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TERMINATION OF THE AT WILL EMPLOYEE: THE GENERAL RULE AND THE WISCONSIN RULE

I. INTRODUCTION

As far back as 1871, the Wisconsin Supreme Court stated the general rule for the termination of an at will employment relationship: “Either party . . . [is] at liberty to terminate the service at any time, no definite period for which the service [is] to continue having been agreed upon.”

In addition, the court decided that an agreement to pay for services at the rate of a certain amount per year was a hiring for an indefinite time and, therefore, governed by the general rule. In other words, the Wisconsin definition of an at will employee includes an employee whose contract is not for a specific term as well as an employee who has no employment contract at all.

The Wisconsin court’s position is analogous to the general American rule as stated in numerous treatises and cases. However, recent decisions in a growing number of jurisdictions have limited the harshness of the at will doctrine. This comment will examine the increasing recognition of a need to limit the traditional doctrine and will discuss some of the leading cases. An analysis of alternative theories of recovery for the wrongfully discharged at will employee will follow. Since there has been some indication that Wisconsin will join the modern trend, this comment will also focus on the present status of the law in Wisconsin as well as the future of the wrongful discharge cause of action in this state.

1. Prentiss v. Ledyard, 28 Wis. 131, 133 (1871).
2. Id.
5. See infra notes 46-68, 83-89 and accompanying text.
II. EVOLUTION OF THE DOCTRINE

A. Historical Background

English common law provided a servant a measure of protection from unjust dismissals by his master. Employment for an indefinite period was construed to be for one year. During the nineteenth century the rule also developed that, unless there was cause for summary discharge, employment could be terminated only after reasonable notice.

American courts, influenced by the laissez-faire theory of the industrial revolution, diverged from the English rule. An early statement of the doctrine was formulated by a treatise writer and was thereafter generally relied upon by courts:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed or whatever time the party may serve.

For a time, the doctrine was even accorded constitutional protection in two United States Supreme Court decisions which struck down legislation proscribing employee discharges for union membership. Additional "sustenance" was received from the contract principles of mutuality of obligation, consideration and freedom of contract.

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8. 1 W. Blackstone, Commentaries *425.
10. See generally Note, *A Common Law Action for the Abusively Discharged Employee*, 26 Hastings L.J. 1435, 1438-43 (1975). The laissez-faire theory held that the government should foster economic growth by exercising as little control as possible over trade and industry.
B. The Beginnings of Change

In spite of the universal acceptance and almost mechanical application by American courts of the employment at will doctrine,\(^{14}\) commentators began questioning its continued validity in the light of changed economic conditions and social policies.\(^{15}\) With the demise\(^ {16}\) of Adair v. United States\(^ {17}\) and Coppage v. Kansas,\(^ {18}\) "the philosophical underpinnings of the [traditional] rule have fallen into decay," one author declared.\(^ {19}\)

Increasingly, both federal and state legislation restricted an employer's power to terminate employees.\(^ {20}\) These statutory exceptions to the general rule can be divided into two main categories: 1) legislation relating to an employee's activity; and 2) legislation relating to an employee's status.\(^ {21}\) The foremost example in the first category is the National Labor Relations Act,\(^ {22}\) which protects the employee's right to participate in labor organizations and to engage in collective bargaining. The laws of some states governing worker's compensation also protect the employee against discrimination for filing a claim or suffering a job-related injury.\(^ {23}\) Examples in the second category include legislation prohibiting discharge of an employee because of race, color, religion, sex or national origin,\(^ {24}\) legislation prohibiting age discrimination,\(^ {25}\) and laws

\(^{14}\) See cases cited supra note 4.


\(^{16}\) Legislation restricting the employer's power of discipline for specified reasons was adopted and upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

\(^{17}\) 208 U.S. 161 (1908).

\(^{18}\) 236 U.S. 1 (1915).

\(^{19}\) Blades, supra note 13, at 1416.

\(^{20}\) See generally Peck, supra note 7, at 13-17.

\(^{21}\) Marsack, Termination of Employees at Will 2, Wis. State Bar Lab. Law Sec.


\(^{23}\) See, e.g., Wis. Stat. § 102.35 (1979).


prohibiting discrimination on the basis of physical handicap.\textsuperscript{26}

Public employees receive a measure of constitutional protection from discharge under certain circumstances, stemming from the first and fourteenth amendments.\textsuperscript{27} In addition, civil service systems and other terminial and union securities generally protect these workers from being discharged without "just cause."\textsuperscript{28}

III. THE NEED TO LIMIT THE AT WILL DOCTRINE

A. The Employee's Interests

The previously noted safeguards against unjust dismissal are significant. But it is important to remember that nearly sixty-five percent of all employees in the United States are still hired on an at will basis.\textsuperscript{29} Therefore, the protection offered by arbitration under collective bargaining agreements is not afforded them. In addition, present legislation offers only narrow protection against specific discriminatory acts. It is the perceived necessity to protect these nonunionized private sector employees that has led courts in a growing number of jurisdictions to limit the at will doctrine judicially.\textsuperscript{30}

Economic conditions and social policies have changed since the period of individualism when the at will doctrine developed.\textsuperscript{31} The basis of economic security has shifted from property ownership to job holding, and most workers have become completely dependent upon wages from others for their livelihood.\textsuperscript{32} In addition, there has been an ever increasing concen-

\begin{itemize}
\item \textsuperscript{27} E.g., Pickering v. Board of Educ., 391 U.S. 563 (1968).
\item \textsuperscript{28} Annot., 24 ATLA L. REP. 386, 387 (1981).
\item \textsuperscript{29} Another 21% are union members, and almost 15% are federal and state employees. See Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 394 (1980), Table No. 652 (total labor force), Table No. 714, at 429 (union membership) and Table No. 519, at 318 (government employees).
\item \textsuperscript{30} See Note, Kelsay v. Motorola, Inc.: Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims, 12 J. MAR. J. PRAC. & PROC. 659, 671-72 (1979).
\item \textsuperscript{31} Id. at 671.
\item \textsuperscript{32} It has been aptly stated that:
We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the
The worker can no longer go from job to job with relative ease. The range of alternative employment has narrowed as modern technology requires more specialization. Decreasing mobility is due in part to seniority policies.

This dependence upon the employer is social as well as economic. Modern studies have shown that employees rely on a stable employment relationship for much of their self-esteem. In addition, employees base many life decisions on the expectation of continuing employment. Because of his dependence on the job, the employee may have to submit to intimidation and coercion. The realities of the situation do not usually leave him free to terminate the employment himself nor to bargain on an equal basis with his employer for a "just cause" provision in his contract.

Furthermore, the employee's interest in job security includes deferred compensation, such as pension rights, extra vacation time, profit-sharing plans and other fringe benefits. A wrongful discharge may cut off these benefits, giving the employer "a windfall."

B. The Employer's Interests

Courts have traditionally upheld the employer's legitimate interest in running the business efficiently and profitably. Fundamental control of the workplace has been seen as a management prerogative. Unquestionably, employers need flexibility in dealing with the uncertainties of the business world due to fluctuation in business cycles, shifts in demand and technological changes. As a result, courts have permitted...
employers wide discretion in personnel decisions in order that they may retain only the best qualified employees.41

The lack of protection of at will employees lies in this “assumed importance” of preserving the employer’s freedom to control the work force.42 But the failure of American law to protect against unjust dismissals is out of step with the standards and experience of Great Britain, West Germany, Japan and other industrialized nations.43 At least one author has suggested that “abandonment of the at will rule may improve business productivity in the long run”44 because arbitrary discharges of able employees involve a waste of training, continuity and expertise. Employee insecurity has a negative impact on a business, whereas a cooperative atmosphere would increase company loyalty and morale, thereby reducing the turnover rate and absenteeism. The business would also realize savings in the form of reduced training costs.45

C. Balancing the Interests

Today, a growing number of courts have realized that the employer’s interests do not exist in a vacuum.46 Recent judicial decisions restricting the employer’s freedom to discharge at will employees can properly be considered a balancing of the employer’s legitimate business interests with the interest of the employee in job security. While traditionally the scale has been tipped in favor of the employer, some courts are now putting the public’s interest on the employee’s side.

IV. Recent Cases in Other Jurisdictions

A. The Public Policy Exception

In the earliest and probably most influential case, Petermann v. International Brotherhood of Teamsters,47 the plaintiff was allegedly discharged for disobeying his employer’s order to give false testimony before a legislative com-

41. See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1834-35 (1980).
42. Peck, supra note 7, at 13.
43. Id. at 11-12. See also Note, supra note 41, at 1836.
44. Note, supra note 41, at 1835.
45. See id. at 1834-35; Comment, supra note 37, at 81 n.90.
46. See cases cited infra notes 46-68, 83-89.
The California Court of Appeals stated that the right to discharge an employee under a contract which does not contain a fixed duration period "may be limited by statute or by considerations of public policy." Since perjury is an act specifically prohibited by statute,

[t]o hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.

In so concluding, the court granted the employee a nonstatutory cause of action against the employer.

In 1973 the Indiana Supreme Court reversed the dismissal of a plaintiff employee's complaint alleging retaliatory discharge for filing a worker's compensation claim. In Frampton v. Central Indiana Gas Co., the court acknowledged that, ordinarily, an at will employee may be dismissed without cause, but, like the California court, it recognized a public policy exception to the general rule. In this case, the employee had been discharged "solely for exercising a statutorily conferred right . . . ." Both Michigan and Illinois have cited Frampton in recognizing a public policy exception for wrongful discharge of an employee who filed a worker's compensation claim.

Along the same lines, the Oregon Supreme Court, in 1975, found a public policy exception in a case in which the plaintiff was terminated for not requesting to be excused from jury duty. The court noted that the state constitution and other

48. Id. at —, 344 P.2d at 26.
49. Id. at —, 344 P.2d at 27.
50. Id.
51. Upon remand, the Petermann case resulted in an award of $50,000 in damages for the plaintiff. The judgment was subsequently affirmed in Petermann v. Teamsters Local 396, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963).
53. Id. at 253, 297 N.E.2d at 428. The court compared this situation to retaliatory evictions in landlord-tenant law.
statutes indicated the high value placed on jury duty and reasoned that the jury system might be adversely affected if the employee were not allowed to collect damages from the employer.\(^5\)

In another recent case, *Harless v. First National Bank*,\(^6\) the West Virginia court recognized a cause of action in tort\(^5\) for a bank employee who was discharged in retaliation for efforts to require his employer to comply with consumer credit and protection laws.\(^6\) Here too, the employer's reasons for the firing contravened an established public policy.\(^6\) Similarly, the California Supreme Court made it clear that an employee wrongfully discharged for refusing to engage in illegal conduct had a remedy in tort. In *Tameny v. Atlantic Richfield Co.*,\(^6\) a case in which the plaintiff had refused to participate in an illegal scheme to fix retail gasoline prices,\(^6\) the court stated:

> [A]n employer's obligation to refrain from discharging an employee who refuses 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 upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action.\(^6\)

The United States District Court for the Eastern District of New York also recognized a cause of action for the tort of "abusive" discharge in *Savodnik v. Korvettes, Inc.*\(^6\) In *Savodnik*, the firing, allegedly to avoid vesting of a pension plan, was of "virtually a model employee"\(^6\) after thirteen years. The court specified the elements of a claim: The plain-

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57. Id. at __, 536 P.2d at 516. This reasoning was followed by the Pennsylvania court in *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978).
59. Id. at 275 n.5.
60. Id. at 272. The plaintiff also alleged intentional infliction of emotional distress.
61. Id. at 275-76.
63. Id. at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840.
64. Id. at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844 (citation omitted).
66. Id. at 825.
tiff must prove that there is a public policy of the state and that the policy was violated by the defendant.\textsuperscript{67}

In one of the more far-reaching cases to date, the Illinois Supreme Court extended its recognition of a cause of action to an abusive discharge which did not undermine a specific statutory or constitutional provision but violated judicially defined notions of public policy.\textsuperscript{68} In \textit{Palmateer v. International Harvester Co.},\textsuperscript{69} the plaintiff was fired for supplying information to the police about a fellow employee and agreeing to testify if requested.\textsuperscript{70} Justice Simon stated:

There is no public policy more basic, nothing more implicit in the concept of ordered liberty, than the enforcement of a State's criminal code . . . . No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters.\textsuperscript{71}

Several jurisdictions have acknowledged a cause of action for wrongful discharge based upon public policy, but have found the exception inapposite to the fact situation presented.\textsuperscript{72} Illustrative are two Pennsylvania cases. Initially, in \textit{Geary v. United States Steel Corp.},\textsuperscript{73} the court affirmed the dismissal of the plaintiff's complaint alleging his discharge for pointing out unsafe tubular products (later withdrawn from the market) sold to the oil and gas industries\textsuperscript{74} because the complaint itself disclosed a "plausible and legitimate reason"\textsuperscript{75} for the discharge. However, the court suggested that "there are areas of an employee's life in which his employer

\begin{footnotes}
\item 67. \textit{Id.} at 826.
\item 68. \textit{Palmateer v. International Harvester Co.}, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). As in \textit{Kelsay}, the court allowed punitive damages only in future cases.
\item 69. \textit{Id.}
\item 70. \textit{Id.} at __, 421 N.E.2d at 877.
\item 71. \textit{Id.} at __, 421 N.E.2d at 879-80 (citations omitted). \textit{But see} the strong dissent by Justice Ryan, the author of the \textit{Kelsay} opinion. \textit{Id.} at __, 421 N.E.2d at 881-86.
\item 74. \textit{Id.} at 173, 319 A.2d at 175.
\item 75. \textit{Id.} at 184, 319 A.2d at 180.
\end{footnotes}
has no legitimate interest. An intrusion into one of these areas by virtue of the employer’s power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. 76

In Pierce v. Ortho Pharmaceutical Corp., 77 the court held that an at will employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. However, the employee must identify a “specific expression” of public policy. 78 The sources of public policy, according to the Pennsylvania court, include legislation; administrative rules, regulations or decisions; and judicial decisions. 79 In Pierce, the plaintiff was a physician who was discharged for refusing to continue a research project she viewed as medically unethical. 80 In affirming summary judgment for the defendant, the court distinguished personal ethics from the recognized code of ethics of an employee’s profession. 81 Moreover, the plaintiff had merely alleged that the drug was controversial, not that it was dangerous. 82

Not all states that have considered the issue in recent years have adopted the public policy exception. 83 Alabama, for example, refused to create an exception because it would abrogate the inherent right of contract between employer and employee because public policy was “too nebulous a standard.” 84

B. Implied Covenant of Good Faith

A few jurisdictions have found an exception to the at will doctrine based on an implied covenant of good faith and fair dealing in the employment contract. The leading case in this category is Monge v. Beebe Rubber Co. 85 In Monge, the plain-
tiff, a female factory worker, claimed that she was fired for refusing "to go out with" her foreman. The New Hampshire Supreme Court stated:

[The employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.]

What makes this case exceptional, as the dissent points out, is that the employee had not pursued the grievance procedures under the union contract nor protested her denial of unemployment compensation.

A better-reasoned, but more limited, decision is Fortune v. National Cash Register Co., in which the plaintiff salesman was allegedly terminated to avoid paying him certain bonuses. Although the written employment contract was terminable at will by either party, the Massachusetts court held that the contract contained an implied covenant of good faith and fair dealing. Therefore, a termination not made in good faith constituted a breach of the contract. However, the court did not decide "whether the good faith requirement is implicit in every contract for employment at will."

V. ALTERNATIVE THEORIES OF RECOVERY

As this sampling of recent cases illustrates, many courts have not clearly articulated the nature of the underlying cause of action for wrongful discharge. Commentators also have suggested a variety of solutions, which are addressed separately...

(Ct. App. 1980) and cases cited in Comment, supra note 6, at 737.

86. 114 N.H. at —, 316 A.2d at 550.
87. Id. at —, 316 A.2d at 551 (citations omitted). Since this was a contract action, no damages were allowed for mental suffering. Id. at —, 316 A.2d at 552.
88. Id. at —, 316 A.2d at 553.
90. Id. at —, 364 N.E.2d at 1256.
91. Id.
92. Id. at —, 364 N.E.2d at 1257 (emphasis added).
in the following discussion.

A. A Statute

Several scholars have proposed a statute specifically prohibiting the unjust dismissal of employees, preferably a broad provision which would leave the courts free to elaborate on a case-by-case basis. The legislature could draw on the accepted body of law of the arbitration process or could expand the authority of fair employment and civil rights commissions. The major weakness in this suggestion, however, is that unorganized employees are not likely to be able to lobby successfully for the enactment of such a statute.

B. Constitutional or Property Law

Another scholar argues for constitutional protection under the due process and equal protection clauses of the fourteenth amendment. Still another considers the creation of a property right in employment more appropriate since constitutional restraints on the private employer may not be feasible. The alternative definition of this new property right (i.e., "the protection of the worker's interest in his employment from discharge without just cause") and the author's analysis are closely related to a tort theory. However, the author is unique in suggesting reinstatement as a possible remedy.

C. Contract Theory

More often, commentators and courts have turned to contract law to attempt to limit the employer's absolute right of discharge. Here the traditional doctrines of freedom of contract, mutuality of obligation and consideration present formi-
dable obstacles to modification of the general rule.  

One possible way to avoid these obstacles is the idea of implied terms in the contract. For example, instead of presuming that an employment contract of permanent or unspecified duration is one at will, the courts could construe it as being for a reasonable period, such as one year. Alternatively, several different factors in the individual employment situation could support an argument for implied rights to job security: 1) separate consideration given by the employer for the position which would include benefits to the employer, such as surrender of tort claims or contributions to the business, and special reliance by the employee. (Examples of the latter are the sale of a business, changing jobs, moving or reliance induced by recruitment techniques); 2) the common law of the job which includes consideration of the policy of the firm itself as well as the nature of the job and common law of the industry; and 3) the longevity of the employee on the job which would include deferred compensation and expressions of satisfactory performance, such as promotions and salary increases.

Promissory estoppel has also been suggested as an avenue around the traditional contract obstacles, but not all courts have accepted this theory, and it might be difficult for a discharged employee to prove all the elements. Unjust enrichment could be argued if the employee were discharged af-


103. See Note, Employment Contracts of Unspecified Duration, 42 COLUM. L. REV. 107, 122 (1942).

104. See Note, supra note 15, at 351-65.

105. See Note, supra note 102, at 273.

106. E.g., Ducote v. Oden, 221 La. 228, 59 So. 2d 130 (1952).

107. The doctrine of promissory estoppel is embodied in the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979), which states: "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." The Wisconsin Supreme Court adopted the doctrine in Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) and stated the conditions imposed as follows: "(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? (2) Did the promise induce such action or forbearance? (3) Can injustice be avoided only by enforcement of the promise?" Id. at 698, 133 N.W.2d at 275.
ter completing a task over and above his regular duties.\textsuperscript{108}

Under a contract theory, dismissal for cause could be used as a standard, as in English common law, or the court could imply a covenant of good faith and fair dealing, as in Fortune, so that a termination motivated by malice or bad faith would be a breach of the employment contract.\textsuperscript{109} Determining "just cause" or "good faith" in a particular case would necessarily involve balancing the employer's and the employee's interests. An advantage would be that courts are already familiar with the good faith standard from commercial transactions. The public policy element could also be considered by the court in the weighing process.\textsuperscript{110}

One disadvantage of proceeding on a contract theory is that damages are limited to lost wages, although arguably the value of lost fringe benefits could be included.\textsuperscript{111} Additionally, if courts seem willing to imply terms, employers may respond by requiring disclaimer-type clauses in employment contracts.\textsuperscript{112}

\textbf{D. Tort Law}

Many commentators and courts have acknowledged the greater elasticity of tort principles as the basis for recovery by the wrongfully discharged employee.\textsuperscript{113} As Professor Prosser observed, "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties."\textsuperscript{114} Analogies have been made to the torts of bad faith,\textsuperscript{115} abuse of process,\textsuperscript{116} intentional inter-

\textsuperscript{108} The essential elements of unjust enrichment are:
1) a benefit conferred upon the defendant by the plaintiff,
2) knowledge or appreciation of the benefit by the defendant,
3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.

\textsuperscript{109} Note, supra note 15, at 366-68.
\textsuperscript{110} See generally Comment, supra note 37.
\textsuperscript{111} Of course, mitigation of damages would be required.
\textsuperscript{112} See Note, supra note 10, at 1455-56; Note, supra note 41, at 1833 n.91.
\textsuperscript{113} E.g., Comment, supra note 102, at 273.
\textsuperscript{114} W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613 (4th ed. 1971).
\textsuperscript{115} See, e.g., Comment, supra note 37, at 94.
ference with a contract by the third party,\textsuperscript{117} outrage (i.e., the intentional infliction of emotional distress)\textsuperscript{118} and to the protection provided consumers in the products liability area.\textsuperscript{119}

The primary advantage to the plaintiff of a tort cause of action, of course, is the availability of damages for mental suffering and of punitive damages in aggravated circumstances. Moreover, it may be easier to convince courts to provide a tort remedy in an individual instance. Imposing terms such as just cause or good faith may seem to be a complete abrogation of the at will doctrine.\textsuperscript{120} On the other hand, in some jurisdictions, a plaintiff may proceed in both contract and tort under the public policy exception.\textsuperscript{121}

VI. LIMITATIONS OF WRONGFUL DISCHARGE ACTIONS

The area of wrongful discharge is obviously ripe for litigation. But the Geary court pointed out some of the disadvantages of allowing this type of suit, including the potential burden on the judicial system due to the increased case load and the difficult problems of proof.\textsuperscript{122} Abuse is particularly likely to arise in "whistle blowing" cases.\textsuperscript{123} It is conceivable, moreover, that an employee who fears imminent discharge will file a fictitious worker’s compensation claim in order to prevent the discharge.\textsuperscript{124} The constant threat of suit may inhibit the employer's necessary power to make critical judgments about employees — particularly professional, managerial and other high ranking personnel.\textsuperscript{125}

\textsuperscript{116} See, e.g., Comment, supra note 102, at 273-74.
\textsuperscript{117} See, e.g., Peck, supra note 7, at 13.
\textsuperscript{118} See, e.g., Comment, supra note 102, at 274.
\textsuperscript{119} See, e.g., Note, supra note 41, at 1838.
\textsuperscript{120} In refusing to follow Monge, the court in Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980), called it a "substitute for a union collective bargaining agreement." Id. at —, 620 P.2d at 703.
\textsuperscript{124} See Note, supra note 30, at 680.
The problem of proof is not insurmountable, however. A higher burden of proof or corroboration could be required, or the court could establish a presumption of good cause, except for long-tenured employees. Recognition of a cause of action might lead employers to seek private means of settlement, such as arbitration. Moreover, providing relief for arbitrary or retaliatory discharge would not deprive the employer of his right to discharge for cause. Any interference with his legitimate business operations would be "minimal in comparison with the rights sought to be protected."

One author fears that the "broad brush" nature of the public policy exception to the at will doctrine could lead to greater protection for the at will employee than that given to unionized employees. For instance, the California court, in Petermann, defined public policy as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . ." However, cases recognizing a public policy exception have generally fallen into definite categories. The first, discharge for refusal to violate a criminal statute at the employer's command, could be considered a per se violation of public policy. The second is discharge for exercising a substantive statutory right. The worker's compensation cases fall into this class. The third category is discharge for complying with a statutory duty such as serving on a jury. The fourth is discharge in violation of general public policy — that is, there is no specific legislative expression of public policy which the court can point to so that its definition must be grounded solely on common law principles. Monge would fall into this category.

Most courts have rejected cases falling into the fourth category, insisting that there be a "clear mandate" of public policy. Other restrictions on the use of the public policy excep-

126. See Blades, supra note 15, at 1429.
127. Id. at 1431.
128. Comment, supra note 15, at 1109.
129. Olsen, supra note 123, at 283 n.77.
131. See generally Comment, supra note 6.
tion have also arisen. For instance, it has been held that the public policy must affect a significant interest of the community.\textsuperscript{133} There cannot be a purely private interest at stake.\textsuperscript{134} Alternatively, the employer can argue that the statute itself establishes an adequate legal remedy.\textsuperscript{135}

VII. THE PRESENT STATUS OF THE LAW IN WISCONSIN

A. Supreme Court Decisions

As indicated in the introduction to this comment, Wisconsin has followed the general rule that employment for an indefinite period is terminable at any time, at the will of either party. The most recent Wisconsin Supreme Court decisions dealing with the issue have reiterated the court's adherence to the doctrine.

In \textit{Forrer v. Sears, Roebuck & Co.},\textsuperscript{136} decided in 1967, the plaintiff brought suit on a promissory estoppel theory claiming damages for discharge without cause after the defendant had allegedly promised him permanent employment.\textsuperscript{137} The court concluded "that a permanent employment contract is terminable at will unless there is additional consideration in the form of an economic or financial benefit to the employer. A mere detriment to the employee is not enough."\textsuperscript{138}

A somewhat different situation was presented in \textit{Goff v. Massachusetts Protective Association},\textsuperscript{139} decided in 1970. In \textit{Goff}, the plaintiff was an insurance agent who brought suit to recover certain commissions after the termination of his contracts with two insurance companies.\textsuperscript{140} There was no provision in the contracts that a termination be for cause although they did provide a method for termination.\textsuperscript{141} Finding an earlier Wisconsin decision controlling, the court concluded that when an employment contract for an indefinite term was silent concerning the grounds for termination, "such silence in-

\begin{thebibliography}{99}
\bibitem{134} E.g., Nees v. Hock, 272 Or. 210, 536 P.2d 512 (1975).
\bibitem{136} 36 Wis. 2d 388, 163 N.W.2d 587 (1967).
\bibitem{137} Id. at 390, 163 N.W.2d at 588.
\bibitem{138} Id. at 394, 163 N.W.2d at 590.
\bibitem{139} 46 Wis. 2d 712, 176 N.W.2d 576 (1970).
\bibitem{140} Id. at 713, 176 N.W.2d at 577.
\bibitem{141} Id. at 714, 176 N.W.2d at 577.
\end{thebibliography}
dictates an intent of the parties that the contract can be terminated at will or without cause and the court cannot read into the silence of the contract a reasonable or just cause.”

In Yanta v. Montgomery Ward & Co., a 1974 case involving statutes which prohibited sex discrimination, the supreme court again noted that “[i]n the absence of contrary statutory or contract provisions, an employer may discharge his employees for any reason without incurring liability therefor.”

B. The Appeals Court Decisions

The general rule appeared to be well-established in Wisconsin until the appeals court rendered a decision which suggested that Wisconsin would adopt a public policy exception to the at will doctrine under appropriate facts. In Ward v. Frito-Lay, Inc., the trial court had awarded compensatory and punitive damages to the plaintiff for his allegedly wrongful discharge. After briefly reviewing cases in other jurisdictions modifying the general rule, the appeals court was persuaded that it was “not in the public interest for courts to uniformly honor private contractual rights when to do so would contravene public policy.” However, Judge John P. Foley distinguished the plaintiff’s fact situation from the cases discussed: Ward was fired because his relationship with a fellow employee was causing dissension at the Frito-Lay factory, “not because he was attempting to exercise some statutorily or constitutionally guaranteed right or perform some public duty.”

The court also rejected Ward’s argument that his discharge contravened a public policy in favor of peaceful labor relations as stated in section 111.01 of the Wisconsin Statutes.

142. Id. at 715, 176 N.W.2d at 578 (citations omitted).
144. 66 Wis. 2d 53, 63 n.16, 224 N.W.2d 389, 394 n.16 (1974).
145. 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980) (District III).
146. Id. at 373, 290 N.W.2d at 536.
147. Id. at 376, 290 N.W.2d 537.
148. Id. at 376, 290 N.W.2d at 538. Ward and a female co-worker, although not married, were living together at the time. The fellow employee had tried to bid onto the same shift as Ward even though Frito-Lay had a rule against relatives working on the same shift. Apparently, their relationship had caused employee comment, insubordination and the filing of a grievance.
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(the preamble to the Employment Peace Act). Additionally, neither section 134.03 (prohibiting interferences with an individual’s engagement in lawful work) nor section 134.01 (prohibiting malicious conspiracies) applied. Finally, the court discussed the Monge exception to the general rule, but concluded that Ward had not shown that Frito-Lay acted maliciously or in bad faith.

A year later the Wisconsin appeals court reiterated the general rule in Wisconsin as follows: “In the absence of contrary statutory or contract provisions, an employer may discharge its employees for any reason without incurring liability” — without any reference to Ward. In Bachand v. Connecticut General Life Insurance Co., the discharged employee had brought an action under the Fair Employment Act, which was specifically designed to discourage discriminatory firing. The court of appeals ruled that the Act itself provided the exclusive remedy for lost wages due to a violation of the Act. Although the element of intent was missing in this particular case, the court acknowledged that damages for intentional infliction of emotional distress might be recoverable in a separate tort action.

C. Recent Federal Decisions Interpreting Wisconsin Law

The United States District Court for the Eastern District of Wisconsin had occasion to interpret Wisconsin law governing retaliatory discharges in McCluney v. Jos. Schlitz

149. 95 Wis. 2d at 376, 290 N.W.2d at 538; Wis. Stat. § 111.01 (1979).
152. 95 Wis. 2d at 377, 290 N.W.2d at 538. In fact, Frito-Lay kept Ward on the payroll long enough for his pension to vest. It also gave him a good job reference. Initially, Ward and the co-worker were given the choice of which of them should leave.
154. Wis. Stat. §§ 111.31-.37 (1979). Bachand claimed that he was fired because of his alcoholism. 101 Wis. 2d at 620, 305 N.W.2d at 150.
155. Id. at 623, 305 N.W.2d at 152. The Fair Employment Act is the Wisconsin equivalent of federal civil rights statutes.
156. Id. at 624, 305 N.W.2d at 152. Therefore, Bachand could not be awarded compensatory or punitive damages for emotional distress.
157. Id. at 630, 305 N.W.2d at 155.
The plaintiff contended that a private cause of action should be implied because his discharge, for opposition to his employer's allegedly discriminatory employment practices against women, violated the public policies expressed in four different Wisconsin statutes. Noting that the Wisconsin Supreme Court had not yet considered whether the public policy or bad faith modification to the general rule should be adopted, the district court, nevertheless, quoted from the appeals court decision in Ward. However, Judge Gordon found that with regard to two of the statutes, the plaintiff's allegations fell outside the coverage of the statute. In regard to the other two, he concluded that Wisconsin courts would not imply a private cause of action based on such policy violations because the legislature had already provided extensive enforcement mechanisms.

In Halsell v. Kimberly-Clark Corp., the United States District Court for the Eastern District of Arkansas recently interpreted Wisconsin law in a wrongful discharge case where the contract for employment was not for a specified time. The court's conclusion was that such an employment relationship continues at the will of either party. Interestingly, the court cited Ward as authority for its statement that this principle remains in effect in Wisconsin.

VIII. The Future of Wrongful Discharge in Wisconsin

It is only a matter of time until the Wisconsin Supreme Court faces the issue of whether to recognize a cause of action for the wrongfully discharged at will employee. Although the Ward and Bachand courts seem to indicate opposite conclusions, it is important to remember that there are a number of other theories under which a plaintiff can proceed so that recovery is not an all or nothing proposition.

Some decisions by the supreme court, such as Goff, indi-
cate its reluctance to imply terms in an employment contract. Goff may be distinguishable, however, in that the contract in question provided a method for termination — it was only silent as to the grounds.

The court left the door open to some arguments for implied rights to job security in Kovachik v. American Automobile Association, when it modified the general rule that a hiring at a specified amount per year would be construed as a contract for an indefinite period by adding that "in the absence of facts or contractual provisions showing a contrary intent." In the Forrer case, the plaintiff tried to show that other circumstances, specifically, giving up his farming operations at a loss to manage defendant's store, manifested the parties' intent to bind each other to "permanent" employment. The court indirectly concluded that the doctrine of promissory estoppel was not applicable, noting that the most that had been promised Forrer was employment terminable at will and Sears had fulfilled that promise by hiring him. However, the court stated that the plaintiff might have a breach of contract action if he could show that he furnished additional consideration in the form of economic benefit to the employer.

In addition, decisions in other contexts indicate that the court would not enforce a provision in a contract that was contrary to public policy. It is only one step further to declare that bad faith in the employment at will relationship is against public policy, as the Monge court did.

The analogy to the tort of bad faith is particularly apt in Wisconsin, which recognizes that a special duty arises between insurer and insured by virtue of their relationship (created by the contract). If the supreme court chooses to follow Ward,

166. 5 Wis. 2d 188, 92 N.W.2d 254 (1958).
167. Id. at 190, 92 N.W.2d at 255.
169. Id. at 392-94, 153 N.W.2d at 589-90.
170. See, e.g., Griffith v. Harris, 17 Wis. 2d 255, 116 N.W.2d 133 (1962) (contracts which impose obligations that are contrary to public policy are unenforceable); Dunphy Boat Corp. v. Wisconsin Emp. Relations Bd., 267 Wis. 316, 64 N.W.2d 866 (1954) (a provision in a collective bargaining agreement requiring the doing of something illegal or against public policy would be void).
language in that case suggests that good faith is also required in the employer-employee relationship, even as to employees at will.\textsuperscript{172} Although Monge was a contract action, it seems more likely that the Wisconsin court will acknowledge a tort cause of action because of the similarity to the tort of bad faith.

If the Wisconsin Supreme Court accepts the appeals court’s conclusion in Ward that a cause of action for wrongful discharge should be recognized when public policy is violated, additional language in Ward indicates that a plaintiff would have to prove that he was “attempting to exercise some statutorily or constitutionally guaranteed right or perform some public duty.”\textsuperscript{173} The court did not want to “second-guess” the business judgment of the defendant “absent a clearly defined and well-established public policy.”\textsuperscript{174}

There are a number of Wisconsin statutes which could form the basis for such a cause of action.\textsuperscript{175} However, the Bachand and McCluney decisions indicate that the Wisconsin court will adhere strictly to the view that where the legislature has provided statutory remedies for the enforcement of particular rights, those remedies should be exclusive.\textsuperscript{176}

If a wrongfully discharged at will employee could meet the

\begin{footnotesize}
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\item[172.] 95 Wis. 2d at 377, 290 N.W.2d at 538.
\item[173.] Id. at 376, 290 N.W.2d at 538.
\item[174.] Id.
\item[175.] E.g., Wis. Stat. § 102.35 (1979) (worker’s compensation); Wis. Stat. § 946.31 (1979) (perjury); Wis. Stat. § 756.01(2) (1979) (jury service).
\item[176.] This could be an obstacle to using the worker’s compensation statute. Wis. Stat. § 102.35 provides penalties as follows:
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\item[(2)] Any employer, or duly authorized agent thereof, who, without reasonable cause, refuses to rehire an employe injured in the course of employment, or who, because of a claim or attempt to claim compensation benefits from such employer, discriminates or threatens to discriminate against an employe as to the employe’s employment, shall forfeit to the state not less than $50 nor more than $500 for each offense. No action under this subsection may be commenced except upon request of the department.
\item[(3)] Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe’s physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year’s wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.
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prerequisites established in *Alsteen v. Gehl*, the court in *Bachand* indicated that he or she could maintain a separate action for the intentional infliction of emotional distress. Where there is evidence that the discharge resulted from pressure from an outside source, a cause of action under the Wisconsin conspiracy statute could be included.

IX. CONCLUSION

The American legal system has increasingly recognized the need to limit the traditional rule that an at will employee may be terminated for any reason or for no reason at all. By balancing the legitimate business interests of the employer with the interest of the employee and the public, courts have attempted to restrict the arbitrary or retaliatory exercise of the employer's power. Although the nature of the underlying cause of action has not always been clearly articulated, two main exceptions to the common law rule have developed allowing relief to the wrongfully discharged employee: 1) where the discharge was for reasons contravening public policy; and 2) for discharge that was motivated by bad faith or malice.

The Wisconsin Supreme Court has not yet considered whether either exception should be adopted. While the appeals court in *Ward* seemed to acknowledge both, the appeals court in *Bachand* adhered to the traditional rule. If the supreme court is faced with the issue directly, it is likely to accept some modification of the at will doctrine, but the court is also apt to limit the source of any definition of public policy to specific legislation which does not provide a corresponding remedy.

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177. 21 Wis. 2d 349, 124 N.W.2d 312 (1963). The *Alsteen* criteria are:
   1) that the defendant's conduct was extreme and outrageous;
   2) that the defendant behaved as he did for the purpose of causing emotional distress for the plaintiff;
   3) that the defendant's conduct was a cause-in-fact of the injury; and
   4) that the plaintiff suffered an extreme disabling emotional response.


179. Wis. STAT. § 134.01 (1979). Although this is a criminal statute, it also gives rise to a civil cause of action. See *Radue v. Dill*, 74 Wis. 2d 239, 246 N.W.2d 507 (1976).