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Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim

Steven H. Winterbauer†

In this article, Mr. Winterbauer examines the scope and the implications of the public policy exception to the employment-at-will rule. He discusses the relatively recent development of the doctrine and identifies the considerations that tend to influence the way in which courts apply it. He concludes that while there is considerable merit in a theory which prohibits employers from discharging employees for reasons that are contrary to public policy, the current parameters of the doctrine are so amorphous they deprive employers and employees alike of any meaningful standards against which to evaluate their own employment relationships.

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"[T]he Achilles heel of the principle lies in the definition of public policy."  

INTRODUCTION

The theory of wrongful discharge in violation of public policy prohibits employers from discharging employees for reasons that contravene recognized public policies. The theory is one of three judge-made exceptions to the employment-at-will rule which provides that employees with indefinite terms of employment may be discharged for any reason or no reason at all.  

The other exceptions are the theories of breach of implied contract and breach of the implied covenant of good faith and fair dealing.  

In addition to claims based on federal and state anti-discrimination laws, these three exceptions to the employment-at-will rule give rise to

3. The common law doctrine of employment-at-will provides that an employee hired for an indefinite term may be discharged "for good cause, for no cause or even for cause morally wrong." Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Waters, 179 S.W. 134 (Tenn. 1915). For a detailed discussion of the historical development of the at-will rule, see Jay M. Feinman, The Development of the Employment at-Will Rule, 20 Am. J. Legal Hist. 118 (1976).
5. The theory of breach of the implied covenant of good faith and fair dealing provides that the employment relationship, like all contracts, carries an implied covenant which imposes on the employer the duty to terminate the employee only in good faith. See, e.g., ARCO Alaska, Inc. v. Aker's, 753 P.2d 1150, 1153 (Alaska 1988); Foley v. Interactive Data Corp., 765 P.2d 373, 388 (Cal. 1988); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977).
6. The federal and state legislatures have developed several exceptions to the at-will doctrine as well. See, e.g., Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 note (Supp. II 1990) (protection against retaliatory discharge for reporting employer violations); National Labor Relations Act, 29 U.S.C. § 158(a)(1),(3),(4) (1988) (procluding discharge for union activity, protected concerted activity, filing charges, and testifying under the Act); Age Discrimination in Employment Act...
most claims brought by discharged employees against their former employers. Of them, the theory of wrongful discharge in violation of public policy is used most often. Its popularity is a relatively recent phenomenon. It did not gain widespread recognition until the late 1970s and the 1980s.

The public policy exception is also the least understood of the exceptions. Courts applaud it for its refinement and amenability to narrow application in those situations when the dismissal of an employee threatens the public welfare. Some courts suggest that it is a more workable exception to the at-will rule than the theory of breach of the implied


Alabama, Florida, and New York have rejected the exception on the grounds that the concept of public policy is too vague to form the basis of a new tort and/or the creation of such a claim is a legislative rather than a judicial matter. Hinrichs v. Transquarian Hosp., 352 So. 2d 1130 (Ala. 1977); De Marco v. Publix Super Mkt., Inc., 394 So. 2d 1253 (Fla. 1980); Murphy v. American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983).
covenant of good faith and fair dealing because it "avoids judicial incursions into the amorphous concept of bad faith." 9

However, the exception is neither as refined nor as narrow as some contend. Although it does avoid the concept of bad faith, it relies on the equally vague concept of public policy. The result is broad disagreement and uncertainty regarding the nature and scope of a claim of wrongful discharge in violation of public policy and the plaintiff’s burden of proof under such a claim. The public policy exception is "an emerging mixture of theories" 10 with which counsel, employers, and employees should become familiar.

This article is aimed at that end. It canvasses the recent development of the theory of wrongful discharge in violation of public policy. Part I discusses the general parameters of the theory, including the nature of a claim, the elements of a prima facie case, and the plaintiff’s burden of proof. Part II analyzes how the courts determine what constitutes public policy for purposes of the exception. Part III describes the scope and application of the public policy exception. Part IV suggests that the public policy exception is potentially much broader than currently characterized by most courts and that some challenges to terminations, although couched in public policy terms, are driven by more basic concerns over what is fair for an individual employee. 11

I. GENERAL PARAMETERS OF A PUBLIC POLICY CLAIM

The public policy exception to the employment-at-will rule is an extension of the theory of protection from retaliation. It is intended to provide employees with protection against retaliation when the employer’s retaliatory animus contravenes public policy but state and federal statutes provide no remedy. 12

11. This thesis runs counter to the criticism of some other commentators who contend that the exception is applied too narrowly. See, e.g., Note, Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931 (1983); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481 (1976).

However, not all courts adhere to this principle. A large and growing minority of courts permit public policy claims where statutory remedies already exist. In Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530 (4th Cir. 1991), for example, the court recognized a claim for wrongful discharge in violation of the public policy against sexual harassment despite the fact that state and federal statutes expressly prohibit such conduct and provide remedies for victims. See also Paige v. Henry J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987) ("[A] private right of action for wrongful discharge due to safety complaints co-exists with the Cal/OSHA remedial scheme."); cert. denied, 486 U.S. 1054 (1988); Broomfield v. Lundell, 58 Fair Empl. Prac. Cas. (BNA) 735 (Ariz. 1992)
A. Tort or Contract Claim?

While wrongful discharge generally is recognized as an actionable tort, the public policy exception is treated as a tort claim in some jurisdictions and a contract claim in others. The courts which characterize the exception as a contract claim find certain discharges actionable because they breach an "implied provision that an employer will not discharge an employee for refusing to perform an act which violates a clear mandate of public policy." In contrast, the courts which have adopted the tort theory reason that employers have a legal duty to implement and further the state's fundamental public policies.

The distinction between these rationales is subtle, but the consequences are enormous because the nature of the cause of action determines the available damages. Recovery for breach of contract claims in the employment context generally is limited to economic damages such as lost wages and benefits. In contrast, tort recoveries may also include punitive damages and damages for emotional distress.

("We hold that the Arizona Civil Rights Act does not preempt a tort action for wrongful discharge."); Amos v. Oakdale Knitting Co., 7 Individual Empl. Rts. Cas. (BNA) 714, 719 (N.C. 1992) ("[T]he legislature, by enacting the Wage and Hour Act, did not intend to preclude wrongful discharge actions based on violations of the state's public policy requiring employers to pay their employees at least the stated minimum wage."); Venuti v. Superior Court, 284 Cal. Rptr. 163 (Cal. Ct. App. 1991) (a public policy claim will lie for discriminatory discharge on the basis of age even though state statute provides remedies for age discrimination).

By permitting a common law claim where a statutory claim already exists, the courts under some circumstances allow plaintiffs to broaden their recovery beyond that authorized by statute and avoid statutory prerequisites to filing suit. For example, in McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980), the court recognized a claim of wrongful discharge in violation of the public policy against age discrimination. This suggests that a plaintiff may cloak a statutory age discrimination claim in common law terms, thereby avoiding the procedural obligations of applicable state and federal anti-discrimination statutes. Under this reasoning, a plaintiff who loses his right to file an action in federal court because of a failure to file a timely charge with the Equal Employment Opportunity Commission may nevertheless file a claim of wrongful discharge in violation of public policy on the basis of the same facts. This result would undermine the policies behind the legislature's enactment of the procedural requirements in the first place.


16. See, e.g., Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980) ("[A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act . . . reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.").

17. However, at least one court that characterizes the public policy exception as a tort has refused to allow recovery for "emotional distress, traumatic neurosis, mental suffering and similar damages of a non-pecuniary nature" for fear of "chilling" the employer's "freedom of hiring." Vigil v. Arzola, 699 P.2d 613, 621 (N.M. 1983), rev'd in part on other grounds, 687 P.2d 1038 (N.M. 1984).
Recoveries for tort damages can be substantial. In a recent decision in Oregon, for instance, a state circuit court jury awarded $6.2 million to a former Bank of California executive who claimed he was wrongfully discharged for refusing to disclose confidential customer information to Mitsubishi Bank. Only $600,000 of the award was for compensatory damages—lost wages. The remaining $5.6 million was divided between punitive damages ($5 million) and damages for emotional distress (approximately $600,000). Thus, in this case, the nature of the claim was a $5 million issue.

B. The Elements of a Claim

Stated broadly, a claim of wrongful discharge in violation of public policy requires proof by a preponderance of the evidence that: (1) an employee performed an act which is encouraged as a matter of public policy; or (2) an employee refused to perform an act which is discouraged as a matter of public policy; and (3) the employee was disciplined; and (4) the motivating factor behind the discipline was to retaliate against the employee for acting in the public’s interest.

The employee need not show actual discharge. Any retaliatory discipline that adversely affects the terms and conditions of the employee’s employment suffices.

While no court has yet applied the exception to a refusal-to-hire situation, such an application appears logical. An impermissible refusal to hire contravenes public policy to the same degree as a discharge. In both situations, the plaintiff is penalized for taking action in furtherance of the public welfare.

Moreover, if the exception is applied to a refusal to hire, it probably will rest on an allegation that the hiring decision was impermissibly based on the applicant’s actions during a former employment relationship. At least one court already has recognized a claim for discharge in violation of public policy on the basis of such an allegation. In *Skillsky v.*

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18. Banaitas v. Mitsubishi Bank Ltd., No. 89-12-07357 (Or. Cir. Ct. 1991). See also Green v. Texas Dept of Human Servs., No. 480,701 (Tex. Dist. Ct. Sept. 23, 1991), where a jury returned a $13.5 million verdict in favor of a former employee of the Texas Department of Human Services who was fired for trying to advise upper management that the department was being shortchanged by contractors. The jury awarded $3.5 million in compensatory damages and $10 million in punitive damages.

19. The trial court ultimately dismissed the $5 million punitive damages award on the ground that there was insufficient evidence to support the finding of wanton misconduct which Oregon law requires to award punitive damages. Banaitas v. Mitsubishi Bank, Ltd., 6 Individual Empl. Rts. Cas. (BNA) 1152 (Or. 1991).

20. At least one court has held that the employee's proof must be established by the more difficult standard of “clear and convincing evidence.” *Vigil*, 699 P.2d at 620.


Lucky Stores, Inc., an employee recovered against his most recent employer for discharging him on the basis of whistleblowing activity that took place at the site of his former employer. Applying California law, the Court of Appeals for the Ninth Circuit reasoned that "the tort of discharge in contravention of public policy is grounded on the need to protect important public policies, not on a particular relationship between the employee and employer." Therefore, the absence of an existing employment relationship in the context of a refusal to hire should not bar a claim.

C. The Burden of Proof

Most courts address claims of discharge in violation of public policy under the shifting burdens analysis set forth in McDonnell Douglas Corp. v. Green. Once the former employee establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-retaliatory reason for the discharge which is not inconsistent with the public policy at issue. The employee retains the ultimate burden of proving both that the employer's articulated reason is a pretext and that the employer's motivation, which was contrary to public policy, was a primary or determinative factor in the discharge decision.

At least two other approaches to analyzing claims of wrongful discharge in violation of public policy have arisen. In Wisconsin, once the

23. 893 F.2d 1088 (9th Cir. 1990). The employee was a bakery truck driver with 10 years of service for Lucky Stores, Inc. ("Lucky"). In approximately 1975, the plaintiff filed a complaint with California's Occupational Safety and Health Agency ("OSHA") regarding the noise level in Lucky's trucks, which resulted in the need to replace 10 of the trucks. Seven years later, in 1982, he was discharged for allegedly using profanity during a confrontation with his manager and for allegedly threatening his manager's life. The discharge was upheld by an arbitrator and a California court. Thereafter, the plaintiff was referred by his union to a job with Colombo Baking Co. ("Colombo"). He was discharged during his probationary period, and the union refused to file a grievance on his behalf.

The plaintiff sued both of his former employers. He claimed Lucky had wrongfully discharged him in retaliation for his prior OSHA complaint. Against his subsequent employer, Colombo, the plaintiff claimed that he was discharged because Lucky management advised Colombo of his earlier OSHA complaint.

The district court granted summary judgment to Colombo. It declined to extend the public policy exception to a claim against any employer other than the present employer. The Ninth Circuit overturned this decision.

24. Id. at 1093.

25. This reasoning may also permit application of the theory in the independent contractor context. See Rosenfeld v. Thirteenth Street Corp., 1989 Okla. LEXIS 105 at 13 (June 13, 1989) ("[W]hether the underlying contract which forms the parties' relationship is an employment contract 'at will' or 'for cause' or creates some other form of relationship, would appear to be irrelevant in determining whether a violation of public policy has occurred.").


27. See, e.g., Parten v. Consolidated Freightways, 923 F.2d 580 (8th Cir. 1991); Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227-28 (S.D. 1988). But see Sabine Pilot Serv., 687 S.W.2d at 735 (the "narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act") (emphasis added).
plaintiff establishes a prima facie case, the burden of persuasion, not merely the burden of production, shifts to the employer. The employer must then show that the discharge was for just cause, not merely for non-retaliatory reasons. The Pennsylvania courts apply a balancing approach. They weigh the public policy against the reason for the discharge. This analysis recognizes that some public policies are more important than others. Thus, a more important public policy requires a more compelling "legitimate business reason" to justify the dismissal.

These different approaches are not mutually exclusive. For example, the Washington Supreme Court adheres to the *McDonnell Douglas* analysis but also considers the degree of the employer's alleged wrongdoing and the reasonableness of the employee's efforts to disclose or remedy the activity. As a practical matter, many courts may consider these factors even though they do not explicitly say so. At bottom, the analysis calls for balancing the public welfare, the employee's interest in job security, and the employer's need for sufficient discretion to run its business.

II. WHAT CONSTITUTES PUBLIC POLICY?

The cornerstone of the public policy exception to the employment-at-will rule is the concept of public policy. The concept is both the exception's greatest asset and its greatest liability. Although it provides the flexibility needed to apply the exception to a variety of contexts, its undefinable parameters imbue the exception with a disconcerting unpredictability. It is very difficult to predict a court's answer to the fundamental question of what constitutes public policy for purposes of the exception. As a result, employees do not know when they are protected from retaliation, employers do not know when they may terminate a complaining employee, and counsel have few guideposts around which to frame legal advice.

Although the issue of what constitutes public policy is a question of

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28. *Brockmeyer*, 335 N.W.2d at 841.
30. *Id.*
31. *Dicomes v. State*, 782 P.2d 1002, 1007 (Wash. 1989) (the court examines "the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct"). *See also O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N.J. Super. Ct. Law Div. 1978) (court should also consider "whether the defendants knew or should have known the act in question was illegal... and, generally, the reasonableness of the acts by all of the parties").
law, the courts have failed to develop any clear guidelines to structure its resolution. Some state that, given the inherent subjectivity of public policy, no precise definition of the concept can be set forth. As the Maryland Court of Appeals explains:

Jurists to this day have been unable to fashion a truly workable definition of public policy. Not being restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions), judges are frequently called upon to discern the dictates of sound public policy and human welfare based on nothing more than their own personal experience and intellectual capacity.34

The Illinois Supreme Court also states that it has no answer to the question of what constitutes clearly mandated public policy.35

The few courts which have ventured to define public policy for purposes of the exception have failed to provide any clarity. In fact, the leading definition was articulated by a court which paradoxically said it could not define the concept. In that case, the Illinois Supreme Court defined the concept as follows:

In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively . . . a matter must strike at the heart of a citizen's social rights, duties and responsibilities before the tort will be allowed.36

This definition, however, raises more questions than it answers.

Most courts do not even attempt to define public policy. Instead, they state that public policy must be determined on a careful, case-by-case basis. They voice the familiar refrain that the exception is to be construed narrowly and applied cautiously only in those situations where

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33. Bloom v. General Elec. Supply Co., 702 F. Supp. 1364, 1367 (M.D. Tenn. 1988); Warthen v. Toms River Community Memorial Hosp., 488 A.2d 229, 232 (N.J. Super. Ct. App. Div.), cert. denied, 501 A.2d 926 (N.J. 1985); Pearson v. Hope Lumber & Supply Co., 444 A.2d 443, 444 (Okla. 1991); Dicomes, 762 P.2d at 1006; Brockmeyer, 335 N.W.2d at 841. In what appears to be the single exception to this majority rule, the New Hampshire Supreme Court has held that in most cases the determination of what constitutes public policy is a question of fact for the jury. Cloutier v. Great Atl. & Pac. Tea Co., Inc., 436 A.2d 1140, 1145 (N.H. 1981) ("We believe it best to allow the citizenry, through the institution of the American jury, to strike the appropriate balance in these difficult cases. Though a public policy could conceivably be so clear as to be established or not established as a matter of law, in this case it was properly a question of fact for jury determination.").


The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

572 A.2d at 1149.

35. Palmeteer, 421 N.E.2d at 878.

36. Id.
the public policy at issue is clearly mandated.37 In other words, since they are not sure where they are going, the courts urge caution when proceeding in this area. Not all courts, however, have heeded this warning.

Despite the lack of any clear guidelines, two broad principles appear to be involved in the public policy determination. First, the dispute at issue must affect the public in some manner, not just the individual employee. Second, the public policy at issue must be clearly mandated. These principles, which are intended to contain the public policy exception and guide its purportedly narrow application, actually have contributed to its expansion. They simply are too undefined themselves to offer any significant clarification of the exception.

A. Public Impact

Purely private disputes that lack broader social ramifications do not state a cause of action. The plaintiff must show that the retaliation at issue not only harms him or herself, but a broader segment of society as well.38 In many instances, this requirement is satisfied by a showing of some concrete threat to public safety. For example, one court has held that an employee may not be discharged for refusing to perform catheterizations without a license because to hold otherwise would jeopardize patient safety.39 By way of contrast, an employee terminated for advising his supervisor of cash inventory discrepancies was found to have no cause of action because theft of company property is an internal corporate matter which poses no threat to a broader segment of society.40

Not all applications of the exception are this clear, however, and some courts have adopted far-reaching notions of what constitutes public

37. Parnar, 652 P.2d at 631 ("[c]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject"); Pierce, 399 A.2d at 1026 ("if there is to be an exception to the at-will employment rule, it must be tightly circumscribed so as to apply only in cases involving truly significant matters of clear and well-defined public policy and substantial violations thereof"); Burk v. K-Mart Corp., 770 P.2d 24, 29 (Okla. 1989) ("the public policy exception must be tightly circumscribed"); Johnson, 433 N.W.2d at 227 (the exception is "narrow"); Brockmeyer, 335 N.W.2d at 840 (the exception is "limited" and "narrowly circumscribed" and "[c]ourts should proceed cautiously when making public policy determinations"); but see infra notes 74-109 and accompanying text.

38. Wagenseller, 710 P.2d at 1034; Foley, 765 P.2d at 379.


impact in different factual contexts. For example, when an employee is terminated for allegedly exercising a legal right or privilege, some courts simply presume public ramifications. In *Semore v. Pool*, the California Court of Appeal upheld an employee’s claim of wrongful discharge in violation of the public policy favoring employee privacy where the employee alleged that he was terminated for refusing to consent to a pupillary test for substance abuse. In so holding, the court penned an expansive interpretation of how one may further the public interest through private acts:

Plaintiff’s right not to participate in the drug test is a right he shares with all other employees. In asserting the right, he gives it life. While rights are won and lost by the individual actions of people, the assertion of the right establishes it and benefits all Californians in the same way that an assertion of free speech rights benefits all of us.

In other words, the mere act of asserting an individual right for one’s own direct benefit automatically implicates the public interest.

An even broader interpretation of the public impact requirement recently was adopted by the Court of Appeals for the Fifth Circuit in *Smith v. Atlas Off-Shore Boat Service, Inc.* The court focused on the potential public impact of the employee’s discharge rather than the effect of the public policy violation at issue. The plaintiff was a seaman who injured his ankle while on the job and then notified his employer that he intended to file a personal injury claim against the employer. He was terminated because he refused to drop the claim. He successfully sued for wrongful discharge on the theory that his discharge violated a public policy favoring open access to the courts.

The court agreed that public policy favors preserving access to the courts. When it addressed the issue of public impact, however, the court did not analyze how the public would be harmed by permitting employers to bar employees from the courts. Instead, it speculated on how the public:

42. *Id.* at 285.
43. The court also reasoned that the public interest was served by application of the exception because, in its estimation, the dispute was not simply between the plaintiff and his employer, but rather “it is a dispute over the role of drug testing in the workplace.” *Id.* at 286.

In a partial dissent, Justice McDaniel argued that the majority appeared to be trying to force a discharge with which it disagreed within the confines of the public policy exception. According to Justice McDaniel, the majority in *Semore* recognized public welfare implications even though “plaintiff’s right not to participate in the pupillary reaction test benefits him alone.” *Id.* at 293. Indeed, the plaintiff’s refusal to undergo the drug test might have harmed the public interest by permitting employees to work while under the influence of illegal substances. *Id.* at 293 n.2.

Furthermore, recasting the dispute as one involving the broad issue of the propriety of workplace drug testing does not satisfy the public interest purpose of the exception. “Such characterization is irrelevant because all actions for wrongful discharge involve disputes over the propriety of particular conduct in the workplace.” *Id.* at 294.
44. 653 F.2d 1057 (5th Cir. 1981).
public might be affected if the employee subsequently was unable to find another job. As the court put it:

Nor does the struggle affect only the employer and the seaman. To permit the seaman's discharge because he resorts to the courts may result in casting the burden of the employer's reprisal in part on the public in the form of unemployment compensation or social security for the worker or his family.45

It is important to note that the court's opinion cites no evidence that this particular seaman was compelled to rely on unemployment compensation or social security benefits to support his family after his discharge. The court's rationale is so broad and speculative that it effectively eliminates the public impact requirement. The possibility that an employee may receive unemployment compensation or some other form of social security benefit is present in the context of nearly every termination, regardless of whether the discharge was in violation of public policy. Under the Smith analysis, all terminations affect the public, and the public impact requirement becomes meaningless.

These decisions show that the concept of public impact is nearly as flexible as the public policy concept whose meaning it is intended to define in part. Vulnerable to varying and broad interpretations, the public impact requirement is not a particularly effective brake on the concept of public policy. Indeed, the rationales underlying the Smith and Semore decisions lead to a finding of the requisite public impact in every conceivable situation.

B. Clear Mandate

The requirement that the public policy be clearly mandated also is elastic. The courts have not established any clear test for making this determination. They simply state that the public policy must be "clear," "fundamental and well-defined,"47 or "important."48 Given that all matters rising to the level of public policy presumably are "clear," "fundamental," and "important," these words provide little substantive guidance for determining what constitutes public policy under the exception. Nevertheless, some general principles have been developed to guide the clear mandate analysis. Though not particularly clear themselves, they may be helpful in assessing the strength of a claim.

First, as a general rule, the strongest statements of public policy are found in statutes or regulations. Courts are more reluctant to derive public policy from constitutional provisions or judicial decisions.49 Sec-

45. Id. at 1062-63.
47. Schultz v. Production Stamping Corp., 434 N.W.2d 780, 783 (Wis. 1989).
ond, if a statute is susceptible to more than one reasonable interpretation, it probably will not qualify as a clear mandate of public policy. Third, the public policy does not have to be expressly stated to be clearly mandated. Claimants are not required to point to specific statutory language in a particular provision to support a claim. The statutory, regulatory or constitutional language may be read as a whole. A statutory or regulatory scheme, which contains no express declaration of public policy, may still support a claim if the collective thrust of the scheme clearly supports a particular policy. Finally, to state a claim in some states, the public policy at issue must be clear; although the violation of that policy need not be. Indeed, the case law provides some interesting examples of successful claims where the purported public policy is undeniable, but the alleged violation of the policy is less than clear.

In Harrison v. Edison Brothers Apparel Stores, for example, a female employee sued her former employer on the grounds that she was wrongfully discharged for refusing her supervisor’s sexual advances. She did not raise a sexual harassment claim. Instead, she claimed wrongful discharge in violation of the public policy against criminal prostitution. She argued that by refusing her supervisor’s sexual advances, she had refused to commit the crime of prostitution. The district court ruled that this argument failed to state a claim for wrongful discharge under North Carolina law. The employee appealed, and the Court of Appeals for the Fourth Circuit reversed the district court, defining prostitution broadly to include sexual favors given in exchange for the economic benefit of gainful employment.

While few would argue that public policy disfavors prostitution, the notion that submitting to workplace harassment is a form of criminal prostitution is problematic at best. In Harrison, a male attempted to coerce sexual favors from an unwilling female. He did not offer compensation in exchange for sexual favors. Harrison involved quid pro quo sexual harassment, not criminal prostitution. It is doubtful that the court believed the employee would be prosecuted for prostitution if she submitted to her supervisor’s advances. It stated specifically that the likelihood of prosecution was irrelevant. All that mattered to the court was that the plaintiff was asked to commit an act which, in its opinion, amounted to

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52. 924 F.2d 530 (4th Cir. 1991).
53. Id. at 534.
criminal prostitution.\textsuperscript{54} This argument, however, begs the question. The fact remains that the plaintiff was not asked to commit criminal prostitution. The court stretched the definition of prostitution to include workplace sexual harassment in order to permit a challenge to a dismissal which otherwise might have been upheld.\textsuperscript{55}

\textit{Wagenseller v. Scottsdale Memorial Hospital}\textsuperscript{56} provides a similar example of a court reaching to find a violation of public policy in order to address unacceptable workplace conduct. The plaintiff was a paramedic coordinator for the defendant hospital. She attended an eight-day rafting trip with employees from the hospital, including her supervisor and other healthcare professionals. During the trip, her supervisor and several others engaged in certain activities in which she chose not to participate. At one point, several participants staged a parody of the song “Moon River” and allegedly concluded by “mooning” the audience. The plaintiff claimed that her supervisor’s attitude toward her changed after the raft trip because the plaintiff had refused to participate in the group’s activities. Six months later she was terminated. She sued, claiming she was discharged for refusing to participate in the “mooning.” She argued that her discharge violated the public policy against criminal indecent exposure.

This theory had several weaknesses. First, there was no evidence that the plaintiff was ever asked to participate in the “mooning,” let alone that the “mooning” was a condition of continued employment. Second, the plaintiff elected not to participate because she did not approve of the conduct, not because she feared prosecution for committing a criminal act. Third, the fact that the plaintiff was discharged a full six months after she expressed disapproval of the behavior displayed during the trip suggests that her discharge was the result of a growing personality conflict with her supervisor rather than a retaliatory act for refusing to perform an illegal act. Finally, the record suggests that the “mooning” did not rise to the level of criminal indecent exposure. Under Arizona law, indecent exposure occurs when the exposure would offend a reasonable viewer.\textsuperscript{57} There was no evidence that anyone other than the plaintiff was offended by the “mooning.” Thus, had she participated, no

\textsuperscript{54} Id.

\textsuperscript{55} The reason the court took this approach is not entirely clear. The court canvassed North Carolina case law and noted that “the only three successful wrongful discharge plaintiffs . . . have had to choose between their jobs and violating the criminal law.” 924 F.2d at 533. This observation suggests that the court felt compelled to stretch the definition of criminal prostitution to bring the Harrison plaintiff in line with North Carolina precedent which required the public policy at issue to have penal roots. A similar conclusion was reached in Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law).

\textsuperscript{56} 710 P.2d 1025 (Ariz. 1985).

\textsuperscript{57} Id. at 1035 (citing ARIZ. REV. STAT. ANN. § 13-1402).
one viewing her conduct would have been offended, and the "moonning" would not have constituted indecent exposure.

The trial court apparently found this latter point persuasive and dismissed the plaintiff's claim on the ground that a minor violation of the statute, such as the one involved here, does not violate public policy. The Arizona Supreme Court disagreed, reasoning as follows:

The nature of the act, and not its magnitude, is the issue. We are compelled to conclude that termination of employment for refusal to participate in public exposure of one's buttocks is a termination contrary to the policy of this state, even if, for instance, the employer might have grounds to believe that all of the onlookers were voyeurs and would not be offended. In this situation, there might be no crime, but there would be a violation of public policy to compel the employee to do an act ordinarily proscribed by the law.

Thus, Wagenseller, like Harrison, holds that a particular act, which may not be a crime, may nevertheless violate public policy because under different circumstances the act "ordinarily" is a crime. Stated another way, these decisions stand for the proposition that a claim of wrongful discharge in violation of public policy may rest on a violation of the spirit of a rule of law, if not the letter of that law.

C. The Adequacy of the Defining Terms

These creative applications of the theory are possible because the guiding principles of public policy, public impact and a clear mandate are so malleable. Indeed, these principles do little more than invite a

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58. A focus on the nature of the act, rather than its magnitude, was also central to the Illinois Supreme Court's decision in Palmeteer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981). There an employee successfully sued his former employer on the theory that he was discharged in retaliation for reporting a fellow employee's theft of a $2 screwdriver to the local authorities. The court flatly rejected the employer's argument that it ought to be able to discipline an employee for overreacting and blowing such a minor, internal problem out of proportion.

59. 710 P.2d at 1035. In an entertaining footnote, the court added the following comments: We have little expertise in the techniques of mooning. We cannot say as a matter of law, therefore, whether mooning would always violate the statute by revealing the mooner's anus or genitalia. That question could only be determined, we suppose, by an examination of the facts of each case. We deem such an inquiry unseemly and unnecessary in a civil case. Compelled exposure of the bare buttocks, on pain of termination of employment, is a sufficient violation of the policy embodied in the statute to support the action, even if there would be no technical violation of the statute.

Id. at 1035 n.5 (emphasis in original).

60. These cases also run counter to the protestations of other courts that a claim may be stated only when the employer's conduct "gravely violates paramount requirements of public interest." See, e.g., Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983).

61. See also Schultz v. Production Stamping Corp., 434 N.W.2d 780, 783 (Wis. 1989).

62. The New Hampshire Supreme Court's decision in Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981) provides another example of creative application of the public policy exception. The plaintiff, a store manager, was discharged for failing to deposit cash receipts at the store's local bank one Sunday. Company rules required two daily deposits so that cash did not accumulate at the store. The store was burglarized that Sunday evening and over $30,000 was taken.
shapeless “I know it when I see it” type of analysis which has led to many conflicting decisions.

The conflicting decisions are the clearest manifestation of the unpredictability that the public policy exception may foster. Because the defining terms of public impact and clear mandate are so broad and flexible, and because judicial interpretations of these terms vary so greatly, employers confront a difficult situation. They face potentially substantial tort damages for certain conduct but they do not know what that conduct is. Without more clearly defined principles in those jurisdictions which have adopted broad approaches to the exception, the final result of the theory of wrongful discharge in violation of public policy may be to undermine, rather than benefit, the employment relationship by further destabilizing it.

The manager challenged his discharge in part on the ground that, under New Hampshire law, employees are required to be given one day of rest per week. He claimed that since Sunday was his day off, his discharge for refusing to make a single trip to the bank to deposit cash receipts that day violated the public policy of this day-of-rest law. The New Hampshire Supreme Court agreed.

These and similar considerations, including the prospect of vexatious litigation and the concomitant chilling of the employer’s legitimate business judgment, have been acknowledged by both the courts that have adopted the public policy exception and those that have rejected it. See, e.g., Hinrichs v. Tranquillaire Hosp., 352 So. 2d 1130, 1131-32 (Ala. 1977) (exception rejected in large part because “the suggested foundation for such rule, ‘contrary to public policy,’ is too nebulous a standard to justify its adoption”); Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723 (Tex. 1990); Brockmeyer, 335 N.W.2d at 844 (Day, J., concurring) (“The majority says that the new rule will result in ‘a more stable job market.’... I doubt it. Most likely, more and more discharges that at present are known to be non-actionable will be vehicles to test the ingenuity of the advocate to find some constitutional, statutory or regulatory provision that can be cited in a complaint for ‘wrongful discharge.’ Settlements will often be made of meritless claims to avoid the high cost of litigation. This will be especially burdensome to the small business person.”).

This fact was recognized at the time the exception was first created. The exception’s roots may be traced to Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25 (Cal. Ct. App. 1959), where a California appellate court upheld a former employee’s claim that she had been wrongfully discharged for refusing her employer’s instruction to commit perjury. In so holding, the court noted that “[p]ublic policy is a vague expression, and few cases may arise in which its application may not be disputed.” 344 P.2d at 27 (quoting Noble v. City of Palo Alto, 264 P. 529, 530 (Cal. Ct. App. 1928)).

For example, in Todd v. Frank’s Tong Serv., Inc., 784 P.2d 47 (Okla. 1989), the Oklahoma Supreme Court held that a truck driver stated a claim on the allegation that he was discharged for refusing to operate a truck in violation of Oklahoma law regarding defective brakes, headlights, and turn signals. In Watson v. Cleveland Chair Co., 789 S.W.2d 538 (Tenn. 1989), however, the Tennessee Supreme Court stated in dictum that where two truck drivers were discharged for refusing to break state speed laws, the drivers failed to state a cause of action under state law because it is the role of the legislature rather than the judiciary to decide whether a public policy exception should exist. Similarly, in Peoples Security Life Ins. Co. v. Watson, 568 A.2d 835 (Md. Ct. Spec. App. 1990), cert. granted, 574 A.2d 312 (Md. 1990), vacated and remanded, 588 A.2d 760 (Md. 1991), the Maryland Court of Special Appeals held that an employee who was discharged after filing a sexual harassment lawsuit against her employer had no public policy claim. In contrast, in Bennett v. Hardy, 784 P.2d 1258 (Wash. 1990), the Washington Supreme Court held that an employee stated a claim where she alleged she was terminated for hiring legal counsel in an effort to combat her employer’s discriminatory practices.
III.

SCOPE AND APPLICATION OF THE PUBLIC POLICY EXCEPTION

A. The Narrow Approach

Not all courts apply the public policy exception as broadly as the courts in Wagenseller and Harrison. Different approaches to its application have arisen. On the narrow end of the continuum, some courts have limited the public policy exception to statutory rights and/or criminal prohibitions. For example, the Texas Supreme Court has generally restricted the exception to those situations where the employee is discharged "for the sole reason that the employee refused to perform an illegal act."\(^{65}\) Similarly, the Rhode Island courts restrict the exception to situations where the employee is dismissed for reporting employer conduct that violates "an express statutory standard."\(^{66}\) Further, in applying North Carolina law, the Court of Appeals for the Fourth Circuit states that the theory is limited to "violations which contravene the clear mandate of public policy 'within the penal sphere.'"\(^{67}\)

Under these standards, the public policy exception routinely has been applied to situations where employers have discharged employees for refusing to participate in criminal activities or for exercising their clear, statutory rights. Thus, courts have held that employees may not be discharged for filing workers' compensation claims,\(^{68}\) for refusing to violate a consumer credit protection law,\(^{69}\) for refusing to alter state-required pollution control reports,\(^{70}\) for refusing to perform catheterizations for which the employee was not properly licensed,\(^{71}\) or for insisting on employer compliance with a state Food, Drug and Cosmetic Act.\(^{72}\)

B. The Broad Approach

The narrow interpretations, however, are the minority view, and the scope of the exception, as illustrated by the Wagenseller and Harrison decisions, has been expanded substantially in some jurisdictions.\(^{73}\) In determining what constitutes public policy, many courts now look not only to statutes, but also to the letter and spirit of administrative regulations, state and federal constitutional provisions, judicial decisions, and even

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\(^{67}\) Merck v. Advanced Drainage Sys., Inc., 921 F.2d 549, 554 (4th Cir. 1990).

\(^{68}\) See, e.g., Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984), and cases cited therein.

\(^{69}\) Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).


\(^{73}\) See also cases cited infra notes 92-109 and accompanying text.
codes of professional ethics.\textsuperscript{74}

In these jurisdictions, violations of fundamental public policies have been found in three general areas: (1) where the discharge was in retaliation for the employee’s performance of a public duty or obligation; (2) where the discharge was in retaliation for the employee’s exercise of a legal right or privilege; and (3) where the discharge was in retaliation for the employee’s refusal to perform an unethical act. Each of these grounds is briefly addressed below. The parameters of these applications of the public policy exception are fact specific and best illustrated by a full discussion of particular cases. Therefore, the following analysis includes lengthy discussions of several recent decisions.

C. Types of Recognized Public Policy Claims

1. Retaliation for Performing a Public Duty or Obligation

The best known examples of discharges in retaliation for the exercise of a public duty or obligation are the “whistleblower” cases. In these cases, employers discharge employees for reporting illegal activity by their employers or for refusing their employer’s instruction to perform an illegal act.

These cases rest on the premise that citizens have a public obligation to facilitate law enforcement by reporting suspected illegal activity. As the Illinois Supreme Court explains, although “no specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime,... public policy nevertheless favors citizen crime-fighters.”\textsuperscript{75}

There are at least three potential difficulties with this particular application of the public policy exception. First, there is the issue of the correctness of the employee’s allegation that the employer was engaging in illegal activity. If an employer shows that the activity about which the employee complains is legal, does that fact defeat the employee’s claim of wrongful discharge? Or is a good faith, mistaken belief on the part of the employee sufficient to state a claim?

Courts vary in their treatment of these issues. Most courts require only a showing of good faith on the part of the employee.\textsuperscript{76} Some, how-


\textsuperscript{76} See, e.g., Wagner v. City of Globe, 722 P.2d 250, 256-58 (Ariz. 1986); Johnson v. World Color Press, Inc., 498 N.E.2d 575, 578 (Ill. App. Ct. 1986) (a claim is stated if the employee “reason-
ever, have rejected the good faith standard in favor of a narrower view which appears to require that the employee be correct in her belief that the employer's activity is illegal in order to state a claim. Under this reasoning, if there is no illegal act, there is no violation of public policy, and the employee's discharge stands.\textsuperscript{77}

As a practical matter, even under the good faith test the accuracy of the employee's belief that he is being asked to perform an illegal act or is reporting illegal conduct will factor into the analysis. The fact that conduct which the employee claims is illegal is actually clearly permissible casts doubt on the good faith of the employee's belief. Conversely, if the employee's suspicion of illegal activity turns out to be correct, it will be difficult, if not impossible, to demonstrate bad faith.

In addition to the accuracy of the employee's allegation of illegality, courts pay close attention to who is exposed to liability by the allegedly illegal act. Public policy claims have been rejected on the ground that the allegedly illegal act the employee was instructed to commit would have exposed the employer, rather than the employee, to liability.\textsuperscript{78} This conclusion rests on the rationale that an employer should not place an employee in the no-win situation of choosing between criminal liability and discharge.\textsuperscript{79} Where the employee is not placed in such a situation, there is no basis for a claim.

The manner in which the employee "blows the whistle" may also

\textsuperscript{77} DeSoto v. Yellow Freight Systems, Inc., 957 F.2d 655 (9th Cir. 1992) (truck driver has no claim against former employer who required him to drive truck bearing expired vehicle tag because such activity is not illegal, and, if it was, it did not implicate fundamental public policy concerns).

\textsuperscript{78} In Vaske v. DuCharme, McMillen & Assoc., Inc., 757 F. Supp. 1158 (D. Colo. 1990), the plaintiff was a salesman for a contact lens distributor. He was discharged for refusing to sign an employment agreement which contained confidentiality and noncompetition clauses. He refused to sign the contract because he understood that under state law such clauses were illegal. The statute on which he relied provided that certain covenants not to compete were null and void and that:

\begin{quote}
any person, firm, or corporation violating [the statute] is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than two hundred and fifty dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.
\end{quote}

Id. at 1162. He claimed wrongful discharge in violation of public policy on the grounds he was discharged for refusing to perform an illegal act under this statute. The court rejected the claim, reasoning that "[w]hile violation of the instant statute could result in criminal penalties, \ldots the employer, not the employee, would be in jeopardy for infringements." Id. at 1163.

\textsuperscript{79} Sheets, 427 A.2d at 389 ("[A]n employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment.").
greatly affect the success of the employee's claim. For example, there is
disagreement over to whom the employee must report the allegedly ille-
gal activity in order to state a claim. Some courts hold that the employee
must report the allegedly illegal activity to the appropriate regulatory
agency to state a claim. Discharge in retaliation for making an internal
complaint is, according to this view, insufficient to create a cause of ac-
tion. Only public disclosure removes the dispute from the private con-
text. Other courts, however, hold that complaints to the employer not
only suffice, but should be encouraged because they provide the opportu-
nity for internal resolution without unnecessary publicity or litigation. The latter appears to be the majority view.

In addition to the person to whom the alleged illegal activity is dis-
closed, the method by which it is disclosed may be important. Under
Washington law, for example, the employer's wrongdoing is weighed
against the reasonableness of the method of disclosure. Farnam v. Crista Ministries illustrates the significance of this factor. In Farnam, a
former nurse of a Christian nursing facility claimed that she was con-
structively discharged in retaliation for reporting suspected patient abuse
to the State Department of Social and Health Services. She believed that
the facility's policy of permitting the removal of nasal-gastric feeding
tubes from terminally ill patients under some circumstances constituted
patient abuse, despite the fact that the policy complied with applicable
Washington law at the time.

The Washington Supreme Court rejected the nurse's claim, in part,
on the ground that, in addition to reporting the alleged abuse to the state
agency, she "also went to the media with her objections, thereby turning
the issue . . . into a public controversy." The plaintiff's contact with
the media resulted in a front page article in the local newspaper's Sunday
dition in which the plaintiff accused her employer of permitting "death by starvation" and trying to make "executioners" of her and her
fellows. The court frowned upon this manner of disclosure be-
cause of the sensitivity of the issue and the fact that the employer had
established mechanisms to address the issue internally.

The court also noted that the plaintiff's work performance deterior-
rated over time because she increasingly focused her energies on the pa-
tient abuse issue. In addition to contacting the press and the state

82. Winters, 795 F.2d at 725 n.3.
84. 807 P.2d 830 (Wash. 1991).
85. Id. at 836.
86. Id. at 832.
agency, she wrote letters to management, requested a meeting with the facility's Board of Trustees and constantly discussed the issue with other personnel, often to the neglect of her work. The court concluded that the plaintiff's unreasonable behavior cast doubt on her motivation. Her conduct suggested a personal crusade to have her employer adopt her view on removing nasal-gastric feeding tubes, rather than an attempt to report suspected illegal activity for the broader public good.

This decision makes clear that a suspicion of improper activity does not automatically relieve the employee of all obligations to the employer. The employee may still be expected to perform his or her job adequately and to exercise some judgment in selecting appropriate channels of disclosure.

The employee may also be expected to reject the employer's instruction to perform an illegal act if he or she hopes to state a claim subsequently. An employee who performs an illegal act at his employer's instruction may be barred from suing later on the basis of the instruction. In *Hoffmann v. Simmons Airlines, Inc.*, 87 for example, the plaintiff, an airline security guard, claimed that his employer instructed him to pretend that a broken metal detector actually worked in order to get flights out on schedule. While the plaintiff was carrying out his employer's instructions, the Federal Aviation Administration conducted a security test by sending an attache case with a simulated pipe bomb through the machine. The bomb went undetected, the employer was fined, and the plaintiff was discharged. The plaintiff claimed he was discharged in violation of the public policy favoring air travel safety.

The Iowa Court of Appeals disagreed and affirmed the trial court's summary judgment in favor of the employer. It reasoned that because the plaintiff followed the employer's instructions, his discharge furthered, rather than contravened, public policy: "If anything, Hoffman's discharge served to emphasize that security guards have a personal duty to insure the public's safety." 88

The nature of the relationship between employer and employee may also affect the success of an employee's claim. The unique relationship between attorney and client, and the professional rules governing that relationship, for example, have precluded whistleblower claims brought by in-house counsel. Some courts have held that an attorney cannot be discharged wrongfully for refusing to perform an illegal act because the attorney has an ethical obligation to withdraw when confronted with such a situation. 89 A discharge simply forces the attorney to do what he

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88. Id. at 39.
or she already is obligated to do under the legal profession's code of ethics and disciplinary rules.

When relying on this line of authority, however, one must be particularly careful. In some instances, in-house counsel arguably represent clients other than their employers. In such a situation, the rules of ethics would not necessarily preclude a claim of wrongful discharge. For example, in *Mourad v. Automobile Club Insurance Association*,\(^\text{90}\) the plaintiff was in-house counsel for the Automobile Club Insurance Association. His duties included supervising the legal department that represented not only the Association in first-party cases, but also policy-holders in third-party cases. The court considered whether in-house counsel could state a claim for breach of implied contract for being discharged from a third-party case by his first-party employer. The Association argued against such a claim on the ground that clients have unfettered discretion to discharge their attorneys. The court rejected this argument. It reasoned that, with respect to his duties as supervisor of the legal staff and lawsuits involving catastrophic injury, the plaintiff's clients were the insureds, not the employer. Thus the insureds, not the employer, had the discretion to terminate his employment. Accordingly, the plaintiff could state a claim of breach of implied contract. Although the court refused to address the issue in *Mourad*,\(^\text{91}\) the same reasoning would certainly apply in the context of a public policy claim.

All of these decisions indicate that a claim of discharge in violation of public policy on the basis of either reporting suspected illegal activity or being required to engage in illegal activity is not as straightforward as it first appears. Factors that must be considered include how the activity was reported, to whom it was reported, whether the reported activity was in fact illegal, whether the activity exposes the employee to potential liability, whether the employee participated or acquiesced in the alleged illegal activity, and the nature of the relationship between the employer and the employee. The decisions also show that the importance of these factors varies from jurisdiction to jurisdiction. The public policy exception is not particularly refined with respect to claims brought by whistleblowers. Counsel must therefore familiarize themselves with the peculiarities of the law governing the exception in the locality in which the claim is brought.

Moreover, like the potentially broad reach of the public impact requirement, the possible applications of the public policy exception in the area of whistleblower claims may be broader than they first appear. Claims are not restricted to situations involving clearly illegal activity. Although certain conduct is not technically illegal, it may support a


\(^{91}\) Id. at 401.
claim if it violates the spirit of a particular rule of law. This provides counsel with considerable latitude to argue for creative and expansive applications of the exception.

2. Retaliation for Exercising a Legal Right or Privilege

Counsel also have considerable latitude in raising claims of discharge in retaliation for exercising legal rights or privileges. The future of this particular application of the exception may rest on vague constitutional principles that are increasingly providing fertile ground for broad applications. Some courts look to the letter and spirit of federal and state constitutional provisions that are intended to limit state action in order to discern public policy which applies in the context of the private employment relationship. With little hesitation, they dismiss the distinction between state and private action, a distinction which has traditionally restricted the application of these constitutional provisions to governmental intrusions.92

The Alaska Supreme Court's decision in Luedtke v. Nabors Alaska Drilling, Inc.93 provides the most recent example of this avenue of expansion. In Luedtke, two former employees of Nabors Alaska Drilling, a private employer, challenged their dismissals for refusing to submit to employer-sponsored drug tests. They claimed that their discharges violated their constitutional right to privacy and a fundamental public policy favoring employee privacy.

The Alaska Supreme Court first rejected the plaintiffs' claim that the drug testing violated their constitutional right to privacy. It noted that the federal and Alaska state constitutions are intended to limit state action. A right to privacy is rooted in the Alaska Constitution.94 The court reasoned that nothing in the history or wording of the constitutional provisions or the decisional law suggested that the right to privacy was intended to apply to private action. Therefore, the court concluded, "we decline to extend the constitutional right to privacy to the actions of private parties."95


94. Article I, section 22 of the Alaska Constitution reads: Right of Privacy: The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

95. 768 P.2d at 1130.
Yet, to some degree, the court went on to do precisely that. Looking to "the entire body of law in the State of Alaska," the court held that in Alaska there is a public policy favoring employee privacy which is derived, in part, from Alaska's Constitution. The court noted that although the Alaska Constitution does not proscribe private action, it nevertheless evidences a public policy favoring employee privacy which extends to the private sector.

The court derived additional support for this public policy from two other sources. First, the court concluded that state statutes prohibiting discrimination in employment and polygraph testing as a condition of employment "evidence[d] the legislature's intent to liberally protect employee rights." Second, the court noted the common law right to privacy against intrusions by private persons reflected in section 652B of the Restatement (Second) of Torts.

The court then considered whether employer monitoring of employee drug use outside the workplace is a prohibited intrusion on that privacy. It held that, on the facts before it, the employees' privacy interests had not been unlawfully abridged because (1) the public policy supporting workplace safety outweighed the public policy favoring employee privacy, and (2) the drug test was conducted at a reasonable time and in a reasonable manner.

The court's reasoning, more than its result, is important. The court relied on a constitutional right to privacy from governmental intrusion to support the finding of a public policy favoring privacy in the private employment context. The court did not need to rely on the constitutional rights of employees to privacy, as derived from the Alaska Constitution and state statutes. However, the court did note that the right to privacy extends to the private sector, as evidenced by common law principles and the Restatement (Second) of Torts.

96. Id. at 1132.
97. Id.
98. The court concluded:

The citizens' right to be protected against unwarranted intrusions into their private lives has been recognized in the law of Alaska. The constitution protects against governmental intrusion, statutes protect against employer intrusion and the common law protects against intrusions by other private persons. As a result, there is sufficient evidence to support the conclusion that there exists a public policy protecting spheres of employee conduct into which employers may not intrude. Id. at 1133.

99. The Court of Appeals for the Third Circuit reached a similar conclusion in Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983). The plaintiff was a district claims manager for Nationwide Insurance Company and one of three candidates for the position of division claims manager. In late 1981, he refused to participate in Nationwide's lobbying effort on behalf of the "No-Fault Reform Act." Despite 15 years of satisfactory performance, the plaintiff was discharged.

He sued, claiming that the discharge for refusing to lobby the state legislature on his employer's behalf contravened the public policy favoring freedom of political expression. The Third Circuit agreed. It derived the public policy from the First Amendment to the United States Constitution and article I, section 7 of the Pennsylvania Constitution. The latter provides that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Id. at 899 n.6.

The court acknowledged that both constitutional provisions had traditionally been applied only to state action taken against public employees. Nevertheless, it concluded that the provisions reflect...
provisions. Presumably it could have reached the same conclusion on the basis of the common law right to privacy and the privacy implications of the state's anti-discrimination statutes. In relying on the state and federal constitutions as well, however, the court may have created a new source of public policy to support broad applications of the exception.

For example, the concept of due process has been traditionally restricted to situations where state action deprives an individual of his or her interest in life, liberty or property. 100 Under the Luedtke court's reasoning, however, this historically restrictive scope does not preclude a court from divining an overarching principle that may be applied to purely private actions. The state and federal constitutional notions of due process arguably evidence a public policy favoring some form of advance notice, warning, or progressive discipline before adverse employment decisions may be made. In the civil service context, for example, the United States Supreme Court has held that the Due Process Clause of the United States Constitution provides minimum guarantees of notice and opportunity for hearing prior to the discharge of an employee with a property interest in his or her employment. 101 Luedtke suggests that these minimum guarantees may exist in the private sector and that a failure to adhere to them might constitute a discharge in violation of public policy.

Similar applications of the public policy exception might be based on the constitutional rights of association and freedom of speech, to

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101. In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the United States Supreme Court held that under the Due Process Clause of the United States Constitution, public employers may not discharge a “tenured” civil service employee without first providing the employee with oral or written notice of intent to discharge, an explanation of the evidence against the employee, and an opportunity to present the employee's side of the story.
name two others.\textsuperscript{102} It is not difficult to foresee very broad interpretations of the public policy exception on the basis of these general, flexible principles. The troubling result may be the unwarranted addition of a constitutional element to otherwise straightforward discharge cases.

3. \textit{Retaliation for Refusing to Perform an Act on Ethical Grounds}

The broadest possible interpretation of the public policy exception comes from those courts which have derived public policy from professional codes of ethics. The New Jersey Supreme Court's decision in \textit{Pierce v. Ortho Pharmaceutical Corp.}\textsuperscript{103} illustrates this mode of analysis. The plaintiff, a physician, was the director of Medical Research/Therapeutics at Ortho Pharmaceutical Corporation ("Ortho"). The plaintiff was responsible for studying non-reproductive drugs, including loperamide, a liquid treatment for diarrhea in infants, children, and the elderly. She was demoted for refusing to participate in clinical testing of loperamide because she felt its saccharin content was dangerously high. She then resigned and sued Ortho, claiming that she had been constructively and wrongfully discharged for refusing to perform a task which she considered medically unethical.

The court rejected the plaintiff's claim on the ground that it was motivated by personal morals rather than professional ethics. The court reasoned as follows:

An employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals. An employee at will who refuses to work for an employer in answer to a call of conscience should recognize that other employees and their employer might heed a different call. However, nothing in this opinion should be construed to restrict the right of an employee at will to refuse to work on a project that he or she believes is unethical.\textsuperscript{104}

The court's logic, more than its conclusion, is significant. The decision rests on a hair-splitting distinction between personal morals and professional ethics. Personal morals may not support claims of wrongful discharge, but professional ethics may. Any distinction between personal morals and professional ethics, however, is so murky that judges will have difficulty trying to develop a workable test.\textsuperscript{105}

\textit{Pierce} demonstrates this fact. The plaintiff based her objection to

\textsuperscript{102} But see Booth, 555 A.2d 24; Hershberger, 575 A.2d 944.

\textsuperscript{103} 417 A.2d 505 (N.J. 1980).

\textsuperscript{104} Id. at 514.

\textsuperscript{105} Free v. Holy Cross Hosp., 505 N.E.2d 1188 (Ill. App. Ct. 1985), provides another example of the difficulty in distinguishing ethics and morals. In Free, an evening nurse supervisor claimed she was wrongfully discharged for refusing the instruction of the hospital vice-president to evict a bedridden patient found in possession of a handgun. She based her claim on the Illinois Right of Conscience Act which provides, in relevant part:
clinical testing on that portion of the Hippocratic Oath which provides that physicians "will prescribe regimen for the good of [their] patients according to [their] ability and [their] judgment and never do harm to anyone." The court acknowledged that this is an ethical standard, yet it concluded that the plaintiff's objections were essentially moral. Implicit in this conclusion is the court's recognition that many moral concerns are subsumed in ethical standards. If lawyers and judges are to separate the two, they need a better articulation of the differences than that contained in the Pierce decision.

The court in Pierce also failed to provide meaningful guidance regarding the issue of which ethical standards rise to the level of public policy. The court simply stated that to express public policy, the ethical standard must, at a minimum, define a standard of conduct beneficial to the public at large, not just to the individual professional. This requirement, however, is illusory because most ethical standards promote conduct which is as beneficial to the public as it is to a particular profession or its members.

To date, most courts have interpreted codes of professional ethics narrowly in determining whether the codes express public policy. No successful claim of wrongful discharge in violation of public policy has involved a public policy which rested on a code of professional ethics. The decisions where such claims have been rejected, however, are not based on any clear standards. Therefore, codes of ethics continue to provide fertile soil from which expansive applications of the public policy exception may spring in the future.

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106. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who are engaged in the delivery of medical services and medical care... and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability on such persons... by reason of their refusing to act contrary to their conscience or their conscientious convictions in refusing to obtain, receive, accept or deliver medical services and medical care. Id. at 1189-90 (quoting ILL. REV. STAT. ch. 111/2, para. 5302 (1985)).

107. Although the plaintiff's refusal to evict a bedridden patient would appear to fall squarely within this statute, the court rejected the plaintiff's claim. It concluded that her opposition to the instruction was ethical in nature and not based on "sincerely held moral convictions arising from religious beliefs" as required by the statute. Id. at 1190.

108. See also Warthen, 488 A.2d at 233 (rejecting nurse's claim that a passage in the Code for Nurses constitutes a clear mandate of public policy where the passage "defines a standard of conduct beneficial only to the individual nurse and not to the public at large").

IV.
THE PUBLIC POLICY EXCEPTION: A JUST CAUSE STANDARD IN DISGUISE?

The broad interpretations of the public policy exception adopted by some courts demonstrate the malleability of the guiding concepts of public policy, public impact, and clear mandate. These concepts permit challenges to discharges that do not readily fit within the ostensibly narrow confines of the public policy exception and which, in the absence of an expansive interpretation of the exception, would be unassailable under the at-will rule. The willingness of some courts to accept such challenges suggests that the courts are driven more by a desire to prevent unjust discharges of particular individuals than by a concern for the broader public good.

Indeed, some courts do not try to hide their motivation. For example, the Wisconsin Supreme Court requires the employer to prove that a dismissal was for "just cause" once an employee establishes a prima facie claim of wrongful discharge on public policy grounds.110 Other courts describe the public policy exception as a claim for bad faith or abusive discharge, terms commonly associated with the just cause standard. In adopting the exception, for instance, the Arizona Supreme Court concluded that: "The interests of society as a whole will be promoted if employers are forbidden to fire for cause which is 'morally wrong.'"111 Similarly, the New Hampshire Supreme Court initially described the exception as prohibiting discharges resulting from "bad faith or malice or based on retaliation."112 The Oklahoma Supreme Court recently defined the exception to include discharges based on an employee's "performing an act that public policy would encourage or, for refusing to do something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice or retaliation."113 The North Carolina State Supreme Court adopted the "bad faith exception" largely because "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships."114

The public policy exception evolved from dissatisfaction with unjust dismissals permitted under the at-will rule.115 Therefore, it is not surprising that some courts apply it to challenge dismissals which the courts

110. Brockmeyer, 335 N.W.2d at 841.
111. Wagenseller, 710 P.2d at 1033.
view as unfair, but which do not appear to fall within the purportedly narrow letter of the exception. The vague concept of public policy lends itself to this effort. Behind the guise of concern for public welfare, the concept of public policy allows the creative attorney and receptive court to inject the standard of just cause into the private employment relationship without expressly abrogating the employment-at-will doctrine.

The public policy exception ultimately may do more than permit the covert infusion of a just cause standard into the private employment relationship. The theory of wrongful discharge in violation of public policy, taken to its logical conclusion, appears tailor-made for any court seeking to reverse the at-will employment doctrine. Many courts have noted that despite the contrary implication of the at-will doctrine, public policy favors job security. For example, one Ninth Circuit judge recently wrote that “job security is the most fundamental employment right possessed by American workers.” The importance of job security is also reflected in collective bargaining agreements, which cover a large percentage of the nonagricultural United States labor force and uniformly forbid the termination of union employees without “cause” or “just cause.” The majority of federal, state and local employees are protected from discharge without cause by various civil service rules. Similarly, federal and state anti-discrimination statutes all contain express prohibitions against adverse employment decisions motivated by discriminatory animus. These express prohibitions appear to support a public policy favoring job security more directly than implicit notions such as privacy, which already have supported public policies in the employment context.

CONCLUSION

The theory of wrongful discharge in violation of public policy is evolving. Its application varies from court to court. Some jurisdictions apply a narrow version of the exception; others employ a much broader one. The concept of public policy, however, may simply be too vague to


117. Saunders, 911 F.2d at 202.

118. In 1990, for example, 18 percent of full-time U.S. workers were union members subject to collective bargaining agreements. BUREAU OF LABOR STATISTICS, CURRENT WAGE DEVELOPMENTS 4 (Feb. 1991).

119. See, e.g., sources cited supra note 6.

form the basis of a narrow exception to the employment-at-will rule. Public policy can be all things to all people, particularly when some courts derive it from the letter and spirit of nearly any official pronouncement governing human behavior, including codes of professional ethics.

This is not to say that the public policy exception is without merit. In most instances, it is difficult to argue with the result of its application. The problem is that the flexibility of the exception injects the employment relationship with an undesirable degree of uncertainty. How does an employer distinguish between personal morals and professional ethics? When does an act which admittedly does not violate the letter of the law nevertheless violate its spirit? Without answers to these and other questions regarding the scope of the public policy theory, employers cannot tailor their employment practices, and employees are encouraged to challenge otherwise non-actionable discharges on the basis of untested applications of constitutional, statutory, regulatory, or ethical provisions. As more and more public policy claims are litigated, the contours of the theory may be more precisely defined and some of these concerns may disappear. Until that time, however, the theory of wrongful discharge in violation of public policy remains an unrefined, evolving claim which is susceptible to broad, unanticipated applications.