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EMPLOYMENT-AT-WILL IN ILLINOIS: IMPLICATIONS AND ANTICIPATIONS FOR THE PRACTITIONER

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The doctrine of employment-at-will\(^1\) has been of longstanding importance in American employment relationships. The doctrine grew out of the economic attitude of the Industrial Revolution which encouraged growth, free enterprise, and entrepreneurship.\(^2\) Under this doctrine, at-will employers or employees are permitted to terminate employment relationships of no defined duration at any time without incurring any liability.\(^3\)

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

For a comprehensive historical perspective of the at-will rule, see Feinman, The Development of the Employment At Will Rule, 20 AM. J. LEGAL HIST. 118 (1976) (traces the development of at-will doctrine vis-à-vis Marxist precepts and control of resource rationale). The terminable-at-will rule remains the majority rule in this country, and under the rule "the employer may, without liability, discharge the employee for a good reason, a bad reason, or no reason at all." Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1054 (5th Cir. 1981).


The force of the rule is illustrated by circumstances under which discharge has been permitted. See, e.g., Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (no
Illinois long has recognized the terminable-at-will rule.\(^4\) Although the rule is still followed by Illinois courts,\(^5\) the continual erosion of the rule has diminished the doctrine's effectiveness in providing security for employers.

This Article will review the history and analyze the present state of the employment-at-will doctrine in Illinois. The focal point of discussion concerns the rise of the tort of retaliatory discharge, which has been increasingly employed by Illinois courts to prevent the terminable-at-will doctrine from thwarting public policy concerns of the State of Illinois. This Article will survey the erosion of the employment-at-will rule through public policy considerations and will suggest means by which practitioners can utilize the rule in its present form.

**HISTORY OF THE EMPLOYMENT-AT-WILL DOCTRINE IN ILLINOIS**

In 1896, the Illinois Appellate Court ruled that an employment for a "long engagement" was no more than employment for an indefinite duration, and therefore, employers had the right to discharge employees after giving them the customary notice.\(^6\) The court stated that the right to discharge such an employee belonged to the employer independent of the employee's competence. Consequently, it was unnecessary for the court to express any views on the propriety of the discharge.\(^7\)

The attitude which prompted this decision was almost uniformly followed by the courts in Illinois for the next eighty-one years. During that period Illinois courts summarily rejected any attempt to limit the employment-at-will doctrine.\(^8\) Indeed, it was not until 1977, in *Leach v. Lauhoff Grain Co.*,\(^9\) that even the slightest erosion of the doctrine occurred in the Illinois courts. This adherence by the courts to the doctrine occurred despite

\(^4\) See supra notes 4-5.

\(^5\) See, e.g., *Odell v. Chicago Great W. R.R.*, 212 Ill. App. 616 (1st Dist. 1918) (fact that employee was paid monthly did not sustain burden of proving monthly employment); *Gunther v. Chicago, B. & Q. Ry.*, 165 Ill. App. 55 (2d Dist. 1911) (in the absence of definite contract for term of employment, employer may discharge employee at will); *Gray v. Wulff*, 68 Ill. App. 376 (2d Dist. 1896) (employee's understanding that his employment was for a "long engagement" held to be at-will employment).


\(^7\) Id.

\(^8\) See supra notes 4-5.

legislative erosion of the doctrine which began slowly in the 1940's, and which has increased in recent years.\textsuperscript{10}

\textit{Long-Standing Predominance of the Employment-At-Will Doctrine}

There are several reasons why the rule persisted in Illinois courts for such an extended period of time. Initially, the at-will theory comported with economic notions of the late nineteenth and early twentieth centuries. During this period, courts were sympathetic to the doctrine of laissez-faire economics and convenient legal notions of contract were altered to comport with that doctrine.\textsuperscript{11}

Apparently relying on notions of laissez-faire economics, the Illinois cases from the early part of this period generally espoused the at-will doctrine freely without citing to any authority.\textsuperscript{12} This laissez-faire analysis was propounded as recently as 1981 by the dissenting opinion of Justice Ryan in \textit{Palmateer v. International Harvester Co.}\textsuperscript{13} Justice Ryan stated that courts should not focus solely on promoting an employee's expectations when they depart from the general rule that at-will employment is terminable at the employer's discretion.\textsuperscript{14} He cautioned that courts must recognize that permitting a tort action for retaliatory discharge is an exception to the general at-will rule and that the legitimate interest of an employer in guiding the business' policies and destiny must be considered.\textsuperscript{15} According to Justice Ryan, one substantial interest to be included in the balancing formula is the "deteriorating business climate" in Illinois.\textsuperscript{16} Noting that Illinois was not attracting large amounts of new industry and business and that industry was leaving the State at an alarming rate, Justice Ryan stated that courts should decline from adding to the problem by utilizing a vague concept of public policy.\textsuperscript{17}

\textsuperscript{10} See infra notes 26-44 and accompanying text.

\textsuperscript{11} This judicial sympathy for laissez-faire economics, however, did not prevail over time. In 1954, when the Court in Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955), upheld Oklahoma's control of the business of selling eyeglasses, a departure from laissez-faire thought was evident: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." \textit{Id.} at 488. The United States Supreme Court has stated that when Congress is regulating the economy, its statutes "are beyond attack without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat." Carolene Prods. Co. v. United States, 323 U.S. 18, 31-32 (1944) (citing United States v. Carolene Prods. Co., 304 U.S. 144 (1937)).

\textsuperscript{12} See, e.g., Davis v. Fidelity Fire Ins., 208 Ill. 269, 70 N.E. 359 (1904); Odell v. Chicago G. W. R.R., 212 Ill. App. 616 (1st Dist. 1918); Chadwick v. Morris & Co., 170 Il1. App. 569 (1st Dist. 1912).

\textsuperscript{13} 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

\textsuperscript{14} \textit{Id.} at 142-43, 421 N.E.2d at 884 (Ryan, J., dissenting).

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 143, 421 N.E.2d at 885.

\textsuperscript{17} \textit{Id.} at 145, 421 N.E.2d at 886. Justice Ryan cites Blades, \textit{supra} note 2, as support for the notion that the expansion of the right of an employee to sue for wrongful discharge is not
Once established, judicial restraint and respect for precedent prevented changes in the at-will doctrine even though the repudiation of laissez-faire economics had begun in the mid-1930’s. Despite increasing activism in the federal judiciary, the Illinois courts maintained a quiet deference to the legislature with respect to the employment-at-will doctrine, and continually reiterated that the duty to create rights belonged to the legislature, not to the courts. Put simply, if the legislature did not provide express civil remedies, the doctrine of employment-at-will governed because the courts assumed that civil remedies were intended to be excluded.

without adverse effect on the employer’s business.

[T]here is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained. The employer’s prerogative to make independent, good faith judgments about employees is important in our free enterprise system.

Thus, for retaliatory discharge to be actionable, Justice Ryan would require a violation of some “strong public policy that has been clearly articulated.”

For a historical analysis of the at-will doctrine with respect to economic considerations, see generally Blades, supra note 2; Protecting At Will Employees, supra note 2.


It is not the function of the courts in the absence of a contract to compel a person to accept or retain another in his employ, not is it the function of courts to compel any person against his will to remain in the employ of another. . . . In the absence of a contract or statutory provision an employer may discharge an employee without cause or reason and owes no duty to continue the employment of an employee.

21. See, e.g., Teale v. Sears, Roebuck & Co., 66 Ill. 2d 1, 359 N.E.2d 473 (1977) (specific criminal sanctions provided for in statute precluded civil remedies). See also Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977). The court in Loucks, interpreting Illinois law, determined that the absence of a provision in the Workmen’s Compensation Act creating a private
An additional reason for the doctrine’s persistence is that Illinois courts received no outside pressure to discard the employment-at-will doctrine. Notwithstanding some change in the federal judiciary, most state courts nationwide continued to accept the rule well past the demise of the economic age from which it was spawned. Then, in 1959, California recognized a judicial exception to the doctrine, concluding that a cause of action existed in tort where an employee claimed he was discharged in contravention of public policy for his refusal to commit perjury in furtherance of his employer’s interests. This limitation of the employment-at-will doctrine evolved slowly. In fact, it was not until the middle to late 1970’s that the ranks of states recognizing this public policy tort began to grow. The cause of action for retaliatory discharge was a deliberate policy decision of the Illinois legislature: “We think it rather unlikely that a retaliatory discharge prohibition would have been omitted from the comprehensive and integrated legislation if it had been intended.” Id. at 748.

22. See infra notes 26-32 and accompanying text.


Some states, although finding for defendant, still have indicated a willingness to recognize exceptions to the common law rule when the proper facts come before their courts. See, e.g., Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) (discharge of employee for refusing to take a lie detector test did not violate clear statutory policies); Jackson v. Mindoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (no evidence that discharge was result of socially undesirable motive necessary to invoke public policy exception); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa Sup. Ct. 1978) (discharge of employee voluntarily writing letter supporting fellow employee’s claim for unemployment benefits did not constitute public policy violation); Keneally v. Orgain, 606 P.2d 127 (Mont. Sup. Ct. 1980) (when public policy is violated, wrongful discharge is actionable); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (discharge of employee for refusing to test a particular drug did not justify public policy exception); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (discharge of employee for taking unsafe product off market did not violate clear public policy mandate); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (discharge of employee for testifying about allegedly illegal cross-billing system failed to establish that termination was beyond normal business operations); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (discharge of employee for violation of company policy forbidding related employees from working on same shift was business judgment, not public policy violation). Cf. Lampé v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978) (discharge of nurse for refusing to obey nursing code did not violate public policy).
Illinois courts, hesitant to carve out new exceptions in the law in this area, predictably chose to remain with the majority of states retaining the at-will doctrine.

One additional obstacle which impeded the Illinois courts from embracing the public policy tort of retaliatory discharge was the definition of "public policy" itself. "Public policy" is an inherently amorphous and ambiguous entity. Any reliance placed on public policy is subject to severe challenge by parties and to reversals by higher courts, and to possible ridicule by the electorate. Consequently, it was understandable that Illinois judges have been reluctant to recognize a new tort based upon such an uncertain definition.

**Erosion of the Common Law Rule**

As intimated, the initial erosion of the employment-at-will doctrine was primarily the result of statutory impingement, at both the federal and state levels. Civil or administrative remedies for certain types of discharges, generally those involving retaliation by the employer, were provided through express legislative mandate or derived from legislative expressions of public policy.

On the federal level, statutory erosion began as early as 1935 with the enactment of the National Labor Relations Act. Congress subsequently enacted other protective measures for employees in derogation of the at-will doctrine. Discharge of "at-will" employees on the basis of their sex, race, color, religion, national origin, age, or in retaliation for the use of these laws is proscribed. Arbitrary discharge of employees who are returning veterans, civil servants, or those who have had their wages

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There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is found in the State's constitution and statutes and when they are silent, in its judicial decisions.

Id. at 130, 421 N.E.2d at 878 (citations omitted). See also People ex rel. Nelson v. Wiersema State Bank, 361 Ill. 75, 86, 197 N.E. 537, 542 (1945) (defines public policy as any act that tends to injure the public welfare).

26. 29 U.S.C. §§ 151-168 (1976). The National Labor Relations Act provides protection from all types of employer and union retaliation against employees who are engaged in "protected concerted activity" to improve their wages or working conditions or employees who choose not to engage in such activity. Moreover, Congress established a full scale administrative mechanism, the National Labor Relations Board, which in theory was aimed at expediting the employee claims of retaliation or harrassment emanating from an employee's exercise of protected concerted activity. Id. § 153.


The Illinois legislature began to erode the at-will doctrine at about the same time the federal erosion began. In 1941, the Servicemen’s Employment Tenure Act was enacted. Under the act, employers were prohibited from discharging a veteran without cause within one year from the veteran’s return to a job held prior to military service. In 1961, the Fair Employment Practices Act, which provided sanctions for various discriminatory discharges, including discrimination on the basis of race, color, religion, national origin, or ancestry, became law. The Act eventually was repealed and incorporated into the Human Rights Act of 1980.

In the 1970’s, the erosion of the at-will doctrine continued with the adoption of the new Illinois Constitution. Article I, section 17, prohibited discrimination on the basis of race, color, creed, natural ancestry, or sex in an employer’s hiring and promotion practices. This constitutional provision

32. For a more detailed discussion of federal law erosion of the at-will doctrine, see Note, Job Security for the At Will Employee: Contractual Right of Discharge for Cause; Toussaint v. Blue Cross & Blue Shield of Michigan, 57 CHI.-KENT L. REV. 697, 707 (1981) [hereinafter cited as Job Security].
34. Id.
36. Section 3, 1961 Ill. Laws 1845 (repealed 1979). Such discrimination also was declared to be against the public policy in Illinois. Id. § 1. In 1975, two additional prohibitions were added. First, mental or physical handicap discrimination was prohibited where the handicap was not related to ability to perform the job. Act of July 11, 1975, P.A. 79-186, § 1, 1975 Ill. Laws 1378 (repealed 1979). Second, discrimination in employment on the basis of unfavorable discharge from military service was outlawed. Act of Aug. 10, 1975, P.A. 79-370, § 1, 1975 Ill. Laws 1378 (repealed 1979).
38. ILL. CONST. art. I, § 17 (1970). Section 17 provides in pertinent part:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

Id. (emphasis added).

Although not specifically stated within § 17, lower Illinois courts have ruled that a cause of action for discriminatory discharge is implied within the terms of the provision. See, e.g., Butler v. Fiat Allis, No. 805-78 (Sangamon County Sept. 11, 1979) (order denying motion to dismiss because § 17 not limited to hiring and promotion); Briggs v. Lawenceville Indus., No. 78-L-6 (Jasper County Feb. 1979) (order denying motion to dismiss because § 17 not limited to hiring and promotion). However, the continuing use of this constitutional provision as a shield against at-will discharges recently has been dealt a significant blow by the decision of the Fourth District Appellate Court in Greenholdt v. Illinois Bell Tel. Co., 107 Ill. App. 3d 748, 438 N.E.2d 245 (4th Dist. 1982). In Greenholdt, the court rejected the notion that § 17 established a claim for discriminatory discharge. Looking to the plain words of the statute, the
was followed by a series of legislative enactments that further circumscribe the employer's right to discharge an employee-at-will. For instance, the 1975 amendment to the Workers' Compensation Act specifically prohibits any retaliatory action taken against an employee filing a claim under the Act. Such retaliation was determined to be against the public policy of Illinois. Another Illinois statute expressly prohibits an employer from discharging an employee because his wages were garnished. Under a 1977 statute, it became unlawful to discharge an employee because his earnings were subject to wage garnishment demands on his employer. The Human Rights Act, which was enacted in 1980, replaced, inter alia, the Fair Employment Practices Act, and the Age Discrimination Act.

To the extent that article I, § 17 can be used, it is a potent weapon. Unlike other employment discrimination provisions, a claim under article I, § 17 of the Illinois Constitution may seek both compensatory and punitive damages. See Walinski v. Morrison & Morrison, 60 Ill. App. 3d 616, 377 N.E.2d 242 (1st Dist. 1978). For an in-depth analysis of the Walinski decision, see Note, State Constitutional Right to Damages for Private Discrimination in Employment—Walinski v. Morrison & Morrison, 28 DEPAUL L. REV. 229 (1978).

39. ILL. REV. STAT. ch. 48, § 138.4(h) (1981). The Act makes it "unlawful for any employer . . . to discharge or threaten to discharge . . . an employee because of the exercise of his rights or remedies granted to him by this Act." Id.

40. ILL. REV. STAT. ch. 62, § 88 (1981). This statute protects the employee whose wages are involuntarily garnished (to be recodified at ILL. REV. STAT. ch. 110, § 12-818).

41. ILL. REV. STAT. ch. 48, § 39.11 (1981). This statute protects the employee who voluntarily assigns his wages to a creditor.

42. ILL. REV. STAT. ch. 68, §§ 1-101 to 9-102 (1981). The Human Rights Act declares that certain discriminatory actions by employers, employment agencies, and labor organizations constitute civil rights violations. Id. § 2-102. Discrimination based on race, color, national origin, ancestry, age, marital status, handicap, or unfavorable discharge from military service is prohibited. Id. § 1-103(Q). Not only did the legislature seek to consolidate all discrimination provisions in Illinois law, but the Act also was designed to develop a uniform and comprehensive legislative framework to handle all types of discrimination. As Representative Gene Barnes, one of the co-sponsors of the bill in the Illinois House of Representatives, stated: "For the first time, with the adoption of this legislation, there will be one central place, one central agency, one structure for those persons to go to have their grievance affirmed or to . . . have that grievance denied." TRANSCRIPT OF THE ILLINOIS HOUSE OF REPRESENTATIVES DEBATE IN GENERAL ASSEMBLY ON SENATE BILL 1377, June 25, 1979, at 89 (emphasis added). This sentiment was echoed by a sponsor of the Human Rights Act, then State Senator Harold Washington:

What has happened here and I think it's a wise move, that we have merged . . . attempted to merge these various disciplines. We bring together the Fair Employment Practice Commission, EEO, Human Relations. We deal with public accommodations with financial credit, with housing with the brokering laws. We remove the brokerage laws out of the criminal court where they should never have been and placed them under this Act to make it a negotiatonal thing. We deal with public accommodations, not as a crime, but as something that should be negotiated and discussed. We cover the entire purview of the law.

TRANSCRIPT OF ILLINOIS STATE DEBATE IN THE GENERAL ASSEMBLY ON SENATE BILL 1377, May 25, 1979, at 284 (emphasis added).


44. § 4, 1967 Ill. Laws 2044, repealed by Illinois Human Rights Act, P.A. 81-1216, § 10-108,
Adoption of the Public Policy Tort in Illinois

In 1977, the Illinois courts began to join their legislative brethren in chipping away at the employment-at-will doctrine through the recognition of an action in tort when an employee is discharged in contravention of Illinois "public policy." In *Leach v. Lauhoff Grain Co.*, an Illinois appellate court permitted a cause of action for retaliatory discharge under the Workers' Compensation Act based upon public policy considerations. In establishing the cause of action, the court relied upon the legislative intent embodied in that Act which suggested that the purpose of the Act was to prohibit an employer from discharging an employee for exercising rights or remedies guaranteed by the Act. The court, however, took great pains to limit the decision's precedential impact. First, the court narrowed the definition of public policy to include only those policies actually embodied in the language of the Illinois Constitution or Illinois statutes. Second, public policy was not to be derived from the decisions of Illinois courts unless the constitution and Illinois statutory law were silent on the subject. Third, the court reinforced its general adherence to the at-will doctrine except in those situations where a clear mandate of public policy was involved. Despite the decision's limited scope, the *Leach* court laid the initial groundwork for further expansion of the tort exception to the terminable-at-will doctrine.

The next significant expansion of the tort of retaliatory discharge occurred in *Kelsay v. Motorola Co.* Although *Kelsay* involved the same statute as *Leach*, the express statutory declaration of Illinois public policy which was vital to the *Leach* court's rationale was not integral to the *Kelsay* decision because the claim in *Kelsay* arose before the prohibition against retaliatory discharge was added to the Workers' Compensation Act in 1975. Instead,
the Illinois Supreme Court permitted the claim solely because it found an implicit expression of public policy against retaliation for the exercise of rights granted under the Act because of the Act's "humane" and "remedial nature," its "beneficent purpose," and its provisions for "efficient remedies for and protection of the employees." Because the Kelsay court's holding was based solely upon a public policy inference as opposed to an express statutory enunciation, the decision dramatically expanded the means by which public policy could be discerned to support a claim for retaliatory discharge. Although Kelsay still required statutory support, Kelsay's public policy inference which derived from the mere existence of a particular statute, invited further expansion—to infer similar public policies from judicial precedent or from a statutory scheme.

The most recent departure from the common law terminable-at-will doctrine in Illinois occurred in Palmateer v. International Harvester Co. Palmateer involved a discharge in retaliation for "whistle-blowing." An employee, who suspected a coworker of violating the Illinois criminal code, notified a law enforcement agency and offered to assist in the investigation of the suspected malfeasance. In declaring the existence of a cause of action for retaliatory discharge, the Illinois Supreme Court, as invited by Kelsay, continued to relax its reliance upon an express statutory mandate. Without relying upon specific legislation of any kind, the court ascertained that a public policy against discouraging a citizen's participation in the enforcement of the criminal laws was inherent in the criminal code. As a result, Palmateer further broadened the means by which a public policy basis to support a claim for retaliatory discharge could be discerned.

In summary, evolution of the public policy tort in Illinois has progressed beyond the limited recognition of a cause of action supported by a clear and express statutory mandate. In Illinois, public policy support for a retaliatory discharge suit may be claimed from an express constitutional and statutory mandate, inferred from implicit statutory expressions of public policy, or discerned from a notion that the synthesis of a body of law requires that employees engaged in particular acts for the public welfare be protected.

**CONTRACTUAL RIGHTS UNDER THE AT-WILL RULE**

Wholly apart from the public policy discharge tort, Illinois courts have

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53. Id. at 181-82, 384 N.E.2d at 357.
55. Id. at 127, 421 N.E.2d at 877.
56. Id. at 132, 421 N.E.2d at 879. The Palmateer court recognized the existence of a clear public policy favoring investigation and prosecution of criminal offenses: "There is no public policy more basic, nothing more implicit in the concept of ordered liberty, than the enforcement of a State's criminal code. There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." Id. (citations omitted). Therefore, even though there was no specific constitutional or statutory provision requiring a citizen to take an active part in discovery, investigation, and prosecution of crime, the Palmateer court determined that public policy favored citizen crime fighters.
recently established a cause of action for employees at-will under a contract theory.\(^\text{57}\) In Martin v. Federal Life Insurance Company,\(^\text{58}\) an Illinois Appellate Court held that an employee has a claim to enforce an oral contract against an employer where the employee alleges that he has provided some specific consideration to the employer in return for the employer's agreement to employ him until such time as he decides to retire. In 1967, the employee, Martin, agreed not to accept a job offer with a rival company in return for his employer's assurances that Martin could continue working for the employer until such time as he retired. In February, 1977, Martin was terminated allegedly without cause. In finding that Martin had a cause of action for breach of contract the court held that "we believe that when the employer gives up another offer in exchange for and in reliance upon the employer's promise of permanent employment, that contract, if proved is enforceable."\(^\text{59}\) The court left open the question as to whether additional consideration, such as the agreement Martin made to forego a specific job offer, is always necessary to enforce an oral contract for lifetime employment or whether a contract for permanent employment is made whenever an employer and employee agree that the employee will be retained permanently so long as the employee performs his present job competently. Instead, the court only notes that the notion of requiring additional consideration from the employee, above and beyond the mere agreement to provide competent job performance, may be viewed as "useful" in certain cases where the employee provides no evidence of a contract for permanent employment other than a statement by his employer that he would be employed for life.\(^\text{60}\)

In reaching its decision, the Martin court rejected any notion that the oral contract which was made between the employer and employee was barred by the Statute of Frauds,\(^\text{61}\) even though 10 years had elapsed between the date of the representation and the discharge. The Statute of Frauds prohibits oral contracts which cannot be performed within the space of one year from the making thereof. The Martin court held that the test to determine whether the Statute of Frauds is applicable in this particular instance was to determine "whether the contract by its terms is capable of full performance within a year, not whether such an occurrence is likely."\(^\text{62}\) By constructing the test in this manner, the court was able to hold that despite the ten-year interval the Statute of Frauds did not apply. Noting that the agreement between the employee, Martin and his employer provided that Martin would be employed "until his retirement" the court ruled that the contract could have been fully performed within the one year time period.\(^\text{63}\)

\(^{57}\) Ill. App. 3d, 440 N.E.2d 998 (1st Dist. 1982).
\(^{58}\) Id.
\(^{59}\) Id. at ____, 440 N.E.2d at 1004.
\(^{60}\) Id. at ____, 440 N.E.2d at 1003.
\(^{62}\) Ill. App. 3d at ____, 440 N.E.2d at 1004.
\(^{63}\) The court, although holding that the Statute of Frauds was not applicable for the above noted reasons, also reinforced the notion that the Statute of Frauds would not be inap-
Interestingly enough, while the Martin court upheld a cause of action for breach of contract in Illinois, the court rejected any notion of a cause of action grounded in a breach of the covenant of good faith and fair dealing. In rejecting such a claim, the court noted that "[c]are must be taken to prevent the transmutation of every breach of contract into an independent tort action through the bootstrapping of the general contract principle of good faith and fair dealing. We conclude that existing principles of tort law are adequate without our creating a new action based on a vague notion of fair dealing." 6

Applicable in instances where a contract could not be performed within one year, absent the death of one of the parties. Id. App. 3d at ___, 440 N.E.2d at 1005. However, the court must only have been speaking of contracts which talk of a specific durational period because the court went on to rule, citing Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250, aff’d, 31 Ill. 2d 507, 202 N.E.2d 516 (1964), that "where a contract extends to a point in time, be it death or some other circumstance, at which time the full service contemplated will have been rendered, and that point in time could occur within one year, the Statute of Frauds will not be a bar to the enforcement of the action." Id. App. 3d at ___, 440 N.E.2d at 1005.

64. A contract action or an action based upon breach of an implied covenant of good faith has been accepted in at least two states. In the first such decision, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), the Supreme Court of New Hampshire held that termination of an at-will employment contract constituted a breach because the discharge was motivated by bad faith, malice, or retaliation. Id. at 133, 316 A.2d at 551. Such termination was not considered in the best interests of the economic system or the public good. The Monge decision was based upon the principle that all contracts impliedly contain an obligation of good faith. Id. In Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), and Gram v. Liberty Mutual Insurance Co., Mass., 429 N.E.2d 21 (1981), the Massachusetts Supreme Judicial Court adopted the Monge reasoning. The court held that where an improperly motivated principal seeks to deprive its agent of all compensation by terminating the contractual relationship when the agent has nearly completed a successful sale, the principal has acted in bad faith and a breach of contract is effected, notwithstanding that the employment is of indefinite duration. Id. at ___, 429 N.E.2d at 29; 373 Mass. at 104, 364 N.E.2d at 1257.

In Fortune, discharge prevented the employee from receiving earned commissions. The court held that this action was in bad faith and therefore in breach of his terminable-at-will employment contract. In adopting Monge, the court stated:

We believe that the holding in the Monge case merely extends to employment contracts the rule that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. . . ." Id. (citations omitted) (emphasis in original).

In a third state, Michigan, although there is no overriding covenant of good faith, if an employer makes any written or oral representations to the effect that the employee will maintain his or her job as long as the employee continues to perform adequately, courts will adjudicate a contract terminable only if just cause is found. See Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (employer’s personnel manual representing company policy of requiring just cause for termination bound employer to that policy in his employment-at-will contract with employee). See also Weiner v. McGraw Hill, Inc., No. 485, slip op. (N.Y. 1982) (employer’s assurances in employment application and manual is sufficient to protect employee from discharge without cause).

65. Id. App. 2d ___, 440 N.E.2d 1006. Finally, the court rejected the notion that an employee of the employer could be charged with tortious interference with contract absent an allegation of conduct which indicates that the employer’s actions were willful and malicious.
The import of *Martin* is that employees in Illinois now have a cause of action for breach of contract regardless of any public policy violations, the time interval between the date of the representation and the date of their termination, or the fact that the contract was completely oral. As long as the plaintiff-employee alleges and proves consideration of some type above the normal agreement to perform his work competently, the teaching of *Martin* is that an employer who has given assurances of permanent employment, may be liable in contract, absent a showing of just cause termination.

In addition to *Martin*, there is another cause of action recognized in Illinois that has grown out of the same factual context—oral assurances given by the employer—and which serves to limit the at-will doctrine. In *Gilliland v. Allstate Insurance Company,* the court indicated that an employee, who was allegedly told at the time he was hired that as long as he substantially complied with the company’s discretions would be employed until retirement and receive the benefits of the profit sharing pension and savings plans, would have a claim for tortious misrepresentation upon his termination without cause.

Not only did the court indicate that such a cause of action was viable, but held that the cause of action would be effective no matter how much time separated the alleged misrepresentation and termination. The court specifically held that the statute of limitations covering the tort of misrepresentation would not start to run until the injury caused by the tort occurred—the time of termination. Based on *Gilliland*, the representation at issue could be ten, even twenty years old by the time the termination took place, yet the cause of action would be timely.

Both the misrepresentation and the contract claims are potent weapons because they can resurrect long past representations as a basis for recovery. A *Gilliland* claim, however, may be more effective than *Martin* because the plaintiff need not demonstrate that consideration was given for the statement of the employer. Moreover, because the *Gilliland* cause of action sounds in tort, the plaintiff may seek both compensatory and punitive damages. In contrast, because *Martin* is based on a contract theory, plaintiff would be limited to the recovery of compensatory damages.

**FUTURE FORM OF THE AT-WILL DOCTRINE IN ILLINOIS**

Although the common law terminable-at-will rule is still respected, recent Illinois decisions, which have expanded the scope of the public policy tort, have led to the continued erosion of the rule. Moreover, by continuing to broaden the definition of public policy as the Illinois courts have done in the transition from *Leach* to *Palmateer*, Illinois courts can, and probably will, continue to erode the at-will doctrine. The extent to which the Illinois courts will expand the definition of “public policy” and, consequently, increase the availability of the tort of retaliatory discharge, is uncertain. One

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67. Id. at 634, 388 N.E.2d at 71.
can glean, however, some indication of where Illinois courts will find public policy to exist in the near future.

First, decisions in other states provide guidance as to when Illinois might recognize a claim for retaliatory discharge. The Illinois Supreme Court tends to seek support for its decisions by reviewing the status of the public policy tort in other states. Consequently, if an employee was discharged in retaliation for fulfilling a jury duty obligation, Illinois courts might look to the case law of other jurisdictions and determine that a cause of action for retaliatory discharge should be permitted in Illinois. Similarly, cases in other jurisdictions concerning a discharge for refusal to accede to the sexual advances of a superior, a discharge of an employee for refusing to commit perjury, and a discharge of an employee for attempting to ensure employer compliance with the law, presumably might provide a public policy basis to support a cause of action for retaliatory discharge.

The likelihood that the Illinois Supreme Court would accept these claims as actionable stems not only from the fact that these dismissals justified actions for retaliatory discharge in other jurisdictions, but also because the court readily could find that each of these instances generates a situation which is injurious both to the specific employee and to the public. The probability that Illinois may adopt any or all of these expansions of the retaliatory discharge tort also is greater in view of Illinois' gradual expansion of the sources from which a public policy basis can be derived to support a claim for retaliatory discharge. Such support may range from an express legislative mandate to a more generalized inference of public policy emanating from a legislative "scheme".

The public policy exemption also may be expanded in Illinois if courts utilize established expressions of public policy and apply such established policies to other employees who were tangentially involved. For example, under the Illinois Workers' Compensation Act, the cause of action for retaliatory discharge logically could be expanded to provide a remedy not only for the employee seeking compensation, but also for an employee who testified on behalf of another employee in a workers' compensation suit.


69. See Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (court looked to case law of several jurisdictions in holding that a cause of action existed for discharge in retaliation for serving on a jury).


73. See People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 294, 22 N.E.2d 798, 803 (1889).


75. The ability of the courts to analogize public policy will be tempered to some extent by the countervailing concern that a legislative failure to create a right or remedy was purposeful. In each particular case the court will have to weigh carefully whether such exclusion of a right
Although the expansion of the public policy exception will continue, recent court decisions in Illinois and in other states indicate that there are distinct limitations to the public policy exception and that the at-will doctrine still is viable. Significantly, the Illinois Supreme Court has noted that the public policy tort in the retaliatory discharge context generally is defined in other jurisdictions as striking at the heart of a citizen's social rights, duties, and responsibilities. Thus, discharges for private reasons, even if for such non-job related reasons as personal animosity, would appear to be protected by the at-will doctrine despite the expanding public policy exception. Moreover, even where a perceived public policy is present, Illinois courts are less likely to permit a further cause of action for retaliatory discharge if the particular statute involved already has provided a remedy.

A final limitation to the exception may arise because several states are pulling away from the broad use of inferring public policy set forth in Palmateer. This may restrain the expansion of the exception in Illinois courts because of the continuing tendency of the Illinois Supreme Court, in recognizing the tort of retaliatory discharge, to examine the holdings of other states that previously have confronted a similar cause of action.

As to other infringements on the at-will doctrine, the recent Martin case indicates that Illinois courts are beginning to recognize that in addition to public policy tort, other causes of action for loss of employment may very well lie. Indeed, the future of the Martin cause of action is probably less was intended. Indeed, this very concern has thwarted the expansion of the public policy theory in several states. See, e.g., Larson v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) (noting an absence of statutory remedies, court refused to extend public policy exception to employee discharged for forcing his employer to take an unsafe product off the market); Abrisz v. Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978) (noting an absence of statutory remedies, court refused to extend the public policy exception to an employee discharged ostensibly for writing a letter which supported former employee's claim for unemployment compensation).


77. See Criscione v. Sears, Roebuck & Co., 66 Ill. App. 3d 664, 384 N.E.2d 91 (1st Dist. 1978) (lack of legitimate business reasons for discharge was not tantamount to a violation of public policy).

78. See, e.g., Teale v. Sears, Roebuck & Co., 66 Ill. 2d 1, 359 N.E.2d 473 (1977) (Illinois Supreme Court declined to expand judicial remedies where statute in question provided for protection of rights).

79. See, e.g., Abrisz v. Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978) (public policy tort acknowledged, but not applied to facts in which employee dismissed for voluntarily writing letter in support of fellow employee's unemployment benefit claim); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (public policy tort acknowledged, but not applied to facts in which employee dismissed for refusing to test a particular drug); Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (public policy tort recognized, but not applied to facts in which employee dismissed for serving on a grand jury).

80. See Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (court used decisions of several other states to support its holding); Kelsay v. Motorola Co., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (court used case law of two other states to support its holding).
limited than the public policy tort. The potential is that Illinois courts could easily expand the cause of action enunciated in Martin by reducing the consideration requirements and by permitting plaintiffs to point to more generalized statements of employment policy such as those that may be contained in a personnel policy manual distributed to the employees as the basic promise which underlies the contract.

Additionally, it is probable that oral representations of permanent employment or no discharge without cause will be utilized more frequently in establishing claims of misrepresentation in employment contexts. Misrepresentation claims such as the one raised in Gilliland v. Allstate Insurance Company, will be an increasingly attractive pleading as it can be proven without any showing of consideration and permits the employee to seek punitive damages.

IMPLICATIONS FOR THE PRACTITIONER

This section provides practical guidance for the practitioner representing either the employer or the at-will employee who is alleging wrongful discharge. Practical suggestions are important because punitive damages may be imposed upon an employer who is found to have wrongly terminated employees whom the employer believed were at-will. The function of punitive damages is to punish wrongdoers and to deter future offenses. In both Kelsay and Palmateer, the Illinois Supreme Court cautioned that punitive damages properly may be awarded in future retaliatory discharge cases. Punitive damages were not awarded in those cases because the court considered such an award unfair for a novel cause of action. The excuse

81. See D. Dobbs, Remedies § 3.9 (1973); Restatement (Second) of Torts § 908 comment a (1973); Williams, The Aims of the Law of Tort, 4 Current Legal Probs. 137 (1951).
82. 74 Ill. 2d at 189, 384 N.E.2d at 361.
83. 85 Ill. 2d at 135, 421 N.E.2d at 881.
84. See Palmateer, 85 Ill. 2d at 134-35, 421 N.E.2d at 881; Kelsay, 74 Ill. 2d at 188-89, 384 N.E.2d at 360-61. The Kelsay court's discussion of punitive damages included the following analysis:
Because of their penal nature, punitive damages are not favored in the law, and the courts must take caution to see that punitive damages are not improperly or unwisely awarded. Adherence to this rule compels us to conclude that punitive damages should not be awarded where, as here, the cause of action forming the basis of their award is a novel one.
74 Ill. 2d at 188, 384 N.E.2d at 360 (citations omitted) (emphasis added).
85 Ill. 2d at 134-35, 421 N.E.2d at 881.
of novelty no longer exists, however, as the courts seek to deter wrongful discharges in the future.

Preventive Measures for Employers

An awareness of the potential consequences of a disputed termination should begin at hiring and should continue throughout the employment relationship. Although no employer can be assured full immunity from viable lawsuits, the employer should at least recognize the more obvious situations which could generate potential liability and establish methods to prevent them. Significant areas from which potential liability may arise include: the content of the job application and employee manual; representations made during the interviewing process; and improper circumstances surrounding the termination of employment.

If an employer desires to maintain a practice of hiring at-will employees, an employer must be careful that neither his acts nor words transform a terminable-at-will relationship into employment for a specific duration. Initially, express language to that effect should be incorporated in the job application form. In *Novosel v. Sears, Roebuck & Co.*,85 a Michigan district court addressed the challenged validity of a clause on a job application which described any potential employment as at-will.6 In sustaining the validity of the clause, the court cited to the language of the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield*.87 The *Toussaint* court stated that where an employer did not agree to guarantee job security, it could protect itself by entering into a written contract which expressly provides that the employee's term of service is determined by the pleasure or will of the employer.88 Consequently, even though it is not necessary under Illinois law at present, it is to the employer's advantage to clearly state in the job application that the employment is at-will.

The job interview is another crucial point in defining the terms of employment and avoiding any challenge to the at-will status of the employee. Verbal definition of the employment relation as at-will should

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86. The job application set forth the following:

I certify that the information contained in this application is correct to the best of my knowledge and understand that falsification of this information is grounds for dismissal in accordance with Sears, Roebuck and Co. policy. . . . In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

*Id.* at 346 (emphasis in original).

88. *Id.* at 612 n.24, 292 N.W.2d at 891 n.24.
help alleviate potential ambiguity. The importance of an accurate portrayal of the employment relationship in the hiring process is heightened by the fact that representations made by an interviewer later may either give rise to a possible Toussaint\(^8\) claim that termination may only be for just cause or appear as grounds for a misrepresentation action. Misrepresentation is available to terminated at-will employees as an alternative cause of action to a retaliatory discharge. Even where the discharge of an at-will employee does not violate public policy, the former employee may be able to recover on the theory that his termination was contrary to representations made to him at the outset of his employment.\(^9\) Inadvertent remarks by an interviewer, such as "one generally is not dismissed without good cause," may transform an otherwise at-will employment into an actionable claim. Thus, where an at-will employee was dismissed without cause, a misrepresentation claim was sustained based upon an allegation that an employee was told that as long as he substantially complied with the company's directions, he would be employed until retirement and would receive the benefits of the profit sharing, pension, and savings plans.\(^9\)

Another potential problem area for employers is the content of employment manuals. Although an Illinois appellate court declined to construe a personnel manual as binding against the employer in Sargent v. Illinois Institute of Technology,\(^9\) the Michigan Supreme Court in Toussaint v. Blue Cross & Blue Shield\(^9\) held that a legally enforceable promise could arise from statements made at the time of hire or statements contained in an employee manual. The Toussaint court held that because the oral and written policy statement created a "reasonable expectation" of job security on the part of the employee, an enforceable contract not to terminate his employment without just cause was thereby created.\(^4\) The Michigan court also indicated that the obligation was enforceable regardless of whether the policy manual was distributed during the pre-employment interview or whether the employee learned of the existence of the policy after he was hired.\(^9\) Despite the Sargent case, the significance of Toussaint should not be ignored by an

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89. Id. at 597, 292 N.W.2d at 884. The employee was told at the time of his hiring that he would be with the company as long as he did his job.

90. See, e.g., Gilliland v. Allstate Ins. Co., 69 Ill. App. 3d 630, 388 N.E.2d 68 (1st Dist. 1979). In Gilliland, a discharged employee alleged breach of an oral contract of employment until retirement, and further alleged fraudulent misrepresentation concerning the receipt of profit sharing, pension, and savings plans. Although the contract claim was properly dismissed, the appeal court upheld the viability of the misrepresentation claims. Id. at 634, 388 N.E.2d at 71. Thus, the plaintiff was effectively allowed to circumvent the terminable-at-will rule by presenting a misrepresentation claim.

91. Id.


93. 408 Mich. 579, 613-15, 292 N.W.2d 880, 892 (1980). In a companion case, Ebling v. Masco Corp., 408 Mich. 579, 292 N.W.2d 880 (1980), a violation was predicated on the indication made in the employment manual that employees were not terminated for just cause.


95. Id.
Illinois employer and thus the employment-at-will concept should be emphasized in the manual itself. Otherwise the employer is taking the unacceptable risk that the manual may be construed as a contract or part of a contract, and a cause of action for the at-will employee may lie.96

Once employment commences, statements by supervisors concerning salary, in certain circumstances, can establish an implied term of duration thereby transforming an at-will employment into contractual employment terminable only by just cause. In Grauer v. Valve & Primer Corp.,97 a memo was sent to an employee clarifying the terms of the corporate employer’s earlier letter containing a salary contract. The memo guaranteed the employee “a minimum of $22,500 in 1973.”98 Based upon the employer’s projected and actual business volume, this amount could only accumulate if the employee remained in employment for a full year.99 Consequently, the letter was held to infer an intent to contract for an annual duration.100

An implied term of duration also was found in Chambers v. John T. Shayne & Co.,101 where an employee brought an action for breach of an oral contract which provided for employment for one year and an implied renewal for the subsequent year. Continuation of employment into a subsequent year without entering into a new agreement was held to renew the contract at the same rate of compensation.102 In Buian v. J.L. Jacobs & Co.,103 however, the Seventh Circuit held that a provision of an employment contract which stated that a scheduled assignment was to continue for a period of eighteen months was merely an expectation. The provision was insufficient to convert an at-will relationship into a contract of specific duration, particularly where the contract specifically permitted the employee to work for as long as he desired.104

A related question is whether the period of time upon which compensation is based constitutes an implied term of duration. The courts of some states have held, for instance, that reference to an “annual salary” creates an inference of employment for the term of a year.105 Illinois courts, how-

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96. The Sargent court distinguished its fact situation from Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (5th Dist. 1974), in which a personnel manual was compiled by an employer and reviewed and accepted by employees. Mutuality and consideration were furnished by continued work under the manual. The manual, adopted after the plaintiff’s employment, was considered a modification of the original at-will employment “contract,” and thus created a contract requiring cause before termination. Id. at 1059, 322 N.E.2d at 576.

98. Id. at 154, 361 N.E.2d at 865.
99. Id.
100. Id. at 155, 361 N.E.2d at 866.
102. Id. at 25, 176 N.E.2d at 649.
103. 428 F.2d 531 (7th Cir. 1970) (applying Illinois law).
104. Id. at 533.
105. For a discussion of implied promises of duration in other jurisdictions, see Job Security, supra note 32, at 703-34; Protecting At Will Employees, supra note 2, at 1820-21.
ever, have consistently held that if a period of employment is not stated, employment is at-will. Terms and conditions of employment, however, should be discussed delicately. Most organizations would benefit from a centralized personnel department where discussion of terms and conditions may be more readily controlled.

One final point should be raised regarding the impact of salary structures on the employment-at-will doctrine. If the employer intends to make renewal commission payments to sales employees so that the employee who originally made the sale will earn additional future income for past work performed, the employer should address this issue on the job application form. A waiver is suggested in which the employee agrees that, in the event he or she is terminated for any reason, the employee will agree to waive any claims to future renewal commissions. Although this issue has not yet arisen in Illinois, the Massachusetts Supreme Judicial Court addressed this problem in Gram v. Liberty Mutual Insurance Company. Gram was an insurance salesman who was terminated without cause, but not for an improper motive. The court ruled that the employee was terminable-at-will and, thus, not entitled to any additional income for future work. Because the employee was not discharged for cause, however, he was entitled to his renewal commissions which constituted future income for business originally sold by him which was renewed after he left the company. Indeed, the court held that where an employee-at-will is terminated without cause, he or she is entitled to all future income for past work performed, up to the date of the employee’s retirement. This decision, if followed in Illinois, could create serious liability to those employers who do not anticipate the problem.

The above considerations are aimed at ensuring that, where applicable, both parties understand that employment is at-will before employment begins and throughout the employment relationship. Once the possibility of termination arises, the employer’s focus must be redirected. Specifically, the

106. See, e.g., Bethany Reformed Church of Lynwood v. Hager, 84 Ill. App. 3d 684, 687, 406 N.E.2d 93, 95 (1st Dist. 1980) (as a matter of law in Illinois, hiring on basis of yearly salary is terminable at will if no period of employment is stated); Atwood v. Curtiss Candy Co., 22 Ill. App. 2d 369, 373, 161 N.E.2d 355, 357 (1st Dist. 1959) (“in this state the rule has long been established that . . . a monthly or annual salary, if no period of duration is specified in the contract, is presumed to be at will . . .”).

107. In the insurance industry, for example, employers often pay insurance sales agents commissions on the sale of a policy and another commission each time the policy is renewed. Because the renewal is usually automatic, at least one court has viewed the renewal commission to be additional future income for past performance. See Gram v. Liberty Mut. Ins. Co., Mass. 429 N.E.2d 21 (1981).

108. Id.

109. Id. at 429 N.E.2d at 29. The court recognized that some future work may be needed to retain Gram’s renewal commissions. The court held, therefore, that the amount of money paid to Gram for his renewals would be lessened by an appropriate amount to compensate Liberty Mutual Insurance Company for the amount of time spent by the agents maintaining Gram’s renewal accounts. Id.
employer who is seeking the maximum protection from a lawsuit must reasonably avoid conduct which might become actionable. Because the repercussions of a wrongful discharge can be expensive, it is advisable for employers to design an internal review procedure to protect against ill-advised terminations by first-line management. Although employers understandably have strong feelings concerning their right to terminate at-will employees at their sole discretion, such emotions cannot play a part in employment decisions which, through adverse litigation, can detrimentally affect the employer’s best business interests. Instead, an objective examination of every discharge decision is imperative so that an employer is fully aware of the risks involved when making such a decision.

The core purpose of an internal review procedure is to avoid litigating cases which cannot be won. To achieve this purpose, the employer’s agent charged with review responsibility must be aware of what actions contravene public policy. As previously discussed, Illinois statutes often expressly enunciate those actions which violate public policy. Although an employer cannot be expected to know all the areas of potential liability, counsel for employers should keep their clients sufficiently aware of the legal trends in Illinois and in other states. An employer should be sufficiently sensitized to the problem to engage in intelligent decision-making or to at least know when to seek legal assistance.

Whatever the real reason for discharge, the internal review procedure must assess all circumstances surrounding the discharge to ensure that no actionable retaliation is lurking in the shadows. For instance, the front-line supervisor who recommended the discharge may know that a particular employee has just reported some allegedly unlawful activity at the plant to law enforcement authorities. In such an instance, the employer’s agent who is responsible for reviewing discharges must be permitted to investigate and determine such facts. Otherwise, summary discharge of that employee, even though he is employed at-will, may involve the potential for employer liability.

110. See supra notes 33-37, 39-44 & 48 and accompanying text.

111. In sensitizing an employer to potential liability, a practitioner should not only inform the employer of the situations already recognized as actionable in Illinois. Emasculation of the at-will rule is an ongoing process. To avoid undue litigation expense and possible compensatory and punitive liability, an employer must recognize the possibility that the public policy tort will expand. The employer, therefore, should be made aware of the trends in other states and pattern his behavior accordingly. See supra note 24 and accompanying text.

112. As in any business decision, practicalities will play a large role in deciding whether to discharge an employee who may have a cause of action. For example, even though an employee may have a cause of action, discharge may be worth the risk of suit if his presence in the work force is disruptive. The willingness of an employer to take a risk of suit should vary with his or her evaluation of the dangers posed by retaining the employee. It is important, however, that this risk be factored into the decision-making process.

113. The type of proof in this situation could be analogous to that in discrimination cases before the National Labor Relations Board. The Board recently spoke of the “dual motive” issue in a decision upheld by a federal court of appeals. See NLRB v. Wright Line, 662 F.2d
Design of an internal review procedure is, of course, a matter of individual concern. If the relevant legal principles are known, small businesses can quickly and easily assimilate all the circumstances surrounding an employee's discharge and may choose an informal review system. Because larger operations have a deeper pocket and a greater potential for factual complexity, some method of formal review for termination decisions should be instituted.\textsuperscript{114}

\textit{The Plaintiff's Case}

There are several bases upon which a suit for the terminated at-will employee may be brought. Initially, a plaintiff's counsel should examine statutory authority fully prior to pleading to determine if a suit is expressly permitted by the statute for four reasons. First, recovery is more likely if the plaintiff can cite to a statute expressly covering the subject matter.\textsuperscript{899} (1st Cir. 1981). Under the dual motive doctrine, the plaintiff's counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the employer must show that the same action would have occurred even in the absence of the protected conduct. This approach was based on the two-part test used by the Supreme Court in Mount Healthy School Dist. v. Doyle, 429 U.S. 274 (1977). In \textit{Mount Healthy}, a school teacher alleged that his rights under the first and fourth amendments had been violated when he was discharged for relating the substance of a school memorandum to a radio station. The Supreme Court ruled that the school board had to be given the opportunity to demonstrate that the teacher's contract would not have been renewed regardless of the protected activity. \textit{Id.} at 287.

The same standard was recently applied by the Court of Appeals for the Seventh Circuit. An employer was found to have met its burden under the \textit{Wright Line} test by showing that the employee would have been discharged even in the absence of her protected conduct. Peavy Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981).

Similarly, to establish a prima facie case under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979), an employee must prove he was in a protected age group, that his job met his employer's expectations, that he was fired, and that the employer sought to replace the discharged employee with a younger person. See Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980); Carolan v. Central Freight Lines, 489 F. Supp. 941 (E.D. Tex. 1980). If the above factors are present, albeit fortuitously, the employer is not, in the practical sense, at will to fire the employee. Despite the at-will doctrine, a temporary just cause requirement is added to the relationship in this situation because the employer will have to rebut the prima facie case of age discrimination with evidence of just cause for discharge. See Moorehouse v. Boeing Co., 501 F. Supp. 390 (E.D. Pa.), \textit{aff'd}, 639 F.2d 774 (3d Cir. 1980).

\textsuperscript{114} It should be noted that such a system may, however, have an affect on the imposition of punitive damages. If the discharge is found to be retaliatory and in contravention of a clear public policy, and if such discharge occurred after review by an internal monitoring of discharge decisions, the basis for imposition of punitive damages may be greater than without review by management. Such discharge might be seen as a knowing disregard of public policy, whereas discharge by a supervisor without review might be viewed as negligence. Because punitive damages generally are associated with knowing and willful acts, award of these damages would be more justifiable where the decision to discharge was made or affirmed by those in a position to know what constituted a violation of public policy.

\textsuperscript{115} For example, in the majority of cases, a unionized worker who was wrongfully discharged could cite to the terms of collective bargaining agreements for support. See Na-
Second, because courts are hesitant to expand exceptions to common law doctrine, they tend to look for remedies which would not entail major changes in the law.\textsuperscript{116} Third, an action may be limited to the statutorily defined procedure. Failure to use this procedure may bar the plaintiff's claim.\textsuperscript{117} Finally, if thorough examination reveals no statutory violation, the plaintiff can assert to his advantage that no remedy other than expansion of the public policy tort exists, and that failure to grant relief will deny him recovery for a clearly egregious wrong.

The plaintiff also should assert a breach of contract claim whenever possible.\textsuperscript{118} For instance, the plaintiff should file a claim stating that the employment manual, job application, or employer representations indicated a durational term of employment or a requirement of just cause for termination.\textsuperscript{119}

In being consistent with the Illinois practice of alternative pleading, or if no statutory or contractual remedy is available, the plaintiff should direct his claim to the sphere of public policy. As previously mentioned, examination of statutory authority is important. Public policy has been limited to expressions of the Illinois Constitution and statutes or expressions of the courts when the constitution and statutes are silent.\textsuperscript{120} Consequently, the


\textsuperscript{117} See \textit{infra} notes 142-43 and accompanying text.

\textsuperscript{118} See \textit{supra} notes 59-67 and accompanying text.

\textsuperscript{119} See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (legally enforceable promise can be based on statements contained in employment manual). \textit{See also supra} notes 89-104 and accompanying text.

\textsuperscript{120} See \textit{supra} notes 46-56 and accompanying text.
plaintiff should attempt to extract public policy from these sources. Indeed, the genesis of the public policy tort in Illinois has depended upon the laws of the state. The *Leach* court implied a private right of action from a statutory proscription of interference with rights under the Workers' Compensation Act. The *Kelsay* decision was based on an implied public policy derived from the purpose behind the Act, and the *Palmateer* court found public policy inherent in a body of law, the Illinois criminal code. Any connection with constitutional or statutory authority will help justify the link between established law and any proposed extension of that law.

Public policy also may be derived from judicial decisions which have recognized various public policies as a basis for a cause of action in retaliatory discharge. Because of the developing nature of the tort, the plaintiff should look to other jurisdictions for public policy support of his claim. In addition to the recognized claim for discharge in retaliation for filing a workers' compensation claim and for discharge in retaliation for aiding law enforcement officials with respect to another employee's possible violation of the criminal code, any of the following discharges are potentially actionable in Illinois: discharge in retaliation for efforts to ensure compliance of a company's product with labeling and licensing statutes; discharge in retaliation for uncovering corporate malfeasance; discharge in retaliation for an employee's refusal to commit perjury; discharge in retaliation for an employee's serving on a jury; and discharge in retaliation for an employee's efforts to ensure a company's compliance with consumer credit laws.

Additionally, even if a colorable claim cannot be derived from implied contractual representations made to the discharged employee, the plaintiff should include a misrepresentation claim in his complaint. Although

121. See *supra* notes 46-51 and accompanying text.
122. See *supra* notes 52-53 and accompanying text.
123. See *supra* notes 54-56 and accompanying text.
124. Courts recognizing retaliatory discharge as actionable under the public policy rationale uniformly look to other jurisdictions for guidance and support. See *supra* note 80 and accompanying text. Therefore, it behooves the plaintiff to bring to the court's attention similar factual situations and the policy decisions from jurisdictions recognizing the tort.
125. See *Kelsay* v. Motorola Co., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
132. The court in *Soules* v. General Motors Corp., 79 Ill. 2d 282, 402 N.E.2d 599 (1980), articulated the cause of action as follows:

As disclosed by decisions of this court, the elements of a cause of action for fraudulent misrepresentation (sometimes referred to as "fraud and deceit" or "deceit") are (1) false statements of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action
misrepresentation may be difficult to establish, such a claim may provide a remedy where no statutory, contractual, or public policy violation can be shown. Thus, the circumstances surrounding the employment process must be scrutinized.

Finally, the claim emanating from the Massachusetts Supreme Judicial Court in Gram v. Liberty Mutual Insurance Co. should be recognized in the event that any future income is attributable to past work. From a plaintiff’s standpoint, this claim should be particularly attractive because it applied to employees who are admittedly terminable at-will, but whose termination is not based upon just cause. No showing of actual malice or violation of public policy is necessary to recover. As a result, this claim may be the easiest to prove, where applicable, assuming that Illinois courts are willing to adopt the theory.

The Defendant’s Case

Once litigation has commenced, the defendant should first concentrate on the procedural grounds which can be pleaded to defeat the plaintiff’s claim. Defenses such as statutes of limitations, the statute of frauds, laches, and failure to state a claim upon which relief can be granted should all be raised.

by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. Furthermore, the reliance by the other must be justified, i.e., he must have had a right to rely. Id. at 286, 402 N.E.2d at 601 (citations omitted).

133. The plaintiff must, for instance, establish his justifiable reliance on the misrepresentations of his employer. The appropriate inquiry as to justifiable reliance is whether, under all the circumstances, plaintiff had a right to rely on the false representations. "This question is to be answered while viewing the representation in light of all the facts of which plaintiff had knowledge as well as those of which he ‘might have availed himself by the exercise of just prudence.’” Id. Many cases stand for the principle that a cause of action for misrepresentation will lie only if the parties do not have equal knowledge or means of acquiring knowledge of the facts represented. See, e.g., Peterson Indus. v. Lake View Trust & Sav. Bank, 584 F.2d 166 (7th Cir. 1978) (reliance upon letter from bank not justified where plaintiff knew of depleted funds); Goetz v. Avildsen Tool & Machs. Inc., 82 Ill. App. 3d 1054, 403 N.E.2d 555 (1st Dist. 1980) (reliance not justified because plaintiff “investigated” through an attorney); Kuska v. Folkes, 73 Ill. App. 3d 540, 391 N.E.2d 1082 (2d Dist. 1979) (purchaser of house chargeable with notice of defect of which their attorney was aware); Costello v. Liberty Mut. Ins. Co., 38 Ill. App. 3d 503, 348 N.E.2d 254 (1st Dist. 1976) (reliance not justified because plaintiff waived his rights to retirement benefits).

134. From a plaintiff’s perspective, it is astonishing that misrepresentation suits are not filed more often. It is rare that an employer does not tell an employee at some point that the employee may work for the employer as long as he continues to perform well. Such a statement, however, transforms the employee from an at-will employee to one who has a cause of action if he is discharged without cause. See Gilliland v. Allstate Ins. Co., 69 Ill. App. 3d 630, 388 N.E.2d 68 (1st Dist. 1978). For a discussion of Gilliland, see supra note 89. Further, the misrepresentation claim is applicable even in the absence of a contract or public policy violation and can be based on statements dating far back in time. The statute of limitations on a misrepresentation claim starts from the date of discovery and not from the date that the misrepresentation was made.

Regarding the statute of limitations, the defendant may find that an employee-plaintiff has not properly read the statute, and therefore the claim is time barred. This is particularly true where the thrust of a plaintiff's claims are based primarily in tort under a public policy theory. If the claim can be characterized as a personal injury or tort, a two year statute of limitations applies.\textsuperscript{136} Otherwise, a five year limitation period applies to all actions not covered by a specific statute of limitations.\textsuperscript{137}

The statute of frauds also can be helpful if an oral employment contract is involved. Although a statute of frauds defense would appear obvious, its use can be overlooked. A defense of laches also may be utilized to limit or negate liability.

Finally, a motion to dismiss for failure to state a claim upon which relief can be granted can be used as an effective defense against the public policy claim. There are several ways that this defense can work to the defendant's benefit. First, in the case of a claim for retaliatory discharge based upon public policies not yet specifically recognized in Illinois courts, a claim for relief should be attacked by pointing out that Illinois does not have such a public policy. The defendant also may argue that economic considerations militate against curtailing business freedom. Justice Ryan's dissent in \textit{Palmateer} voiced this very concern about the adverse effect of a liberal application of the public policy exception.\textsuperscript{138} Courts of other states similarly have noted that economic factors should restrict undue expansion of the tort.\textsuperscript{139}

Similarly, it may be advantageous for a defendant to discuss the impact of derogation of the at-will rule upon small employers.\textsuperscript{140} The federal

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\item[137.] \textit{Id.}, § 13-205.
\item[138.] Justice Ryan stated:

The deteriorating business climate in this State is a topic of substantial interest. A general discussion of that subject is not appropriate to this dissent. It must be acknowledged, however, that Illinois is not attracting a great amount of new industry and business and that industries are leaving the State at a troublesome rate. I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy which will permit an employer to discharge an unwanted employee, one who could be completely disruptive of labor-management relations through his police spying and citizen crime-fighter activities, only at the risk of being sued in tort not only for compensatory damages, but also for punitive damages. \textit{Palmateer v. International Harvester Co.}, 85 Ill. 2d 124, 143, 421 N.E.2d 876, 885 (1981) (Ryan, J., dissenting). See \textit{supra} notes 13-17 and accompanying text.
\item[139.] 85 Ill. 2d at 144, 421 N.E.2d at 885. Justice Ryan quoted decisions from other states which tended to restrict expansion of the public policy exception for economic reasons. Professor Blades, while promoting an expansion of an employee's right to sue his employer for wrongful discharge, recognized the adverse effect of such litigation on the employer's business. See \textit{supra} note 17.
\item[140.] It has been suggested that the original purpose of the at-will rule was to foster "self-reliance and economic individualism," and that it was no longer valid in the present economic
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government has indicated its interest in affording small employers discretion in structuring their employment relationships. Modification of the at-will rule will have a greater impact on small employers because they are often less unionized or structured than larger companies and their employees are more often terminable at-will. Additionally, small employers are less able to afford the costs of litigating individual termination decisions and to pay resultant damages. Thus, the ironic effect of expanding the tort would be greater restrictions on the employment practices of the very class of employers which Congress intended to accord broader discretion.

If a public policy is alleged to be inherent in a statute, a defendant can argue that the appropriate remedies were included in the statute by the legislature and that a cause of action for retaliatory discharge was considered and rejected as part of the legislative process. This follows the reasoning of the Illinois Supreme Court in *Teale v. Sears, Roebuck & Co.* The *Teale* court declined to imply a civil right of action because other statutes expressly provided causes of action while the statute in question did not. The court reasoned that the legislature expressly would have provided a remedy if it had intended that one exist.

If the procedural roadblocks fail, the defendant will have to prove that the employee was discharged for just cause. For example, the defendant would have to show that the contravened public policy alleged as the reason for discharge was not, in fact, the employer’s reason for discharging the employee. The defendant must establish that the alleged retaliation occurred for permissible business reasons, rather than through retaliatory intent, and that the discharge would have occurred despite public policy considerations.

**CONCLUSION**

The doctrine of employment-at-will continually has been eroded as Illinois courts increasingly have employed the tort of retaliatory discharge. To avoid potential liability, an employer who maintains a practice of hiring at-will employees should expressly state that the employment is at-will in the context of large corporate employers. *Protecting At Will Employees*, supra note 2, at 1826. To small employers, however, those principles of laissez-faire economics remain relevant.

141. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1976), exempts small employers from its sanctions. The policies behind employment discrimination are deserving of universal application; however, to afford maximum protection to small employers, the legislature chose to exempt them. It would be inconsistent with that policy to substantially limit the discretion given these small employers by expanding the public policy exceptions.

142. 66 Ill. 2d 1, 359 N.E.2d 473 (1977).

143. Id. at 6, 359 N.E.2d at 475.

144. See supra note 113 and accompanying text. In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court held that in a Title VII employment discrimination case the defendant can rebut the plaintiff’s prima facie case only by proving, by a preponderance of the evidence, the existence of legitimate, nondiscriminatory reasons for the employment action. Id. at 254-56.
job application, in the employee manual, and in representations made during initial interviewing. In addition, the employer should scrutinize the termination procedures to ensure that no actual retaliation exists. An employee suing for a wrongful discharge should incorporate in his complaint any possible cause of action which can be derived from the Illinois Constitution, Illinois statutes, or from case law. In drafting his pleading, the employee also should include a misrepresentation count, a count for breach of contract, and a count demanding future income for past services whenever possible.

Although these practical guidelines do not provide precise definitions, arguments, and procedures, they are intended to aid the practitioner in conceptualizing a framework of thought to effectively use the new public policy tort of retaliatory discharge in the proper context. The arguments on both sides are ripe for expansion and will grow and change in correlation with developments in the public policy tort across the country. Any concept as ambiguous as public policy necessarily involves results of uncertain predictability. Such a volatile situation must be approached with great caution and preparation by the employer, upon whom the axe may fall in the form of punitive damages. Correspondingly, the plaintiff should take heed of the trend to expand the tort and strive to carve out new areas of policy.