EMPLOYMENT AT WILL: THE DECAY OF AN ANACHRONISTIC SHIELD FOR EMPLOYERS?

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I. INTRODUCTION

The venerable common law doctrine of employment-at-will is currently the subject of a legal controversy of great magnitude. Indeed, smoldering dissatisfaction with the contract-related doctrine has recently ignited into a flaming debate in legislatures and courts across the country.

Recessionary economic influences have heightened employee concerns over the issue of job security. As a consequence, critics of the doctrine have attacked the common law employment concept with renewed vigor in an effort to completely extinguish its vitality in a non-unionized work environment.[1] Thronging to the defense of the at-will employment rule are countless

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1. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980); St. Antoine, *You're Fired*, Thirty-Fourth Annual Meeting of the National Academy of Arbitrators, BNA pg. 43-62 (1982); Blumrosen, *Strangers No More: All Workers are Entitled to 'Just Cause' Protection Under Title VII*, 2 INDUSTRIAL RELATIONS L.J. 519 (1978); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J.

numbers of employers who perceive yet another legal restriction on management's freedom to dictate terms and conditions of employment for their labor forces. Employers, unburdened by collective bargaining relationships or individual contracts of employment, are now fearful of incurring liability for wrongful discharge by virtue of supervisory representations and gratuitous employment documents never intended to be contractual in nature.

Judicial and legislative scrutiny of the doctrine of employment-at-will in Iowa and across the country has been intermittent, inconsistent, and inconclusive. The dearth of definitive adjudicative or statutory guidance addressing the viability of the doctrine has left the parties to the employment relationship, and their counsel, in a quandry.

Attorneys representing business employers in Iowa must be aware of the nuances of the controversy over the rule of employment-at-will. Absent thorough judicial or legislative treatment of the doctrine, counsel must aggressively seek to shield their employer-clients from potential liability attributable to an emerging network of common law exceptions to the rule of employment-at-will. Indeed, only preventative consultation between attorney and business client may serve to sidestep unnecessary liability for wrongful employee terminations.

II. Evolution of the Doctrine of Employment At Will

The doctrine of employment-at-will has been articulated in countless ways since its introduction in America nearly a hundred years ago. The essence of the doctrine has perhaps never been more succinctly stated than it was in *Payne v. Western and A.R.R. Co.*,[2] where employment-at-will was explained in the following manner: "All may dismiss their employee(s) at will, be they many or few, for good cause, for no cause, or even for cause morally wrong without being guilty of legal wrong."[3]

The concept of employment-at-will is said to have originated toward the middle of the nineteenth century when the traditional master-servant relationship was restructured to reflect the influence of the evolving legal theory of contract.[4] This emphasis upon contract theories in the employment setting, fused with the entrepreneurial spirit of embryonic industrial-

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1 (1979); Weingarten, *Help for Fired Workers, Courts Coming Around After Years of Backing Bosses*, 2 Nat'l Rev. 1 (1980); Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. Sch. L. Rev. 768 (1979).

2. Payne v. Western and A.R.R. Co., 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). *See also* C. Labatt, Master and Servant, § 183 (2d ed. 1904).

3. Payne v. Western and A.R.R. Co., 81 Tenn. at 514.

4. Horwitz, The Transformation of American Law, 186-210 (1977); Feinman, *Development of the Employment-At-Will Rule*, 20 Am. J. Legal History 118-122 (1976); Smith, Master and Servant, 41-47 (1852).

ized America, served to limit employment-related commitments to those expressly articulated between the parties. Hirings for an indefinite period were presumptively terminable at the will of either party.[5] Indeed, a clear manifestation of assent to express contract terms was required if employment promises were to be enforceable.[6]

The direct consequence of tying the employment relationship to traditional notions of contract specifically reserved to both parties the discretionary right to terminate an indefinite tenure of employment at any time, for any reason. The concept of restrictive discharge for cause was a legal theory still slumbering in the minds of academicians and prospective labor movement activitists.[7]

The basic substance of the traditional common law rule of employment-at-will has long been followed in Iowa.[8] The rule has been deemed to appropriately order, in a somewhat flexible manner, the relationship between an employer and his employees. Recent decisions of the Iowa courts still espouse adherence to the doctrine, absent a collective bargaining obligation, an individual contract of employment for a fixed duration, or a statutory restriction on at-will employment.[9] The inevitable pressure from critics of the doctrine as well as changing economic and political considerations, however, will force the Iowa courts to constantly reexamine the posture they have taken on the issue of employment-at-will.

III. Economic and Policy Issues Prompting Reexamination of the Doctrine in Iowa.

In spite of its longevity, the concept of employment-at-will has been subject to controversy, particularly over the past two decades. The rapid emergence of modern federal legislation designed to protect employees from a host of employment-related ills has served to confirm the awakening of the American populous to the issue of employment security.[10] Indeed, the Iowa

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5. Harrod v. Wineman, 146 Iowa 718, 720, 125 N.W. 812, 813 (1910); O'Connor v. Hayes Body Corp., 258 Mich. 280, 281, 242 N.W. 233, 235 (1932); Bitzke v. Folger, 231 Wis. 513, 515, 286 N.W. 36, 38 (1939).

6. Wood, A Treatise On the Law of Master and Servant, § 134 (1977); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith, supra* Note 1; *Gonyea v. Duluth M. and I. R. Ry. Co.*, 230 Minn. 225, 19 N.W.2d 384 (1945); Morris, Government and Labor in Early America, at 219 (1965).

7. *See infra* notes 4, 6.

8. *See, e.g.*, Allen v. Highway Equip. Co., 239 N.W.2d 135 (Iowa 1976); Drake v. Block, 247 Iowa 517, 74 N.W.2d 577 (1956); Harrod v. Wineman, *supra* note 5.

9. *See, e.g.*, Peoples Memorial Hospital v. Iowa Civil Rights Comm'n, 322 N.W.2d 87 (Iowa 1982); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782 (Iowa 1976).

10. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1976); Labor Management Relations Act (Taft Hartley) of 1947, 29 U.S.C. §§ 141-187 (1976); Fair Labor Standards Act, 29 U.S.C. § 215 (1976); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)

legislature has not been dilatory in enacting supportive legislation designed to provide sanctuary and redress for employees burdened by employment-related injuries.[11]

Unquestionably, the increased willingness of Americans to discover and assert new entitlements, ranging from the rights of nonsmokers to the rights of the disabled, has spawned a renewed scrutiny of the claim to continuous employment. The perceived entitlement to employment stability has grown as the number of at-will employees has risen to equal almost two-thirds of the nation's workforce in the past twenty years.[12] Certainly, this heightened concern over employee rights has been spurred on by the civil rights movements of the 1960's and 1970's and the high unemployment and economic turmoil of the 1980's. The product of the marriage of these influences has been a litigious insistence on the perceived "right" of job security.

In conflict with the aggressive movement to extinguish employment-at-will are the conservative legal theory of contract and the traditional notion of managerial rights. Academicians and jurists supportive of non-interventionist judicial construction shy away from the creation of implied contractual relationships and new causes of action which may abrogate at-will employment.[13] Further, employers jealously claim the right to discharge at will in order to make immediate and radical adjustments to their workforces. This flexibility is demanded in order that employees may be extracted from

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(1976); Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 633(a) (1967); Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (1973); Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2012 *et seq.*; Railroad Safety Act, 45 U.S.C. § 441(a)(b)(1).

11. Iowa Wage Payment Collection Law, IOWA CODE Ch. 91A (1983); Iowa Civil Rights Act of 1965, IOWA CODE Ch. 601A (1983); Iowa Occupational Safety and Health Act, IOWA CODE Ch. 88 (1983); Iowa Employment Security Law, IOWA CODE Ch. 96 (1983); Iowa Worker's Compensation Act, IOWA CODE Ch. 85 (1983).

12. BNA Special Report, *The Employment at Will Issue*, Vol. 111 Labor Special Projects Unit No. 23 (1982); Olsen, *Wrongful Discharge Claims Raised by At-Will Employees: A New Legal Concern for Employers*, 32 LABOR LAW J. 265, 266 (1981).

13. *See* MacCabe v. Consolidated Edison Co., ___ Misc. ___, 30 N.Y.S.2d 445, 447 (N.Y. Civ. Ct. 1941). With regard to an employee's rights under a retirement plan, the *MacCabe* court stated:

> In this state, the rule is settled that, unless a definite period of service is specified in the contract, the hiring is at will; and the master has the right to discharge and the servant to leave at any time . . . If hiring can be terminated at will and provision for an employee's retirement is not embodied in a juridically recognizable obligation of the employer, then whatever provision may be made is, in the eye of the law, not a right but a gift.

See also Murphy v. American Home Products, 112 Misc. 2d 507, 447 N.Y.S.2d 218 (N.Y. Sup. Ct. 1982); Levin, "*Do Workers 'Own' Their Jobs*?", FORTUNE, February 7, 1983; Chin v. American Telephone and Telegraph Company, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Sup. Ct. 1978), *aff'd.* 70 A.D.2d 791, 416 N.Y.S.2d 160 (1979), *appeal dismissed* 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979); Kavanaugh v. KLM Royal Dutch Airlines, No. 83 C 153 (N.D. Ill. June 20, 1983).

the labor force at any time without the necessity of meticulously reviewing employment "rights" of individual employees.[14] The resounding collision of the aforementioned interests will continue to significantly increase civil litigation concerning at-will employment. As a consequence, Iowa lawyers and their clients must be familiar with current trends in judicial treatment of the viability of the doctrine.

IV. Analysis of Current Law on the Doctrine of Employment at Will

At the present time, courts in twenty-four states have granted exceptions to the strict application of the employment-at-will doctrine for reasons of public policy.[15] Additionally, judicial decisions have been rendered in fourteen states finding breach of implied employment contracts purportedly in existence between employers and discharged employees.[16] Twelve other

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14. Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 458 (Iowa 1978). Hanson v. Central Show Printing Co., 256 Iowa 1221, 130 N.W.2d 654 (Iowa 1964); Justice v. Stanley Aviation Corp., 35 Colo. App. 1, ___, 530 P.2d 984, 986 (1974).

15. *Arkansas*, Scholte v. Signal Delivery Service, Inc., 548 F. Supp. 487, 494 (D. Ark. 1982); *California*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172-78, 164 Cal. Rptr. 839, 846 (1980); Meyer v. Byron Jackson, Inc., 120 Cal. App. 3d 58, 59-65, 174 Cal. Rptr. 428, 429 (1981); *Connecticut*, Kilbride v. Dushkin Pub. Group, Inc., 186 Conn. 718, ___, 443 A.2d 922, 923 (1982); *Florida*, Smith v. Piezo Technology and Prof. Adm'rs., 427 So.2d 182, 184 (Fla. 1983); *Hawaii*, Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Hawaii 1982); *Idaho*, Jackson v. Minidoka Irrigation, 98 Idaho 330, 333-35, 563 P.2d 54, 57 (1977); *Illinois*, People v. Huggins, 258 Ill. App. 238, 240-43 (1930); Wyatt v. Jewell Companies, Inc., 108 Ill. App.3d 840, 841-42, 439 N.E.2d 1053, 1054 (1982); *Indiana*, Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1389 (S.D. Ind. 1982); *Kansas*, Murphy v. City of Topeka-Shawnee County Department of Labor Services, 6 Kan. App. 2d 488, ___, 630 P.2d 186, 192 (Kan. 1981); *Kentucky*, Firestone Textile Co. v. Meadows, Ky. Ct. App. 81-CA-2640-MR (Nov. 1982); *Maryland*, De Bleecker v. Montgomery County, 438 A.2d 1348, 1353 (Md. 1982); *Massachusetts*, Gram v. Liberty Mutual Ins. Co., 429 N.E.2d 21, 27, n.6 (Mass. 1981); Siles v. Travenal Laboratories, Inc., ___ Mass. App. Ct. ___, ___, 433 N.E.2d 103, 106 (1982); *Michigan*, Trombetta v. Detroit, Toledo, and Ironton R.R. Co., 81 Mich. App. 489, 495, 265 N.W.2d 385, 388 (1978); *Missouri*, Mitchell v. St. Louis County, 575 S.W.2d 813, 815 (Mo. Ct. App. 1978); Henderson v. St. Louis Hous. Auth., 605 S.W.2d 800, 803 (Mo. Ct. App. 1979); *Montana*, Gates v. Life of Montana Ins. Co., ___ Mont. ___, 638 P.2d 1063, 1067 (1982) (dictum); *New Hampshire*, Howard v. Dorr Woolen Co., 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980); *New Jersey*, Lally v. Copygraphics, 85 N.J. 668, 671, 428 A.2d 1317, 1318 (1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66-71, 417 A.2d 505, 512 (1980); *Oregon*, Nees v. Hocks, 272 Or. 210, 213-18, 536 P.2d 512, 515-16 (1975); *Pennsylvania*, Perks v. Firestone Tire and Rubber Co., 611 F.2d 1363, 1366 (3rd Cir. 1979); Molush v. Orkin Exterminating Co., Inc., 547 F. Supp. 54, 56 (E.D. Pa. 1982); *Texas*, Murray Corp. of Maryland v. Brooks, 600 S.W.2d 897, 902, 903 (Tex. Civ. App. 1980); *Virginia*, In Re Terry, 7 Bankr. 880 (Bankr. E.D. Va. 1980); *Washington*, Krystad v. Lau, 65 Wash. 2d 827, 829-35, 400 P.2d 72, 83 (1965); *West Virginia*, Harless v. First Nat'l. Bank in Fairmont, 246 S.E.2d 270, 276 (W. Va. 1978); Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 696 (W. Va. 1982); *Wisconsin*, Brockmeyer v. Dun and Bradstreet, 109 Wis. 2d 24, 28, 325 N.W.2d 70, 74 (1982).

16. *California*, Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 717-19, 150 Cal.

states, including Iowa, have granted exceptions to the at-will employment rule where additional consideration for continued employment has established a more "permanent" employment relationship.[17]

Currently, the Iowa courts have clung to the essential substance of the traditional rule of employment-at-will.[18] Nevertheless, the Iowa Supreme Court has clearly preserved its options to contribute to the erosion of the doctrine by following the lead of more liberal decisions rendered by courts in other states.[19] A brief analysis of some of the Iowa Supreme Court's decisions provides insight into the circumstances under which the Iowa Court may choose to further chip away at the doctrine of employment-at-will.

Initially, the court has indicated a willingness to carefully scrutinize the factual circumstances of any given employment relationship in an effort to decipher whether the parties entered into an employment agreement of

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Rptr. 408, 411 (1978); Rabago-Alvarez v. Dart Industries, Inc., 55 Cal. App. 3d 91, 96-99, 127 Cal. Rptr. 222, 225 (1976); Cleary v. American Airlines, Inc., *infra*, note 37; *Connecticut*, Magnan v. Anaconda Industries, Inc., 37 Conn. Supp. 38, ___, 429 A.2d 492, 494 (1980); *Idaho*, Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 340-43, 563 P.2d 54, 59-60 (1977); *Louisiana*, Williams v. Delta Haven, Inc., 416 So.2d 637, 638 (La. App. 1982); Griffith v. Sollay Foundation Drilling, Inc., 373 So.2d 979, 982 (La. App. 1977); *Maine*, Terrio v. Millenocket Community Hosp., 379 A.2d 135, 137 (Me. 1977); *Massachusetts*, McKinney v. Nat'l Dairy Council, 491 F. Supp. 1108, 1121-22 (D. Mass. 1980); Fortune v. Nat'l. Cash Register Co., 373 Mass. 96, ___, 364 N.E.2d 1251, 1255-56 (1977); *Michigan*, Toussaint v. Blue Cross and Blue Shield of Michigan, 408 Mich. 579, 610-12, 292 N.W.2d 880, 885 (1980); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1078 (W.D. Mich. 1982); *Montana*, Gates v. Life of Montana Ins. Co., ___ Mont. ___, 638 P.2d 1063, 1066-67 (1982); *Nebraska*, Sinnett v. Hie Food Products, Inc., 185 Neb. 221, 223-24, 174 N.W.2d 720, 721-22 (1970); *New Hampshire*, Foley v. Community Oil Co., 64 F.R.D. 561, 563 (D.N.H. 1974); *New York*, Weiner v. McGraw-Hill, Inc., 83 A.D.2d 810, 811, 442 N.Y.S.2d 11, 13 (1982); *North Carolina*, Bennet v. Eastern Rebuilders, Inc., 52 N.C. App. 579, 582-84, 279 S.E.2d 46, 48-49 (1981); Still v. Lantz, 279 N.C. 254, 257-58, 182 S.E.2d 403, 406-07 (1971) (dicta); *Oregon*, Yartzoff v. Democratic-Herald Publishing Co., 281 Or. 651, 652, 576 P.2d 356, 360 (1978); *Washington*, Parker v. United Airlines, Inc., 32 Wash. App. 722, ___, 649 P.2d 181, 183 (1982); Saruff v. Miller, 90 Wash. 2d 880, 883-85, 586 P.2d 466, 469 (1978).

17. *Alabama*, United Steel Workers v. University of Alabama, 599 F.2d 56, 60 (1979); Scott v. Lane, 409 So.2d 791, 794 (Ala. 1982); *Florida*, Chatelier v. Robertson, 118 So.2d 241, 244 (1960); *Iowa*, Collins v. Parsons College, 203 N.W.2d 594, 599 (Iowa 1973); *Maine*, Terrio v. Millenocket Community Hosp., 379 A.2d 135, 137 (Me. 1977); *Minnesota*, Bussard v. College of St. Thomas, Inc., ___ Minn. ___, 200 N.W.2d 155, 161 (1972); *Mississippi*, Sartin v. City of Columbus Utilities Comm'n, 421 F. Supp. 393, 401 (D.C. Miss. 1976); *Missouri*, Lopp v. Peerless Serum Co., 382 S.W.2d 620, 627 (Mo. 1964); *Nebraska*, Sinnett v. Hie Food Products, Inc., ___ Neb. ___, 174 N.W.2d 720, 722 (1970); *North Dakota*, Sjaastad v. Great Northern Ry. Co., 155 F. Supp. 307, 312 (D.C.N.D. 1957); *South Carolina*, Weber v. Perry, 201 S.C. 8, 11-12, 21 S.E.2d 193, 194 (1942).

18. Bixby v. Wilson and Co., 196 F. Supp. 889, 898 (N.D. Iowa 1961); Laird v. Eagle Iron Works, 249 N.W.2d 646, 647 (Iowa 1977).

19. Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 456 (Iowa 1978). "We do not decide if an employee under an at-will contract is without a remedy under any circumstances . . . . We hold only that under the facts of this case there is no showing that plaintiff's discharge was violative of public policy." *Id.* at 456-457.

fixed duration.[20] The court has noted with approval treatise excerpts which suggest that the Iowa Supreme Court has adopted a flexible posture toward scrutiny of the duration of an employment relationship such that:

> If the employer made a promise, either expressed or implied, not only to pay for service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him "at will" after the employee has begun or rendered some of the requested service or given other consideration . . . .[21]

In applying this flexible standard, the court has carefully examined the factual circumstances of each case to determine the parties' intentions as well as the extent to which the employee may have altered his position in reliance upon an employment contract for a specified period.[22] The finding of an employment contract for a fixed duration protects the employee from termination during the term of the contract except for cause and also provides an employee who was improvidently terminated with a claim for wrongful discharge.[23]

In spite of its articulated willingness to scrutinize the terms and conditions of employment for the critical element of duration, the Iowa Supreme Court has not cavalierly cut away at the rule of employment-at-will. Employees formerly parties to contracts of specified duration carry a fairly heavy burden to establish that the parties intended that the contract be renewed automatically once the fixed term of the agreement had expired.[24] Where substantial evidence establishes that the parties understood that the terms of the written contract were not to be applied to continued service, the status of the employee reverts to a servant terminable-at-will, with or without cause.[25]

Perhaps the greatest concession currently offered by the Iowa Supreme Court to critics of the doctrine of employment-at-will is an exception occurring when a discharged employee establishes sufficient consideration for an employer's promise of permanent employment. Generally, it has been held that adequate consideration for permanent employment must include something *in addition* to the employee's promise to perform the required ser-

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20. Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796, 802 (Iowa 1971); Allen v. Highway Equipment Co., 239 N.W.2d 135, 140-42 (Iowa 1976).

21. 1A CORBIN, CONTRACTS, § 152 (2d ed. 1963); *cf.*, Allen v. Highway Equip. Co., 239 N.W.2d 135 (Iowa 1976).

22. *Compare* Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796, 802 (Iowa 1971) *with* Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782, 789-91 (Iowa 1976).

23. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311-12 (Iowa 1971); Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796, 802 (Iowa 1971).

24. *See supra* note 20 and accompanying text.

25. Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782, 791 (Iowa 1976); Sultan v. Jade Winds Construction Corp., 277 So.2d 574, 576 (Fla. App. 1973).

vices.[26] The Iowa court has ruled that the relinquishment of tenured employment at another location is sufficient additional consideration to support a permanent contract and abrogate the existence of at-will employment.[27] The mere deferment of moving expenses or the relinquishment of another employment position held at-will, however, are deemed to constitute insufficient consideration for permanent employment.[28]

If the doctrine of employment-at-will is to be further eroded in Iowa, the exception which looms most prominently on the horizon is the discharge of an employee in violation of public policy. A significant number of other state courts have already rejected at-will employment defenses where an employer's reason for discharge contravened recognized public policy.[29] Although the Iowa Supreme Court was offered the opportunity to uphold a claim of wrongful discharge as violative of public policy in *Abrisz v. Pulley Freight Lines, Inc.*,[30] it refused to do so. In *Abrisz*, the plaintiff advanced claims for violation of contract and retaliatory discharge claiming that she was maliciously fired in violation of public policy for espousing support of a co-employee's claim for unemployment compensation benefits.[31]

The Iowa Supreme Court found that the plaintiff was legitimately discharged without malice for disseminating false statements which reflected upon the integrity of the employer concerning the claimed unemployment compensation benefits.[32] The court spurned the invitation to declare the employer's decision to discharge in violation of public policy stating: "Courts should not declare conduct in violation of public policy unless it is clearly so."[33] While applying the rule of employment-at-will, the court injected a caveat in its opinion forewarning employers that appropriate factual circumstances could indeed abrogate the right to discharge as violative of public policy.[34]

Decisions rendered in other states have adopted exceptions to the at-will employment rule for violations of public policy which include specific

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26. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311-12 (Iowa 1971); Moody v. Bogue, 310 N.W.2d 655, 658 (Iowa Ct. App. 1982).

27. Collins v. Parsons College, 203 N.W.2d 594, 599 (Iowa 1973).

28. Bixby v. Wilson & Co., Inc., 196 F. Supp. 889, 900 (N.D. Iowa 1961); Laird v. Eagle Iron Works, 249 N.W.2d 646, 648 (Iowa 1977).

29. Frampton v. Central Indiana Gas Co., 260 Ind. 249, 252-54, 297 N.E.2d 425, 428 (1973); Sventko v. Kroeger Co., 69 Mich. App. 644, 646-49, 245 N.W.2d 151, 152 (1976); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 175, 384 N.E.2d 353, 355, (1978); Harless v. First Nat'l. Bank in Fairmont, 246 S.E.2d 270, 276 (W. Va. 1978); Reuther v. Fowler and Williams, Inc., 255 Pa. Super. 28, 31-34, 386 A.2d 119, 120 (1978); Brown v. Transcom Lines, 284 Or. 597, 601-03, 588 P.2d 1087, 1090 (1978); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 70-71, 417 A.2d 505, 512 (1980); Mitchell v. St. Louis County, 575 S.W.2d 813, 815 (Mo. Ct. App. 1978).

30. 270 N.W.2d 454 (Iowa 1978).

31. *Id.* at 455.

32. *Id.* at 456.

33. *Id.* at 456.

34. *Id.* at 456-57.

statutory violations,[35] non-statutory policy violations,[36] and an array of independent tort and contract claims which focus, in varying degrees, upon the egregious character of the employer's discharge decision.[37] Employers have even been held liable for breach of contract stemming from discharges purportedly in violation of an implied covenant of good faith.[38] Such covenants are relied upon must frequently where an employer has failed to follow its own internal policies and procedures in discharging an employee.[39] Indeed, an employer's internal policies and work rules have provided the genesis for some of the most liberal decisions contradicting the concept of at-will employment.

In a single opinion involving the cases of *Toussaint v. Blue Cross/Blue Shield of Michigan* and *Ebling v. Masco Corp.*,[40] the Michigan Supreme Court held that an employment manual providing only for "just cause" termination was legally enforceable even though the resulting employment "contract" was for an indefinite term.[41] According to the court, an implied contractual obligation not to terminate an employee without just cause could eminate from a number of independent sources.[42] Indeed, the employment contract could rely upon express agreement, oral or written employment documents, or, more simply, an employee's legitimate expectations grounded in the employer's policy statements.[43] More certain, however, are oral statements made by employer representatives which were acknowledged as providing sufficient evidence of an implied employment agreement to jus-

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35. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172-78, 164 Cal. Rptr. 839, 843-45 (1980); Peterman v. International Brotherhood of Teamsters, Local 396, 174 Cal. App. 2d 184, 188-90, 29 Cal. Rptr. 399, 344 P.2d 25 (1959); Trombetta v. Detroit, Toledo and Ironton R.R. Co., 81 Mich. App. 489, 494-95, 265 N.W.2d 385, 388 (1978); Murray Corp. of Maryland v. Brooks, 600 S.W.2d 897, 904 (Tex. Civ. App. 1980).

36. *See* Nees v. Hocks, 536 P.2d 512, 512-17 (Or. 1975); Palmatter v. International Harvester Co., 85 Ill. 2d 124, 126-28, 421 N.E.2d 876, 877-88 (1981); Adler v. American Standard Corp., 291 Md. 31, 35-37, 432 A.2d 464, 465-73 (1981); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475-80, 427 A.2d 385, 385-91 (1980).

37. *See* Alcoen v. Ambro Engineering, Inc., 2 Cal. 3d 493, 496-500, 468 P.2d 216, 217-20, 86 Cal. Rptr. 88, 89-92 (1970); Monge v. Beebe Rubber Co., 316 A.2d 549, 550-53 (N.H. 1974); Cartwright v. Golub Corp., 51 A.D.2d 407, 409-10, 381 N.Y.S.2d 901, 902-03 (1976); Agis v. Howard Johnson Co., 371 Mass. 140, 142-45, 355 N.E.2d 315, 316-20 (1976).

38. *See, e.g.*, Chancelleir v. Federated Dept. Stores, 672 F.2d 1312, 1315-20 (9th Cir. 1982), *cert. den.* 103 S. Ct. 131 (1983); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 172-78, 610 P.2d 1330, 1331-36, 164 Cal. Rptr. 839, 840-48 (1980); McKinney v. National Dairy Council, 491 F. Supp. 1108, 1109-23 (D. Mass. 1980).

39. Cleary v. American Airlines, 111 Cal. App. 3d 443, 448-454, 168 Cal. Rptr. 722, 723-30 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 321-30, 171 Cal. Rptr. 917, 918-28 (1981).

40. 408 Mich. 579, 292 N.W.2d 880 (1980).

41. *Id.* at 885.

42. *Id.* at 890.

43. *Id.* at 884-85, 892.

tify submission of the case to the jury.[44]

The *Toussaint* decision went far beyond the mere reliance upon the existence of employer personnel policies as a basis for a contract. In holding that a contract to discharge only for cause was created, the court implied that a contractual obligation could arise even without pre-employment negotiations or employee knowledge of employer policies and practices before employment.[45] The plaintiffs in *Toussaint* offered no evidence that the parties had ever agreed that the policy statements would create contractual rights.[46] Indeed, the statements of policy were not executed by the plaintiffs, nor did the alleged contractual language contain any reference to a specific employee, his/her job description or compensation.[47] While it is unquestioned that the *Toussaint* opinion remains in the forefront of the trend toward liberalization of the at-will employment rule, the Michigan Supreme Court is not a bastion of isolation on this issue.[48]

Generally, the courts have adopted a case-by-case approach when confronted with potential exceptions to the at-will employment doctrine.[49] Even while examining the vitality of the plaintiffs' legal theories, the decisions reflect a balancing of the employee's interest in making a living with the company's interest in running its business, its motive for the discharge and the manner in which the employer effectuated the termination.[50]

V. Observations Concerning the Viability of the Doctrine

The controversy over the concept of employment-at-will will not dissipate easily. Absent definitive legislative intervention, the Iowa courts may gradually move to expand the number of state-recognized exceptions to the rule. Whether this continued deterioration of the doctrine is to be construed in a positive or negative manner will depend upon which party to the employment relationship is interviewed.

Proponents of the movement to expunge the doctrine claim that limitations on the right to discharge will produce employee job security and provide a stable workforce, as well as enhance employee mental and emotional health.[51] It has been estimated that the average cost of training a new em-

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44. *Id.* at 884, n.5 (based on the fact pattern of *Ebling*).

45. *Id.* at 892.

46. *Id.*

47. *Id.*

48. *Cf., e.g.*, Crossen v. Foremost-McKesson, Inc., 537 F.Supp. 1076, 1076-80 (N.D.Ca. 1982); Gram v. Liberty Mut. Ins. Co., ____ Mass. ____, 429 N.E.2d 21, 22-30 (1981).

49. 53 Am. Jur. 2d. Master and Servant, § 27 at 103-04 (1970).

50. *See, e.g.*, Yaindl v. Ingersoll Rand Co. Standard Pump - Aldrich Division, 281 Pa. Super. 560, 563-67, 422 A.2d 611, 618 (1980); Roberts v. Atlantic Richfield Co., 88 Wash.2d 887, ____, 568 P.2d 764, 767-71 (1977); Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796, 802 (Iowa 1976); Allen v. Highway Equipment Co., 239 N.W.2d 135, 136-43 (Iowa 1976); Stauter v. Walnut Grove Products, 188 N.W.2d 305, 306-14 (Iowa 1971).

51. *See supra* note 1.

ployee hovers near $1,000.00, a cost of doing business which conceivably could have a significant impact upon the level of employee wages and fringe benefits.[52] A number of countervailing observations must, however, be noted in defense of enjoining the deterioration of the rule of employment-at-will.

Initially, employers will unquestionably be confronted with additional costs resulting from increased liability for claims of wrongful termination. It can logically be assumed that a portion of those increases will be passed onto the consumer as higher costs for goods and services. The employer's labor force, however, will undoubtedly be called upon to bear some of the cost burden, possibily as reductions to employee wages or fringe benefits and even as curtailment of the size of the workforce. If an employer is *required* to refrain from terminating employees except for verifiable just cause, many proponents of business fear the promotion of incompetence and disloyalty among the employer's "tenured" labor force.[53] Further, discharge only for objective causes infringes upon the right of business to react to changes in the operational environment which may also require radical adjustments in employee staffing. If an employee is granted an entitlement or property right in his or her job, at what point may disinterest or disloyalty on the part of the employee constitute misconduct or cause for discharge? Indeed, utilizing traditional contract theory, what does the employee offer *as consideration* for this promise of "permanent" employment?

A myriad of practical and policy considerations must be confronted in redefining the employment relationship if the doctrine of employment-at-will is expunged. Aside from the aforementioned pragmatic concerns, of parallel significance are a number of thorny legal issues which demand thorough and consistent treatment.

Traditionally, the law of contract has evolved around mutuality of obligation, consideration, and the meeting of the intentions or "minds" of the parties.[54] If a concerted move is made to strip the employment relationship of these so-called "cumbersome" contractual concepts,[55] how does one define with precision the new employment relationship? Unquestionably, the law of tort affords the greatest flexibility in analyzing the employment relationship.[56] However, the pliable nature of tortious causes of action and damages may also constitute that legal theory's most significant drawback.

The duty-bound obligations of tort law are grounded upon an assessment of the measure of gravity of any particular offense in relation to con-

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52. BNA Special Report, *The Employment At Will Issue*, Vol. 111, Labor Special Projects Unit No. 23 at 25 (1982).

53. Levin, *Do Workers "Own" Their Jobs*, Fortune, February 7, 1983; Olsen, *Wrongful Discharge Claims Raised by At Will Employees: A New Legal Concern for Employers*, 32 LAB. L. J. 265, 265-97 (1981).

54. 1A CORBIN, CONTRACTS § 152 (1952); Blades, *supra* note 1.

55. Blades *supra* note 1 at 1421-22.

56. *See, e.g.*, Inre v. Riegel Paper Corp., 24 N.J. 438, 448, 132 A.2d 505, 506-11 (1957); Blades, *supra* note 1 at 1422.

siderations of public policy.[57] How are the parties to define an alleged breach of the employment relationship if the harm incurred does not rise to the level of being clearly contrary to the public interest? How is the relationship to be depicted if the alleged wrongful act of the employer fails to fall within a defined public interest? For example, has an employer who discharges a practicing homosexual with a spotless employment record committed a tort where a sexual preference has not, as yet, generally been accorded statutory or common law protection? At what point may a "whistle blowing" employee be discharged for disloyalty when his public criticism of the employer's operation is founded upon compound hearsay as opposed to credible factual evidence?

Clearly, a host of problems will be unleashed with the Pandora's box of issues created from the judicial erosion and eventual expungement of the doctrine of employment-at-will. Still, employers and their legal counsel would be foolish to ignore the deterioration of the legal defenses formerly available to the business client under the strict interpretation of the at-will employment rule. The perceptive business person would be wisely encouraged to regularly scrutinize the terms and conditions governing the employment of his workforce. Client and counsel should make every effort to extinguish the breeding ground for potential employment claims before they are spawned.

VI. Pragmatic Suggestions to Attorneys and Their Clients for Confronting the "New" Doctrine of Employment at Will

Assuming that the literal application of at-will employment will continue to decline in importance, attorneys must aggressively counsel their business clients on structuring their employment environments to minimize liability for wrongful discharge claims. Since the Iowa courts have yet to reject the basic substance of the employment-at-will rule, the business client should be assisted in conducting a comprehensive "audit" of his employment relations. The purpose of the audit is to identify those potential "trouble" areas where the Iowa courts may eventually find exceptions to the at-will employment rule.

All employment handbooks, personnel manuals, and employment applications should be carefully reviewed to spot any express or implied guarantees of continuous employment absent cause for discharge. While the Iowa courts have been hesitant to recognize the viability of such documents as providing the basis for implied contracts of employment, courts in other jurisdictions have not been so timid.[58] Disclaimers of any permanent employ-

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57. Prosser, Law of Torts § 1 (4th Ed., 1971).

58. Cleary v. American Airlines, 111 Cal. App. 3d at ____, 168 Cal. Rptr. at 723-30; Pugh v. See's Candies, Inc., 116 Cal. App. 3d at ____, 171 Cal. Rptr. at 918-28; Greene v. Howard University, 412 F.2d 1128, 1129-35 (D.C. Cir. 1969); Hinkeldey v. Cities Serv. Oil Co., 470

ment relationship should be inserted in each personnel manual and employment application. Each disclaimer must articulate the existence of employment-at-will and admonish that the relationship may only be altered in writing by the chief executive officer of the company. Every employee should be required to execute a release form acknowledging receipt of the manual as well as his/her agreement to comply with all terms and conditions contained therein.

All company handbooks, employment applications, and work rules should also be carefully scrutinized to avoid guarantees of only "just cause" termination.[59] Care should be taken to eliminate any references in the company documents to distinctions between temporary, probationary, and "permanent" employment. Rather, employees should simply be classified as full-time or regular as opposed to permanent or tenured.

Attorneys should also counsel their clients to review any other company materials which may negate the existence of an at-will employment relationship. Clients who utilize advertising materials or brochures soliciting employees should be particularly careful of avoiding gratuitous representations about "career" opportunities with the company. Obviously, any document which dictates the terms and conditions of employment should be carefully reviewed before dissemination to insure that it does not alter the at-will employment environment.

Business clients often revise their personnel manuals or other documents outlining the terms and conditions of employment. As such, the express right to alter the rules of the workplace without liability for breach of contract must be exclusively reserved to the employer. Retroactive changes in the terms of employment should be acknowledged in writing as received by the workforce and not as negating employment at will or providing any basis for a breach of contract claim.

In implementing the terms and conditions of employment, the employers' supervisory staff must comply with the substance of the personnel manual or workrules in their day-to-day interaction with the workforce. All too frequently employers have carefully dictated the boundaries of the employment relationship only to subsequently find an overly-enthusiastic supervisor has provided a verbal guarantee inconsistent with the substance of the manual and workrules.[60]

Employers can also do much to head off potential civil litigation by

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S.W.2d 494, 495-502 (Mo. 1971); McNulty v. Borden, Inc., 474 F. Supp. 1111, 1113-22 (E.D. Pa. 1979).

59. *Compare* Toussaint v. Blue Cross and Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) *with* Novosel v. Sears, Roebuck and Co., 495 F. Supp. 344 (E.D. Mich. 1980) *and* Johnson v. Nat'l Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976).

60. *Compare* Terrio v. Millenocket Community Hosp., 379 A.2d 135, 137 (Me. 1977) *and* Rabago-Alvarez v. Dart Industries, Inc., 55 Cal. App. 3d 91, 96-99, 127 Cal. Rptr. 222, 225, (1976) *with* Paice v. Maryland Racing Comm'n., 539 F. Supp. 458 (D. Md. 1982).

carefully regulating their dealings with employees entering and leaving the business' workforce. Prior to hiring any new employee, an employer must circumspectly review each applicant to decipher potential employment "trouble" areas.

What is the applicant's prior work history and why did he/she leave previous places of employment? Do listed references verify the applicant's background data? Has the prospective employee willingly executed a Release and Authorization form granting the employer the right to inquire into the employee's past work history, medical history, educational background, and credit standing without liability? Have security checks on the employee verified the applicant's claim of good moral character and absence of criminal record? Has the employee willingly submitted to a physical examination, and, if so, has that examination revealed any potential physical defects which would prevent the employee from performing the normal functions and responsibilities of the position sought?

Undoubtedly, the list of pre-employment inquiries could be substantial and may vary significantly depending upon the type of employment. Nevertheless, every client should be cautioned to carefully review the qualifications of potential applicants in an effort to avoid hiring future employment problems.

In a similar fashion, interaction with employees leaving the client's workforce must be undertaken circumspectly. If misconduct or performance deficiencies provided the foundation for discharge, a reasonable investigation should be conducted of the circumstances relied upon as grounds for discharge.[61] In some jurisdictions the failure to afford an employee recourse to company evaluation and grievance procedures has given rise to a cognizable claim for wrongful discharge.[62] The offending employee should be suspended temporarily, thus permitting the employer to review a number of factors prior to finalizing the decision to terminate. Among those items to be carefully scrutinized by the employer before discharging the employee are:

1. The past practice of the employer concerning this offense;
2. The severity of the offense;
3. The employee's knowledge of workplace rules and standards;
4. The length and quality of the employee's service;
5. The circumstances of the offense;
6. The previous disciplinary history or warnings given this employee;
7. Any grounds serving to mitigate the potential sanction of discharge.

Depending upon the individual case, the emphasis placed on any of the

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61. Schulz v. Hickok Manufacturing Co., 358 F. Supp. 1208 (N.D. Ga. 1973); Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich 1982).

62. Gates v. Life of Montana Insurance Co., 638 P.2d 1063, 1064-68 (Mont. 1982); Schulz v. Hickok Manufacturing Co., 358 F. Supp. 1208, 1210-16 (N.D. Ga. 1973); Hatton v. Ford Motor Co., 508 F. Supp. 620, 622-40 (E.D. Mich. 1981).

aforementioned factors may differ. If the employee is a long term company employee, the length of service should be given significant weight in evaluating the decision to discharge. Many of the decisions rendered by courts in other jurisdictions have seemingly had the merits of the wrongful discharge claim swayed convincingly by the long length and good quality of the employee's work record.[63] An employer would be ill-advised to overlook such "equitable" considerations since it is likely that a court or jury evaluating the propriety of the discharge will not.

Assuming discharge is subject to internal employer review, equitable treatment of the employee's claims must be given. Ignoring the established terms of the discharge review process could pin liability on an employer simply because the requisite procedures have not been uniformly and scrupulously followed.[64] Clients utilizing an internal complaint procedure should be assisted in evaluating the steps of the review process to insure that it may be easily applied in practice.

Even the mechanics of actually discharging an employee must be thoughtfully constructed. Prior to making a decision to terminate, the employer should carefully evaluate the potential ramifications of the decision. Is the employee a member of a protected class? Does the employee's personnel file substantiate the reasons for causal discharge? Do legitimate business reasons support the employee's removal from the workforce? Has the company's decision to terminate been carefully evaluated in light of its past practice? Does the company's experience with the employee indicate the likelihood of litigation over the decision to terminate?

When conducting the termination conference, business employers should present the employee with documentation accurately substantiating the reasons for discharge. Witnesses on behalf of the company should be present at the termination conference. All internal company communications concerning the termination should be treated as confidential to avoid the defamation tort claims of libel and slander per se.[65]

If the company has solicited the employee's voluntary resignation, the advisability of granting severance pay in consideration for an executed release of all employment-related claims against the company should be evalu-

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63. Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 117 Cal. Rptr. 917 (1981); Savodnik v.Korvettes, Inc., 488 F. Supp. 822, 824-27 (E.D.N.Y. 1980); Fortune v. National Cash Register, 373 Mass. 96, ___, 364 N.E.2d 1251, 1253-59 (1977); Sherman v. St. Barnabus Hospital, 535 F. Supp. 564, 573-74 (S.D.N.Y. 1982).

64. Chancelleir v. Federated Department Stores, 672 F.2d 1312 (9th Cir. 1982), *cert. denied* 103 S. Ct. 131 (1983); Crossen v. Foremost-McKesson, Inc. 537 F. Supp. 1076 (N.D. Ca. 1982); Hepp v. Lockheed California Co., 86 Cal. App.3d 714, 717-19, 150 Cal. Rptr. 408 (1978); Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1068-84 (W.D. Mich. 1982); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 652, 576 P.2d 356, 359-360 (Sup. Ct. 1978).

65. *See, e.g.*, Pierre v. Printing Developments, Inc., 468 F. Supp. 1028, 1030-44 (S.D.N.Y.1979); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1388-91 (S.D. Ind. 1982).

ated.[66] The employer must also promptly pay any accrued and vested commissions or fringe benefits which are conceded as owing the employee to avoid prospective liability under applicable state legislation.[67] Finally, counsel for the employer must not allow his client to lose sight of considerations of workforce morale which may be affected as a result of a decision to terminate an employee. Few workplace decisions can fuel the fires for unionization more rapidly than the inequitable discharge of a respected employee.

VII. Handling Wrongful Discharge Litigation

Unfortunately, even the most attentive client may be forced to defend an employment decision against claims of wrongful discharge. Accordingly, counsel should be conversant with a number of practical issues which will facilitate assisting his client in avoiding unnecessary liability in civil litigation.

A claim for wrongful discharge will likely be accompanied by a host of additional causes of action.[68] Painstaking care must be exerted in evaluating the legal theories contained in a petition or complaint as each claim generally carries with it distinct elements, remedies, and even periods of limitation. Clearly, imaginative plaintiffs' counsel have successfully blurred the line separating contract and tort claims with such regularity that it is now commonplace to see contract-related claims demanding punitive damages and tort theories encompassing contract elements.[69]

Counsel for business clients must also be cognizant of a number of pragmatic concerns in actually litigating the defense of the discharge decision. Initially, because of the erosion of the doctrine of employment-at-will, state and federal courts have become more reluctant to grant an employer's mo-

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66. *See, e.g.*, Wise v. Midtown Motors, Inc., 231 Minn. 46, 50, 20 A.L.R.2d 735, 735-53 (1950); Bachorik v. Allied Control Co., 34 A. D.2d 940, 941-42, 312 N.Y.S.2d 272, 273-75 (1970).

67. *See, e.g.*, Iowa Wage Payment Collection Law, Iowa Code § 91A.7, (1983).

68. Some examples of potential causes of action which may be combined with a breach of contract or tortious wrongful discharge claim include theories involving: (1) intentional infliction of emotional harm; (2) interference with contractual relations; (3) interference with prospective contractual advantages; (4) violations of ERISA and state statutory protections for pension and retirement plans; (5) age, race, sex, and disability discrimination; (6) defamation claims including libel or slander; (7) breach of an implied covenant of good faith and fair dealing; (8) violations of veteran's preference statutes or civil service statutes; (9) negligence; (10) claims for unpaid compensation, commissions and fringe benefits under the Iowa Wage Payment Collection law, Ch. 91A; (11) constitutional claims including alleged violations of the First Amendment right of free speech where an employee has publicly criticized his employer, and, in the public sector, Fifth and Fourteenth Amendment claims concerning deprivation of property and liberty interests or entitlements purportedly arising out of public employment; (12) loss of consortium; (13) assault and battery; (14) fraud and misrepresentation; (15) promissory estoppel; (16) civil rights claims under 42 U.S.C. § 1983.

69. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 174-75, 164 Cal. Rptr. 839, 848 (1980); Cleary v. American Airlines, 111 Cal. App. 3d 443, 445, 168 Cal. Rptr. 722, 723 (1981); Agis v. Howard Johnson Co., 371 Mass. 140, ____, 355 N.E.2d 315, 317-19 (1976).

tion for summary judgment predicated upon the doctrine.[70] Consequently, counsel for the employer must be prepared for the likelihood of litigation on the merits of the employee's wrongful discharge claims.

Given the rapid growth of viable legal theories in this area, defense counsel must constantly seek to isolate individual claims, particularly in jury trials. Assuming the plaintiff has alleged a number of different counts, the defendant employer should always seek separate verdicts and instructions on each of the plaintiff's claims. Indeed, "mixed theory" cases make it imperative that the jury's role be circumscribed in advance of trial. The employer's counsel may wisely use the pretrial order as a basis for filing a motion in limine to exclude prejudicial evidence and define the jury's fact-finding role.[71]

The critical issue placed before the jury or the court in any wrongful discharge action is the essential question of whether the employee was treated *fairly* by the employer.[72] Defense counsel must correspondingly synthesize the employer's case to convince the trier of fact that the employee was treated in a fair and impartial manner. Invocation of a grievance or complaint procedure in a fair and uniform manner is an example of one evidentiary fact which can work to the employer's benefit in presenting the defense on the just cause issue.

The issue of just cause in civil litigation essentially encompasses an analysis of labor arbitration law on the causation issue. Thus, factors such as compliance with plant standards and procedures, past practices, employee awareness of rules and regulations, length of service of the employee and quality of that service, warnings and efforts to correct employee conduct, evaluation of discipline for similar offenses, and appeals to the trier of fact's sense of equity are all items logically bearing upon proof problems on the just cause issue.[73]

The extent of appropriate damages in litigation for wrongful discharge

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70. *Compare* Hepp v. Lockheed-California Co., 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978) and Foster v. Swift and Co., 615 F.2d 701 (C. A. Tex. 1980) (summary judgment denied) *with* Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978) *and* Trombetta v. Detroit, Toledo and Ironton Railroad Company, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (summary judgment granted).

71. Defense counsel may choose to argue that the jury does not have sufficient expertise to determine good cause as the ultimate question but only to determine whether the employer acted in good faith. For example, in *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 918-20 (1981), the court found that the jury was not allowed to substitute its judgment for that of management and, as such, could only decide the issue of the employer's good faith in enacting a decision to discharge the plaintiff.

72. R. J. Cardinal Co. v. Ritchie, 218 Cal. App. 2d 124, 144-45, 32 Cal. Rptr. 545, 547 (1964).

73. *Compare* Yaindl v. Ingersoll-Rand Co. Standard Pump - Aldrich Div., 281 Pa. Super. 560, ____, 422 A.2d 611, 620 (1980) *with* Boresen v. Rohm and Haas, Inc., 526 F. Supp. 1230, 1231-35 (E.D. Pa. 1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 445, 168 Cal. Rptr. 723, 728.

also provides another pitfall for the inattentive employer. Counsel for the business employer must see to it that contractual theories are not commingled with claims for compensatory and exemplary damages that are typically available only under tortious causes of action.[74] Further, the business client should be made aware of the fact that a claim for punitive damages may permit the parading of the employer's assets as evidence before the jury. Monetary damages will inevitably be the relief awarded as civil courts are generally reluctant to order reinstatement where an amicable employment relationship has been destroyed by the discharge.[75] Again, counsel must tenaciously isolate claims and damages in an effort to provide an appropriate foundation for appeal should his employer client fare poorly before the trial court.

Aside from the obvious array of factual defenses potentially available to his employer client, counsel should also not lose sight of the cadre of procedurally-related defenses which may be applicable in any given case. Federal preemption, exhaustion of contract and administrative remedies, exclusivity of Workers' Compensation statutes, statute of limitations, privileges, laches, waiver, estoppel and mitigation issues may all be available as defenses in a wrongful discharge case.[76]

Finally, thorough preparation of company witnesses is an absolute necessity. The court or jury must be the recipient of the most comprehensive and credible "personal" evidence which the employer is capable of marshalling. Company testimony which is disorganized, flippant or which smacks of arbitrary and capricious management action negates claims of impartial and thoughtful decision-making.

VIII. Conclusion

Whether one is a supporter or critic of the doctrine of employment-at-will, there can be little question that the rule is undergoing an evolutionary legal transformation. Barring judicial or legislative consensus on the continued vitality of the doctrine, both employees and employers will continue to struggle to persuade the courts that their respective positions on the rule are supported by sound legal, economic, and policy considerations.

In Iowa, perhaps the only current conclusion which can be safely drawn is that the strict doctrine of employment-at-will may no longer be applicable. As a consequence, it is incumbent upon all business clients retaining employees in a non-unionized environment to attentively evaluate the substance of their employment relations.

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74. *See supra* note 64 and accompanying text.

75. *See* Chancellier v. Federated Dept. Stores, 672 F.2d 1312 (9th Cir.), *cert. den.* 103 S. Ct. 131 (1982).

76. *See* Selignan, *At-Will Termination: Evaluating Wrongful Discharge Actions, Trial* at 60-64 (February 1983).

A heightened concern over the potential legal ramifications of employee terminations cannot guarantee that wrongful discharge litigation will not be pursued. However, elevated awareness of the potential sources of liability will assist counsel and client in avoiding unnecessary liabilities for wrongful employee termination.

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