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Notes

WRIGHT LINE AND WRONGFUL DISCHARGE ACTIONS: A UNIFORM STANDARD OF REVIEW

An increasing number of courts are recognizing the right of an employee who is not a party to an employment contract or a collective bargaining agreement to maintain a “wrongful discharge” action against his employer. The rapidly growing body of case law pertaining to wrongful discharge, although signifying a justified departure from the rigid common law terminable at will rule, is plagued by inconsistency and confusion. Most notably, courts are split on the legal theory of wrongful discharge—tort or contract—and consistently fail to give adequate consideration to the significant employee and employer interests implicated by wrongful discharge claims. This Note therefore proposes a uniform standard of judicial review for wrongful discharge actions. The suggested standard is derived from the test espoused by the National Labor Relations Board in Wright Line, A Division of Wright Line, Inc., presently used by both the Board and courts of appeals to resolve claims alleging anti-union motivated discharge under the National Labor Relations Act. The author of the Note maintains that Wright Line will remedy the current problems with the law of wrongful discharge by providing an analytical framework within which wrongful discharge claims may be consistently evaluated and relevant employee and employer interests considered.

INTRODUCTION

AT COMMON LAW, employees not covered by employment contracts1 or collective bargaining agreements are terminable at will.2 Historically, at will3 employees were not protected from

1. The employment contract must be of fixed duration for an employee to be considered nonterminable at will. A contract for “permanent employment,” considered to be of indefinite duration, results in a terminable at will relationship. See, e.g., Bixby v. Wilson & Co., 196 F. Supp. 889, 898 (N.D. Iowa 1961).

2. The terminable at will rule is well established at American common law. In Adair v. United States, 208 U.S. 161 (1908), the Supreme Court held that the employer's right to discharge could not be limited by federal legislation. The Court stated that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of the employee." Id. at 174–75. Subsequently, however, the Supreme Court recognized that Congress had the power to prevent employers from discriminatorily discharging employees. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The Court expanded this view in Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), holding that an employer cannot refuse to hire or reinstate an individual based on his union membership. Jones & Laughlin and Phelps Dodge upheld the validity of the National Labor Relations Act, passed by Congress in 1935. Pub. L. No. 198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 141-198 (1976 & Supp. V 1981)). Congress further modified the terminable at will rule during the 1960's
arbitrary dismissal by their employers. Recently, however, a growing number of courts have allowed at will employees to sue their employers for wrongful, abusive, or retaliatory discharge. These courts recognize overriding public and private policy interests which compel modification of the traditional rule. In support of this view, commentators focus on the inevitability of social progress, changing economic conditions, and the need to correct historical inequities between employers and employees. Although recognition of a wrongful discharge cause of action appears to represent the trend in scholarly opinion and case law, the state of the law is uncertain.

This Note examines the current status of wrongful discharge actions and proposes a uniform standard of review. Section I sets forth the judicial views, explores the two legal theories under which wrongful discharge actions are recognized—contract and tort—and concludes that tort theory is the most workable and


4. See supra note 2.

5. See infra note 23.


7. See infra notes 105–21 and accompanying text.

8. See Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1, 42 (1979) (imposition of a good faith requirement on employers mandates judicial creativity if the common law is to be adapted to society's changing conditions).

9. See Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARv. L. REV. 1816 (1980), analyzing the negative economic impact of changing the at will rule and concluding that such impact may be exaggerated and will be absorbed easily.

10. See Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967). This seminal article provides a comprehensive social, philosophical, and legal analysis supporting the recognition of wrongful discharge actions in tort.

11. See infra notes 23–103 and accompanying text.

12. See infra notes 23–51 and accompanying text.

13. See infra notes 55–89 and accompanying text.

14. See infra notes 90–103 and accompanying text.
appropriate. Section II surveys the factual situations presented by wrongful discharge actions, concentrating on the employer and employee interests at stake. It is asserted that an informal standard of protected employee conduct exists, and that employers' interests should be given significant weight by the courts.

The final section of the Note proposes a uniform standard of review for wrongful discharge cases analogous to the test in *Wright Line, A Division of Wright Line, Inc.* This test is used by the National Labor Relations Board to determine whether disciplinary actions and dismissals are motivated by anti-union animus. Applied to wrongful discharge actions, the *Wright Line* test will balance the interests of all parties and provide a manageable tool for judicial decisionmaking.

I. CURRENT STATUS

The number of jurisdictions recognizing a wrongful discharge cause of action is increasing. Courts addressing the issue take

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15. See infra notes 52–103 and accompanying text.
16. See infra notes 105–43 and accompanying text.
17. See infra notes 105–21 and accompanying text.
18. See infra notes 122–43 and accompanying text.
19. See infra notes 144–89 and accompanying text.
22. See infra notes 167–89 and accompanying text.

three positions. A number of courts recognize wrongful discharge actions, in a variety of factual situations, as an exception to terminable at will rule. These courts base their analyses on both contract and tort theories. Other courts reject wrongful discharge actions on the facts before them, but state that other factual settings may dictate a different result. Finally, some courts emphatically reject any modification of or exception to an employer’s right to discharge an at will employee.


25. See infra notes 53–103 and accompanying text.

26. See, e.g., Larson v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Cl. App. 1977) (although discharge for refusal to take “psychological stress evaluation” test similar to lie detector test did not violate public policy, discharge for absence from employment for voting, jury duty, or national guard duty may have sufficed); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (consumer protection policy exception to terminable at will rule not recognized because no violation of clear mandate of public policy was established); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (only exercise of statutory right or refusal to engage in criminal activity would support public policy exception).

27. See, e.g., Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (at will doctrine may not be overridden by something so nebulous as public policy); see also Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981); Kelly v. Mississippi Valley Gas
A. Recognition of Wrongful Discharge

Courts recognizing wrongful discharge actions advance sound policy arguments for their position. A generally illustrative case is Petermann v. International Brotherhood of Teamsters, in which an employee was discharged for refusing to perjure himself. In holding that public policy would be violated if employers were permitted absolute freedom to discharge employees, the Petermann court stated:

It would be obnoxious to the interests of the state and contrary to sound morality to allow an employer to discharge any employee . . . on the ground that he declined to commit perjury, an act specifically enjoined by statute. . . . To hold otherwise would be without reasons and contrary to the spirit of the law.

Courts allowing wrongful discharge actions also have addressed the inferior bargaining position of the employee in the employment relationship, the employee's need for job security, and the modern economic atmosphere. Moreover, the courts not only are concerned with protecting the at will employee from arbitrary dismissal, but also are interested in limiting protection when other significant interests are involved. Specifically, courts may consider the appropriateness of legislative rather than judicial action, the importance of the public interest alleged, and the relative weight of the employee and employer interests involved. Significantly, courts recognizing wrongful discharge do not ignore or overrule the terminable at will doctrine, but find an exception on the facts of the particular case.

A number of jurisdictions reject wrongful discharge actions in

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29. Id. at 187, 344 P.2d at 26.
30. Id. at 188-89, 344 P.2d at 27.
31. See infra notes 55-96 and accompanying text.
32. Some courts, in deference to the legislature, have been reluctant to allow wrongful discharge actions. See, e.g., Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. Ct. App. 1981). This reluctance is not shared by courts holding that public policy should be protected by the judiciary. See, e.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 181, 384 N.E.2d 353, 357 (1978).
33. See infra notes 90-103 and accompanying text.
34. See infra notes 105-43 and accompanying text.
35. See, e.g., Nees v. Hocks, 272 Or. 210, 218, 536 P.2d 512, 517 (1975) (generally, absent legislation or employment contract, employer can discharge employee or employee can quit at any time and for any reason, but under certain circumstances employer who discharges with socially undesirable motive is responsible for injury done).
specific factual settings but indicate that other circumstances may lead to a different outcome.\textsuperscript{36} For example, in \textit{Geary v. United States Steel Corp.},\textsuperscript{37} an employee was discharged for informing his supervisor of the safety hazards of a product manufactured by the employer.\textsuperscript{38} The Pennsylvania Supreme Court refused to recognize the employee's wrongful discharge claim, holding that "no clear mandate of public policy [was] violated."\textsuperscript{39} The court indicated, however, that a cause of action may be recognized when an established public policy is threatened by the discharge of an at will employee.\textsuperscript{40}

Even courts that refuse to recognize wrongful discharge actions\textsuperscript{41} address the weight of contrary opinion. In \textit{Whittaker v. Care-More, Inc.},\textsuperscript{42} two nursing home employees brought suit against their employer alleging termination without good cause as a breach of their employment contract and "retaliatory discharge" as an independent tort.\textsuperscript{43} In rejecting the claim, the court, while noting that other jurisdictions recognize exceptions to the at will rule, deferred to the legislature.\textsuperscript{44} The court expressed concern that the foundation of the free enterprise system could be jeopardized by such a drastic change in the common law and stated that a detailed analysis of the probable effect on commerce should predate any change.\textsuperscript{45} In \textit{Ivy v. Army Times Publishing Co.},\textsuperscript{46} an employee filed a wrongful discharge claim against his employer alleging that he was discharged solely because he testified truthfully, but against his employer's interests, in an administrative hearing.\textsuperscript{47} The court affirmed a panel decision refusing to recognize wrongful discharge.\textsuperscript{48} A strong dissent argued that the question presented was of "exceptional importance" and that the majority's terse disposal of the issue flew "in the face of that substantial body of scholarly commentary and decisional law sup-

\begin{itemize}
\item \textsuperscript{36} See supra note 26.
\item \textsuperscript{37} 456 Pa. 171, 319 A.2d 174 (1974).
\item \textsuperscript{38} \textit{Id.} at 173–74, 319 A.2d at 175.
\item \textsuperscript{39} \textit{Id.} at 185, 319 A.2d at 180.
\item \textsuperscript{40} \textit{Id.} at 184, 319 A.2d at 180.
\item \textsuperscript{41} See supra note 27.
\item \textsuperscript{42} 621 S.W.2d 395 (Tenn. Ct. App. 1981).
\item \textsuperscript{43} \textit{Id.} at 395.
\item \textsuperscript{44} \textit{Id.} at 396.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} 428 A.2d 831 (D.C. 1981).
\item \textsuperscript{47} \textit{Id.} at 832. The employer had conceded that he discharged the employee because of his testimony. \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 831.
\end{itemize}
porting the recognition of either a tort or contract cause of action for an at will employee."49

Wrongful discharge exceptions to the terminable at will rule are consistent with both public policy50 and modern economic conditions.51 Unfortunately, however, wrongful discharge is yet to be accepted by a majority of jurisdictions, and where accepted, is often inconsistently applied.

B. Tort or Contract?

Two approaches have evolved in jurisdictions allowing wrongful discharge actions. Courts recognize suit for breach of contract or hold that wrongful discharge is an independent tort.52 The distinctions between tort and contract actions, however, are not always clear. Similar factual situations may present an issue in either contract or tort, or both.53 Generally, tort and contract actions can be distinguished by the nature of the duty involved; tort duties are imposed by law, while contractual duties arise from agreement.54

49. Id. at 834.
50. See infra notes 90-103 and accompanying text.
51. The development of capitalism has left individuals increasingly vulnerable to private economic power. The employer-employee relationship best illustrates this phenomenon. Because an employee's livelihood depends on his ability to earn wages, the employer possesses a significant economic advantage that poses a threat to employee freedom. This advantage is further magnified as economic power becomes increasingly concentrated in the hands of fewer employers. Labor unions are one mechanism to limit this advantage; the growth of labor unions at least partially offset the economic inequality of employers and employees. However, a significant number of employment relationships are not covered by collective bargaining agreements. In these relationships, the terminable at will rule traditionally governs, and the powerful employer retains an unconscionable economic advantage. Thus, the terminable at will rule, once necessary to foster economic growth, is inconsistent with modern economic conditions and deleterious to the growth of employee power. See Blades, supra note 10, at 1404-06.
52. As of this writing Alaska, New Hampshire, and Wisconsin recognize a contract action while Connecticut, Hawaii, Illinois, Indiana, Michigan, Oregon, and West Virginia recognize a tort action. California, Massachusetts, and New Jersey recognize both.
54. In distinguishing tort from contract actions, the court in Malone v. University of Kan. Medical Center, 220 Kan. 371, 374, 552 P.2d 885, 888 (1980), stated:

A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract. Torts can, of course, be committed by parties to a contract. The question to be determined here is whether the actions or omissions complained of constitute a violation of
1. The Contract Theory

Courts finding that a wrongful discharge action arises in contract look to several factors. The first is the nature of the employment contract. Traditionally, contracts for an indefinite duration are presumed to be at will, terminable at any time by either party. Some courts, however, have held that the employer's right to terminate is not absolute, but that both parties to the contract are bound by an implied covenant of good faith and fair dealing. The covenant is breached when an employer discharges an at will employee in bad faith, with malice, or with retaliatory motives.

In Monge v. Beebe Rubber Co., an employee discharged for rebuffing her supervisor's sexual advances was allowed to sue her employer for breach of an oral employment contract, although the contract was for an indefinite time. The court reasoned that neither the public good nor the economic system is served by permitting terminations motivated by bad faith, malice, or retaliation. The Monge court carefully noted that it was not overruling the terminable at will rule, but was recognizing an exception based on changing legal, social, and economic conditions. Similarly, in Fortune v. National Cash Register Co., the court held that an employee working under a written contract was protected by an implied covenant of good faith and fair dealing, despite a specific provision for termination at will by either party on written notice. The plaintiff in Fortune alleged that he was dismissed to prevent his collection of sales commissions. The court held that the dismissal was in bad faith, amounting to a breach of the em-

55. See supra note 1.
57. See Monge, 114 N.H. at 133, 316 A.2d at 551; see also Fortune, 373 Mass. at 101, 364 N.E.2d at 1255–56; Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983).
58. Monge, 114 N.H. at 133, 316 A.2d at 551.
60. Id. at 133, 316 A.2d at 551.
61. Id. at 132–33, 316 A.2d at 551–52.
63. Id.
64. Id. at 99–100, 364 N.E.2d at 1254.
employment contract.\textsuperscript{65} Courts adopting the contract theory also consider the express or implied terms of the employment agreement.\textsuperscript{66} These terms may involve the length of employment,\textsuperscript{67} representations made by the employer in personnel policies\textsuperscript{68} or an employee handbook,\textsuperscript{69} statements made by the employer during the employment interview,\textsuperscript{70} or the employee's work record.\textsuperscript{71} In \textit{Pugh v. See's Candies, Inc.},\textsuperscript{72} the plaintiff had worked for thirty-two years for the employer, advancing from dishwasher to vice president and member of the board of directors.\textsuperscript{73} The company president had assured plaintiff that if he was loyal and hardworking his future with the company would be secure.\textsuperscript{74} Plaintiff had never received formal or written criticism of his work, nor had he ever been denied a raise or bonus.\textsuperscript{75} Based on the totality of the parties' relationship, the court found that the company had impliedly agreed not to discharge its employees arbitrarily.\textsuperscript{76} The plaintiff in \textit{Pugh} was permitted to maintain a wrongful discharge action for breach of that agreement.\textsuperscript{77} In \textit{Cleary v. American Airlines, Inc.},\textsuperscript{78} the court held that the employee's eighteen years of satisfactory service and the employer's expressed policy involving the adoption of specific procedures for settling employment disputes precluded the employer from discharging without good cause.\textsuperscript{79} The court allowed the discharged employee to recover against the employer for breach of this implied contractual term.\textsuperscript{80}

\textsuperscript{65} Id. at 104–05, 364 N.E.2d at 1257.
\textsuperscript{67} \textit{Pugh}, 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 924.
\textsuperscript{68} \textit{Cleary}, 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729.
\textsuperscript{70} Id., 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927.
\textsuperscript{71} \textit{Id.}; \textit{Cleary}, 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729.
\textsuperscript{72} 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).
\textsuperscript{73} \textit{Id.} at 316, 171 Cal. Rptr. at 918–19.
\textsuperscript{74} \textit{Id.} at 317, 171 Cal. Rptr. at 919.
\textsuperscript{75} \textit{Id.} at 317–18, 171 Cal. Rptr. at 919.
\textsuperscript{76} \textit{Id.} at 329, 171 Cal. Rptr. at 927.
\textsuperscript{77} \textit{Id.}.
\textsuperscript{78} 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
\textsuperscript{79} \textit{Id.} at 455–56, 168 Cal. Rptr. at 729.
\textsuperscript{80} \textit{Id.}
Finally, some courts hold that the right to discharge an employee under a terminable at will contract is limited by considerations of public policy. These courts find an implied contractual provision protecting an employee from discharge for refusing to act contrary to public policy. In the recent case of *Brockmeyer v. Dunn & Bradstreet*, an employee was dismissed after admitting to having an affair with his secretary and having smoked marijuana. The Wisconsin Supreme Court recognized wrongful discharge as a breach of contract action based on an implied provision that an employer will not discharge an employee for refusing to violate the clear mandate of public policy. On the facts of the case, however, the court held that the discharge did not violate a public policy reflected in the constitution or statutes of Wisconsin.

The damage issue is significant in wrongful discharge cases under the contract theory. Damage awards generally are restricted to lost wages, commissions, and other earnings. In assessing compensatory damages, courts also may consider lost benefits such as stock options. Although evidence may indicate the bad faith of the employer, punitive damages and damages for mental

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81. See *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), where the court recognized that an employment contract of indefinite duration generally is terminable at will by either party. In allowing the wrongful discharge action of an employee who had refused to commit perjury, the *Petermann* court held that an employer's contractual right of discharge may be restricted by law for the good of the community. *Id.* at 188, 344 P.2d at 27.

82. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.3d 505 (1980). The *Pierce* court stated that an action based on the public policy exception to the terminable at will rule may arise in either contract or tort, asserting that the "action in contract may be predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy," while the "action in tort may be based on the duty of an employer not to discharge an employee who refused to perform an act that is a violation of a clear mandate of public policy." *Id.* at 72, 417 A.2d at 512. The court held that the plaintiff, discharged for refusing to continue research on a controversial drug, failed to establish the requisite "violation of a clear mandate of public policy." *Id.* at 76, 417 A.2d at 514.

83. *Id.* at 575-76, 335 N.W.2d at 841. The court considered the public policy exception under both tort and contract theories, adopting the latter because the remedies established by Wisconsin wrongful discharge statutes, reinstatement and backpay, were considered appropriate only in contract actions. *Id.* The court expressly refused to imply a covenant of good faith. *Id.* at 569, 335 N.W.2d at 838.

84. *Id.* at 579, 335 N.W.2d at 842.

pain and suffering normally are disallowed. At least one court has
held that punitive damages may be recovered only if the employee
proves that the employer was guilty of oppression, fraud, or mal-

ice. 87 Some courts have refused to account for pain and suffering
in the damage award. 88 Others have imposed a privity require-
ment, limiting standing to sue and recovery to the discharged
employee. 89

The difficulty of defining contract terms and the limitations on
damage recovery are the primary weaknesses of the contract ap-
proach to wrongful discharge. Partially because of these deficien-
cies, the tort approach is the majority view.

2. The Tort Theory

Courts recognizing wrongful discharge as a tort hold that
when the discharge is designed to prevent the employee's exercise
of a statutory right or require criminal behavior as a condition of
employment, the employer violates public policy and an exception
to the at will rule exists. 90 Discharge under such circumstances


88. See, e.g., Monge v. Beebe Rubber Co., 114 N.H. 130, 132, 316 A.2d 549, 552 (1974). The court ordered a jury verdict reduced by the amount attributable to damages for pain and suffering, citing authority holding that such damages are not generally recoverable in a contract action. The Monge court limited plaintiff's recovery to lost wages. Id.

89. See, e.g., Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1, 2 (1st Cir. 1977). In Pstragowski, the wife of an employee alleging malicious discharge brought suit as a third party beneficiary of her husband's employment contract. The court of appeals upheld the district court's dismissal of her action because she did not have a reasonable expectation of pecuniary benefit from her husband's continued employment and the legal wrong was against the husband. Id. at 5.

"violates a basic duty imposed by a law upon all employers," and the aggrieved employee may maintain a tort action for wrongful discharge against the employer. Unlike the inquiry in most contract actions, the tort inquiry typically goes beyond the relationship of the parties, enabling courts to find that an employer breaches a duty to uphold the public interest by wrongfully discharging an employee.

In *Palmateer v. International Harvester Co.*, the court relied on the public policy exception to the terminable at will rule to recognize wrongful discharge as a tort. In *Palmateer*, the complaint alleged simply that the plaintiff was a former employee of defendant, discharged for reporting the possible criminal activity of a fellow employee to the police. Holding that the complaint stated a cause of action, the majority stated that "[a]ll that is required is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy." The court found enforcement of the state's criminal code to be the clearly mandated public policy violated by the discharge. A critical dissent urged that a wrongful discharge cause of action should lie "only when the discharge has been violative of some strong public policy that has been clearly articulated."

The imprecise definitional limits of public policy have engendered criticism, but operate in fact to facilitate decisionmaking by providing flexibility. This flexibility is generally not enjoyed

93. *Id.* at 127, 421 N.E.2d at 877.
94. *Id.* at 134, 421 N.E.2d at 881.
95. *Id.* at 132-33, 421 N.E.2d at 879-80. According to the majority, "there is a clear public policy favoring the investigation and prosecution of criminal offenses" and "[t]he law is feeble indeed if it permits [an employer] to take matters into its own hands by retaliating against its employees who cooperate in enforcing the law." *Id.* at 133-34, 421 N.E.2d at 880.
96. *Id.* at 145, 421 N.E.2d at 885 (emphasis in original).
97. *See, e.g.*, Hinrichs v. Tranquilare Hosp. 352 So. 2d 1130, 1131 (Ala. 1977) (public policy "is too nebulous a standard" to justify modification of the at will rule); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981) (definition of public policy is the "Achilles heel" of the tort theory). The court in *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959), recognized that "public policy is a vague expression, and few cases can arise in which its application may not be disputed." (quoting *Noble v. City of Palo Alto*, 89 Cal. App. 47, 50, 264 P. 529, 530 (1928)). The *Petermann* court adopted the definition of Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953), stating that public policy is "[a] principle of law which holds that no citizen can lawfully do that which has a tendency to be
by courts bound by the strictures of the contract theory. The greater flexibility of the tort approach is also reflected in the scope of damage remedies—the full range of tort damages, including punitive damages, are available to discharged employees who establish a public policy exception. For example, when an employee has been discharged for exercising a statutory right, such as filing for worker’s compensation, courts may impose punitive damages. Courts also stress the deterrent aspects of punitive damages in holding that employers cannot act contrary to the public interest by claiming a right to terminate at will. Damages for mental pain and suffering typically are permitted where the pain and suffering flows from the employer’s malicious behavior in effecting the discharge. Finally, recovery is not restricted to the discharged employee but extends to an affected spouse.

injurious to the public or against the public good . . . .” 174 Cal. App. 2d at 188, 344 P.2d at 27.

98. Courts adhering to the contract theory based on considerations of public policy do enjoy this flexibility. See supra notes 81–85 and accompanying text.

99. See, e.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The Kelsay court held that the plaintiff was entitled to compensatory damages and addressed the issue of punitive damage for malicious, intentional, or grossly negligent conduct in wrongful discharge cases, holding that they could be awarded in subsequent cases presenting similar facts. Id. at 186–90, 384 N.E.2d at 359–61.


101. The Kelsay court emphasized that punitive damages would both punish and serve as a warning and an example to deter employers from committing acts such as discharging employees who file worker’s compensation claims. 74 Ill. 2d at 186–88, 384 N.E.2d at 359–60. The court noted that imposition of exemplary damages is appropriate in actions based on a separate and independent tort rather than a breach of contract. Id. at 187, 384 N.E.2d at 360.

102. See Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976). The Agis court allowed damages for mental pain and suffering arising from a summary dismissal. Plaintiff was discharged when defendant restaurant, attempting to uncover a theft, began dismissing its waitresses in alphabetical order. Id. at 141, 355 N.E.2d at 317. The Agis court did not focus on public policy but instead based its award for pain and suffering on findings that the act of discharge was extreme and outrageous and that the employer intentionally or recklessly caused the infliction of severe emotional distress. Id. at 144–45, 355 N.E.2d at 318–19; see also Keller, Ackland & Glad, The Evolving Doctrine of Wrongful Termination of Employment: Practical Considerations Regarding Employment and Insurance Agent Relationships, 32 Fed’N Ins. Couns. Q. 105 (1982) (cautioning employers against harassing an undesirable employee into quitting because of possible tort liability independent of wrongful discharge).

II. THE COMPETING INTERESTS

It is evident that the judiciary recognizes the inadvisability of completely abolishing the common law terminable at will rule. By reaffirming the rule in words and finding a multitude of exceptions in fact, however, courts have diminished its vitality as a legal concept. The ideal approach would involve balancing the interests of the employee, the employer, and society. In reality, however, neither employee nor employer interests have been addressed adequately by the courts. As a result, employers are disadvantaged and employees harmed by a judicial construct designed to protect employee interests.

A. Developing the Protected Interest

Although courts apparently are willing to consider a wide variety of factual settings under the general rubric of wrongful discharge, they are not willing to grant a cause of action to every discharged employee. Standards of protected employee conduct vary significantly, although some behavior is deemed particularly worthy of judicial protection.

Where the employee is discharged for exercising his civic rights, duties, and responsibilities, courts have little trouble finding that a wrongful discharge has occurred. Reasoning that an employer’s authority over employees does not include the right to demand criminal behavior and that employees should not be forced to choose between criminal sanctions and continued employment, courts have recognized wrongful discharge claims when employees are discharged for refusing to perjure themselves, participate in a violation of the antitrust laws, or violate various health, safety, and consumer protection

104. See infra notes 144–89 and accompanying text.
105. See supra notes 24 & 90–96 and accompanying text.
106. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The court held that an employer cannot discharge an employee for refusing to engage in criminal activity at the employer’s request. Id. at 178, 610 P.2d at 1336–37, 164 Cal. Rptr. at 846.
108. See, e.g., Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusal to give false testimony before legislative committee). But see, e.g., Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981). The majority refused to recognize wrongful discharge when an employee was dismissed in retaliation for giving truthful testimony before the District of Columbia Wage and Hour Board. A dissent argued that the practical effect of the decision was to encourage perjury. Id. at 832.
109. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164
regulations.\textsuperscript{110}

The employee who demonstrates years of good and faithful service to the employer and alleges that his discharge was arbitrary or designed to deprive him of commissions,\textsuperscript{111} stock options,\textsuperscript{112} or pension benefits\textsuperscript{113} also presents a favorable case. In allowing a cause of action in these situations, courts protect the integrity of the employment contract and its implied provisions.\textsuperscript{114}

Typically, unprotected activities are those involving the internal management of a company. Reasoning that a company must maintain autonomous control over the management of its internal affairs, courts have denied a cause of action to "whistleblowers," individuals who publicize the wrongful activities of their employers.\textsuperscript{115} Thus, an employee who informed a supervisor that another supervisor was soliciting and receiving kickback payments from the employer's suppliers was denied a wrongful discharge cause of action,\textsuperscript{116} as was an employee who attempted to correct, both publicly and within the corporation, allegedly fraudulent statements made by the employer regarding construction of new plants.\textsuperscript{117} Arguably, these courts are concerned not only with preserving

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\textsuperscript{114} See supra notes 66–80 and accompanying text.

\textsuperscript{115} But see Comment, Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy, 1977 Wis. L. REV. 777. According to the author, the responsible whistleblower should be viewed as acting in the public's best interest by exposing employer activity contravening expressed and sanctioned norms of social behavior. Id. at 778–79. The author contends that extending the public policy exception to protect whistleblowers is consistent with the philosophy that a citizen has a societal obligation to prevent others from engaging in illegal behavior. Id. at 805-811. The author also notes that the definition of whistleblower in the wrongful discharge context need not be limited to employees who publicize the wrongful activities of their employers; it also may include those who internally expose wrongful activity or seek to obtain rather than disclose information. Id. at 799 n.151.


\textsuperscript{117} Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), aff'd, 539 F.2d 1126 (8th Cir. 1976).
managerial discretion, but also with the distinct possibility of employee malice.

Where employee interests are purely private, courts also are reluctant to allow wrongful discharge actions. One court denied a cause of action where an employee alleged that he was discharged for requesting to examine the employer's books and records as a stockholder in the corporation. The court stated that the statutory right of inspection is not based on public policy but on protecting the private and proprietary interests of stockholders as owners of the corporation. Employees discharged for attending night school and for expressing political beliefs also have been denied a cause of action. In these situations, the employer may exercise his absolute right to terminate an at will employee.

Clearly, while courts have retreated from rigid adherence to the terminable at will rule, they will not grant relief to every disgruntled employee who complains of wrongful discharge. The difficulty arises in defining exactly which employee interests deserve protection. Case law establishes the parameters of protected conduct, but the definition is often unclear and inconsistent.

B. Articulating the Employer's Interest

In wrongful discharge actions, the employer's interests should provide a substantial counterweight to the protected interest of the employee. The terminable at will rule was actually designed to safeguard employers' freedom of contract by allowing the unimpeded movement of employees in the marketplace. Although

119. Id. at 249-50, 546 P.2d at 145-46.
121. Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), aff'd mem., 70 A.D. 791, 416 N.Y.S.2d 160, appeal denied, 48 N.Y.2d 603, 421 N.Y.S.2d 1025 (1979). However, the Chin court simply may have been reacting to the violence of the plaintiff's expression—driving a van into a crowd at a political rally.
122. The terminable at will rule arose with the advent of the industrial revolution. It displaced a medieval common law master-servant theory that substantially protected the servant's interest in maintaining employment. The economics of the late nineteenth century, however, gave rise to the laissez-faire theory of government. Courts subscribed to this theory, reasoning that economic growth would be encouraged by minimal legislative and judicial control over trade and industry. The terminable at will rule, based on the employer's "fundamental right" to discharge employees as he pleased, was a corollary to the laissez-faire theory. It was thought that insulating employers from the risks normally associated with employing workers also would facilitate economic growth. See Note, supra note 9, at 1824-28; Note, Recognizing the Employee's Interests in Continued Employment—The California Cause of Action for Unjust Dismissal, 12 PAC. L.J. 69, 72-74 (1980); Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335, 340-343 (1973).
changed social and economic conditions support modification of
the traditional rule, employers retain strong and compelling inter-
ests that courts should consider carefully in deciding wrongful dis-
charge cases. These interests may be primarily economic or may
purely involve personnel choices. Unfortunately, employers' inter-
ests generally have not been articulated by courts recognizing
wrongful discharge actions.\textsuperscript{123}

Indiscriminate recognition of wrongful discharge actions could
chill the employers' practice of taking risks by hiring unproven
employees. The Massachusetts Supreme Court in \textit{Fortune v. Na-
tional Cash Register Co.} \textsuperscript{124} recognized that the uncertainties of the
business world compel flexibility in decisionmaking—employers
necessarily require substantial control over hiring and dis-
charge.\textsuperscript{125} Similarly, in \textit{Geary v. United States Steel Corp.}, \textsuperscript{126} the
Pennsylvania Supreme Court stated that employers have a legiti-
mate interest in employing and maintaining the best personnel
available,\textsuperscript{127} and that the threat of wrongful discharge suits could
inhibit employers from making critical personnel decisions.\textsuperscript{128}

Personnel decisions are inevitably subjective.\textsuperscript{129} The qualities
of a good employee, particularly in management positions, are
often incapable of precise definition.\textsuperscript{130} For this reason, employ-
ers frequently are willing to hire unproven employees. If the em-
ployee fails to fulfill the employer's expectations, termination
without liability results under the terminable at will rule. Under
the current judicial modifications of the rule, however, employers
faced with the possibility of suit by every discharged employee,
may be unwilling to take a chance on unproven employees.

\textsuperscript{123} Some courts have at least acknowledged employer interests. \textit{See}, e.g., \textit{Palmateer v. International Harvester Co.}, 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981) (interest in running business efficiently and profitably); \textit{Monge v. Beebe Rubber Co.}, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (interest in running business as employer sees fit). Comment-
tators have articulated the dangers of ignoring employer interests in wrongful discharge actions. \textit{See}, e.g., \textit{Note, Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?}, 35 \textit{VAND. L. REV.} 201 (1982) (arguing that courts should narrowly define the public policy exception to the at will rule, deferring to legislatures to strike the proper balance between the interests of employer, employee, and society).

\textsuperscript{125} \textit{Id.} at 101–02, 364 N.E.2d at 1256.
\textsuperscript{127} \textit{Id.} at 181, 319 A.2d at 179.
\textsuperscript{128} \textit{Id.} at 181-82, 319 A.2d at 179.
\textsuperscript{129} \textit{See} \textit{Note, supra} note 123, at 229.
\textsuperscript{130} Blades, \textit{supra} note 10, at 1428–29. Professor Blades warns that the employer's evaluation of the employee is usually highly personalized and intuitive, and therefore particularly difficult to translate into concrete terms that a juror can readily appreciate. \textit{Id.}
Retention of unproductive employees is another employer concern that may be affected by an employee bias in wrongful discharge actions. The court in *Palmateer v. International Harvester Co.* 131 acknowledged that an employer has a legitimate interest in running his business efficiently and profitably. Maintaining unproductive employees on the payroll creates inefficiency which, however, the employer may decide to absorb simply to avoid the time, expense, and adverse publicity involved in defending a wrongful discharge action. Further, by effectively denying employers the right to fire unproductive employees, courts which allow wrongful discharge actions could seriously reduce their state's attractiveness to new business. 132 Several courts have noted the negative impact that recognizing wrongful discharge actions might have on a state's economy. 133

Employee morale also may be undermined by overly broad exceptions to the terminable at will rule. The *Geary* court remarked that "even an unusually gifted person may be of no use to his employer if he cannot work effectively with fellow employees." 134 Since an unusually gifted employee probably will present an effective case for wrongful discharge, the employer may retain the employee even if the best decision is termination. Fellow employees could be adversely affected by this practice, resulting in a disaffected work force. When a terminated employee successfully recovers damages in a wrongful discharge action, the impact on employee morale also is potentially devastating; employees may reason that model behavior is financially less rewarding than behavior that leads to discharge.

The threat of vexatious lawsuits is substantial because the standards governing wrongful discharge actions are vague. Since courts have indicated a willingness to hear a wide variety of cases, discharged employees are alert to the strong possibility of recovery, which may include punitive damages if the action is brought in tort. 135 Furthermore, juries tend to identify with and therefore

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favor employees. Thus, the disgruntled employee has little to lose and much to gain by instituting a wrongful discharge action. The possibility of a flood of unwarranted litigation resulting from a vaguely defined public policy exception was raised in Pierce v. Ortho Pharmaceutical Corp., where the court stated that the public policy exception should be narrowly defined to avoid this problem.

Finally, the time and expense of defending a wrongful discharge action can be extreme. The corporate giant may be able to bear the cost, but it will likely be reflected in higher prices or reduced wages. The small business may find the imposition of a judgment staggering, particularly if punitive damages are awarded. In addition, attempts by employers to spread the risk of wrongful discharge liability with insurance may not be successful. A case indicating that employers may obtain limited insurance coverage is Howard v. Russel Stover Candies, Inc., where the court imposed on an insurer the duty to defend and possibly indemnify an employer in a wrongful discharge action. This case does not have broad application, however; the court held only that the employer's nonwillful failure to send a statutorily required termination letter to a discharged employee was covered by a comprehensive general liability policy. In the typical wrongful discharge case, coverage would probably be denied based on the strong public policy against insurance coverage for intentional acts or punitive damages.

Guarding against the mere possibility of wrongful discharge actions also may involve considerable time and expense. Employers must spend more time in the personnel selection process, attempting to recognize candidates likely to bring suit upon termination. To assure some measure of protection against suit, employers may use written employment contracts or employee handbooks containing written statements of personnel policies.

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136. See Blades, supra note 10, at 1428.
137. 84 N.J. 58, 417 A.2d 505 (1980).
138. Id. at 73, 417 A.2d at 512–13.
139. See Note, supra note 123, at 230 (most commentators analyzing wrongful discharge actions improperly focus on employees of corporate giants while ignoring the plight of small business).
140. 649 F.2d 620 (8th Cir. 1981).
141. Id.
142. See Keller, Ackland & Glad, supra note 102, at 107 n.2.
143. Id. at 114. The authors suggest that employers adopt certain practical measures to avoid wrongful discharge claims. They caution against “puffing” in the employment inter-
The expense of drafting and printing these items may be considerable, however, particularly if expert assistance is required. Again, these expenses ultimately will be reflected in price increases or wage reductions. Employee benefits also may be cut, as personnel budgets expand to cover the increased cost of selecting, hiring, and discharging employees. Employees not directly harmed by loss of benefits will be injured indirectly as consumers of higher priced goods.

III. A Uniform Standard of Review

The current state of the law governing wrongful discharge actions is uncertain. The traditional terminable at will rule probably will continue to be modified by judicially defined public policy exceptions and contract considerations. The manner in which the modifications are defined and applied vary considerably and the resulting inconsistency disadvantages both employer and employee.

Adopting a uniform standard of review for wrongful discharge actions will remedy the inconsistencies in theory and application. The standard must take into account the interests of employee, employer, and society. To balance these different and sometimes competing interests, adoption of a modified version of the test espoused by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc.* is appropriate.

The *Wright Line* test is recognized by courts as providing a view and suggest use of written employment contracts and a written statement of employment policies, including a policy on discharge.

144. See supra notes 23–103 and accompanying text.
145. See supra notes 105–43 and accompanying text.
146. See supra notes 105–21 and accompanying text.
147. See supra notes 122–43 and accompanying text.
148. See supra notes 90–96 and accompanying text.
149. See infra notes 122–43 and accompanying text.
150. See infra notes 160–66 and accompanying text.
151. A number of federal courts of appeals have expressly approved the *Wright Line* analysis. See NLRB v. Senfner Volkswagen Corp., 681 F.2d 557, 560 (8th Cir. 1982); NLRB v. Charles H. McCauley Assoc., 657 F.2d 685, 688 (5th Cir. 1981); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981); NLRB v. Nevis Indus., Inc., 647 F.2d 905, 909 (9th Cir. 1981). The First, Second, Third, and Seventh Circuits have refused to adopt *Wright Line* in its pure form. See NLRB v. New York Univ. Medical Center, 702 F.2d 284, 293 (2d Cir. 1983); NLRB v. Webb Ford, Inc., 689 F.2d 733, 739 (7th Cir. 1982); Behring Int’l, Inc. v. NLRB, 675 F.2d 83, 88 (3rd Cir. 1982), vacated, 103 S.Ct. 3104 (1983); Wright Line, A Div. of Wright Line, Inc., 662 F.2d 899, 904 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Recently, the Supreme Court resolved the split among the circuits by
clear standard of review for discriminatory discharge actions, an area of labor law that, like wrongful discharge, was characterized by uncertainty and inconsistency.152

A. Background of Wright Line

The National Labor Relations Act (NLRA) protects the right of employees to engage in collective activity.153 Specifically, section 7 of the NLRA defines permissible collective activities154 and sections 8(a)(1) and 8(a)(3) prohibit interference with the exercise of section 7 rights and discriminatory hiring and firing practices which encourage or discourage union membership.155 These provisions safeguard the employee from disciplinary action or dismissal arising out of union activity or sympathy. The NLRB hears complaints brought under sections 8(a)(1) and 8(a)(3) alleging that an employer's anti-union animus was the motivating factor in an employee's discharge.156

Prior to the formulation of the Wright Line test, an ongoing battle raged between the courts of appeals and the NLRB over the standard to be used in resolving cases where an employer's motive

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154. Section 7 grants "employees . . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." 29 U.S.C. § 157 (1976).

155. Section 8(a)(1) states that an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(3) provides that an employer may not "by discrimination in regard to hire or tenure of employment . . . encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976). An employer who punishes an employee for exercising section 7 rights violates § 8(a)(1). If union activity is involved, § 8(a)(3) may be violated as well. Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. Pa. L. Rev. 1195, 1198 (1967). When an employer is accused of violating these provisions, the National Labor Relations Board may issue a complaint and conduct a hearing on the matter. NLRA § 10(b), 29 U.S.C. § 160(b) (1976). If a violation is found by a preponderance of the evidence, the employer is subject to statutory sanctions including reinstatement of the employee and payment of lost wages. Id. § 10(c), 29 U.S.C. § 160(c) (1976).

156. The anti-union animus may be either the sole reason for the discharge or only part of the reason. In a "pretext" case, the employer's allegations of good cause for discharge mask purely discriminatory motives. If, however, the employer asserts a legitimate business justification for discharge and there is also evidence of anti-union animus, a "dual motivation" case is presented. See Note, supra note 152, at 237-38.
in discharging an employee was questioned. Some courts were dissatisfied with the Board's "in part" test, which held that any evidence of anti-union motive established a violation of section 8(a)(1) or 8(a)(3) of the Act. These courts considered the test to be too pro-labor and thus favored an approach that gave management more consideration. The causation test announced by the NLRB in Wright Line, providing for a balancing of the interests of the employer and the employee, was a logical synthesis of the conflicting approaches of the Board and the courts.

The Wright Line test requires that the General Counsel make a prima facie showing supporting the inference that protected employee conduct was a "motivating factor" in the employer's decision to discharge. The burden then shifts to the employer to show that the discharge would have taken place absent protected conduct. The employer may absolutely rebut the inference by establishing that the circumstances justified the discharge. The shifting burdens of proof allow both parties to present their case with equal force.

To establish a prima facie case, the General Counsel must establish a nexus between the protected employee conduct and the discharge. This can be done by submitting evidence of the employer's knowledge of the protected activity, his hostility towards the employee, the timing of the discharge, and departure from the usual disciplinary measures in similar situations. Evidence of

157. Id. at 241-48. The NLRA specifically grants the courts of appeals the power to review NLRB decisions. NLRA § 10(f), 29 U.S.C. § 160(f) (1976). Section 10(f) grants review power upon filing of a written petition requesting modification or setting aside of a final Board order denying the relief sought.

158. Approximately half of the courts of appeals followed the in part test; the remainder applied a "dominant motive" or "but for" test. See Note, supra note 152, at 241-48 (discussing the various tests used by the circuits).

159. The First and Second Circuits, for example, favored a but for analysis, relying on the Supreme Court's decision in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977), that a school board must be given the opportunity to justify a discharge even though an unconstitutional consideration played a significant part in the board's decision to terminate an employee. See Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97-99 (2d Cir. 1978); Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293-94 (1st Cir. 1977). These courts applied the Mount Healthy analysis to actions brought under the NLRA.


161. The NLRB provides counsel for employees who allege discriminatory action by employers. The General Counsel represents the employee and argues his case before the Board.

162. See supra note 154.

163. See, e.g., Guerdon Indus., 255 N.L.R.B. 610, 617 (1981) (prima facie case estab-
threats of reprisal or surveillance also will establish the necessary nexus between the discharge and the protected activity.\textsuperscript{164}

To rebut the inference presented by the employee's prima facie case, the employer must show that the discharge would have occurred regardless of the protected behavior. Employers typically present evidence of an employee's violation of plant rules or company policies, similar disciplinary action in prior cases, and an employee's poor work record.\textsuperscript{165} Significantly, employers need not establish a complete absence of anti-union animus, but only that the same action would have been taken absent protected conduct.\textsuperscript{166}

B. Application to Wrongful Discharge Actions

A standard similar to the \textit{Wright Line} test is appropriate for judicial review of wrongful discharge cases. Both NLRB actions alleging discriminatory discharge and wrongful discharge actions involve the employment relationship, specifically, the termination of employment. More significantly, wrongful discharge actions and section 8(a)(1) and 8(a)(3) actions similarly are predicated on an employer's motive in discharging an employee.

Courts recognizing exceptions to the terminable at will rule often wrestle with the question of whether the employer's motive for the discharge has contravened a protected employee interest.\textsuperscript{167} Similarly, in section 8(a)(1) and 8(a)(3) actions, the NLRB...
and the courts of appeals have considered whether an employee's exercise of section 7 rights motivated the discharge. While section 7 rights are statutorily defined and employee rights in wrongful discharge actions are judicially defined, both actions involve the balancing of employee and employer interests and the evaluation of employer motive. Because motive is a subjective element, it is frequently difficult to determine how much weight it should be given. A test similar to the Wright Line analysis provides a structured framework within which the parties' interests may be weighed and motive considered.

To establish a violation in section 8(a)(1) and 8(a)(3) actions, it must first be demonstrated that the aggrieved employee's section 7 rights were violated by the discharge. By analogy, the employee who alleges wrongful discharge must establish on the face of his complaint that a protected interest was violated by the discharge. In wrongful discharge actions, the protected interest can be drawn from decisional law. The selectivity of the judiciary in allowing wrongful discharge actions and the rationales employed by the courts establish loose guidelines for the development of protected interests. These guidelines are the basis of the hierarchy of protected employee interests incorporated into the proposed standard of review.

(1976) (employer is not free to discharge an employee when the reason is an intention to contravene public policy); Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (holding that where termination is motivated by bad faith or malice or based on retaliation, a cause of action for wrongful discharge will lie); see also Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). In Geary, the court stated that imposing wrongful discharge liability on the basis of motive is "on the frontier of the law of tort." Id. at 177–78, 319 A.2d at 177 (quoting 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 4.10, at 336 (1956)). The Geary court indicated that where there is specific intent to cause harm or accomplish an ulterior purpose, courts have recognized tortious conduct. Id. at 178, 319 A.2d at 177. The court analogized that if an employer has specific intent to harm an employee or achieve some other proscribed goal by the discharge, the employee could maintain wrongful discharge cause of action. Id.

168. See Blades, supra note 10, at 1427–29. The author states that any case which turns on motive or subjective intent poses difficult factual questions. In cases of abusive dismissal, this is the most compelling argument against giving all disgruntled employees recourse to the courts.

169. Id. Professor Blades also highlights the problems of pleading and proof raised by motive-oriented discharge actions, adding that the average jury is unlikely to identify with and believe the employer even where both sides present equally credible versions of the facts. Id. at 1428.

170. Failure to allege facts establishing a protected interest would properly result in dismissal of the complaint for failure to state a claim upon which relief can be granted. Dismissing actions not based on a recognized protected interests at the complaint stage will discourage vexatious lawsuits. See supra notes 135–38 and accompanying text.

171. See supra notes 106–21 and accompanying text.
The highest level of protected interests are those based on civic rights, duties, and responsibilities as articulated in state or federal statutes. By anchoring the public policy exception to legislatively declared interests, courts will avoid the criticism that they are usurping the role of the legislature by implementing their own notions of public policy. Because interests embodied in statutory enactments are societal interests that transcend the employment relationship, actions in which these interests are implicated present the strongest case. The next level of protected interests involve the contract relationship. Where an employee alleges that express or implied terms of the employment agreement, such as length of service, statements by the employer, and work record, legitimately gave rise to an expectation of continued employment, the complaint would state a cause of action. Expectations of continued employment can be drawn from contract law and based on the mutual and reasonable beliefs of employer and employee. Where legislatively declared public policy is absent, where employee interests involve the internal management of the company, or where purely private interests are involved, the complaint properly would be dismissed.

Once a protected interest is established, the employee must make a showing sufficient to support the inference that the interest was a motivating factor in the discharge. The causal nexus can be established by introducing evidence of the direct statements of the employer, the timing of the discharge, the employer's knowledge of the protected interest, the departure from usual disciplinary practices, and the employer's antagonism toward the discharged employee.


173. Palmateer, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (Ryan and Moran, J.J., dissenting). Justice Ryan bitterly concluded that no "employer should be compelled to defend a tort action and possibly, be forced to pay a disgruntled employee compensatory, and possibly substantial, punitive damages because of a violation of some vague concept of public policy that has never been articulated by anyone except four members of this court." Id. at 145, 421 N.E.2d at 886.

174. See supra notes 111-14 and accompanying text.
175. Id.
176. See supra notes 115-17 and accompanying text.
177. See supra notes 118-21 and accompanying text.
employee. Some of these factors were present and apparently considered by the court in *Harless v. First National Bank*. There, the employee was demoted immediately after he brought evidence of violations of state and federal consumer credit and protection laws to the attention of his superiors. He was subsequently subjected to harassment and threats and ultimately discharged shortly after he gave bank files to an auditor. Based on these facts, the *Harless* court concluded that the employee had made a sufficient showing that the firing was motivated by an intention to contravene public policy and thus held that the complaint stated a cause of action for wrongful discharge.

To rebut the employee's prima facie case, the employer must establish that the discharge would have taken place absent the protected activity. He cannot merely assert his right to terminate at will if a protected activity is involved. Rather, under the exceptions to the terminable at will rule the absolute right of discharge is limited, and the employer must justify his action.

The employer's justifications may include many factors not addressed in discriminatory discharge actions under the NLRA because in wrongful discharge actions the arena of protected employee interests is more expansive. While management in section 8(a)(1) and 8(a)(3) actions typically presents evidence of plant policy, employee work records, and prior disciplinary action, the employer in a wrongful discharge action may assert any legitimate interest that reasonably could influence his decision to discharge the employee. This might include intangible interests such as employee morale and risk-taking in personnel decisions, as well as tangible economic interests such as the preservation of a productive and efficient work force. Since the protected activity

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178. These are factors traditionally used by the NLRB to determine the causal nexus between the discharge and the protected activity in section 8(a)(1) and 8(a)(3) actions. *See supra* notes 163–64 and accompanying text.
180. *Id.* at 272.
181. *Id.* at 272–73.
182. *Id.* at 275–76.
183. The terminable at will rule, allowing discharge "for good cause, for no cause or even for cause morally wrong," Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519–20 (1884), has been modified by judicial decisions so that "cause morally wrong" or no cause will no longer justify an arbitrary dismissal. *See supra* notes 23–103 and accompanying text.
184. *See supra* note 165 and accompanying text.
185. *See supra* note 134 and accompanying text.
186. *See supra* notes 124–30 and accompanying text.
187. *See supra* notes 131–33 and accompanying text.
may have only partially motivated the discharge, the employer may account for this in his rebuttal. The Wright Line test does not require proof that discriminatory motive played no part in the discharge; it simply requires a showing that absent the protected activity, the employer would have taken the same action.\textsuperscript{188}

After the employer has presented his case, the employee may rebut the employer's assertion of a legitimate business justification with additional evidence of a retaliatory motive.\textsuperscript{189} The factfinder will balance the strength of the employer's asserted interests with the employee's protected interest. After any relevant societal interests have been taken into account, the judge or jury will determine whether a wrongful discharge has occurred.

\section*{IV. Conclusion}

Continued judicial modification of the traditional terminable at will rule appears inevitable. As courts continue to carve out exceptions to the rule, the number of wrongful discharge actions will increase. The probable increase in litigation and the present inconsistencies and confusion in this area of the law compel the adoption of a uniform standard of judicial review. The standard proposed in this Note provides a clear guide for the judiciary in deciding wrongful discharge actions. Significantly, the proposed standard will adequately safeguard the interests of society, the employer, and the employee by providing an analytical framework within which the interests can be balanced. As a consequence of judicial adherence to this standard, inconsistency and confusion will be transformed into uniformity and predictability and both parties to an at will employment relationship will be the beneficiaries of equitable results.

\textbf{MARY TERESA SOBNOISKY}

\textsuperscript{188} See supra note 158.

\textsuperscript{189} In Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1980), the court stated that after both parties have presented their case, the employee "may attack the employer's offered explanation, either on the ground that it is pretextual . . . or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles." \textit{Id.} at 329-30, 171 Cal. Rptr. at 927.