Chapter 2: EMPLOYMENT CONTRACTS AND WRONGFUL DISCHARGE

INTRODUCTION

The second chapter focuses on employment contracts, employment at will, and wrongful discharge. The chapter begins with a discussion of employment at will; a term first introduced in chapter one. The student should have an understanding of employment at will, and the chapter proceeds to identify all of the many exceptions to this legal theory and when they apply. Generally, the exceptions to employment at will are when the termination violates a public policy, an implied employment contract, a covenant of good faith and fair dealing, or one of the many federal, state, or municipal statutes that protect employees from termination based on basis of some protected characteristic. Termination under any of these situations is called a "wrongful discharge." An employee who has been wrongfully discharged may be entitled to redress.

OUTLINE

Employment - At - Will

Historical Roots

The doctrine of employment-at-will in its purest (and harshest) form held that an employee without a contract could be fired at any time, for any, or no, reason.

While legislation has limited the employment-at-will doctrine in some areas—such as the NLRA's prohibition on terminating an employee for engaging in concerted activities and Title VII's prohibition of any discharge for racially discriminatory reasons—these laws still leave a zone of discretion to private sector employers.

Advocates of employment-at-will point out that the employee is free to sever employment at any time, and that employees can use bargaining power to attempt to demand an employment contract covering a specific term.

However, individuals often lack the bargaining power to demand such a set contract—that's one reason why they join unions.

But the freedom of employees to quit the employment relationship is an important issue underlying the employment-at-will doctrine.

Wrongful Discharge Based on Public Policy

The most common limitation on employment-at-will is the public policy exception—the employer cannot fire an employee for a reason that undermines or violates a "clear mandate of public policy."

Most state courts have adopted this exception, although some state courts restrict the "public policy" to some right or duty clearly spelled out in a statute.

Geary v. U.S. Steel (PA Supreme, 1978) is an example from Pennsylvania.

Also, if the statute provides for a remedy or cause of action, the courts are reluctant to allow the employee another remedy in the form of a suit alleging wrongful discharge.

CASE 2.1 Rodgers v. Lorenz
25 A.3d 1229 Pa. Super (2011)

SUMMARY:

Background: An employee filed a complaint, alleging that his employer wrongfully terminated him for planning to attend criminal proceedings against a co-worker and alleging breach of contract, negligent supervision and a violation of the Pennsylvania Whistleblower Law. The Court of Common Pleas sustained the employer's preliminary objections and dismissed the employee's claims, and the employee appealed.

Issue: When the Crime Victims' Employment Protection Act was written, did the Legislature intend to protect crime victims, who have not yet attended their hearing, from threats, coercion, and loss of employment? Is the Crime Victims' Employment Protection Act preempted by the Workers' Compensation Act?

Decision: In its opinion, the trial court stated: "After argument on [Appellee's] preliminary objections to [Appellant's] complaint, [the trial court] decided that the facts alleged were not sufficient to state a cause of action under § 4957. [The trial court] also ruled that the other avenues for relief of [Appellant] against [Appellee] were barred by the Workers' Compensation Act." This statement by the trial court clarifies that it did not hold that the Workers' Compensation Act preempts the Crime Victims' Employment Protection Act. Rather, the trial court distinguished the employment protection claim from the breach of contract and negligent supervision claims brought by Appellant and found only the latter preempted by the Workers' Compensation Act.
Order reversed in part. Case remanded for further proceedings.

ANSWERS TO CASE QUESTIONS
Rodgers v. Lorenz
25 A.3d 1229 Pa. Super (2011)

1. The Superior Court held that the state legislature intended that the Crime Victims' Employment Protection Act provide employees with a cause of action for wrongful termination. The court did not, and would not, hold that the employee-plaintiff here was entitled to reinstatement. That is for the trial court to determine on remand, possibly after a trial on the merits of the plaintiff's claim.

2. The plaintiff will have to prove that the employer in fact fired him for exercising his rights under the Crime Victims' Employment Protection Act.

3. Neither act preempted the other. The Workers' Compensation Act's "exclusivity" provision prevented the plaintiff from pursuing his negligent-supervision claim; the essence of that claim was that he got hurt on the job because of the employer's failure to exercise due care in the hiring and supervision of the plaintiff's co-worker, who assaulted and injured him. On the other hand, the Workers' Comp Act did not shield the defendant-employer from all of the plaintiff's claims. Although the job termination grew out of the assault and related to the injury in that regard, plaintiff's firing was not the sort of consequential injury that falls under the comp act's exclusivity shield.

4. The Superior Court took a broad view of the legislature's intent, holding that the facts of this case were precisely what the lawmakers had in mind when they enacted the statute.

5. This question can make for a good discussion. The Pennsylvania Supreme Court is squarely among those state forums, which historically have been highly conservative with regard to wrongful termination suits grounded in public policies. The Crime Victims' statute, said the Superior Court, presented a clear instance of legislative intent. Whether the Supreme Court would agree is a matter of speculation. However, it would require two leaps of faith to conclude that the Commonwealth's highest court would both affirm the Rodgers decision and use it as a wedge to widen what has for many decades beena very narrow cause of action in that state.

Express* and Implied Contracts* of Employment

While some employees are covered by a collective bargaining agreement or an individual contract of employment, many are not. Those employees have sometimes attempted to persuade the courts that an implied contract of employment has been created.

Contracts may be implied from the firm's personnel manual or the statement of disciplinary procedures that will be followed.

***Express Contract:** A contract in which the terms are explicitly stated, usually in writing.

***Implied Contract:** A relationship between the parties, the behavior of which leads to an inference of a contract.

CASE 2.2 McCaskey v. California State Auto Assn.
189 Cal.App.4th 947, 118 Cal.Rptr.3d 34 6 Dist. (2010)

SUMMARY:

Background: Former employees brought action this against their employer, asserting claims of breach of contract and age discrimination, alleging that the employer had wrongfully rescinded a policy of relaxing sales quotas for senior employees and subsequently fired those employees for refusing to agree to the employer's rescission of the policy or for failing to comply with non-relaxed sales quotas. The Superior Court entered a summary judgment in favor of the employer, and the employees appealed.

Issue: Once an employer's unilaterally adopted policy – which required the employer to relax sales quotas for employees who were over the age of 55 and who had worked for the employer for 15 years – has become a part of the employment contract, may the employer thereafter unilaterally terminate the policy?

Decision: The court determined that the answer was "no," the employer could not unilaterally rescind its contractual obligation to relax sales quotas for employees who were over age 55 and had worked for employer over 15 years, because the employees had an ascertainable term of duration.

CASE 2.3 Dworschak v. Transocean Offshore Deepwater Drilling, Inc.
352 S.W. 3d. 191, Tex.App.-Houston 14 Dist. (2011)

SUMMARY:

Background: A former employee, Dworschak, brought action against his former employer, Transocean, for breach of contract and wrongful discharge, among other claims, after he was terminated for having a physical altercation with another employee. Dworschak contended that Transocean had been planning to terminate him because he had discovered "certain billing and other irregularities" between the Transocean and a subcontractor. The 11th Judicial District Court granted no evidence motion for summary judgment and the former employee appealed.

Issue: Did Transocean breach the employment contract by terminating Dworschak?

Decision: No. Although there was a formal contract between Dworschak and Transocean, it was specifically an at-will agreement. As a result, Dworschak failed to meet his burden to overcome the presumption that his employment was at-will. There is no material fact question regarding Dworschak's at-will status. As an at-will employee, Dworschak contractually agreed he could be terminated for any reason.

CASE 2.4 Bollinger v. Fall River Rural Elec. Co-op, Inc.
152 Idaho 632 , 272 P.3d 1263 Idaho (2012)

SUMMARY:

Background: An employee, Bollinger, sued her former employer for breach of express and implied contract, including breach of the covenant of good faith and fair dealing, retaliatory discharge and wrongful termination in violation of public policy, and negligent and intentional infliction of emotional distress. The District Court of the Seventh Judicial District granted summary judgment to the employer, and the employee appealed.

Issue: Did the district court err in granting summary judgment on Bollinger's breach of employment contract claim?

Decision: The court found that the district court properly granted summary judgment on Bollinger's breach of employment contract claim because she was an at-will employee at the time of her termination and, even if the for-cause policy remained in effect, she was laid off for economic reasons in accordance with that policy.

THE WORKING LAW

The Model Employment Termination Act is not a real success story. The purpose of the act is to offer the states a uniform law protecting employees from being terminated except for good cause. The committee charged with developing the act do not agree on it's terms. If adopted by many states, this law would fundamentally change the employment at will culture that defines employment in the United States. Only one state (Montana) has adopted a form of this law.

Protection for Corporate Whistleblowers

In the wake of the Enron and Worldcom scandals, the Sarbanes Oxley Act (SOX) was passed. Among other things, SOX amended the Security Exchange Act and several other statutes to include criminal and civil protection of employees who report improper conduct concerning securities fraud and corruption by corporate officials. Following the 2008-10 Great Recession, the Obama Administration and the Democratically dominated Congress at that time enacted the Dodd-Frank Act, which reinstated some regulatory restrictions on the U.S. financial industry that had been

antiquated in the 1990s, and added additional whistleblower provisions that apply to employees in the realm of banking and investments.

Many other employment laws such as Occupational Safety and Health Act (OSHA) and Title VII contain anti-retaliation provisions.

Additionally, many states have passed laws protecting employees who engage in whistleblower type activities.

Where there is not a federal, state, or municipal law directly protecting whistleblower activities, employees may still seek protection under the theory of public policy, where an employee provides proof that termination of employment was in retaliation for reporting or restricting supervisory illegal activity.

Despite this, many who seek to be protected by whistleblower laws find that enforcement is lacking and remedies are ineffective.

SOX protections are not limited to the reporting of securities fraud. It covers the reporting of any federal offense.

Civil Liability Under SOX

SOX only protects employees of publically traded companies.

CASE 2.5 Lawson v. FMR LLC.
670 F.3d 61 C.A.1 (Mass.) (2012)

SUMMARY:

Background: In two separate cases, employees of nonpublic companies in the mutual fund industry sought the protection of the Sarbanes-Oxley Act's (SOX) whistleblower provision, alleging that their employers unlawfully retaliated against them after they complained of employers' improper business activities. The United States District Court for the District of Massachusetts partially granted and partially denied the motions, certified a "controlling question of law" to the appellate court, and stayed the cases. The parties' cross-petitioned for interlocutory review, and those petitions were granted.

Issue: Are the plaintiffs covered by the SOX whistleblower provisions?

Decision: Rejecting the position taken by not only the plaintiffs, but also the SEC as *amici,* the judges held, "Although there is a close relationship between the private investment adviser defendants and their client mutual funds, as pointed out by the plaintiffs and the SEC as amicus curiae, the two entities are separate because Congress wanted it that way. Had Congress intended to ignore that separation and cover the employees of private investment advisers for whistleblower protections, it would have done so explicitly in § 1514A(a). However, it did not."

ANSWERS TO CASE QUESTIONS
Lawson v. FMR LLC.
670 F.3d 61 C.A.1 (Mass.) (2012)

1. The trial judge first decided that private companies, which are sub-contractors of SOX-covered publicly traded companies, ought to be covered by SOX too. Then, having some second thoughts about how far this stretched the law, the judge tightened up the basis on employees of the sub-contractor could sue under SOX's whistleblower provisions. The First Circuit disagreed with the district court on both points.

2. "Employee" for purposes of a cause of action means someone employed by a publicly traded company. While the plaintiffs certainly were "employees" in the common-law sense of that term, they were not "employees" for purposes of the SOX whistleblower provisions.

3. This and the two questions that follow create opportunities for class discussion and debate. The statutory provision at issue clearly states that no "officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee " in exercising her/his whistleblower rights. The plaintiffs contended that this clearly means they were protected by SOX. The defendants retorted that only the employees of the publicly traded company were protected, albeit that protection extended to adverse actions perpetrated by a subcontractor of the publicly trader firm.

4. Here the discussion might center around whether Congress had reason to single out publicy traded companies, leaving private firms alone. The court noted that Congress could have been clearer, if it really intended to extend rights to persons, such as the plaintiffs. The judges noted that in other sections of SOX, the Congress was more explicit about being expansive in extending rights and remedies. When it wanted to extend a portion of the act to private investment advisors, it did so. The court does not speculate on Congressional motives, but we are free to do so. Perhaps some Congressmen succumbed to lobbyists. Or perhaps the sponsors of the bills saw reasons why privately held firms should not be subjected to the same levels of liability as publicly traded entities. Or perhaps the relative size of the companies was a consideration.

5. The answer to this question may depend upon whom we mean by the "investing public." If we mean all pension funds, individual investors and others who buy securities, the plaintiffs' position might best protect them (i.e., all of "us"). But if we mean the shareholders of publicly held financial institutions, then private firms might very well be excluded since they do not have shareholders, other than those insiders who own the stock of such closely held entities.

ETHICAL DILEMMA
When the Whistleblower is a Lawyer

SUMMARY:

Attorneys discover illegal activity on the part of an important client (child pornography on a client's computer). Rather than report the client, under federal law, the firm directs one of it's attorneys to have the computer erased. The attorney in charge of this is uncomfortable carrying out these orders because he knows it is a violation of law. When the partners discover that the attorney has not carried out the orders they fire the attorney. The attorney sues for wrongful discharge, claiming that it is a violation of public policy to fire him for refusing to violate federal law. The firm moved to have the lawsuit dismissed because to proceed with it would necessarily require divulging the client's possession of pornography, which would be a violation of the attorney client privilege.

QUESTIONS

The author views the competing public policies as the law against child pornography and the attorney client privilege. However, this is also an opportunity to discuss competing public policies – attorney client privilege and the need to feel free to ignore a mandate from your employer to violate the law,

regardless of which law is involved.

PROBLEMS

QUESTIONS

1. Students may suggest that the courts wished to protect emerging American industries from employee litigation. Control of the judicial appointments of many states and the federal courts by upper and upper-middle class interests may be another reason. Disdain for immigrant workers may be yet another suggestion.

2. Employers often defend the doctrine on the ground that they have built their businesses, they create jobs and they ought to be free to decide whom they will employ. Jurists sometimes point to the fact that employees are free to come and go as they please; it's only fair that employers have he same freedom of contract. President Obama directly challenged the first of these propositions during the 2012 presidential campaign, when he pointed out that no so-called self-made businessperson has achieved success without support from both government and her/his employees. The second position ignores the disparate bargaining leverage enjoyed by employers on one hand and employees on the other. The U.S. is the only developed nation that still adheres to employment-at-will, which since the 19th century has been a uniquely American common-law doctrine,

3. (1.) Contract: This exception includes express, written contracts; oral contracts under some circumstances; and implied contracts, notably handbooks, again under appropriate circumstances; (2) Public Policy: An adverse employment action will not stand, where it offends a Clear mandate of public policy; (3) Statutory: A federal or state statute specifically forbids an adverse action, such as termination.

4. The advantage of the common law may be that it is more adaptable and amenable to fine-tuning than a statute, which requires the often difficult chore of legislative amendment. On the other hand, a statute presumably will provide the parties to an employment relationship with a clearer, plainer, and more predictable expression of the law and the likely legal outcomes of their actions.

5. As discussed under the case, above, we can speculate about Congress's motives for limited SOX's whistleblower provisions to publicly traded companies.

CASE PROBLEMS

6. No, he does not. The Court held that the intent of the parties was very important in the decision and that if the handbook contains clear language that employment is at will, then the reasonable employee would understand that is the employer's intent. The Court also said that longevity of employment and promotions or raises do not create an implied contract. This would discourage employers from retaining employees over the long run. In the case in this hypothetical, the company's handbook clearly stated that the employment was at will. Therefore, the handbook does not constitute an employment contract.

7. According to the decision in Honorable v American Wyott Corporation, 11 P.3d 928 (Wyoming Supreme Court 2000), the employee is not correct. The handbook states that the employee must

receive medical leave permission in writing. The employee did not do this. The handbook also clearly states that the employment is at will. An at will employee can be fired for a good reason, bad reason, or no reason. Therefore, even though it appears unfair, the termination is not illegal. This decision will seem unfair to most students, since the HR Director told the employee to take time off from work. Essentially, he was not requesting leave be "granted," he was barred from returning. Students might argue that it would be a breach of good faith and fair dealing for your employer to bar you from coming to work and then fire you for not showing up.

8. A whistle blower need not be able to actually prove wrongdoing, in order to be protected under the public policy exception to the at will doctrine. It is enough that the whistle blower have a good faith belief that that a crime was committed.

9. The court ruled that under the Montana Wrongful Discharge from Employment Act, once an agreement to arbitrate has been made it cannot be abrogated by either party, but rather it survives the employment termination and must be honored and enforced. Possible public policy grounds to be taken into account are predictability and reliability of the remedy, plus the prevention of lawsuits challenging the enforceability of the arbitration clause, precisely as occurred here, if the court held that such arbitration agreements are enforceable only some of the time. Furthermore, to permit the abrogation of the clause under the attorney's argument here would require the court to also reach the merits of the case itself**.**

10. It is a violation of public policy, according to Wisconsin law, to terminate an employee for refusing to violate any law, regardless of the origination of the law (state or federal). The payroll clerk has an action for wrongful discharge in violation of public policy. This may be an opportunity to discuss with the students that not all states recognize the public policy exception to employment at will, and even the states that do are not all in agreement of what reasons for termination may violate public policy.

11. In this case, the Iowa Supreme Court said that the employee must show that his dismissal would undermine the public policy identified. Fitzgerald was not able to show that terminating an employee for advocating for an employee who he believed to have been terminated in violation of a policy was itself a violation of public policy. The court was not willing to take that leap and narrowly construed public policy to the types of public policy already recognized. This may be an opportunity to point out to students that other laws, such as Title VII and the ADA protect not only those persons who are directly discriminated against under the law but also those persons who stand in solidarity with them. To be fair to the Iowa Supreme Court, the employer persuasively argued that Fitzgerald did not advocate on behalf of his co-worker due to him being terminated in violation of public policy. Fitzgerald's complaints to them were that they simply should not terminate the co-worker because he had been a long time and valuable employee.

12. The "whistleblowing" in this case did not meet the requirements for a violation of public policy. Because the relevant statute leaves the parameters of "mismanagement" undefined, it is an amorphous term that essentially includes any decision of an employer that's challenged by an employee with a different opinion about the way an organization should be managed. The term falls short of being sufficiently specific and clear for purposes of articulating an established and well-defined public policy against discharging employees for reporting mismanagement. Thus, the statute cannot be used to support a common law claim.

13. The court's analysis began with a finding that the local's secretary was a "confidential" employee capable of thwarting implementation of the union's policies and programs. Since the plaintiff had access to the local's confidential information, including attorneys' opinions, membership and dues

records, and disciplinary matters, she was in a position to further her own political views and to thwart the aims of her superiors. These facts placed her squarely under the provisions of the LMRDA dealing with "confidential employees." Therefore her common law, wrongful discharge claim was preempted by federal law.

14. The court held that there was no public-policy cause of action here. Considerations included: (a) preemption of the common law by the state statute; and (b) a superior public policy of protecting small businesses from sexual discrimination claims

15. Students can debate the public policy of whether or not attorneys fall within the intent of the small business public policy exception. Attorneys are officers of the court, and due to the special placement in our system of government, they are necessarily keepers of the public trust. Additionally, before becoming licensed to practice in any state, an attorney takes an oath agreeing to be bound by this higher standard. Therefore, it seems as though the stronger public policy would be to hold the attorney accountable and conduct an investigation, even though there is no other legal action pending. The term "moral turpitude" generally means that if the attorney's conduct would reflect badly on others in the profession, then the attorney should not engage in that conduct.

HYPOTHETICAL SCENARIOS

16. Constructive discharge occurs when the employer has made the employment environment so intolerable that the employee feels no other choice but to quit. In order for the constructive discharge to become wrongful termination, the motivation for making the workplace intolerable must be illegal, such discrimination in violation of one of the employment laws. Constructive discharge is viewed as the equivalent of termination of employment. The same analysis is used as to determine whether or not the employer had wrongfully terminated the employee is used to determine whether or not the constructive discharge was wrongful. In our case, Debra appears to be employed at will. Students can debate whether termination for participation or non-participation in extra curricular work activities should be protected under public policy exceptions. Generally, public policy exceptions are those instances where it would serve the public good, such as when an employee is punished for exercising a legal right or duty. It is unlikely that protection from refusing to participate in team building exercises, regardless of how silly and demeaning would be considered important to public policy.

17. Since Dr. Boris is an at will employee, he does not have a claim for wrongful discharge. Although according to the law, the hospital had abandoned the property, the hospital apparently did not intend for anyone to possess the equipment after them. There are a myriad of logical reasons why the hospital would not want employees to take things, even things that they planned to dispose of, without permission, the least of which is not liability issues. If a piece of equipment were damaged and the subsequent purchaser/user suffered an injury, the hospital could be liable for having sold damaged goods, if the buyer could prove that it had a reasonable belief that Dr. Boris was acting as their agent. (If students have not had business law prior to this class, they may not recognize the issue of agency liability).

The answer does not change if the handbook said that employees would only be fired for good cause. First, this might be enough to satisfy good cause. Second, since we know that Dr. Boris is an employee at will, we can assume that there is likely a disclaimer in the handbook stating that it does not constitute a contract or change the employment at will arrangement. And third, even if the handbook does not contain such a disclaimer, the discipline clause would need to be specific

enough that a reasonable person would construe it as a binding agreement. "For Cause" is not a very descriptive term.

If Dr. Boris had salvaged equipment before, and was acting under a misunderstanding, he still does not have a claim. In order to claim wrongful discharge he would need to prove some sort of public policy exceptions. He was not exercising a legal right or duty.

18. Unfortunately, Stanley does not have a case. Although Stanley was concerned with safety, there is no indication that Stanley has any expertise or specialized knowledge related to why the other shed collapsed or to refute the company's claims that it was due to incorrect assembly.

If OSHA had a regulation and Stanley had a good faith belief that the regulation was being violated, then he may be protected under a whistleblower statute or public policy, in absence of a whistleblower statute.

19. Mindy and Fred do not have a wrongful discharge claim, if they are employees at will. An employer is free to terminate an employee for a good reason, bad reason, or no reason at all. There is no public policy protecting people from being fired for having sex with someone who are not their spouse. Whether or not they knew about the policy is not relevant.

20. Unless the student has had a business law class, the student will not possess the background to analyze a breach of contract claim. For example, if the company knew that the deal with Wells Fargo was upcoming and elected not to renew the contract, despite good performance, simply as a means to avoid the stock option exercise, Janice may have a claim. The court may determine the "active member of management team" clause to be unconscionable, and reform that part of the contract. However, if the company can show that Janice had ample opportunity to review the contract with a lawyer and understood that even if the sales mark was reached due to her efforts, if it occurred after her contract had expired, she would not be entitled to exercise the stock options, then she would lose. She does not have a wrongful discharge claim against the company because she was not terminated during the term of employment. She simply reached the end of the term of her contract.