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The Public Interest Versus Freedom of Contract
The Expanding Public Policy Exception to the Terminable At-will Employment Rule

by Ed Northwood

In March, 1975, Dr. Grace Pierce was Director of Medical Research/Therapeutics for Ortho Pharmaceutical Corporation in New Jersey and the only medical member of a team working on the development of loperamide, a liquid drug treatment for diarrhea. Loperamide, as then formulated, contained forty times the concentration of saccharin then permitted by the U.S. Food and Drug Administration in a twelve-ounce soft drink. The company's management pressed the team to begin clinical or human testing of the formula despite the probability that a reformulation of the drug was possible within three months. Adhering to the Hippocratic Oath, the codes of ethics of her profession, and various state health and safety regulations, Dr. Pierce refused to submit the drug for testing. Subsequently, her employer removed her from the project, demoted her, wrote a harsh critical evaluation, and published the action taken. Thereafter, Dr. Pierce resigned.

Dr. Pierce possessed no employment contract which specified a fixed duration nor did there exist express promises relating to her professional conduct while in the employment of Ortho. Hence, Dr. Pierce was an at-will employee; that is, she could quit when she wanted to, for whatever reason, and she could be fired whenever her employer so desired, for whatever reason, according to the common law of New Jersey and the vast majority of American jurisdictions.

Notwithstanding the fact that the law was apparently against her, Dr. Pierce sought a legal remedy. She sued Ortho, alleging that her termination was induced by the wrongful acts of her employer. Her claim for various damages was alternatively based on theories of breach of contract, denial of a property right to practice her profession, and various state health and safety regulations, Dr. Pierce refused to submit the drug for testing. Subsequently, her employer removed her from the project, demoted her, wrote a harsh critical evaluation, and published the action taken. Thereafter, Dr. Pierce resigned.

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that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980).

However, the court noted that if a plaintiff who alleges that he or she has such a cause of action fails to point to a clear expression of public policy supporting his or her rights, the court could dismiss the claim. Under this latter criteria, the high court of New Jersey found against Dr. Pierce, thus giving her a Pyrrhic victory: on the one hand her case set a precedent, one she was trying to establish; on the other, she lost her individual battle and recovered no damages.

Pierce exemplifies the relatively broad doctrinal reach of the public policy exception to the terminable at-will employment common law rule. While this exception has achieved the status of a recognized cause of action in only fourteen jurisdictions in the United States, the attention it has been given by legal commentators, legislators, public interest advocates, and courts that have not yet adopted the doctrine demonstrates its importance to all those concerned with the private employment relationship. A preliminary survey of the common law at-will employment rule will aid in understanding the contours of the public policy exception.

Overview of the Employment At-Will Doctrine: From the late nineteenth century, the common law rule in America regarding employment created without expressed intentions as to duration has been that employers may dismiss their employees at any time for good cause, no cause, or any cause. As a corollary, the employee may leave without notice or cause. Thus, the courts have abided by a terminable at-will employment doctrine.

Oddly, this doctrine emerged from a treatise on master-servant relationships by a not-widely-known commentator, H.G. Woods. Although there was only scant authority for his formulation of the rule, it became universally adopted. Apparently the doctrine is based on two presumptions of law: (1) that the sole consideration upon which the employment relationship is based is work for pay; and (2) the formation of the relationship is premised on notions of freedom of contract and freedom of enterprise. Thus, the employer may exercise unfettered his management prerogative with respect to his labor resource; likewise, an individual worker may avoid involuntary servitude and be totally mobile.

New York provided the precedent-setting case in this area, Martin v. New York Life Insurance Co., 148 N.Y. 117 (1895). The potential harshness of the application of Woods' rule was evidenced by the fact that the court apparently ignored the equities involved in the case. The plaintiff was a manager of real estate with over ten years seniority who was found to have no express agreement covering his employment duration notwithstanding his customary receipt of an annual salary, payable monthly. The court cited Wood as governing this situation, offering no rationale.

Even where an employment contract was involved, but the termination of which was found not to be capable of being tested in court, the at-will rule controlled, Parker v. Borock, 5 N.Y. 2d 156 (1959). The employment termination issue in Parker was subordinate to the main holding, yet the case is oft-cited for the principle that a wrongful discharge claim is not actionable when a job is terminable.
At-will Employment...

The plaintiff machinist was a member of a union which had a collective bargaining agreement with the employer which allowed termination only for good and sufficient cause. His union chose not to go to arbitration on his case. In view of this, the court held that the plaintiff was without a remedy for wrongful discharge likening his situation to that of an at-will employee.

Exceptions to the Common Law Rule: The vast discretionary power accorded employers and the consequent opportunity to abuse and to take unfair advantage of, even manipulate, their at-will employees by the operation of the common law rule, is readily apparent. For example, in the case of the medical professional employee who has no protection from the rule, any disclosure of unethical or otherwise improper practices of a colleague, hospital or employer could result in numerous forms of retaliation such as the constructive firing in Pierce, outright discharge, or other negative effects on the employment conditions.

Needless to say, since such activities are possible and exist, they operate as ever-present dampeners of an employee's arguable rights to free expression and imperil the fulfillment of an employee's duty to abide by professional codes of conduct and otherwise act in the public interest. It is not surprising, therefore, that the twentieth century has witnessed an erosion in the tenable at-will employment doctrine. Such erosion has been facilitated by means of legislative action, collective bargaining, and development of common law exceptions to this doctrine.

As will be noted, not all of the developments have been actualized; that is, commentators have not completely persuaded courts and legislatures of the appropriateness, legitimacy and value of their proposals. But since the evolution of this area is rapid, many proposals and arguments not yet a part of the law will be cataloged below, along with the existing exceptions of law, so as to present a survey and preview of this field in the early 1980's.

Fundamental concern of at-will employees is that they may be unprotected against unjust discipline. Needless to say, the concern disappears where there exists an employment contract which, although not likely to designate a specific duration for employment, will require by its terms that discharge may only occur where there exists just cause or good and sufficient cause. Such cause, of course, would not be one motivated by retaliation for a legal or ethical or otherwise protected act of the employee or by malice. This condition need not even be express; a large body of arbitration rulings indicates that employees covered by collective bargaining agreements do have extensive protection against abuses of the employment relationship. These protections include applying just cause principles, requiring employers to justify their actions in full and fair hearings, and voiding disciplinary measures which do not comply with the employer's standard policies.

Thus, it is obvious that one way to prevent abuses of the at-will rule is to make every employment relationship one of contract, as by means of collective bargaining agreements. What is also obvious is that this solution is unrealistic. Many employment relationships do not lend themselves to the structuring associated with unions. Private professionals in particular have shown little inclination to organize (perhaps partly due to the adverse publicity reaction to such movements). Moreover, a general inertia working against unionization seems formidable. Only 22% of all American employees are unionized despite a period of strong support for union organization. In view of the fact that approximately 60% to 65% are at-will employees, collective bargaining agreements will not supply the answer to policy questions at issue.

Legislation can protect an at-will employee from abusive discharge in two ways. First, a legislature may, in effect, prescribe the contractual terms which are deemed part of every applicable employment relationship. For example, the termination conditions may be defined by statute as in 5 U.S.C § 7501 which governs federal civil service employees.

Secondly, a legislature may expressly proscribe certain employer actions regarding at-will employee relations. This device has been utilized in numerous situations relative to employee discipline, usually on the basis of either employee attributes or employee actions against which retaliatory measures may not be taken. For example, the National Labor Relations Act of 1935 prohibits discharges in retaliation for union organization activity; Title VII of the Civil Rights Act of 1964 prohibits discharges which either discriminate on the basis of sex, race, creed or national identity or relate to participation in the enforcement of the Act; § 239 of the Labor Law of New York State essentially prohibits discrimination on the basis of race, creed, color, national origin, age or sex in performing public work contracts; the Consumer Credit Protection Act prohibits discharge of those whose wages are garnished for indebtedness; the Fair Labor Standards Act makes illegal a retaliatory discharge of one exercising rights under the Act; the Civil Rights Act of 1964 prohibits discharges which either discriminate on the basis of sex, race, creed or national identity or relate to participation in the enforcement of the Act; § 239 of the Labor Law of New York State essentially prohibits discrimination on the basis of race, creed, color, national origin, age or sex in performing public work contracts; the Consumer Credit Protection Act likewise prohibits the discharge of those exercising rights under the Act; many states prohibit retaliatory discharge for the filing of workmen's compensation claims; some states prohibit employer discipline for political activity; and recently Congress protected federal whistle blowers by banning reprisals for such activity.

With this background of legislation which erodes the common law employment at-will doctrine several commentators have called for a statute which would protect at-will employees from abusive or retaliatory discharge. Were legislation embodying the substance of the proposal adopted, a common law solution would be mooted. However, as Blades, among others, has noted:

general statutory limitations on the employer's right of discharge are unlikely to be enacted so long as there is no strong lobby to promote them. . The likelihood that such legislation will be enacted in the foreseeable future is enhanced by the strong interest groups to be counted on to oppose it. 67 Col. L. Rev. 1404, 1434 (1967).

Even narrow proposals would be likely to encounter organized opposition since they would diminish employer rights (which would threaten all employers), possibly erode or shift the powers of existing professional organizations, such as the AHA or AMA, and possibly conflict with rules relative to client confidentiality.
At-will Employment...

Where there exists a governmental nexus in the employment relationship, the U.S. Constitution may provide protection against unjust dismissal. Civil rights causes of action for infringement of First Amendment freedoms have succeeded in protecting certain public employees. See, for example, Evrod v. Burns, 427 U.S. 347 (1976), Perry v. Sondernann, 408 U.S. 593 (1972).

Frequently, however, employment relations’ abuses occur in circumstances when there is no “State Action” and these aggrieved employees would have no standing to sue on a First Amendment claim. Nevertheless, First Amendment considerations are valuable in that they may provide additional policy support for persuading courts that disclosure in the public interest (as in informing the public of unhealthy or unsafe products or practices, or fraudulent or corrupt activities) deserves legal protection. Such observations gain credibility in view of the recent doctrinal development of the “right to know”, summarized by Chief Justice Burger in his concurring opinion in First National Bank of Boston v. Bellotti, 435 U.S. 765, 806-7 (1978), which invalidated a Massachusetts statute forbidding certain types of corporate political pamphleteering as violative of the First and Fourteenth Amendments:

One of the (First Amendment’s) functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas . . . it can be argued, furthers the purposes of the First Amendment.

In view-of the limitations of the above means of protecting an employee who is discharged or otherwise disciplined for acting in the public interest, great importance must be placed on the developing public policy judicial exception to the terminable at-will rule. Pierce represents the pinnacle of that development with regard to medical professionals. So that the Pierce principles and those closely related to it may be fully understood and so that chances for their expansion and adoption in other jurisdictions be appraised, a survey of this doctrinal development be appropriate.

Perhaps the seminal case in this area is Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P2d 25 (1959). The plaintiff had been a business agent in the employ of a union who instructed him to commit perjury in a legislative hearing. When Petermann testified truthfully he was fired. The court acknowledged the existence of the terminable at-will rule but countered:

It would be obnoxious to the interest of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Consequently, despite the absence of an express statutory prohibition of discharge on such grounds and the viability of the traditional rule, the court held that Petermann had a tort cause of action for wrongful discharge. This holding, at a minimum, stands for the rule that one who refuses to engage in illegal conduct at his employer’s request, and is discharged for that reason, may seek legal redress.

Subsequent to Petermann, many jurisdictions have adopted some form of the public policy exception. In some instances this cause of action has been grounded in contract wherein an implied duty to discharge in good faith and/or for good cause has been read into the employment relationship. In other “public policy” jurisdictions the recovery is based on the tort of wrongful/abusive/retaliatory discharge. New Jersey, by virtue of Pierce, allows recovery under either theory.

In “Protecting the Private Sector At Will Employee Who Blows the Whistle’” (1977 Wisc. L. Rev. 777), the author divided the cases which have developed the public policy exception to at-will terminations into three categories, each dependent upon the source of the determinant of public policy. In the first category are the cases where a statute gives a right to a discharged employee but no remedy, in which case an implied remedy must be sought. Category two involves a statutory expression of public policy but provides for no right or remedy, in which case both must be implied. Finally, there may be no (or only remotely connected) legislation relative to the public policy at issue. In this last instance, the judiciary must define the public policy and then imply the right and remedy. Presumably in this last area only progressive courts will deign to not defer to the legislature.

Typical of the first category are the cases involving individuals who were discharged for filing workmen’s compensation claims. The oft-cited Frampton v. Central Indiana Gas Co., 260 Ind 249, was such a case. There an employee was discharged one month after she had filed her claim. The court decided the case on the pleadings and held there to be a tort cause of action for retaliatory discharge where the employer’s action was taken in response to the exercise of a statutory right. Arguably, any statute which imposed a duty upon an individual would be equivalent to a statute providing a right. Therefore, any cases alleging retaliation for fulfilling a statutory duty would lie in this category.

Petermann represents a sample of the second category. The rationale of Petermann was reiterated by the Califor-
At-will Employment...

nia Supreme Court in a recent case which also falls in this category, Tameny v. Atlantic Richfield Co., 164 Cal Rptr 839 (1980). The plaintiff alleged that he had been fired solely on account of his refusal to participate in a price-fixing scheme, an activity which is a criminal offense in California. The court held 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.

The court further held that such an employee has a cause of action in tort against such an employer since the employer would violate “a basic duty imposed by law on all employers.” Recovery, the court added, could include both compensatory and punitive damages.

In terms of jurisprudence, there is perhaps a more important case falling in the second category. In Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (W.Va., 1978) a long-time bank employee discovered violations of the federal and state consumer protection laws and went to superiors, members of the board of directors, and auditors in an attempt to persuade the bank, his employer, to comply with the law. The bank’s response was to fire him. The West Virginia Supreme Court held that the employee had a tort cause of action for wrongful discharge since it found the discharge to contravene a “substantial public policy principle.” After a detailed analysis of the State’s Consumer Credit Protection Act, the court found a “clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection” and that the courts could not frustrate this intent by giving no protection to an individual like Harless.

Since it is unlikely that legislation expressly giving private sector whistle blowers rights and remedies will be adopted, cases falling in the third category are perhaps the most important to professional at-will employees. Up until Pierce, the two leading cases in this category were Monge v. Beebe Rubber Co, 114 N.H. 130 (1974), and Fortune v. National Cash Register Co., 373 Mass. 96 (1974). Interestingly, both cases provided discharged employees protection under implied contract theories.

Monge involved sexual harassment of an hourly employee. The New Hampshire Supreme Court held: “controversial but not unlawful,” research at issue. Nonetheless, Pierce does provide a foundation upon which the judiciary of States not yet embracing the public policy exception may formulate their own protections of the public interest.

New York is one state which, although tempted, has refrained from adopting the wrongful discharge cause of action. The temptation was acknowledged in a lower court opinion in 1978 in which the court looked for a claim premised on public policy demonstrated in constitutional, statutory or decisional law, noting the great inertia working against adopting new causes of action, Chin v. AT&T Co., 96 Misc.2d 1070 (1978), aff’d, 488 F Supp 822 (EDNY, 1980). There a discharged employee who had been a participant in the company retirement plan, subject to regulation by the Employment Retirement Income Security Act, complained that his discharge after thirteen years of service was based solely on an attempt to avoid the vesting of his pension rights. Judge Platt concluded New York would adopt the new cause of action. The sole authority cited was Frampton, without explanation. Monge, therefore, supplies a broad basis on which a contract action (which has the disadvantage as compared to torts of having limited remedies), at least, may be premised on a public policy exception; arguably, where the public interest involved exceeds the interest of the employer in being able to discharge an individual for any reason, under Monge the discharged individual would have a cause of action.

The salesman with 25 years experience with his employer in Fortune alleged that he was fired in an attempt to deprive him of a substantial bonus. Finding in the principles of the law of agency prohibitions against a principal depriving his servant an agreed-to compensation and against overreaching, the court held that the at-will employment contract at issue (and, by inference from dicta, all employment contracts) contained “an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract”. Therefore, as in Monge, arguably, any indication of public policy support may give rise to a breach of contract action in the retaliatory/abusive discharge situation.

Finally, under Pierce a discharged employee must be able to demonstrate that his/her termination was contrary to a clear mandate of public policy. Legislation and judicial decisions present the strongest indicia that the standard has been met. Professional codes of ethics may express the clear mandate, but they fail to do so where they are “designed to serve only the interests of a profession”. The looseness of this standard is demonstrated by Pierce decision itself in that Dr. Pierce’s reliance on the Hippocratic Oath was found not to prohibit the specific, “controversial but not unlawful,” research at issue. Nonetheless, Pierce does provide a foundation upon which the judiciary of States not yet embracing the public policy exception may formulate their own protections of the public interest.

(Continued on page 18)