds in part by, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915)).
2. Payne v. Western & Atlantic R. Co., 81 Tenn. 507, 1884 WL 469 (1884) (overruled on other grounds in part by, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915)).
3. Adair v. U.S., 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908) .
4. Deborah A. Ballum, "Employment-at-Will: The Impending Death of a Doctrine," 37 *Am. Bus. L.J.* 653, 660 (Summer 2000).
5. Charles Muhl, "The Employment-At-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January, 2001) at pp.10-11.
6. Egerton v. Brownlow, 4 H.L.Cas. 1, 196 (1853) (Lord Truro, J.).
7. Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25, 1 I.E.R. Cas. (BNA) 5, 44 L.R.R.M. (BNA) 2968, 38 Lab. Cas. (CCH) P 65861 (2d Dist. 1959).
8. *See* Deborah A. Ballum, "Employment-at-Will: The Impending Death of a Doctrine," 37 *Am. Bus. L.J.* 653, 660 (Summer 2000)., n.4..
9. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876, 878, 115 L.R.R.M. (BNA) 4165 (1981).
10. *See* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834, 115 L.R.R.M. (BNA) 4484, 98 Lab. Cas. (CCH) P 55398 (1983) (rejected by, Payne v. Rozendaal, 147 Vt. 488, 520 A.2d 586, 41 Fair Empl. Prac. Cas. (BNA) 1748, 1 I.E.R. Cas. (BNA) 800, 42 Empl. Prac. Dec. (CCH) P 36886 (1986)).
11. *See* Charles Muhl, "The Employment-At-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January, 2001), n.5, at p.4, Exh.1 (indicating that by October 1, 2000, forty-two states, as well as the District of Columbia, recognized a public-policy exception to the employment-at-will doctrine). Since 2000, courts in Alabama, Florida, Georgia, Louisiana, Nebraska, New York, and Rhode Island have issued similar rulings. *See* Webb Wheel Products, Inc. v. Hanvey, 922 So. 2d 865, 870, 22 I.E.R. Cas. (BNA) 1810 (Ala. 2005) (acknowledging that retaliatory discharge of an employee for filing a worker's compensation claim in contravention of Ala Code 1975 §25-5-11.1 substantiates an exception to the general at-will rule); Bruner v. GC-GW, Inc., 880 So. 2d 1244, 21 I.E.R. Cas. (BNA) 1277, 1250 (Fla. Dist. Ct. App. 1st Dist. 2004) (holding that it is against Florida public policy to allow the discharge of an employee for filing a worker's compensation claim); *see also* Walsh v. Arrow Air, Inc., 629 So. 2d 144, 147-148, 8 I.E.R. Cas. (BNA) 850 (Fla. Dist. Ct. App. 3d Dist. 1993), decision quashed, 645 So. 2d 422, 10 I.E.R. Cas. (BNA) 84 (Fla. 1994) (holding that the Florida Whistle-blower's Act of 1986, as expanded in 1991, modified Florida's common law employment-at-will rule); Eckhardt v. Yerkes Regional Primate Center, 254 Ga. App. 38, 561 S.E.2d 164, 165, 18 I.E.R. Cas. (BNA) 1302 (2002) (acknowledging the "legislatively created public policy exceptions to the at-will doctrine…[specifically] employer cannot discharge employee whose earnings are subject to garnishment…[and] employer cannot discharge employee who is absent to attend judicial proceeding in response to court order"); Quebedeaux v. Dow Chemical Co., 820 So. 2d 542, 545-546, 18 I.E.R. Cas. (BNA) 1505 (La. 2002) (explaining that employment-at-will is the default rule and that there are no broad policy considerations creating exceptions to employment-at-will in the state, but that the doctrine "is tempered by numerous federal and state laws which proscribe certain reasons for dismissal of an at-will employee…[including] various state statutes [which] prevent employers from discharging an employee for exercising certain statutory rights, such as the right to present workers' compensation claims"); Wieder v. Skala, 80 N.Y.2d 628, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992) (permitting cause of action for wrongful discharge based on ethical rules of the legal profession); Day v. City of Providence, 338 F. Supp. 2d 310, 320 (D.R.I. 2004) ("…under Rhode Island law an employee-at-will possesses a cause of action in tort against an employer who discharges the employee for reporting employer conduct that violates an express statutory standard." (Citation omitted)).
12. *See* Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 118 L.R.R.M. (BNA) 2489, 104 Lab. Cas. (CCH) P 55577 (Me. 1984).
13. *See* Charles Muhl, "The Employment-At-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January, 2001), n.5, at p.4, Exh.1. Though Muhl includes Indiana among the states that did not recognize the exception, its supreme court had previously stated that an at-will employment relationship may be converted to a relationship in which the employer may terminate an employee only for good cause, but the employee must provide adequate independent consideration. *See* Wior v. Anchor Industries, Inc., 669 N.E.2d 172, 175, 11 I.E.R. Cas. (BNA) 1742, 132 Lab. Cas. (CCH) P 58147 (Ind. 1996). Similarly, the Massachusetts Supreme Judicial Court had declared that "on proper proof, a personnel manual can be shown to form the basis of an express or an implied contract." *See* Jackson v. Action for Boston Community Development, Inc., 403 Mass. 8, 525 N.E.2d 411, 415, 3 I.E.R. Cas. (BNA) 1102, 122 Lab. Cas. (CCH) P 56947 (1988), citing Hobson v. McLean Hosp. Corp., 402 Mass. 413, 522 N.E.2d 975, 3 I.E.R. Cas. (BNA) 1217, 123 Lab. Cas. (CCH) P 57140 (1988). The Massachusetts Appeals Court has since held that provisions in manuals such as those pertaining to progressive discipline in advance of firing are enforceable to the extent that they instill a "reasonable belief in the employees that management will adhere to the policies therein expressed." *See* Ferguson v. Host Intern., Inc., 53 Mass. App. Ct. 96, 757 N.E.2d 267, 272-273, 18 I.E.R. Cas. (BNA) 51 (2001). The Superior Court of Pennsylvania, another "non-recognition state," had acknowledged that an employee could overcome the presumption of employment-at-will by establishing that he had furnished sufficient additional consideration, which could include a substantial benefit other than the services which the employee was hired

to perform, or undergoing a substantial hardship other than the services which he was hired to perform. *See* Rapagnani v. Judas Co., 1999 PA Super 203, 736 A.2d 666, 669 (1999).

14. *See* Jones v. Lake Park Care Center, Inc., 569 N.W.2d 369, 374, 13 I.E.R. Cas. (BNA) 504 (Iowa 1997) (holding an employee handbook creates an implied contract if: (1) the handbook is sufficiently definite in its terms to create an offer, (2) it is communicated to and accepted by the employee so as to create an acceptance, and (3) the employee provides consideration); *but see* Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 287, 11 I.E.R. Cas. (BNA) 263, 131 Lab. Cas. (CCH) P 58035 (Iowa 1995) (holding a disclaimer can prevent the formation of a contract by clarifying the intent of the employer not to make an offer).
15. Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880, 115 L.R.R.M. (BNA) 4708, 109 Lab. Cas. (CCH) P 55888 (1980).
16. Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880, 892, .R.R.M. (BNA) 4708, 109 Lab. Cas. (CCH) P 55888 (1980).
17. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722, 1 I.E.R. Cas. (BNA) 122, 115 L.R.R.M. (BNA) 3030, 110 Lab. Cas. (CCH) P 55998 (2d Dist. 1980).
18. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455-456, Rptr. 722, 1 I.E.R. Cas. (BNA) 122, 115 L.R.R.M. (BNA) 3030, 110 Lab. Cas. (CCH) P 55998 (2d Dist. 1980) (Emphasis added). The court went on to approve actions providing both contract and tort remedies for breach of the covenant of good faith and fair dealing in every employment relationship.
19. *See* Charles Muhl, "The Employment-At-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January, 2001), at p.9 (indicating only eleven states had recognized the exception as of October, 2000).
20. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373, 3 I.E.R. Cas. (BNA) 1729, 110 Lab. Cas. (CCH) P 55978 (1988).
21. Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P.3d 1089, 84 Fair Empl. Prac. Cas. (BNA) 64, 16 I.E.R. Cas. (BNA) 1345, 142 Lab. Cas. (CCH) P 59072 (2000).
22. California Labor Code, § 2922.
23. Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, n. 21 at 335, Cal. Rptr. 2d 352, 8 P.3d 1089, 84 Fair Empl. Prac. Cas. (BNA) 64, 16 I.E.R. Cas. (BNA) 1345, 142 Lab. Cas. (CCH) P 59072 (2000).
24. Jie v. Liang Tai Knitwear Co., 89 Cal. App. 4th 654, 660-661, 107 Cal. Rptr. 2d 682, 17 I.E.R. Cas. (BNA) 1176, 144 Lab. Cas. (CCH) P 59379 (2d Dist. 2001).
25. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330, 1 I.E.R. Cas. (BNA) 102, 115 L.R.R.M. (BNA) 3119, 121 Lab. Cas. (CCH) P 56822, 1980-2 Trade Cas. (CCH) ¶ 63378, 9 A.L.R.4th 314 (1980).
26. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330, 1 I.E.R. Cas. (BNA) 102, 115 L.R.R.M. (BNA) 3119, 121 Lab. Cas. (CCH) P 56822, 1980-2 Trade Cas. (CCH) ¶ 63378, 9 A.L.R.4th 314 (1980).
27. Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, n. 21 at 336, Cal. Rptr. 2d 352, 8 P.3d 1089, 84 Fair Empl. Prac. Cas. (BNA) 64, 16 I.E.R. Cas. (BNA) 1345, 142 Lab. Cas. (CCH) P 59072 (2000).
28. Foley v. Interactive Data Corp., 47 Cal. 3d 654, 680-681, 254 Cal. Rptr. 211, 765 P.2d 373, 3 I.E.R. Cas. (BNA) 1729, 110 Lab. Cas. (CCH) P 55978 (1988).
29. Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56, 24 I.E.R. Cas. (BNA) 1688, 153 Lab. Cas. (CCH) P 60241 (2006).
30. Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 391, 46 Cal. Rptr. 3d 668, 139 P.3d 56, 24 I.E.R. Cas. (BNA) 1688, 153 Lab. Cas. (CCH) P 60241 (2006).
31. Cress v. Recreation Services, Inc. 795 N.E.2d 817, 839 (Ill.App 2d Dist. 2003).
32. Mein v. Masonite Corp., 485 N.E.2d 312, 314 (Ill. 1985).
33. See Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314 (Ill. 1987) (recognizing that parties may modify an at-will employment by an employee handbook or policy if contract formation requirements are met); *see* also Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) and Palmateer v. International Harvester Co., 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876, 115 L.R.R.M. (BNA) 4165 (1981) (recognizing the tort of retaliatory discharge).
34. Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978).
35. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978).
36. Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359-360 (Ill. 1978).
37. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876, 115 L.R.R.M. (BNA) 4165 (1981)
38. See Barr v. Kelso-Burnett Co., 478 N.E.2d 1354 (Ill. 1985) (tort does not encompass claims based on the exercise of free speech rights); Harlein v. Illinois Power Co., 601 N.E.2d 720 (Ill. 1992) (declining to expand the tort to encompass constructive discharge); Zimmerman v. Buchheit of Aparta, Inc., n. 35 supra (declining to expand the tort to encompass demotions or suspensions).
39. McInerney v. Charter Golf, Inc., 680 N.E.2d 1347 (Ill. 1997).
40. Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314, 318, n. 34 (Ill. 1987).
41. Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d 314, 318, n. 34 (Ill. 1987).
42. Harrison v. Sears, Roebuck & Co., 546 N.E.2d 248, 255 (Ill.App.4.Dist. 1989).
43. See Wieder v. Skala, 80 N.Y.2d 628, 633, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992), 633, citing Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 300 (1983) and Martin v. New York Life Ins. Co., 148 N.Y. 117 (1895).
44. See n. 11 supra.
45. Wieder v. Skala, 80 N.Y.2d 628, 636-637, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992).
46. Wieder v. Skala, 80 N.Y.2d 628, 637, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992) citing 3 Corbin, Contracts §570, 1992 Supp. at 411.
47. Wieder v. Skala, 80 N.Y.2d 628, 637-638, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992).
48. Under Muhl's scheme, this ruling is apparently characterized as an "implied-contract exception" but not a "covenant of good faith and fair-dealing exception," despite the court's inclusion of language suggesting both.
49. Wieder v. Skala, 80 N.Y.2d 628, 639, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992).
50. Wieder v. Skala, 80 N.Y.2d 628, 634, 593 N.Y.S.2d 752, 609 N.E.2d 105, 8 I.E.R. Cas. (BNA) 132 (1992).
51. Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 443 N.E.2d 441, 118 L.R.R.M. (BNA) 2689, 98 Lab. Cas. (CCH) P 55401, 33 A.L.R.4th 110 (1982).
52. Lobosco V. New York Telephone Company/NYNEX, 96 N.Y.2d 312, 727 N.Y.S.2d 383, 751 N.E.2d 462, 143 Lab. Cas. (CCH) P 59311 (2001).
53. See Henry v. Pittsburgh & L. E. R. Co., 139 Pa. 289, 21 A. 157 (1891).
54. McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307, 314, 750 A.2d 283, 17 I.E.R. Cas. (BNA) 336 (2000).
55. Donahue v. Federal Exp. Corp., 2000 PA Super 146, 753 A.2d 238, 16 I.E.R. Cas. (BNA) 920 (2000).
56. Carlson v. Community Ambulance Services, Inc., 824 A.2d 1228 (Pa.Super.2003).
57. McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 288, n. 56 (2000).
58. Weaver v. Harpster, 2005 PA Super 359, 885 A.2d 1073, 96 Fair Empl. Prac. Cas. (BNA) 1629, 23 I.E.R. Cas. (BNA) 1149 (2005), appeal granted in part, 592 Pa. 13, 922 A.2d 876 (2007).
59. Weaver v. Harpster, 2005 PA Super 359, 885 A.2d 1073, 1076-1077, 96 Fair Empl. Prac. Cas. (BNA) 1629, 23 I.E.R. Cas. (BNA) 1149 (2005), appeal granted in part, 592 Pa. 13, 922 A.2d 876 (2007).
60. Weaver v. Harpster, 2005 PA Super 359, 885 A.2d 1073, 1077, 96 Fair Empl. Prac.

Cas. (BNA) 1629, 23 I.E.R. Cas. (BNA) 1149 (2005), appeal granted in part, 592 Pa. 13, 922 A.2d 876 (2007).

61. Weaver v. Harpster, 2005 PA Super 359, 885 A.2d 1073, 1077-1078, 96 Fair Empl. Prac. Cas. (BNA) 1629, 23 I.E.R. Cas. (BNA) 1149 (2005), appeal granted in part, 592 Pa. 13, 922 A.2d 876 (2007).
62. *See* Charles Muhl, "The Employment-At-Will Doctrine: Three Major Exceptions," *Monthly Labor Review* (January, 2001), at p.4, Exh. 1 (indicating only eleven states had recognized the exception as of October, 2000).
63. See Bauer v. Pottsville Area Emergency Medical Services, Inc., 758 A.2d 1265 (Pa. Super. 2000).
64. See Janis v. AMP, Incorporated, 856 A.2d 140, 146 (Pa.Super. 2004).
65. Bauer v. Pottsville Area Emergency Medical Services, Inc., 758 A.2d 1265, 1269 (Pa. Super. 2000).
66. Grose v. Procter & Gamble Paper Products, 2005 PA Super 8, 866 A.2d 437, 441 (2005).
67. See Ruzicki v. Catholic Cemeteries Ass'n, 610 A.2d 495 (Pa.Super. 1992).
68. Rapagnani v. Judas Co., 1999 PA Super 203, 736 A.2d 666, 669 (1999), citing Darlington v. General Electric, 350 A.2d 306, 314 (1986).
69. Rapagnani v. Judas Co., 1999 PA Super 203, 736 A.2d 666, 669 (1999), citing Darlington v. General Electric, 350 A.2d 306, 314 (1986).
70. Janis v. AMP, Incorporated, 856 A.2d 140, 146 (Pa.Super. 2004).
71. Under Pennsylvania law, there is a presumption that continued employment without objection or change following the expiration of an employment contract of one year or more renews by implication of law under the same terms and conditions. See Smith v. Shallcross, 69 A.2d 156 (1949).
72. Janis v. AMP, Incorporated, 856 A.2d 140, 146 (Pa.Super. 2004).
73. Ed Rachal Foundation v. D'Unger, 207 S.W.3d 330, 24 I.E.R. Cas. (BNA) 833, 152 Lab. Cas. (CCH) P 60188 (Tex. 2006).
74. Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 1 I.E.R. Cas. (BNA) 733, 119 L.R.R.M. (BNA) 2187, 102 Lab. Cas. (CCH) P 55493 (Tex. 1985).
75. Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735, 1 I.E.R. Cas. (BNA) 733, 119 L.R.R.M. (BNA) 2187, 102 Lab. Cas. (CCH) P 55493 (Tex. 1985).
76. Ed Rachal Foundation v. D'Unger, 207 S.W.3d 330, 332, 24 I.E.R. Cas. (BNA) 833, 152 Lab. Cas. (CCH) P 60188 (Tex. 2006).
77. Ed Rachal Foundation v. D'Unger, 207 S.W.3d 330, 332, 24 I.E.R. Cas. (BNA) 833, 152 Lab. Cas. (CCH) P 60188 (Tex. 2006)..
78. See Webber v. M.W. Kellogg Company, 720 S.W.2d 124 (Tex. 1986).
79. See Deborah A. Ballum, "Employment-at-Will: The Impending Death of a Doctrine," 37 *Am. Bus. L.J.* 653, 685-686 (Summer 2000).