



Spring 1982

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Eric Isbell-Sirotkin

University of New Mexico - Main Campus

Recommended Citation

Eric Isbell-Sirotkin, *Defending the Abusively Discharged Employee: In Search of a Judicial Solution*, 12 N.M. L. Rev. 711 (1982).

Available at: <https://digitalrepository.unm.edu/nmlr/vol12/iss2/4>

DEFENDING THE ABUSIVELY DISCHARGED EMPLOYEE: IN SEARCH OF A JUDICIAL SOLUTION

ERIC ISBELL-SIROTKIN*

I. INTRODUCTION

The industrial expansion of the last 100 years has spawned a presumption that, without some formal agreement to the contrary, a worker is employed at the "will" of his employer.¹ An employer's exercise of such arbitrary control can lead to hardship for a worker which is difficult to remedy. An employee may make great financial and psychological investments in reliance on an employer's representations of a secure future, but find no avenue of redress when terminated in bad faith or for a non-job-related reason. Under this presumption, all workers may face the dilemma of risking their livelihoods and chances of being rehired if they file an injury claim, participate in a judicial proceeding, or make complaints about illegal company practices.² Terminated employees may lose economic stability, self-esteem and psychological gratification, and gain only the stigma inherent in such a discharge.³ By contrast, even if an injured worker brings a lawsuit for wrongful discharge, an employer risks only money damages and may win his case merely by pointing to the presumption that he may terminate at will.

Concern for the interests and expectations of workers has led to a recent nationwide trend toward abolishing the obstacles posed by the "employment at will" presumption. Courts have begun to question an employer's right to terminate for reasons not related to performance on the job.⁴

*Attorney, Reiselt and Rosenfield, Albuquerque, New Mexico. The author wishes to thank Joseph A. Golden, a fellow practitioner advocating the rights of discharged employees, and to dedicate this article to workers everywhere struggling for recognition and respect.

1. This presumption provided for discharges at the mere whim of the employer. See *infra* text accompanying note 8.

2. "In purchasing labor does the employer buy the right to regulate the employee's day as he sees fit? Does he purchase the right to ignore the proprieties of conduct, or must he treat the employee with decency and respect for his physical and psychological needs?" P. Selznick, *Law, Society, and Industrial Justice* 135 (1969).

3. A U.S. Department of Labor report demonstrated that "[a] change of occupational specialty usually requires some degree of risk and may require long-term investment in retraining." U.S. Dept. of Labor, *Emp. & Training Admin., Emp. & Training Report to the President* 135 (1976).

4. One must not merely view the employment relationship from simply the employer's perspective. While such protection may lead to a few small employers being "stuck" with employees for whom they don't personally care, the benefits of a secure and respected labor force far outweigh these interests. As one court recently found, "it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employees' interest in earning a livelihood, and society's interest in seeing its public policies carried out." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 126, 421 N.E.2d 876, 878 (1981).

More courts now accept the premise that there are "areas of an employee's life in which an employer has no legitimate interest."⁵

This trend has not yet appeared in New Mexico courts.⁶ Because fewer New Mexicans are self-employed each year,⁷ and most employees in New Mexico are unorganized,⁸ most workers in New Mexico still face arbitrary dismissal of their complaints when they sue for wrongful discharge. This article will first demonstrate that in light of the foundations of the "employment at will" presumption and the sociological realities of today, employees in New Mexico should be accorded protection from abusive discharges by abolishing the presumption of "employment at will." Attorneys, as the conduit from the community to the judicial system, possess a special responsibility for helping return a sense of fair play to the workplace. Therefore, the second purpose of this article is to show the general practitioner in New Mexico how to find and recognize aspects of the employment relationship which could serve as a basis, in tort or in contract, for a cause of action for wrongful or abusive discharge.⁹

5. *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *see also* *Hunter v. Port Authority of Allegheny City*, 277 Pa. Super. 4, 419 A.2d 631, 636 (1980).

6. A recent New Mexico case, *Bottijliso v. Hutchinson Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981), appeared to ignore the movement toward granting a cause of action for wrongful discharge, and may be read to reject it. However, the decision is arguably narrow, because it may be confined to the "precise" instance of discharge for filing a workmen's compensation claim. In addition, the *Hutchinson Fruit* decision suffers from various misconceptions. First, the court mistook the granting of such a cause of action as a "proposed legislative change." 96 N.M. at 790, 635 P.2d at 993. It held that "[t]he sagacity of making changes in the workmen's compensation statutes, or rights created thereunder, has been generally held to be outside the province of the courts." *Id.* at 794, 635 P.2d at 997. Second, the court "adhered" to the "at will" rule under an inappropriate mutuality doctrine that "an employee may sever his employment at any time voluntarily." *Id.* at 791, 635 P.2d at 994. *See infra* text accompanying note 22. Third, the court admitted that it has acted to abolish common law defenses that are outdated, and gave as examples sovereign immunity, assumption of the risk, and contributory negligence. It then ironically concluded that the legislature should decide because of the "long-standing recognition of the 'at will' rule." *Id.* *Cf.* *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), which held:

The doctrine of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary. [Citations omitted.] Merely because a court made rule has been in effect for many years does not render it vulnerable to judicial attack once it reaches a point of obsolescence.

Id. at 589-90, 544 P.2d at 1154-55.

7. In September of 1981 there were 37,000 self-employed people in New Mexico amidst some 471,400 jobs (7.85%). In 1970, however, there were 294,00 jobs, with 25,300 self-employed (8.85%). Employment Security Department, Department of Research and Statistics. Telephone interview with Larry Blackwell, Economic Analyst III (Nov. 1981).

8. The average worker in New Mexico is not a member of a labor organization. Less than one-third of the national employed labor force enjoys this protection. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976) [hereinafter cited as Summers]; *see also* U.S. Bureau of the Census, Dept. of Commerce Statistical Abstract of U.S. 1979, at 392.

9. The terms "wrongful discharge" and "abusive discharge" are used interchangeably in this article, because the author views all wrongful discharges as "abusive." *See infra* text accompanying notes 23-32.

II. THE "EMPLOYMENT AT WILL" DOCTRINE SHOULD BE ABOLISHED

A. *Historical Perspectives*

The "employment at will" doctrine is based on the premise that an employment relationship without a specific duration is terminable by either party at any time "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹⁰ The doctrine is of relatively recent origin. Early English common law did not recognize such an open-ended relationship, but instead provided that a hiring for an indefinite period should be considered to be a hiring for one year. Blackstone wrote:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle on natural equity, that the servant shall serve and master maintain him, throughout all the revolutions of the respective season, as well when there is work to be done and when there is not.¹¹

At first, most jurisdictions in the United States adopted the British common law rule.¹² There was no presumption that an employee worked "at will," because the original master/servant relationship existed then in a highly personalized setting with a sense of commitment and responsibility on the parts of both parties.

As the nineteenth century progressed and production increased, the master/servant relationship became more commercial and impersonal.¹³ Employer and employee came into less contact with each other, and, as a result, "many workers became farther removed from ownership."¹⁴ In addition, the last third of the nineteenth century produced three financial panics and a severe depression.¹⁵ The labor force, desperate for work,

10. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884).

11. 1 W. Blackstone, *Commentaries* 425. The Statute of Labours also proscribed a duty to work and prohibited a worker from leaving his employment or an employer from discharging a servant before the end of the season. 5 Eliz., ch. 4 (1562).

12. See *Graves v. Lyon Bros. & Co.*, 110 Mich. 670, 68 N.W. 985 (1896); *Chamberlain v. Detroit Stove Works*, 103 Mich. 124, 61 N.W. 532 (1894); *Davis v. Gorton*, 16 N.Y. 255 (1857).

13. Philip Selznick wrote that modern employment often lacks any sense of duty or "relationship," and therefore, "[f]rom a legal point of view, the encounter is as casual as the sale of a newspaper on a city street." P. Selznick, *Law, Society, and Industrial Justice* 134 (1969).

14. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 132 (1976) [hereinafter cited as Feinman]. Professor Feinman's excellent article discusses the relationship between the "employment at will" theory and the development of advanced capitalism. *Id.* at 135. As a method to "control labor" by the "owners of capital," the "employment at will" theory became the "ultimate guarantor of the capitalist's authority over the worker." *Id.* at 132-33. Feinman adds, "If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor." *Id.* at 133.

15. Mathews, *A Common Law Action for the Abusively Discharged Employee*, 26 Hastings L.J. 1435, 1440 n.23 (1975).

was not in a position to insist upon job security from employers, or upon the principle of "natural equity" which Blackstone had described. The pure capitalism concepts of the late nineteenth century did not provide economic benefits to a worker as a matter of "natural equity." Only if some economic incentive existed would such benefits be provided, and there were no such incentives. Under pure capitalism, the worker lost any economic and social right to be secure in his livelihood. This loss can be explained as simply a natural consequence of the laissez faire approach to freedom of contract.¹⁶ This laissez faire theory served to alter the mutual responsibility which once existed between employers and the work force. What remained was a precarious relationship based solely on economics, which was subject to the "master's" whim.

In 1877, Horace Gray Wood, an Albany lawyer, codified this laissez faire mood in his treatise, *Master and Servant*, writing:

With us the rule is inflexible, that a general hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party. . . .¹⁷

Despite accusations of "scholarly disingenuity" for Wood's sources substantiating this inflexible rule,¹⁸ the courts began to cite Wood's rule, that general hiring is hiring at will, as authority in defense of the arbitrary discharge of employees.¹⁹

The unrestrained right to discharge an employee at will grew until it gained constitutional protection. In *Adair v. United States*,²⁰ a federal statute prohibiting employers from discharging employees for their union activities was declared unconstitutional as an unjust interference with freedom to contract and the right of the employer to acquire "property." In *Adair*, the employer argued that he had a property right in regulating his workplace in such a manner that he could fire at will, and that the statute deprived him of this right without due process of law. The Court agreed. In support of its decision, the Court stated that the employee had a corresponding right, guaranteed by due process, to leave such employment at will. This established the mutuality doctrine that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense

16. The spread of the concept may also be attributed to the social Darwinism fervor of the period which espoused theories of natural selection. The theory suggested a clear division between those who were the superior "masters" and those who were the weaker "servants."

17. Wood, *Master and Servant* § 134, at 272 (1877).

18. For a discussion of Wood's use of cases "far off the mark," "scholarly disingenuity" in describing history, and failure to state any policy grounds, see Feinman, *supra* note 14, at 126.

19. See, e.g., *Martin v. New York Life Ins. Co.*, 42 A. 416, 148 N.Y. 117 (1895).

20. 208 U.S. 161 (1908).

with the services of the employee[e]."²¹ Because either party had the right to terminate, the Court reasoned, an "at will" presumption left the parties equal, and a statute should not interfere with that equal bargaining power.²² The Court's argument failed to recognize the reality of those times when work was such a rare commodity that an employee could not readily exercise his right to quit and seek or begin other employment. The Great Depression sharpened this reality and brought to light the abuses inherent in absolute power to terminate on the part of the employer.

In the 1930s, Congress again acted to correct these abuses.²³ The Supreme Court finally acceded to the change. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,²⁴ the Court upheld protection of an employee's right to argue for better working conditions under the National Labor Relations Act. The Court first agreed, in general terms, that the public's interest in industrial peace, as expressed by the legislature, could outweigh the absolute power to discharge. The Court also finally recognized that the inequality of bargaining power and the growing immobility of workers made an employee entirely "dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair

21. *Id.* at 174-75. See also *Coppage v. Kansas*, 236 U.S. 1 (1915). Note the view of mutuality in *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 139 So. 760 (1932), which held:

An employee is never presumed to engage in services permanently, thereby cutting himself off from all chances of improving his condition; indeed in the land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of mutuality.

Id. at 67, 139 So. at 761.

22. 208 U.S. at 174-75. This mutuality doctrine today still impedes efforts to abolish "employment at will." See discussion of *Bottijliso v. Hutchinson Fruit*, 96 N.M. 789, 635 P.2d 992 (Ct. App. 1982), *supra* note 6. This applicability of the doctrine has been dispelled by some courts, however. These courts view the "at will" rule as a "harsh outgrowth of the notion of reciprocal rights and obligations in employment relationships." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 121, 421 N.E.2d 876 (1981); see also *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In *Pugh*, the court found that "[a] contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the employee to quit his employment." *Id.* at 925. These cases hold that the enforceability depends "on consideration and not mutuality of obligation. *Toussaint v. Blue Cross*, 408 Mich. 579, _____, 292 N.W.2d 880, 885 (1980). Simply because an employee was able to include the right to be treated fairly in his bargain does not necessitate his giving up his right to quit. The Michigan Supreme Court, in *Toussaint*, found that an employer may actually have received "an orderly, cooperative and loyal workforce" in exchange for granting the employee "the peace of mind associated with security and the conviction that he will be treated fairly." *Id.* at _____, 292 N.W.2d at 892.

23. National Labor Relations Act of 1935, 49 Stat. 449, 29 U.S.C. § 451 (1976).

24. 301 U.S. 1 (1937).

treatment."²⁵ This recognition of the employee's role and stake in the economic system began to erode the presumption that an employer had an unqualified right to discharge. The highest court in the land now understood that "[t]he general reason behind this development in the common law seems to have been to give maximum freedom to expanding industry."²⁶

Today, partly because of the lessons of the Great Depression, the need to protect expanding industry is not the only goal to be considered.²⁷ Greater protection of the worker and the consumer is the trend in both the legislature and the courtroom.²⁸ In the light of these recognized economic realities, the "employment at will" presumption is an anachronism and should be abandoned.

B. Sociological Realities

An understanding of the purely social impacts of absolute employer discretion over employment indicates as clearly as do the historical and economic analyses that the "employment at will" presumption should be abolished. Today's immobile labor market²⁹ presents higher stakes for employees, and leaves the employer with enormous power over a worker's livelihood. The Illinois Supreme Court recently explained this phenomenon by stating: "With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic."³⁰ Thus, a worker's loss in being fired is not only economic, but social. She³¹ carries the stigma of having been discharged, with a concomitant loss of self-esteem. She may also have difficulty finding another job.³²

Modern social realities demonstrate how an employer's absolute right

25. *Id.* at 33.

26. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 59 (1943).

27. *See infra* note 130.

28. *See, e.g.*, cases and statutes *infra* notes 128, 174.

29. Geib, *Non-Statutory Cause of Action for an Employer's Termination of an "At Will" Employment Relationship*, 24 N.Y.L. Rev. 743 (1979) (citing J. Galbraith, *American Capitalism* 114 (2d ed. 1956) and Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1405 (1967) [hereinafter cited as *Blades*]); *see also* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 126, 421 N.E.2d 876, 878 (1981).

30. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 126, 421 N.E.2d 876, 878 (1981).

31. The author prefers to use "she" at various points throughout the article in order to assist the trend away from male-oriented classifications.

32. Other states have recognized the economic and social evils of the "at will" presumption. *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) ("We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good."); *see also* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 126, 421 N.E.2d 876, 878 (1981) ("[U]nchecked employer power . . . has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole.")

to discharge leads to abuses. Even a failure to rehire an employee imposes on him "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."³³ Work also "plays a crucial role in the individual's psychological identity and sense of order."³⁴ As one court explained:

Every man's employment is of utmost importance to him. It occupies his time, his talents and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security.

In days gone by, a man's occupation literally gave him his name. Even today, continuous secure employment contributes to a sense of identity for most people.³⁵

Therefore, it is likely than an abusive discharge will "affect the self-esteem of employees no less severely than it affects their economic well being."³⁶

The "psychological comfort inherent in ordered relationships binds workers to their jobs," and, when coupled with today's increased occupational immobility, makes them vulnerable to the expanding economic power of their employers.³⁷ This vulnerability arises primarily because the "substance of life is in another's hands."³⁸ While the abuses of this inequality of bargaining power were substantiated many years ago,³⁹ it is only recently that courts have begun to recognize that the "economic relationship between the parties require[s] some modification of the unfettered right to discharge."⁴⁰ Replacing a worker's fear that his livelihood

33. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). In *Roth*, failure to rehire a state university professor brought a due process challenge. The court did not allow the claim because the professor failed to demonstrate a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The employee must demonstrate any stigma. The court will not presume a stigma from the refusal to re-employ. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). The employee might demonstrate this through post-termination refusals to hire. Also the older the worker, the greater the difficulty of finding other employment. See *infra* text accompanying note 110.

34. Report of Special Task Force to Secretary of HEW, *Work in America* 825, at 2-23 (1972) [hereinafter cited as *Work in America*].

35. *Lowe v. Hotel & Restaurant Employees Union, Local 705*, 389 Mich. 123, 142, 205 N.W.2d 167, 178 (1973) (action by union employee against union concerning his wrongful discharge).

36. *Work in America*, *supra* note 34, at 22.

37. *Shapiro & Tune, Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335, 338-339 (1974) [hereinafter cited as *Shapiro & Tune*].

38. *Blades*, *supra* note 29, at 1404 (quoting F. Tannenbaum, *A Philosophy of Labor* 9 (1951)).

39. Congress, in adopting the National Labor Relations Act in 1935, found "[i]nequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151 (1935).

40. *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1364 (3d Cir. 1979). In *Perks*, an employee was required to take a polygraph test as a condition of employment. The court allowed a "tortious discharge" action, if the discharge resulted from the plaintiff's failure to submit to the examination. *Id.* at 1366.

rests upon the whim of his "master," will help restore a degree of respect to the profession of working.⁴¹

Yet, granting a cause of action for abusive discharge is not a unilateral bargain which unfairly ties the hands of the employer. It is in the interest of all concerned to restore confidence in the abilities and opportunities of workers for secure employment by recognizing their stake in the economic system. A recent conference on "Work in America" found that "[w]orkers are unlikely to perform well if they have inadequate job security."⁴² The conference concluded that "[j]ob security is basic to employee cooperation with change. It will enhance both productivity and the quality of working life."⁴³ One commentator noted:

Productivity depends upon more than strict managerial authority and hierarchical order. The continuity and expertise supplied by a stable workforce, the benefits from loyalty, and the savings from reduced training costs and lower turnover all contribute to the long-run success of an enterprise.⁴⁴

Thus, the abandonment, or at least modification, of the "employment at will" presumption could prove advantageous for all concerned.⁴⁵

III. ESTABLISHING A CAUSE OF ACTION

The sociological realities indicate that it is only a matter of time before the presumption of employment "at will" is abolished. As that presumption disappears, employees' suits against employers for wrongful discharge will increase. An attorney who takes such a case must analyze and prepare the case carefully.

For the practicing attorney with a possible wrongful discharge case, the first step is to examine the kinds of facts which can give rise to a suit for abusive discharge, and to consider the approaches which may establish a cause of action for the client. One approach has been to

41. The concept of "work" as a "profession" arose recently in light of the research of Studs Terkel. Terkel asks, "Ought not there be an increment earned though not yet received, from one's daily work—an acknowledgement of man's being?" S. Terkel, *Working*, xv (1972). Terkel's excellent study demonstrates the growing separation of employers from the needs of their employees. He says: "Bob Cratchit may still be hanging on, . . . but Scrooge has been replaced by the conglomerate. Hardly a chance for Christmas spirit here. Who knows Bob's name in this outfit—let alone his lame child's." *Id.* at xvi.

42. Work in America Institute, Final Report of the Oct. 16-18, 1978, Symposium, *Work in America: The Decade Ahead* 5 (1978).

43. *Id.* Dec. 13-15 Symposium 4 (1978).

44. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 Harv. L. Rev. 1816, 1835 (1980).

45. The United States remains one of the few industrial nations which has not passed general protection against "socially unwarranted dismissals" based on reasons unconnected with employment. For a discussion of such practices in France, Great Britain, Germany, and Sweden, see Summers, *supra* note 8, at 508-19.

examine carefully the "agreement" between the parties to determine if there has been a breach of contract.⁴⁶ Another approach is to determine whether the circumstances surrounding the discharge are so violative of principles of public policy that the employee should be able to have a remedy sounding in tort.⁴⁷ While a lawyer may wish to argue both, a hybrid cause of action based on the contractual relationship, but sounding in tort, appears most appropriate.⁴⁸

A. *Express or Implied Practices*

In New Mexico, the "employment at will" presumption does not prevail over an express or implied contract for employment which specifies some duration. The New Mexico courts have recognized the common law right to discharge an employee at any time "for just cause or not," but have made it clear that the right does not exist if it "is restricted by agreement."⁴⁹

Therefore, a lawyer who accepts a wrongful discharge case must determine exactly what was the agreement between the employer and the employee. To make this determination, the lawyer should examine the intent of the parties as evidenced in negotiations, business usage, the situations of the parties, and the nature of the circumstances surrounding the employment.⁵⁰

The attorney must make a thorough factual examination in order to determine whether an employer's conduct restricted his right to discharge the employee. An evaluation of these facts may yield an employer's implied or express practice which precludes abusive dismissals or suggests that an employee has given some additional consideration sufficient to support a claim of protection from arbitrary treatment. Different facts may give rise to different pleading strategies.

I. *Assurances*

The easiest case to argue is where there has been some oral or written agreement concerning conditions of discharge. This usually takes place

46. This has often been called an implied contract. See Shapiro & Tune, *supra* note 37, at 335.

47. See cases cited *infra* note 128.

48. See *infra* text accompanying notes 217-219.

49. Jones v. International Union of Operating Engineers, 72 N.M. 322, 327, 383 P.2d 571, 576 (1963). This agreement "may be express or implied; a course of conduct may give rise to a contract implied in fact." Hillis v. Meister, 82 N.M. 474, 475, 483 P.2d 1314, 1315 (Ct. App. 1971). These agreements arguably have a strong basis in New Mexico, in that "[p]ublic policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contract unless they clearly contravene some positive law or rule of public morals." Lynch v. Santa Fe Nat'l Bank, ___ N.M. ___, 627 P.2d 1247, 1253 (Ct. App. 1981), *cert. denied* (1981) (exculpatory clause in escrow account upheld) (quoting General Elec. Credit Corp. v. Tidenberg, 78 N.M. 59, 428 P.2d 33, 40 (1967)).

50. "The primary objective in construing a contract is to ascertain the intent of the parties." Schultz & Lindsay Constr. Co. v. State, 83 N.M. 534, 535, 494 P.2d 612, 613 (1972).

at the employment interview. One commentator analogized the interview to other types of contract negotiations "wherein the parties set the terms of the contract, albeit in a ritualized and symbolic way."⁵¹ Employees often receive various assurances at the recruiting stage. The lawyer must find out what an employee was told at the time of hiring. The employer and employee might have discussed job security or promotions. The employer might have led the employee to feel that she could be fired only for certain reasons. These facts are all important. While a contract without specific duration has been deemed a contract at will, the trend has been to allow the intentions of the parties to be the "ultimate guide."⁵²

Some courts have held that promises that an employee would only be fired for "just cause," if relied upon by the employee to her detriment, would create a cause of action for wrongful discharge. In *Ryan v. Upchurch*,⁵³ an Indiana federal district court heard a case involving a woman who accepted a position because she was promised that she would not be discharged except for cause. These assurances further induced her to take part in the company's pension and profit-sharing plan. The company terminated Ms. Ryan and failed to give her a reason. The lower court determined that "if the employer made a promise, either express or implied, . . . that employment is not terminable by him 'at will,' " and the employee has either "given any other consideration, . . . begun or rendered some of the requested service, or has acted in reliance on the promise," the assurances are a valid unilateral contract which cannot be breached without showing just cause.⁵⁴ The court cited Professor Corbin for the proposition that "when parties make a contract of employment without specifying the length of service, but indicate that it is not terminable at will, the legal effect is that the parties are bound for a reasonable time."⁵⁵ The Seventh Circuit Court of Appeals reversed this far-reaching decision and warned that "not every promise by an employer will bind him to a contract."⁵⁶ The court of appeals, however, reiterated that an employee could have a cause of action, but must show a "detrimental reliance on [the] employer's promise" not to fire her except for cause."⁵⁷ Ms. Ryan had failed to make such a showing.

The recruitment discussion need not mention the terms "just cause"

51. Comment, *Employment at Will and the Law of Contracts*, 23 Buffalo L. Rev. 211, 214 n.21 (1974). The lawyer can ascertain this promise of employment during satisfactory performance by examining the facts and circumstances of the employment. Promotions, more authority and raises may be indications that the employee has performed satisfactorily and can expect to have a secure position.

52. *Geib v. Alan Wood Steel Co.*, 419 F. Supp. 1205, 1208 (E.D. Pa. 1976).

53. 474 F. Supp. 211 (S.D. Ind. 1979).

54. *Id.* at 215-216.

55. *Id.* at 219. See 3A Corbin on Contracts § 684 (1960 & Supp. 1971).

56. 627 F.2d 836, 837 (7th Cir. 1980).

57. *Id.* at 838 n.2.

in order to bind the employer. In *Toussaint v. Blue Cross & Blue Shield*,⁵⁸ the vice president of the company assured Ebling, a co-appellant, as an inducement for him to accept employment, that the vice president would personally review Ebling's job performance. The vice president further assured Ebling that he would not be discharged "if he was doing his job."⁵⁹ Ebling was fired without any prior complaints and without the hearing provided by the oral "employment contract."⁶⁰ The Michigan Supreme Court justices concluded:

When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause). The result is that the employee, if discharged without good or just cause, may maintain an action for wrongful discharge.⁶¹

Therefore, New Mexico lawyers must probe carefully for express promises. Established New Mexico case law "requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals."⁶²

2. Company Policy

Company policies concerning standards for discharge, either written statements communicated to the employee or prevailing practices, can have binding effect. Some courts have used handbook provisions on severance pay, bonuses and other compensation, which imply continued employment, to defeat the "at will" presumption.⁶³ With more and more courts looking past an "at will" label to determine the intent of the parties, attorneys must scrutinize "the language used, the purpose to be accomplished and the circumstances under which the agreement was made"⁶⁴ to determine whether they constituted an offer to contract.

58. 408 Mich. 579, 292 N.W.2d 880 (1980).

59. *Id.* at 884.

60. *Id.* at 884 n.5.

61. *Id.* at 890. The termination precluded Ebling from exercising a stock option plan. He was awarded \$300,000 at trial. The Michigan Supreme Court upheld the judgment.

62. *Lynch v. Santa Fe Nat'l Bank*, ___ N.M. ___, ___ P.2d ___ 627 P.2d 1247, 1253 (Ct. App.), *cert. denied*, ___ N.M. ___, ___ P.2d ___ (1981).

63. *See Pineman v. Oechslein*, 637 F.2d 601 (2d Cir. 1981) (Connecticut courts enforce employer promises such as bonus, pension plans, etc., based on reliance); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978) (employer cannot fire employee to avoid paying pension payments laid out in pension plan); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977) (vacation pay in handbook is part of employment contract).

64. *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d 695, 703, 101 Cal Rptr. 169, 174 (1972). The court also stated:

A handbook may contain a written job description, standards for termination, or assurances of job security, any of which can be construed to overcome the "at will" presumption. In *Maloney v. E. I. Du Pont de Nemours & Co.*,⁶⁵ a printed employment form made no mention of "employment at will," but specified "discharge for cause, layoffs for certain lengths, and other forms of termination."⁶⁶ The court found that the handbook's failure to state that "discharge may be at Du Pont's whim,"⁶⁷ coupled with various company policies, made employees feel that they had a permanent place to work. The court held that the contract was for as long as the employee satisfactorily performed his job.

In *Perry v. Singerman*,⁶⁸ the United States Supreme Court upheld a university professor's claim to tenure which was based on his reliance on a "de facto tenure policy" as spelled out in the Faculty Guide. In *Perry*, the Faculty Guide said that "the Administration wishes the faculty member to feel that he has a permanent tenure as long as his teaching services are satisfactory."⁶⁹ The court recognized the need to protect the employee's reliance on the contractual agreement, saying:

[T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." . . . Explicit contractual provisions may be supplemented by other agreement implied from "the promisor's words and conduct in light of the surrounding circumstances." . . . And "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past."⁷⁰

The *Perry* court noted that employees have property rights in their jobs.⁷¹ The Court noted, however, that the entitlement need not follow "rigid,

We embrace the prevailing viewpoint that the general rule is a rule of construction, not of substance, and that a contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary.

Id. at 704, 101 Cal. Rptr. at 174. However, some courts have held that if a policy handbook provides no duration, the employment remains at the will of either party. See *Uriarte v. Perez-Molina*, 434 F. Supp. 76 (D.D.C. 1977).

65. 352 F.2d 936 (D.C. Cir. 1965).

66. *Id.* at 939.

67. *Id.*

68. 408 U.S. 593 (1972). See also *Board of Regents v. Roth*, 408 U.S. 564 (1972). While the constitutional language of these cases has been narrowed by *Codd v. Velger*, 429 U.S. 624 (1977) (no hearing required when information on probationary employee is to be kept concealed), and *Bishop v. Wood*, 426 U.S. 341 (1976) (probationary employee not shown to have had expectation or resulting stigma), the rule of examining the parties' intentions and reliance still remains.

69. 408 U.S. at 600.

70. *Id.* at 601-02 (citations omitted).

71. The employee was entitled to a hearing as a "person's interest in a benefit is a 'property' interest for due process purposes." *Id.* at 601.

technical forms,"⁷² but should, in reality, denote "a broad range of interests that are secured by existing rules or understanding."⁷³

In *Brawthen v. H. & R. Block*,⁷⁴ a California court found that the circulation of a policy sheet to managers, stating that their positions would be secure if they performed satisfactorily, served as evidence of such a separate binding agreement. The court found that the award of over \$200,000 to the employee included "reasonably certain" anticipated profits and upheld the award.⁷⁵ Therefore, employees who have relied on such statements have a viable claim that such offers were not gifts or gratuities, but "[a]n offer on the part of the employer, with whom the offer originates, in order to procure efficient and faithful service and continuous employment."⁷⁶ When an employee enters into the service upon that inducement, "it becomes a supplementary contract of which he cannot be deprived without cause."⁷⁷

Recently, in *Toussaint v. Blue Cross & Blue Shield*,⁷⁸ an employee received oral assurance that "he would be with the company 'as long as [he] did the job.'" ⁷⁹ He asked about job security and was told "that if [he] came to Blue Cross, [he] wouldn't have to look for another job because [the recruiter] knew of no one ever being discharged."⁸⁰ *Toussaint's* case was strengthened "because he was handed a manual of Blue Cross personnel policies which reinforced the oral assurances of job security."⁸¹ The manual claimed that the policy of the company was to release employees "for just cause only."⁸² The Michigan court held that:

72. *Id.*

73. *Id.*

74. 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975).

75. *Id.* at 148, 124 Cal. Rptr. at 851.

76. *Cain v. Allen Elec. & Equip. Co.*, 346 Mich. 568, _____, 78 N.W.2d 296, 301 (1959) (action for severance pay allowed) (quoting *Roberts v. Mays Mills*, 184 N.C. 406, 114 S.E. 530(1922)). The *Cain* court stated:

We cannot agree that all we have here is a mere gratuity, to be given, or to be withheld, as whim or caprice might move the employer. An offer was made, not merely a hope or intention expressed. The words on their face looked to an agreement, an assent. The cooperation desired was to be mutual. Did the offer consist of a promise? "A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promisee that he may justly expect performance and may reasonably rely thereon." (Corbin on Contracts, § 13) The essence of the announcement was precisely that the company would conduct itself in a certain way with the stated objective of achieving fairness, and we would be reluctant to hold under such circumstances that an employee might not reasonably rely on the expression made and conduct himself accordingly.

346 Mich. at 578, 78 N.W.2d at 301.

77. *Id.*

78. 408 Mich. 579, 292 N.W.2d 880 (1980).

79. *Id.* at _____, 292 N.W.2d at 884.

80. *Id.* at n.5.

81. *Id.*

82. *Id.*

1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is “indefinite,” and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee’s legitimate expectations grounded in an employer’s policy statements.

4) A jury could also find for Toussaint based on legitimate expectations grounded in his employer’s written policy statements set forth in the manual of personnel policies.⁸³

Therefore, a policy handbook with assurances should at least get the client past a summary judgment motion.⁸⁴

Where there is a company policy, *Toussaint* indicates that there need not be a meeting of the minds in contract. The *Toussaint* court stated: “No pre-employment negotiations need take place and the parties’ minds need not meet on the subject.”⁸⁵ All the *Toussaint* court required to bind the company was that “[t]he employer contemplated mutual adherence to stated company policies and goals and derived benefits from a cooperative and loyal work force.”⁸⁶ Thus, a case involving written company policies may be even easier to win than one involving specific oral assurances.

3. Implied Covenants of Good Faith

When she applies for a position, a prospective employee is sometimes told that she will have a job for so long as she performs satisfactorily. These assurances provide a strong basis on which to challenge the discharge of an employee for non-job-related motives because they imply a secure position unless the employer demonstrates some “genuine dissatisfaction” with the employee’s performance.⁸⁷ Even without explicit assurances, some courts have recognized a covenant of good faith in all employee-employer agreements.⁸⁸

This concept is not of recent origin. It was clearly expressed in the 1907 decision of *Corgan v. George F. Lee Coal Co.*⁸⁹ In *Corgan*, the

83. *Id.* at _____, 292 N.W.2d at 885.

84. *Id.* at _____, 292 N.W.2d at 896.

85. *Id.* at _____, 292 N.W.2d at 892.

86. *Id.*

87. *Clem v. Bowman Lumber Co.*, 83 N.M. 659, 662, 495 P.2d 1106, 1109 (Ct. App. 1972) (The satisfaction must be real and in good faith.).

88. See *Pugh v. See’s Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee terminated after 32 years): “[I]mplied in law covenant of good faith and fair dealing inherent in every contract.” *Id.* at 327, 171 Cal. Rptr. at 926.

89. 218 Pa. 386, 67 A. 655 (1907).

Pennsylvania court concluded that under a contract lasting "for so long as he . . . satisfactorily performs his duties . . . , the dissatisfaction of the master must be genuine."⁹⁰ In 1948, the Maryland court, in *Ferris v. Polansky*,⁹¹ held that

[w]here [an] employer agrees to employ another as long as the services are satisfactory, the employer has the right to terminate the contract and discharge the employee, whenever he, the employer, acting in good faith is actually dissatisfied with the employee's work. . . . [D]issatisfaction . . . must be real and not pretended, capricious, mercenary, or the result of dishonest design.⁹²

The court decided that a discharge was "wrongful" if the employer feigns dissatisfaction.⁹³

More recently, in *Cleary v. American Airlines, Inc.*,⁹⁴ a California court confirmed this analysis. The employee in *Cleary* was dismissed after 18 years of allegedly satisfactory service. He brought suit, claiming a violation of a published company policy that provided for a "fair, impartial and objective" hearing. While the court did not examine the contents of the specific policy, it used the policy to support its conclusion that "this employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to all of its employees."⁹⁵ In addition, the court found that the length of service makes a termination without good cause offensive to "the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts."⁹⁶

An attorney seeking to present a case for abusive discharge must examine whether the client has performed satisfactorily at the job. If so, a discharge may offend the implied covenant of good faith and give rise to liability even without specific assurances or company policies.⁹⁷ This will often be true despite an understanding by both parties that an employee can be discharged without cause. In Massachusetts, the court found that in *every* contract:

[T]here is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the

90. *Id.* at _____, 67 A. at 656-57.

91. 59 A.2d 749 (Md. 1948).

92. *Id.* at 752.

93. *Id.*

94. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

95. *Id.* at _____, 168 Cal. Rptr. at 729.

96. *Id.*

97. Many jurisdictions hold that if an employee can show evidence of motives other than dissatisfaction the question should be resolved by the trier of fact. See *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Rees v. Bank Bldg. & Equip. Corp.*, 332 F.2d 548 (7th Cir. 1964) (applying Missouri law).

other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant on good faith and fair dealing.⁹⁸

Similarly, in South Carolina, a federal district court protected against terminations which were "contrary to equity and good conscience."⁹⁹

Historically, New Mexico courts have protected employees from discharges made in bad faith. In *Atma v. Munoz*,¹⁰⁰ the New Mexico Supreme Court adopted the rule that "a promise by one party to a contract to perform on his part to the satisfaction of the other party is binding; but the dissatisfaction must be real and in good faith."¹⁰¹ Therefore, attorneys must find out whether the employer can prove actual dissatisfaction with the employee's services.

B. Additional Consideration

Beyond express or implied practices, courts have enforced agreements of employment for indefinite duration when the circumstances indicated the existence of "additional consideration." This consideration, often required to be independent of services rendered,¹⁰² serves as evidence that the agreement provides for some type of job security.

The courts originally recognized additional consideration only when employees surrendered tort claims,¹⁰³ or brought accounts to the business.¹⁰⁴ Recently, some courts and commentators have found additional consideration in the sacrifices of other employment:

[An] employee who spends a significant part of his working life for one employer to the exclusion of others has conferred a substantial

98. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977) (quoting *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549, 552 (1974)); see also *Zimmer v. Wells Management Corp.*, 348 F. Supp. 540, 541 (S.D.N.Y. 1972).

99. *DeTreville v. Outboard Marine Corp.*, 439 F.2d 1099, 1100 (4th Cir. 1971) (allowed tort action for wrongful termination of franchise agreement despite unilateral termination clause).

100. 48 N.M. 114, 146 P.2d 631 (1944).

101. *Id.* at 118, 146 P.2d at 633. The New Mexico court indirectly reaffirmed the covenant of good faith in *Clem v. Bowman Lumber Co.*, 83 N.M. 659, 495 P.2d 1106 (Ct. App. 1972), by refusing recovery to a fired employee because the employer proved genuine dissatisfaction with the employee. The trial court in the *Clem* case used language which appeared to recognize a cause of action for abusive discharge sounding in tort: "failure of the evidence to establish any tortious conduct on defendant's part." 83 N.M. at 662, 495 P.2d at 1108. *But see infra* text accompanying note 213.

102. *Garza v. United Child Care, Inc.*, 88 N.M. 30, 536 P.2d 1087 (Ct. App. 1975); see *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977) (consideration in addition to the required services which results in a detriment to the employee and a benefit to the employer). The court declared that longevity of service was not enough to be "additional consideration." See also *Ryan v. Upchurch*, 474 F. Supp. 211 (S.D. Ind. 1979); *Schroeder v. Dayton Hudson Corp.*, 448 F. Supp. 910 (E.D. Mich. 1978).

103. *Sax v. Detroit, G.H. & M. Ry.*, 125 Mich. 252, 84 N.W. 314 (1900); *Harrington v. Kansas City Cable Ry.*, 60 Mo. App. 223 (1895).

104. *Downes v. Poncet*, 38 Misc. 799, 78 N.Y.S. 883 (N.Y. City Ct. 1902).

benefit on the employer. There seems to be even more truth in the assertion that such an employee has suffered a real detriment in the irretrievable loss of productive years, especially when his seniority and experience are not likely to be readily transferrable to new employment.

In *McNulty v. Borden, Inc.*,¹⁰⁶ the court allowed an action for wrongful breach of a contractual relationship where the plaintiff had rejected many offers of employment upon the employer's representations that the employee would be promoted. The court viewed the employee's sacrifice of other jobs as sufficient additional consideration to extend the duration of an employment contract for a reasonable period of time.

The District of Columbia Circuit Court of Appeals, in *Maloney v. E. I. Du Pont de Nemours & Co.*,¹⁰⁷ found that the plaintiff was induced to leave his original job with a promise of permanent employment. The parties executed a written employment contract, but it was indefinite as to wage and duration. The court found both additional consideration and an intent to continue the contract "as long as [plaintiff] performed satisfactorily and economics permitted."¹⁰⁸ Thus, a promise of permanent employment can be binding because the employee "assumes what may be a substantial burden of diminished employment mobility" upon working with one company so long.¹⁰⁹

All of these policies are even stronger when the discharged employee is an older worker whose occupational mobility has been severely reduced because he is "locked in" to a particular job or skill.¹¹⁰ In *Ward v. Consolidated Foods Corp.*,¹¹¹ a 60-year-old supervisor was induced to leave his job under assurances that the new position would be "permanent."¹¹² The court found that the company had reduced the expenses inherent in training a new employee by promising Ward a secure position. Because Ward had borne the cost of his education, and had an investment of a lifetime in a particular industry, the court found additional consid-

105. Blades, *supra* note 29, at 1420.

106. 474 F. Supp. 1111 (E.D. Pa. 1979).

107. 352 F.2d 936 (D.C. Cir. 1965).

108. *Id.* at 938.

109. *Id.* at 939. The court saw the conditions of trade secrecy placed on Maloney as sufficient additional consideration because trade secrecy could have a "chilling effect on negotiations with prospective employers who want to avoid the threat of litigation." *Id.*

110. It is clear that older workers face such a dilemma. See Hearings on Age Discrimination in Employment Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967); U.S. Bureau of Labor Statistics, Dep't of Labor Bull. No. 1721, The Employment Problems of Older Workers 10-12 (1971).

111. 480 S.W.2d 483 (Tex. Civ. App. 1972).

112. *Id.* at 486. Some courts have found that an offer of permanent employment does not mean a fixed period, but only a promise of a steady job of some permanence, as distinguished from a temporary job or temporary employment. See *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976). But see *supra* text accompanying note 78.

eration. The case was remanded for a jury determination of whether good cause existed for the termination.

In *Rowe v. Noren Pattern & Foundry Co.*,¹¹³ an employer lured an employee away from a position in which he was one and one-half years from vesting a pension. The employer promised the employee the protection of union membership after forty-five days. The employee was terminated after forty-three days. He challenged his firing, and claimed that he would not have switched jobs "but for the guarantee of the protection of a union contract."¹¹⁴ The court found that where the job given up is tenured or permanent, and the new job is promised to be permanent, additional consideration exists.¹¹⁵ The court allowed the employee protection.

New Mexico accepted the general rule requiring "additional consideration" in its holding in *Garza v. United Child Care, Inc.*¹¹⁶ The New Mexico Court of Appeals, in defining the term "permanent employee," declared that "[w]here a contract for permanent employment provides additional consideration, the employee can recover damages for his discharge when made without just cause."¹¹⁷ In light of this holding, New Mexico attorneys must examine the circumstances surrounding the agreement to determine if the employee gave "any consideration, other than employment and payment of wages."¹¹⁸

A recent California case, however, *Pugh v. See's Candies, Inc.*,¹¹⁹ may make an "additional" consideration requirement a thing of the past. The added consideration requirement appeared to the *Pugh* court to be "contrary to the general contract principle that courts should not inquire into the adequacy of consideration."¹²⁰ In *Pugh* an employee was discharged after some 32 years on the job. The court explained the development of the "independent consideration" rule as most likely serving only an "evidentiary function."¹²¹ The *Pugh* court cited Corbin as clearly providing that

113. 91 Mich. App. 254, 283 N.W.2d 713 (1979).

114. *Id.* at _____, 283 N.W.2d at 718.

115. *Id.* at _____, 283 N.W.2d at 716. *Rowe* also stands for the principle that oral assurances may come outside the statute of frauds. The court declared that "[w]here an oral contract may be completed in less than a year, even though it is clear that in all probability the contract will extend for a period of years, the statute of frauds is not violated. *Id.* at _____, 283 N.W.2d at 715. The court reasoned that the plant could close down or the employee could be fired for just cause in the first year. *Id.* In addition, his reliance in giving up a prior job where he had been employed 13½ years was "sufficient to circumvent the statute of frauds." *Id.*

116. 88 N.M. 30, 536 P.2d 1086 (1975).

117. *Id.* at 31, 536 P.2d at 1087.

118. *Id.*

119. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

120. *Id.* at 325, 171 Cal. Rptr. at 925.

121. *Id.*

"[a] single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises." . . . Thus there is no analytical reason why an employee's promise to render services, or his actual rendition of services over time, may not support an employer's promise both to pay a particular wage (for example) and to refrain from arbitrary dismissal.¹²²

The court found that it was only more probable that the parties intended a continuing relationship with a limitation of dismissal power "when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service."¹²³

An employee who has suffered the detriment of decreased mobility or who sacrifices other employment may meet the "additional consideration" requirement which is required by some courts. This is especially true where employees have moved their families,¹²⁴ or have taken some other major action, while apparently relying on an employer's assurances. A close investigation by an attorney into an employee's job history, options which the employee has passed up and major reliance expenditures could provide a basis for a cause of action under an "additional consideration" theory.

C. Public Policy

After considering the possibility of a purely legal set of arguments based on contract, the attorney in a wrongful discharge case should consider what policy arguments might be made against the discharge of the client, based on the circumstances of the case. An employer's motive in discharging an employee may be so contrary to the public interest that the court will intervene to curb dismissals even of "at will" employees. Justice Day, in his 1915 dissent in *Coppage v. Kansas*,¹²⁵ wrote:

It may be that an employer may be of the opinion that membership of his employ[ees] in the National Guard, by enlistment in the militia of the State, may be detrimental to his business. Can it be successfully contended that the state may not, in the public interest, prohibit an agreement to forego such enlistment as against public policy? Would it be beyond a legitimate exercise of the police power to provide that

122. *Id.* at 325-26, 171 Cal. Rptr. at 925 (citations omitted). See 1 A. Corbin, Corbin on Contracts § 125, at 535-36 n.68.

123. 116 Cal. App. 3d at 326, 171 Cal. Rptr. at 925.

124. See *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975) (employee's move to take position was additional consideration); see also *Hackett v. Foodmaker, Inc.*, 69 Mich. App. 591, 245 N.W.2d 140 (1976) (employee's moving his family from California and quitting the Navy was additional consideration).

125. 236 U.S. 1 (1915).

an employ[ee] should not be required to agree, as a condition of employment, to forego affiliation with a particular political party, or the support of a particular candidate for office? It seems to me that these questions answer themselves.¹²⁶

Twenty years later, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,¹²⁷ the Supreme Court found that the absolute right to discharge at will violated the public's interest in industrial peace. Today, at least twenty states recognize the "public policy" exception.¹²⁸

What is considered a "fundamental public policy," however, differs with each jurisdiction. Therefore, lawyers must understand how courts have identified policies, and which kinds of policy arguments have been recognized in the context of an action for wrongful discharge.

1. Defining Public Policy

a. What Policy?

One of the most difficult tasks in asserting an abusive discharge cause of action based on "public policy" is defining just what is meant by the

126. *Id.* at 37.

127. 301 U.S. 1 (1937); see also *Glenn v. Clearman's Golden Cocks Inn*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (Ct. App. 1961), which held that "[i]t would be a hollow protection indeed that would allow employees to organize, and would then permit employers to discharge them for that very reason, unless such protection would afford to the employees the right to recover for the wrongful act." *Id.* at 772.

128. The court in *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 825 n.3 (E.D.N.Y. 1980), cited thirteen jurisdictions which recognize the tort of "abusive discharge" when the firing violates some public policy, and five other states, including New York, which appear to be prepared to do so under propitious circumstances. States in the first category include: Arizona: *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); California: *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Illinois: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); Indiana: *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); Kentucky: *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977); Massachusetts: *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); Michigan: *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); New Hampshire: *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); New Jersey: *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978); Oregon: *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); Pennsylvania: *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); Washington: *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977); West Virginia: *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

States in the latter category are: Colorado: *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); Idaho: *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); Iowa: *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); Louisiana: *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. Ct. App. 1974); New York: *Chin v. American Tel. & Tel.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), quoted in *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 825 n.3 (E.D.N.Y. 1980). Recent research by the author disclosed two more recent cases; *Keneally v. Orgain*, _____ Mont. _____, 606 P.2d 127 (1980) (noting that other courts have recognized an action for abusive discharge when firing violates public policy, although the court did not need to reach the issue because the case did not involve this "public policy" exception.); *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981).

term. Courts generally define public policy as a broad equitable principle that "no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."¹²⁹ Courts have split, however, over who should define public policy and what the public policy should be. One extreme requires that "the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."¹³⁰ The other requires a clear and compelling policy which is spelled out by the legislature.¹³¹

Failure of the courts to unify behind a general policy against abusive discharge has led to inconsistent results and complicated distinctions between "clear" and "indefinite" policies. Some courts have exploited these difficulties and have effectively restricted the public policy exception. For example, many courts simply have been conservative in identifying a public policy strong enough to support a cause of action when breached. In *Percival v. General Motors Corp.*,¹³² a General Motors executive was fired for allegedly disagreeing with the corporation's deceptive practices in its disclosure of required information to the government. The Eighth Circuit Court of Appeals recognized that "a discharge is wrongful and actionable if it is motivated by the fact that the employee did something that public policy encourages or that he refused to do something that the public policy forbids or condemns."¹³³ The court, however, felt that discouraging disagreement with company policies was not a sufficient breach of public policy to allow the plaintiff to recover.¹³⁴ Therefore, the employer's right to terminate at will prevailed.

129. *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, _____, 344 P.2d 25, 27 (1959). Another statement which attempts to define public policy is that "whatever contravenes good morals or any established interests of society is against public policy." *Good v. Starker*, 216 Wis. 253, _____, 257 N.W. 299, 301 (1934). See definitions at 72 C.J.S. *Policy* § 4, at 212 (1951). Most recently, the Illinois court defined public policy as that which "concerns what is right and just and what affects the citizens of the State collectively." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, _____, 421 N.E.2d 876, 878 (1981).

130. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, _____, 316 A.2d 549, 551 (1974). This view as reiterated in Illinois, where the supreme court held that "it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, _____, 421 N.E.2d 876, 878 (1981).

131. *Scorghan v. Kraftco*, 551 S.W.2d 811 (Ky. Ct. App. 1977).

132. 539 F.2d 1126 (8th Cir. 1976).

133. *Id.* at 1130.

134. One court recently cited the sources of public policy as including "legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations." *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, _____, 417 A.2d 505, 512 (1980).

The majority in *Geary v. United States Steel Corp.*¹³⁵ also found no clear and compelling public policy to warrant judicial relief. In *Geary*, a salesman for the company feared that a product was unsafe and warned the employer. After the product was removed from the market, the company terminated Geary. Despite a vigorous dissent arguing that a "strong public policy [in preventing injury] . . . has been offended,"¹³⁶ the majority felt that Geary's action was a mere expression of an "educated" view and was therefore unprotected.¹³⁷ The court justified its decision by focusing on the fact that the employee bypassed his supervisors and made such a "nuisance" of himself that discharge was necessary to "preserve administrative order in its own house."¹³⁸ While its real fear appeared to be an "increased caseload and the thorny problems of proof,"¹³⁹ the court did not foreclose the possibility of bringing such actions. The court noted that there are "areas of an employee's life in which his employer has no legitimate interest,"¹⁴⁰ implying that different facts might have resulted in a different holding.¹⁴¹

To further add to the confusion over public policy, courts have sometimes made a distinction between a public "community interest" and a matter of purely private concern to the employee.¹⁴² In such cases, the courts gave the community interest more weight, and placed a burden on the plaintiff to prove harm to the community. Courts have considered individual animosity arising from business judgments¹⁴³ and requests by stockholder-employees to see corporation books¹⁴⁴ to be inapplicable to a public community interest rationale. In *Scroghan v. Kraftco Corp.*,¹⁴⁵ an employee was terminated after announcing his intention to attend law

135. 456 Pa. 171, 319 A.2d 174 (1974).

136. *Id.* at —, 319 A.2d at 181. In his dissent, Justice Roberts recognized the precarious position in which the employee found himself. His failure to notify his employers of the defect could have resulted in his discharge, and yet his loyalty both to the company and to the public did result in his discharge.

137. *Id.* at 180.

138. *Id.* at 178.

139. *Id.* at 179.

140. *Id.* at 180.

141. Courts which require statutory expression of specific public policies have failed to place "employment at will" into its proper perspective. The unfairness of this position was made evident recently, in *Martin v. Platt*, —Ind. App. —, 386 N.E.2d 1026 (Ct. App. 1979), where the Indiana court viewed two retaliatory discharges for an employee's truthfully reporting kickbacks taken by a superior as violative of only an "undeclared" public policy. *Id.* at 1028. The court refused to override the general "at will" rule unless a statute specifically prohibited discharge. It felt that it must wait for legislative determination. Thus, both Indiana public policy and a truthful, law-abiding employee suffered. *Cf. Bottijliso v. Hutchinson Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981), where the New Mexico Court of Appeals also chose to hide behind the legislature.

142. See *infra* text accompanying note 145.

143. See *Pirre v. Printing Developments, Inc.*, 432 F. Supp. 840 (S.D.N.Y. 1977).

144. *Campbell v. Ford Industries, Inc.*, 274 Or. 243, 546 P.2d 141 (1976).

145. 551 S.W.2d 811 (Ky. Ct. App. 1977).

school in the evenings. The employee attempted to raise a broad community interest in continuing education, but the court would not deal with this strictly "private" concern.¹⁴⁶ The court refused to extend the protection unless an employee was engaging "in a lawful activity in which the community has an interest."¹⁴⁷ In *Scroghan*, the court's narrow reading of the public policy exception had the effect of reinstating the "at will" presumption. The employee did not recover.

In a particularly egregious case, *Lampe v. Presbyterian Medical Center*,¹⁴⁸ the Colorado Court of Appeals also followed the strict "at will" rationale by upholding a discharge of a head nurse who refused to reduce her staff's overtime because of her belief that it would jeopardize the care of the patients. The court, while recognizing the "public policy" theory, deemed the hiring to be "at will" and would not recognize a claim of abusive discharge.¹⁴⁹ The choice which the court forced on Nurse Lampe was to put the lives of her patients on the line, or to be fired and suffer the pains of unemployment. This example of insensitivity toward the employee, patients, and public truly demonstrates the harshness of resorting to strict, antiquated presumptions such as "employment at will."

Some courts find it easier to restrict the right to discharge an "at will" employee when the policy is "clear and compelling,"¹⁵⁰ as spelled out by the legislature. This undoubtedly makes things easier for the courts, but it may be an abdication of judicial responsibility. The legislature did not create the "employment at will" doctrine. Interpretation and protection from abuses of that doctrine, therefore, should fall upon the judiciary.¹⁵¹ The Connecticut Supreme Court, in *Sheets v. Teddy's Frosted*

146. This position is difficult to reconcile with the *Geary* court's concern that "there are areas of an employee's life in which his employer has no legitimate interest." 456 Pa. at _____. 319 A.2d at 180. See *infra* note 127.

147. 551 S.W.2d 811, 812 (Ky. Ct. App. 1977); see also *Ward v. Frito-Lay*, 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (employee's discharge for living with another employee upheld).

148. 41 Colo. App. 465, 590 P.2d 513 (1978).

149. Nurse Lampe argued that if she had not refused the reduction of overtime, she might have been brought before a disciplinary board for negligence. The court ignored this argument. *Id.* at ____, 590 P.2d at 516.

150. *Geary v. United States Steel Corp.*, 456 Pa. at ____, 319 A.2d at 180 n.16 (mandates of public policy need to be clear and compelling); *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976) (termination for allegedly disagreeing with the corporation's deceptive practices in its disclosure of information to the government was not such a "well-defined public policy" as to allow relief).

151. A misconception must be overcome concerning the fear that allowing such relief to employees will result in a flood of litigation. See *Geary v. United States Steel Corp.*, 456 Pa. at ____, 319 A.2d 174, 182 (1974) (Roberts, J., dissenting). The Arizona Court of Appeals recently rejected the adoption of a public policy exception to "employment at will" and claimed that "[t]he effect of adhering to such a rule would be to expose an employer to a lawsuit every time he discharges an employee with a contract terminable at will." *Daniel v. Magma Copper Co.*, 127 Ariz. 320, ____, 620 P.2d 699, 703 (Ct. App. 1980). As one Pennsylvania justice put it, however, the argument "is nothing more than an unarticulated fear of the mythological Pandora's box. . . . The reality is that

Foods, Inc.,¹⁵² recently recognized the difficulty in drawing a line between actionable and nonactionable policies, but still said: "We are, however, equally mindful that the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers."¹⁵³ The court needed no explicit statute prohibiting discharges, finding that "it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment."¹⁵⁴

b. Who Recognizes the Policy?

New Mexico lawyers may be faced with the task of convincing the court that it has the power to override the "at will" presumption and create a cause of action for the abused worker. Various jurisdictions have refused to find a cause of action for wrongful discharge for fear that they will be acting as a legislature. Most recently, in *Bottijliso v. Hutchinson Fruit*, the New Mexico Court of Appeals fell victim to this misconception in its decision that "in light of [its] long standing recognition of the 'at will' rule, the issue of whether a new cause of action should be recognized in this state for retaliatory dismissal is more appropriately addressed to the state legislature than to the judiciary."¹⁵⁵

The *Hutchinson Fruit* decision leaves what would constitute a tortious act, or at least a breach of an agreement in any other setting, barred by

. . . a cause of action for wrongful discharge . . . will help to check a serious menace in our society, the arbitrary dismissal power of employers." *Geary v. United States Steel Corp.*, 456 Pa. at ____ 319 A.2d at 182.

Deciding a case on such a basis would be a sad formulation in light of the above sociological realities. A flood of litigation argument is arguably not even a proper subject for judicial determination. *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970). To bring such an action, an employee would still have to demonstrate a colorable claim which could withstand a summary judgment motion. The resulting small increase in litigation which might occur is hardly a reason to deny relief to an employee who has suffered economically and psychologically at the hands of an abusive employer.

152. 179 Conn. 471, ____, 427 A.2d 385, 388 (1980) (quality control director of frozen food products challenged his discharge in retaliation for his insistence that his employer comply with federal law. The court found that the employee was employed "at will," but he was able to make a tort claim for retaliatory discharge).

153. *Id.* at ____, 427 A.2d at 388; see also *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981), which recognized the public policy exception, stating that "modern economic conditions differ significantly from those that existed when the at will rule was first advanced in the latter part of the nineteenth century." *Id.* at ____, 432 A.2d at 470. The court noted that it could amend the common law "at will doctrine" when it was "no longer suitable to the circumstances of our people." *Id.* at ____, 432 A.2d at 471. The court also stated that new causes of action should be recognized when "compelled by changing circumstances." *Id.*

154. 179 Conn. at ____, 427 A.2d at 389. The employee had insisted that the company comply with the requirements of the Food, Drug & Cosmetic Act.

155. *Bottijliso v. Hutchinson Fruit*, 96 N.M. 789, 794-95, 635 P.2d 992, 997-98 (Ct. App. 1981).

the unfounded explanation that the employment was presumed to be at the "will" of the master.¹⁵⁶ New Mexico courts must re-educate themselves to the established principle that the "law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employ[ee]s, as they arise."¹⁵⁷

In order to assist in this process, the lawyer in a wrongful discharge action must begin by convincing the court that it is not the first, nor is it alone, in making these types of decisions. After all, the concept of *caveat emptor* was not ended through legislation, but through judicial intervention in the field of products liability.¹⁵⁸ Many courts have recognized their proper roles in bringing the common law up to date. In New Jersey the court pointed out that

[t]he law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . .¹⁵⁹

The Supreme Court of Oregon agreed, and took it upon itself "to create or recognize new torts when confronted with conduct causing injuries which we feel should be compensable," so as "to grant redress for injury resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn as indecent and outrageous." ¹⁶⁰ A Pennsylvania justice criticized his colleagues' inaction demonstrating that "[w]hen a seemingly-absolute right or the conditions of an existing relationship are contrary to public policy then a court is obligated to qualify that right in light of current reality."¹⁶¹

The Maryland Supreme Court recently summed up the "current reality" when it amended the common law "at will" rule in *Adler v. American*

156. Consequently, "[i]f the law on duration of service contracts had followed the teaching of pure contract law, the agreement discerned from the parties' intentions would have been enforced, rather than resorting to a presumption of employment at will." Feinman, *supra* note 14, at 132.

157. *Holden v. Hardy*, 169 U.S. 366, 387 (1898).

158. Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 800-05 (1966); see also *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1976) (abolishing the doctrine of sovereign immunity); *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971) (abolishing the defense of assumption of the risk); *Bottijliso v. Hutchinson Fruit Co.*, 96 N.M. at 794, 635 P.2d at 997 ("The Courts in New Mexico have not hesitated to recognize the existence of new causes of action or to abolish certain common law defenses where public policy or statutory grounds are found to warrant such judicially sanctioned change.").

159. *O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N.J. 1978) (quoting *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, _____, 207 A.2d 314, 325 (1965)).

160. *Nees v. Hoch*, 272 Or. 210, 536 P.2d 512 (Or. 1975) (created public policy exception for retaliatory discharge).

161. *Geary v. United States Steel Corp.*, 456 Pa. 171, _____, 319 A.2d 174, 183 (Pa. 1974) (dissenting opinion).

*Standard Corp.*¹⁶² It stated: "[M]odern economic conditions differ significantly from those that existed when the at will rule was first advanced in the latter part of the nineteenth century."¹⁶³ Justice Holmes long ago made it clear that often 'the most absolute seeming rights are qualified, and in some circumstances become wrong.'¹⁶⁴ A rule designed "to protect a burgeoning and mobile economic society"¹⁶⁵ does not conform to today's economic and sociological realities. Even the conservative New Mexico court recently recognized that it has the power to amend the common law when changing social realities demand amendment. In *Claymore v. City of Albuquerque*,¹⁶⁶ the court disallowed the old common law defense of contributory negligence and adopted the more modern concept of comparative negligence. Similarly, in *M & M Rental Tools, Inc. v. Milchem, Inc.*,¹⁶⁷ the court created a new cause of action in tort, interference with prospective contractual relations. It is difficult to reconcile the New Mexico court's actions in *Claymore* and *M & M* with their insistence in *Hutchinson Fruit* that amendment of the "at will" doctrine, which was created by the courts, is best left to the legislature.

The difficulties encountered from defining public policy exceptions to the "at will" rule demonstrate the need for a general policy opposing all abusive discharges. The New Mexico courts can take the initiative by abolishing the "employment at will" presumption and replacing it with a protective scheme which grants traditional judicial tort relief to one's cognizable injuries. An employer who wrongfully discharges a worker should not be able to hide behind his status as "master" to preclude a remedy. Once a lawyer can convince the court to disregard the antiquated "at will" presumption analogies to standard tort elements should provide the relief.¹⁶⁸

2. Recognized Public Policies

Some courts have recognized certain policies which will support a cause of action for abusive discharge.¹⁶⁹ Attorneys should carefully examine whether these policies might apply in their wrongful discharge cases. It is important that the lawyer ascertain all of the employee's opinions about the possible motives behind the termination. The attorney should ask about an employee's past vocal complaints concerning company procedure or working conditions, possible criminal sanctions which

162. 290 Md. 615, 432 A.2d 464 (1981).

163. *Id.* at —, 432 A.2d at 470.

164. *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434 (1926).

165. *Foley v. Community Oil Co.*, 64 F.R.D. 561, 562 (D.N.H. 1974).

166. 96 N.M. 682, 634 P.2d 1234 (Ct. App. 1981), *aff'd sub nom.*, *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

167. 94 N.M. 449, 612 P.2d 241 (Ct. App. 1980).

168. See *infra* text accompanying note 211.

169. See *supra* text accompanying note 128-154.

could apply to the employee who did not complain, relations with supervisors outside of work, the dates upon which pensions might vest, and recent worker's compensation claims or jury service. The creative lawyer may be able to shape a public policy to fit a specific case. An understanding of policies which have succeeded in this context will increase the chances that a policy argument will succeed.

a. Discriminatory Motive

It is clearly within the public's interest to prohibit discharges which are based on a discriminatory motive. In *Greiss v. Climax Molybdenum Co.*,¹⁷⁰ the Colorado federal district court recently recognized that breach of this public policy can give rise to a cause of action for abusive discharge. Other jurisdictions have allowed suit for discharges based on race,¹⁷¹ sex,¹⁷² and age¹⁷³ discrimination. These courts have found that a cause of action based on a discriminatory motive is necessary to avoid a chilling effect on one's statutory rights. This policy is a strong one and may be particularly persuasive to the court by virtue of its being clearly spelled out by the legislature.¹⁷⁴

b. Worker's Compensation Claims

Several jurisdictions have provided that an employee should be free from the fear of being discharged in retaliation for filing a worker's

170. 488 F. Supp. 484, 487 (D. Colo. 1980) (alleged wrongful termination violated rights under a labor contract. The court held that "absent an agreement or statute, an employer may discharge an employee for cause or without cause, except when there is a discriminatory motive."); *see also* NLRB v. Acker Indus. Inc., 460 F.2d 649 (10th Cir. 1972); *Young v. Southwestern Bell Tel. Co.*, 424 F.2d 256 (8th Cir. 1970) (per curiam) (can discharge without cause unless the motivating cause is protected union activity).

171. *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1973) (abusive discharge suit available because race discrimination is contravention of public policy).

172. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (employee refused to date supervisor).

173. *McKinney v. National Dairy Council*, 491 F. Supp. 1108, 1118-22 (D. Mass. 1980). It is necessary to note that certain age discrimination cases have held that when other remedies were available, it would not be necessary to provide for a cause of action under the public policy exception. *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910 (E.D. Mich. 1978); *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1054-1055 (E.D. Pa. 1977) ("A finding that certain conduct contravenes public policy is not enough . . . [It] must 'violate some well-established public policy, . . . and that there be no remedy to protect the interest of the aggrieved employee or society.'")

174. Many explicit statutes can provide a basis for a suit. *See* N.M. Stat. Ann. § 38-5-18 (Cum. Supp. 1981) (employer prohibited from penalizing employee for jury service); N.M. Stat. Ann. § 50-9-25(A) (1978) (employer prohibited from discriminating against employee for filing OSHA complaint); N.M. Stat. Ann. § 28-1-7(A) (1978) (employer prohibited from discriminating against employee because of race, age, religion, color, national origin, ancestry, sex or physical or mental handicap). On a federal level, *see* the Labor Management Relations Act, 29 U.S.C. § 158(a) (1976) (protects those in union activity from discharge without cause); the Veterans Preference Act, 5 U.S.C. § 2024(a)(1976) (protects veterans from discharge without cause); the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (protects garnished employees from arbitrary discharge); Federal Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a) (1976) (prohibits race, color, religion, sex and national origin from being a basis of discharge).

disability claim.¹⁷⁵ The consensus is that "[t]he fear of being discharged would have a deleterious effect on the exercise of a statutory right" and would "undermine a critically important public policy."¹⁷⁶ In *Frampton v. Central Indiana Gas Co.*,¹⁷⁷ the court compared a cause of action for retaliatory discharge to that of the landlord/tenant policy against retaliatory evictions: "The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy."¹⁷⁸ In *Sventko v. Kroger*,¹⁷⁹ the Michigan Court of Appeals endorsed this cause of action and concluded that "the better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state."¹⁸⁰ As in *Frampton*, the court found the public policy easily because of the statutory provision for filing Michigan claims. This indicated to the court a legislatively defined policy that their filing not be hampered.

In *Bottijliso v. Hutchinson Fruit Co.*,¹⁸¹ the New Mexico Court of Appeals gave the legislature's policy-defining role a new twist. The court chose not to recognize a cause of action in tort for a worker discharged for exercising his rights under the Workmen's Compensation Act.¹⁸² In *Hutchinson Fruit*, the court returned to a Tenth Circuit Court of Appeals holding in the 1953 case of *Odell v. Humble Oil & Refining Co.*¹⁸³ that the New Mexico courts "have not judicially restricted the right of an employer to terminate an employee hired 'at will' except where the dismissal is predicated upon a fraudulent basis."¹⁸⁴ The *Hutchinson Fruit* court appeared to base this holding on legislative action in the area of workmen's compensation. Because the legislature had enacted a com-

175. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960 (1980); *Kelsay v. Motorola*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). *Contra*, *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Bottijliso v. Hutchinson Fruit*, 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981).

176. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, _____, 297 N.E.2d 425, 427, 428 (1973).

177. *Id.* The court also stated: "Upholding retaliatory discharge opens the door to coercion and other duress-provoking acts." *Id.*

178. *Id.*

179. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

180. *Id.* at 651, 245 N.W.2d at 153.

181. 96 N.M. 789, 635 P.2d 992 (Ct. App. 1981).

182. In this section of this article, the New Mexico Act will be referred to by its current title, "Workmen's Compensation." The state of New Mexico continues to adhere to its outdated title for the Act. To eliminate the gender-based form of this Act, the title should be changed from "Workmen's" Compensation to "Worker's" Compensation. Note, 12 N.M. L. Rev. 1, 562 n.15 (1982).

183. 201 F.2d 123 (10th Cir. 1953).

184. *Bottijliso v. Hutchinson Fruit*, 96 N.M. at 794, 635 P.2d at 997 (citing *Odell v. Humble Oil & ref.*, 201 F.2d 123, 127 (10th Cir. 1953)).

prehensive statute, the court declined to get involved: "The sagacity of making changes in workmen's compensation statutes, or rights created thereunder, has been generally held to be outside the province of the courts."¹⁸⁵ It is not clear, however, how allowing a cause of action for abusive discharge will be inconsistent with legislative policy in the area of workmen's compensation. In the end, the court appeared to fall back on the antiquated view that public policy warrants no new cause of action because of "New Mexico's long-standing recognition of the 'at will' rule."¹⁸⁶ Thus, the court did not use legislatively defined policy to form its inquiry into whether the discharge was against public policy as did the courts in *Frampton* and *Sventko*. Instead, the court used the "lack of" legislative action to uphold the "at will" presumption.

It is too early to tell whether this decision will hamper the development of a cause of action for abusive discharge in New Mexico. The *Hutchinson Fruit* case may be limited to the "precise" question in the field of worker's compensation due to the existence of comprehensive legislation in the area in New Mexico.¹⁸⁷ The court indicated in its decision that courts in New Mexico have "not hesitated to recognize the existence of new causes of action or to abolish certain common law defenses where public policy or statutory grounds are found to warrant such judicially sanctioned change."¹⁸⁸ Therefore, while the court awaits the legislature's action to amend its workmen's compensation statute, it may be willing to recognize an action for abusive discharge which clearly violates public policy in an area less pre-empted by legislative action.

c. Jury Duty and Public Service

Another form of abusive discharge which is repugnant to public policy is an employer's dissatisfaction with an employee for taking time off for jury duty. In *Nees v. Hoch*,¹⁸⁹ the Oregon Supreme Court protected the community interest in having employees serve on jury duty. When Ms. Nees would not ask to be excused from serving, she was discharged. The court noted that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."¹⁹⁰ The *Nees*

185. *Id.* at 794, 635 P.2d at 997.

186. *Id.* See *supra* note 6.

187. See *supra* note 6.

188. *Bottijliso v. Hutchinson Fruit*, 96 N.M. at 794, 635 P.2d at 997. See *supra* text accompanying notes 155-168.

189. 272 Or. 210, 536 P.2d 512 (1975).

190. *Id.* at _____, 536 P.2d at 515 (1975). Some courts have held that a retaliatory discharge by an employer which is contrary to an express public policy of the state will give rise to a cause of action in tort for both compensatory and punitive damages. See *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977). The courts have denied punitive damages, however,

court found a public policy in favor of protecting those called for jury duty through a statute declaring that it was in the public's interest to have the most competent jurors serve.¹⁹¹ The public policy forbidding discharge for jury duty might apply to other types of public service.

In 1953, in *Odell v. Humble Oil & Refining Co.*,¹⁹² the employer wrongfully discharged an employee for testifying under subpoena before a grand jury which indicted the employer. The court refused to allow him to bring an action for abusive discharge because "rights under the contract would not constitute a tort against them unless the violation thereof amounted to a tort at common law."¹⁹³ Recent decisions in other jurisdictions¹⁹⁴ directly contradict such a holding, and the common law is evolving to provide such a remedy.¹⁹⁵ Therefore, a cause of action may now exist for any retaliation which results from an employee's performing any type of service in the governmental system.

d. Refusal to Perform an Illegal Act

Society has an interest in seeing that illegal acts are not performed and that those who know about such illegality may disclose it without retaliation.¹⁹⁶ This public policy has also led to a limitation on an employer's right to discharge. The situation first arose in the famous case of *Petermann v. International Brotherhood of Teamsters*.¹⁹⁷ Mr. Petermann refused to give perjurious testimony before a committee and was subsequently discharged. The court recognized the "at will" presumption, but felt that "[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury. . . . To hold otherwise would be without reason and contrary to the

where they found that no cause of action existed at the time of the employer's abusive conduct because there would be no deterrent effect on the employer's action. See *Nees v. Hoch*, 272 Or. 210, _____, 536 P.2d 512, 517 (1975) (no punitive damages because it established a new tort that beforehand could not have been determined to be actionable); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

191. Today some states have statutory proscriptions prohibiting abusive discharges in such instances. See Mich. Comp. Laws Ann. § 725.145(a) (1968); N.M. Stat. Ann. § 38-5-18 (Supp. 1981). Remember that the trier of fact is always free to infer that there was another reason, other than refusal to avoid jury service, for the discharge. See *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, _____, 386 A.2d 119, 122 (1978).

192. 201 F.2d 123 (10th Cir. 1953).

193. *Id.* at 127.

194. See *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981) (complaints of criminal activity of fellow employee to police and follow-up investigation for police is protected by the state's public policy so as to provide a cause of action for retaliatory discharge); see *supra* cases cited in note 128.

195. See *supra* note 128 for a list of jurisdictions which either recognize the tort of abusive discharge or appear to be ready to do so.

196. This has been referred to as protecting "whistle-blowers." See Westin, ed., *Whistle Blowing: Loyalty and Dissent in the Corporation* (New York, 1981).

197. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

spirit of the law.”¹⁹⁸ The court found that the public’s interest in enforcing the penal code outweighed the employer’s interest in discharging the employee at will.¹⁹⁹

The holding in *Petermann* was strongly reinforced in the 1980 California decision of *Tameny v. Atlantic Richfield Co.*²⁰⁰ Mr. Tameny was fired for his refusal to participate in an illegal scheme to fix gasoline prices. Cut off from his livelihood, he brought a tort action against his employer. The court decided that “an employer’s authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order.”²⁰¹ The court stated that such use of the discharge power “violates a basic duty imposed by law on all employers.”²⁰² The court found that a tort action was the appropriate route for an employee damaged by such an act of coercion. The court declared: “The days when a servant was practically a slave of his master have long since passed.”²⁰³

Other jurisdictions have also recognized the need for a cause of action by permitting a public policy tort remedy. The New Jersey court has allowed medical employees to complain about ethical and licensing violations without fear of discharge.²⁰⁴ Similarly, the West Virginia court, in *Harless v. First National Bank in Fairmont*,²⁰⁵ found an employer liable in tort for terminating an employee who attempted to persuade him to conform to consumer protection laws. The lawyer must make an exhaustive analysis of all of the employee’s past complaints, grievances and alleged insubordination to provide a basis for a retaliatory discharge claim.

198. *Id.* at _____, 344 P.2d at 27.

199. This theory also held true in *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to alter pollution control reports), and in *Harless v. First Nat’l Bank*, 246 S.E.2d 270 (W. Va. 1978) (complaints about employer’s violations of consumer credit laws); see *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). 876 (1981).

200. 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).

201. *Id.* at 846, 610 P.2d at 1336–37.

202. *Id.*

203. *Id.* (citing *Greene v. Hawaiian Dredging Co.*, 26 Cal. 2d 245, 251, 157 P.2d 367, 370 (1945)).

204. *O’Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (N.J. 1978) (the public’s foremost interest in medical care provided a remedy for an x-ray technician’s discharge for refusing to perform catheterizations); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1979) (a physician’s employee’s complaints against testing a controversial drug did not provide a basis for challenging his discharge on the basis of public policy. There was no evidence that the practice would have been illegal, as in *O’Sullivan, supra*, or that it was clearly harmful.). See *supra* text accompanying notes 148–49.

205. 246 S.E.2d 270 (W. Va. 1978). See also *Palmateer v. International Harvester Co.*, 85 Ill. 2d at _____, 421 N.E.2d at 880, which found a “clear public policy favoring investigation and prosecution of criminal offenses.”

e. Claim for Pension Rights

An attempt by an employer to terminate an employee to avoid vesting of a pension plan recently served as an improper motive contrary to public policy in *Savodnik v. Korvettes, Inc.*²⁰⁶ *Savodnik* is a fine example of how to use statutory intent to formulate a public policy limitation on abusive discharges. The court in *Savodnik* found a strong public policy favoring the protection of the integrity of pension plans and their participants. The New York Constitution expressed this policy, but the court also relied on the intent behind the Employee Retirement Income Security Act (ERISA) " 'to protect . . . interests of participants in employee benefit plans and their beneficiaries.' " ²⁰⁷ The very passing of such an act was enough to demonstrate to the *Savodnik* court the "great significance income security has for the millions of the country's retired population."²⁰⁸ The court concluded:

To allow an employer to avoid the vesting of rights in a pension plan after thirteen years of service by a model employee, under the guise of the employment at will doctrine, does not sit well with this court. . . . If ever there were a case to invoke the doctrine of abusive discharge, this is it.²⁰⁹

Consequently, the attorney who contemplates a wrongful discharge action should complete a full analysis of all employee benefit plans. Not only does ERISA provide a special concern for pension rights, but these lost benefits can be the basis of a large award for the wrongfully discharged client.

D. Proving Damages

It is only in the area of damages that it may be important whether the court views the abusive discharge action as one of contract or tort. With respect to some items, a discharge case is no different from any other case in the evaluation and proof of damages. The possibility of a defense of mitigation raises the necessity of establishing and documenting that the employee has looked for another job. Financial losses after an abusive discharge can be devastating. Therefore, the attorney should inquire as to exactly what benefits were lost (medical insurance, life insurance, use of a company car, etc.). Whether the client suffered damage to her credit rating or was forced to lose a major item to creditors is another avenue to pursue. The lawyer must also find out which of the client's career and long-term objectives were impaired by the firing. These sorts of losses

206. 488 F. Supp. 822 (E.D.N.Y. 1980).

207. *Id.* at 826 (citing 29 U.S.C. § 1001 (1976)).

208. *Id.*

209. *Id.*

should be compensable regardless of whether the court deems the cause of action a tort or a contract action.

Exemplary and punitive damages are more likely to be awarded if courts view an abusive discharge as a tort committed during the employment relationship, rather than a breach of an agreement.²¹⁰ A framework for this type of remedy can be drawn from the extensive tort case law surrounding wrongful motives. Professor Blades forcefully argues:

Through adaption of the general emphasis on wrongful and ulterior motives which today pervades the law of torts the courts could fashion a remedy for the abusively discharged employee and thereby give to *all* employees some assurance that they will be their own masters as to matters not their employers' business.²¹¹

In preparation for arguing that the action sounds in tort, the lawyer should inquire into pre-incident health of the client and determine what doctors she has seen since her discharge. The client should then see a psychologist.²¹² A clear record of all physical (headaches, nausea, curtailed activities, etc.) as well as mental (troubles with sleeping, eating or nerves) injuries to the entire family would be helpful. Marital problems conceivably could give rise to a cause of action for the spouse for loss of consortium.

New Mexico has yet to declare that an employee will have a cause of action in tort for wrongful discharge. In fact, in *Bottijliso v. Hutchinson Fruit Co.*,²¹³ the court of appeals reiterated the older holding that absent fraud, a violation of an employment contract "irrespective of the motive therefor constitutes only a breach of contract and not a tort and that the recoverable damages are limited to those flowing from the contractual breach and that no punitive damages are recoverable no matter what the motive that prompted the discharge."²¹⁴ In light of this ruling, it may be

210. An appropriate analogy exists in New Mexico in the area of economic compulsion. In *Terrel v. Duke City Lumber Co.*, 86 N.M. 405, 524 P.2d 1021 (Ct. App. 1974), the court of appeals described the doctrine's rationale as "to discourage or prevent an individual in a stronger position, usually economic, from abusing that power by presenting an unreasonable choice of alternatives to another person in a weaker or more vulnerable position, in a bargaining situation." *Id.* at 422, 524 P.2d at 1038. The court found that this inequality of bargaining power was clearly established in the employee/employer context. See text accompanying note 30. Terrel, the defendant, challenged the award of consequential damages, but the court found that "[e]conomic compulsion cases lend themselves most readily to the tort analytical framework (duty, breach of duty, causation and damages)." *Id.* This duty to refrain from abusive discharges exists if the courts abolish the "at will" presumption.

211. Blades, *supra* note 29, at 1435 (emphasis in original).

212. Today's sociological realities conceivably make extreme and outrageous conduct actionable for intentional infliction of emotional distress. See *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).

213. 96 N.M. 789, 635 P.2d 994 (Ct. App. 1981).

214. *Id.* at 789, 635 P.2d at 994 (quoting *Odell v. Humble Oil & Ref. Co.*, 201 F.2d at 128); compare *Tameny v. Atlantic Richfield Co.*, 164 Cal. Rptr. at 843, 610 P.2d at 1334, in which the defendant argued that "because of the contractual nature of the employer-employee relationship"

necessary to demonstrate that the implied or express employment agreement is merely the basis of the relationship and that the action is brought in order to challenge the employer's tortious conduct.

This argument is not new. It has existed for the past few years in the field of insurance contracts. Plaintiffs have been able to recover all damages, including punitive damages, which flow from an insurance carrier's failure to act in good faith toward an insured. The Arizona Court of Appeals recently answered the question of whether a breach of contract can be a tort in the affirmative. In *Noble v. National American Life Insurance Co.*,²¹⁵ the Arizona Court of Appeals found that "[t]here are also certain classes of contracts which create a relation out of which certain duties arise as implied by law independently of the express terms of the contract, a breach of which will constitute a tort."²¹⁶

In 1976, New Mexico, in *Chavez v. Chenoweth*,²¹⁷ described this cause of action as being separate from the contract in that it is a "tort claim for unreasonable delay in paying medical expenses under the insurance contract."²¹⁸ The *Chenoweth* court decided that a tort claim could be a basis of recovery if there were evidence of bad faith on the part of the insurer. The court defined bad faith as a "frivolous or unfounded refusal to pay."²¹⁹ In light of the mutual duties discussed by Blackstone, and the present sociological realities which make the employment relationship a unique "contract," the lawyer in an abusive discharge case can make a strong argument that such a tort remedy exists when an employer makes an "unfounded" decision to discontinue paying his employee. Thus, the cause of action may be considered a tort even if founded on contract. For purposes of deciding damages, the lawyer must argue these issues.

IV. CONCLUSION

When we examine our economic system in light of today's realities, it is evident that public interest in New Mexico warrants a redefinition of the "master/servant" relationship. The courts devised the doctrine of "employment at will" to deal with a highly mobile, burgeoning capitalistic economy. Today, times have changed. With the concentration of em-

the injury should only sound in contract. The court disagreed, holding that decisions "have long recognized that a wrongful act committed in the course of a contractual relationship may afford both tort and the contractual relief, and in such circumstances the existence of this contractual relationship will not bar the injured party from pursuing redress in tort." *Id.*; see also *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. at _____, 427 A.2d at 387 (1980), finding that "contract rights which are inherently legitimate may yet give rise to liability in tort if they are exercised improperly."

215. 128 Ariz. App. 196, 624 P.2d 874 (1979).

216. *Id.* at _____, 624 P.2d at 875 (quoting 1 C.J. § 139, at 1017).

217. 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976).

218. *Id.* at 429, 553 P.2d at 709.

219. *Id.*

ployment power in fewer and fewer hands,²²⁰ it is necessary to consider the interests which employees have in the system, and to strike a new balance in employer/employee relations.

The realities and inequities of today's immobile economic system call for judicial qualification of the employer's right to discharge employees for arbitrary and retaliatory purposes. As one federal district court judge recently said, "Courts cannot hide in ivory towers ignoring the economic and social realities of modern society, for it is that very society we are here to serve. As that society changes, so must our thinking."²²¹ By abolishing the "employment at will" presumption in favor of an examination of the parties' intent, and installing the prevalent contract principles of good faith and fair dealing, the courts of New Mexico can guarantee to employees the benefit of their bargains. Anything less is clearly contrary to the public good.

New Mexico attorneys must begin to accept and try cases which question an employer's absolute power of discharge. The courts must take judicial notice of the economic and psychological strain which the "employment at will" doctrine inflicts on the majority of workers. Then the judiciary may move to protect employees from the whim, vindictiveness, and retaliatory actions of abusive employers. It was the courts which first "immunized" employers from liability by devising "employment at will." The courts must now step forward and care for their casualties.

220. The 500 largest industrial and retail firms constituting only .03% of all corporations accounted in 1970 for almost 30% of all private non-agricultural wage and salary workers. Compiled from Economic Report of the President, 1978 Table B-34, at 296; Statistical Abstract 1974, Tables No. 793 and 796, at 484, 486.

221. *Sadovnik v. Korvettes, Inc.*, 488 F. Supp. at 826-27.