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Sides v. Duke Hospital: A Public Policy Exception to the Employment-at-Will Rule

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North Carolina adheres to the common-law rule that employment for an indefinite period is terminable at the will of either party. The employment-at-will rule allows an employer to discharge an employee "for good cause or for no cause, or even for bad cause." Although the at-will rule remains firmly established in modern law, it has been limited by labor laws and other federal and state laws. In addition, since 1973, numerous courts have either recognized a public policy exception to the rule or have indicated they would do so under appropriate facts.

1. The at-will rule first appeared in an 1877 treatise on the law of master and servant. H. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). "[T]he rule [in America] is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." It is generally agreed, however, that Wood's rule was not supported by the cited cases. See Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 567 n.3, 335 N.W.2d 834, 837 n.3 (1983); Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118, 126 (1976). Nevertheless, the at-will rule was compatible with existing notions of laissez-faire economics, Note, Employment at Will: An Analysis and Critique of the Judicial Rule, 68 IOWA L. REV. 787, 789 (1983), and freedom of contract, Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1818-19, 1824-26 (1980).

The at-will rule in North Carolina was stated in Edwards v. Seaboard & Roanoke R.R., 121 N.C. 489, 28 S.E. 137 (1897), and has been reaffirmed by numerous cases. See, e.g., Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); Smith v. Monsanto Co., 71 N.C. App. 632, 322 S.E.2d 611 (1984); Brooks v. Carolina Tel. & Tel. Co., 56 N.C. App. 801, 290 S.E.2d 370 (1982).


Many courts, however, including until recently those in North Carolina, have refused to impose any public policy limitations on the at-will rule. Most of these courts have stated that any changes in the at-will rule should be made by the legislature. Courts have also been reluctant to interfere with the inherent freedom of contract between an employer and an employee and have reasoned that bad motives alone cannot make unlawful an otherwise lawful act. Finally, some courts have declined to adopt a public policy exception because it is "too nebulous a standard."

In the recent case of *Sides v. Duke Hospital*, the North Carolina Court of Appeals departed from its previous decisions and announced that an employer's right to discharge an employee was limited by public policy concerns. This Note examines the development and current status of exceptions to the at-will rule and analyzes the public policy exception adopted in *Sides*. It concludes that the decision in *Sides* offers employees in North Carolina significantly greater protection against unjust and arbitrary discharge without unduly restricting an employer's discretion to discharge an employee.

Marie Sides was employed as a nurse anesthetist at Duke University Medical Center (DUMC), a hospital operated by Duke University (Duke), for more than eleven years prior to her dismissal. While on duty Sides refused to follow a doctor's order to administer anesthetics to a patient because she thought the legal development affecting employment relations during the past decade and a half, and almost surely the most significant such common law development." Report of the Committee on Development of the Law of Individual Rights and Responsibilities in the Work Place, 1982 A.B.A. Sec. LABOR & EMPLOYMENT L. 1, 16.

6. States that have refused to recognize a cause of action for wrongful discharge are concentrated in the South. "It is as though the turn of the century values concerning formalism, laissez-faire economics, stare decisis and deference to legislatures ... still predominate in the South." Krauskopf, *supra* note 5, at 251. These states are Alabama, Georgia, Mississippi, Missouri, Tennessee, and South Carolina. Florida and Kentucky have indicated a willingness to adopt a public policy exception. *Id.* Texas recently recognized an exception to the at-will rule in *Hauck v. Sabine Pilots*, Inc., 672 S.W.2d 322 (Tex. Ct. App. 1984), aff'd, 687 S.W.2d 733 (Tex. 1985) (employee discharged for refusing to pump boat bilges in illegal manner).


13. *Id.* at 332, 328 S.E.2d at 820.
drugs would harm the patient. The doctor nevertheless administered the drugs, and the patient suffered permanent brain damage. The patient's estate filed suit, alleging that the patient had been injured as a result of the doctor's negligence.

Before Sides gave her deposition in the case, she was advised by several doctors at DUMC and by attorneys for Duke not to testify about all she had observed, and some of the doctors warned her that she "would be in trouble" if she did so. Despite these warnings, Sides "testified fully and truthfully" at the deposition and again at the trial. After the trial court entered judgment for the patient's estate in the amount of $1,750,000, several doctors displayed hostility toward Sides and refused to work with her. Shortly thereafter, Sides was notified that her job performance was poor and that she would be monitored closely for the next three months. Although Sides requested specific examples of her poor performance, none was given, and she was discharged less than three weeks later.

Sides brought an action against Duke for wrongful discharge and for wrongful interference with her employment contract. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. In a unanimous decision, the court of appeals reversed the dismissal of the claim against DUMC and determined that Sides had stated claims for relief under both tort and contract theories.

The court began its analysis by considering whether its earlier decision in Dockery v. Lampert Table Company controlled Sides' tort claim for wrongful

14. Id. at 333, 328 S.E.2d at 821.
15. Id.
16. Id; see Fields v. Duke Univ., No. 80CVS1946 (Cumberland County Super. Ct. 1980). Fields was the administratrix of the patient's estate. The patient had been operated on at DUMC for a cleft palate and went into cardiac arrest when anesthetics were administered. The jury returned a verdict of $1,750,000 in favor of the patient's estate. Id.; see Record at 3-4, Sides.
17. Sides, 74 N.C. App. at 333, 328 S.E.2d at 821.
18. Id.
19. Id. at 333-34, 328 S.E.2d at 821.
20. Id. at 334, 328 S.E.2d at 821.
21. Id.
22. Id. at 334, 328 S.E.2d at 821-22.
23. Id. at 334-35, 328 S.E.2d at 822.
24. Id. at 332, 328 S.E.2d at 819.
25. Judge Arnold wrote a brief concurring opinion, stating that although he did not agree with the majority's reasoning concerning the wrongful discharge tort, he would not delay the decision any longer by writing an in-depth opinion. Id. at 349-50, 328 S.E.2d at 830-31 (Arnold, J., concurring).
26. Id. at 343-45, 328 S.E.2d 826-28. The court reversed the dismissal of the wrongful discharge and breach of contract claims against Duke Hospital, but affirmed the order dismissing those claims against the chief nurse and two doctors. Id. The court also reversed the interference with contract claim against the two doctors. Id. at 348, 328 S.E.2d at 830. This cause of action is recognized in North Carolina and will not be discussed in this Note. See Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979).
discharge. In *Dockery* defendant had discharged plaintiff because plaintiff had pursued his worker’s compensation benefits.\(^{28}\) Plaintiff alleged that his discharge was wrongful as against public policy. The court of appeals refused to recognize plaintiff’s claim, rejecting the reasoning of the Indiana Supreme Court, which had recognized a cause of action for wrongful discharge under a fact situation similar to *Dockery*.\(^{29}\) In *Frampton v. Central Indiana Gas Company*,\(^{30}\) the Indiana court held that retaliatory discharge was a “device” proscribed by the State workers’ compensation statute.\(^{31}\) Although the Indiana statute did not provide for a private right of action, the court in *Frampton* created such a right “in order for the goals of the act to be realized and for public policy to be effectuated.”\(^{32}\)

Although the North Carolina workers’ compensation statute was similar to Indiana’s,\(^{33}\) the court of appeals failed to discuss the public policy principles underlying *Frampton*. The *Frampton* court pointed out that the workers’ compensation statute gave employees a right to be compensated for work-related injuries and imposed a corresponding duty on employers.\(^{34}\) The court reasoned that allowing employers to discharge employees for filing workers’ compensation claims would discourage employees from exercising their rights to receive compensation and would relieve employers of their duty to compensate.\(^{35}\) The *Dockery* court stated only that policy concerns were best left to the general assembly, concluding that a judicial remedy “would do violence to the long-standing rule governing employment contracts for an indefinite period and would constitute judicial legislation.”\(^{36}\) Moreover, the court interpreted the general assembly’s failure to create a cause of action as evidence of its intent that none be created.\(^{37}\) The *Dockery* court noted that the analogy drawn by the court in *Frampton* between retaliatory discharge and retaliatory eviction was not applicable to North Carolina because its courts had expressly rejected the defense of retaliatory eviction.

In *Sides*, however, the court of appeals suggested that it may not have interpreted legislative intent correctly in *Dockery*.\(^{38}\) The court noted that in response to *Dockery* the general assembly had created a cause of action for employees demoted or discharged for instituting workers’ compensation proceedings.\(^{39}\) Furthermore, at the same session, the general assembly had authorized the de-

\(^{28}\) *Dockery*, 36 N.C. App. at 293, 244 S.E.2d at 272.


\(^{31}\) *Id.* at 252, 297 N.E.2d at 428.

\(^{32}\) *Id.* at 251, 297 N.E.2d at 427.

\(^{33}\) *Dockery*, 36 N.C. App. at 295-96, 244 S.E.2d at 274. The North Carolina workers’ compensation statute states that “[n]o . . . device shall . . . relieve an employer . . . of any obligation created by this Article.” N.C. GEN. STAT. § 97-6 (1985).

\(^{34}\) 260 Ind. at 251, 297 N.E.2d at 427.

\(^{35}\) *Id.*

\(^{36}\) *Dockery*, 36 N.C. App. at 300, 244 S.E.2d at 277. Other courts also have deferred to the legislature rather than create a public policy exception. See supra note 8 and accompanying text.

\(^{37}\) *Dockery*, 36 N.C. App. at 300, 244 S.E.2d at 277.

\(^{38}\) *Sides*, 74 N.C. App. at 337, 328 S.E.2d at 823.

\(^{39}\) North Carolina Workers’ Compensation Act, ch. 738, 1979 N.C. Sess. Laws 806 (codified
fense of retaliatory eviction. The court reasoned that these actions showed "that the legislature is not at all adverse to the courts of this State entertaining actions based on a violation of policies that have been enacted or otherwise established for the protection and benefit of the public." 

The court further dispelled the notion that Dockery controlled its decision, noting that Sides was distinguishable from Dockery because it presented much more compelling public policy considerations. The court recognized the public interest in protecting employees who are entitled to workers' compensation benefits from retaliatory discharge, but stated that the public has a greater interest in preventing the obstruction of justice. After noting that perjury, subornation of perjury, and intimidation of witnesses were offenses at common law and are punishable under North Carolina statutes, the court said: "These offenses are... an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given." The court concluded that to deny Sides a cause of action "would be a grave disservice to the public."

The court observed that the at-will rule has been criticized by numerous commentators in recent years and cited cases from other jurisdictions concerning the wrongful discharge issue. The cases the court cited pointed to an evident, if somewhat erratic, trend toward formulating a public policy exception to the at-will rule. Public policy, however, is a broad concept and therefore some

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41. Sides, 74 N.C. App. at 337, 328 S.E.2d at 823.
42. Thus, instead of overruling Dockery, the court found it did not control. After stating that Sides was not a departure from common law and clear precedent, the court explained that North Carolina courts do not overrule decisions lightly, quoting from a North Carolina Supreme Court opinion: "No court has been more faithful to stare decisis [than the supreme court].... Nevertheless, when the duty has seemed clear, it has [departed from precedent]... The doctrine of stare decisis will not be applied in any event to preserve and perpetuate error and grievous wrong." Id. at 343-44, 328 S.E.2d at 827 (quoting State v. Ballance, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949)).
43. Id. at 337, 328 S.E.2d at 823.
44. Id. at 338, 328 S.E.2d at 823-24.
45. Id. at 338, 328 S.E.2d at 824.
48. "The term 'public policy' is perhaps the most expansive and widely comprehensive phrase known to the law." 72 C.J.S. Policy 209 (1951).
courts have refused to recognize it as an exception to the at-will rule.\(^49\) Even the California Court of Appeals, in *Petermann v. International Brotherhood of Teamsters*,\(^50\) the first case to uphold the exception, admitted that the term is "not subject to precise definition."\(^51\) Similarly, the Illinois Supreme Court, in *Palmateer v. International Harvester Co.*,\(^52\) described the definition of public policy as "the Achilles heel" of the wrongful discharge tort.\(^53\)

Courts have defined public policy in various ways. For example, in *Petermann* the court stated that public policy is the "'principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.' "\(^54\) In *Palmateer* the court stated that public policy concerns "strike at the heart of a citizen's social rights, duties, and responsibilities."\(^55\) Other courts have alluded simply to "some substantial public policy principle"\(^56\) or "a clear mandate of public policy."\(^57\)

Thus, courts do not concur on what constitutes public policy.\(^58\) Moreover, they also disagree on the sources they are willing to use in applying the exception to the employment-at-will rule.\(^59\) Although statutes, constitutional provisions, regulations, professional codes of ethics, and judicial decisions have all been mentioned as sources of public policy,\(^60\) most of the courts that have adopted a public policy exception to the employment-at-will rule have required that the discharge contravene a specific statutory or constitutional provision. The exception has been applied when an employee has been discharged in violation of a statute that applies to the employment context, as when employees have been discharged for pursuing their workers' compensation rights\(^61\) or for refusing to take a polygraph test required by the employer.\(^62\)

Courts have also applied the public policy exception when an employee has been discharged for refusing to commit an unlawful act or to violate a statutory

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\(^50\) 174 Cal. App. 2d 184, 344 P.2d 25 (1959); see infra text accompanying notes 63-64.

\(^51\) *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)).

\(^52\) 85 Ill. 2d 124, 421 N.E.2d 876 (1981); see infra text accompanying notes 76-78.

\(^53\) *Palmateer*, 85 Ill. 2d at 130, 421 N.E.2d at 878.

\(^54\) *Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27 (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)).

\(^55\) *Palmateer*, 85 Ill. 2d at 130, 421 N.E.2d at 878-79.


\(^58\) "The phrase [public policy] is used in several senses, and it may mean the common law or general statutory law of the state, and it may mean the prevalent notions of justice and general fundamental conceptions of right and wrong, and it may mean both." 72 C.J.S. Policy 209 (1951).

\(^59\) See infra notes 61-79 and accompanying text.

\(^60\) Id.

\(^61\) E.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979); Frampton, 260 Ind. 249, 297 N.E.2d 425 (1973). *Contra* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Dockery, 36 N.C. App. 293, 244 S.E.2d 272.

\(^62\) See, e.g., Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (Pennsylvania statute forbidding polygraph test as condition of employment evinces State public policy).
duty. Petermann, in which an employee was discharged when he refused to commit perjury before a legislative committee investigating union wrongdoing, is the leading case. The court stated, "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury, an act specifically enjoined by statute." Other courts have extended protection to an employee discharged for serving on a jury, for refusing to perform catheterizations for which the employee was not licensed, or for refusing to participate in an illegal price fixing scheme.

"Whistleblowing" also comes under the public policy exception, and courts have recognized a cause of action when an employee has been discharged for insisting that an employer comply with laws related to consumer credit and protection, food packaging, and the registration of pharmacists. "Whistleblower" protection, however, was not extended to an employee who made "a nuisance of himself" in questioning the safety of his employer's product or to a physician who opposed the development of a controversial drug because of "a difference in medical opinions."

Even when a statutory right exists, courts have not allowed actions when the policy claimed to be violated is more private than public. When a statute provides a remedy for a discharged employee, most courts have not applied the public policy exception, reasoning that the legislature has created an appropriate remedy.

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63. 174 Cal. App. at 184, 344 P.2d at 25.
64. Id. at 188-89, 344 P.2d at 27.
68. Whistleblowing occurs when an employee reports employer violations of statutory policy. For a discussion of whistleblowing, 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.
74. See, e.g., Kavanagh v. KLM Royal Dutch Airlines, 566 F. Supp. 242, 244 (N.D. Ill. 1983) (discharge for retaining attorney in wage dispute with employer would create "the monster that swallowed the employment-at-will rule"); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977) (discharge for attending law school at night); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976) (discharge for exercising stockholder's right to inspect corporate books).
A minority of courts have adopted a broader version of the public policy exception by not restricting it to statutory sources. In *Palmateer*\textsuperscript{76} an action was allowed when an employee had informed a law enforcement agency that a coemployee might be violating the criminal code.\textsuperscript{77} The Illinois Supreme Court stated that although "[n]o specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime... public policy... favors citizen crime-fighters."\textsuperscript{78} In addition, one court has suggested that under appropriate conditions public policy may be found in professional codes of ethics.\textsuperscript{79}

 Courts that have adopted the broad public policy exception emphasize that restraint is necessary "lest they mistake their own predilections [sic] for public policy which deserves recognition at law."\textsuperscript{80} Consequently, these courts have applied the broad public policy exception only in very narrow circumstances, as when an employee reported a crime to public officials.\textsuperscript{81} There is no indication that courts will apply the public policy exception, absent a statutory basis, in an indiscriminate manner. Moreover, even if public policy is an "'amorphous' [concept]... the narrowing of it totally defeats its effectiveness... Ultimately, it is the broader approach that affords protection to the more nebulous societal values that are not, and may never be, spelled out in a specific amendment or statutory provision."\textsuperscript{82}

With the *Sides* decision, North Carolina joins the growing number of states that have adopted the public policy exception to the at-will rule.\textsuperscript{83} In adopting the exception, the court of appeals relied on statutes prohibiting perjury, subornation of perjury, and intimidation of witnesses.\textsuperscript{84} Thus, *Sides* falls within the narrow view of the public policy exception, which requires that public policy be legislatively declared.

It is unclear, however, whether the court would allow a cause of action when there is an existing statutory remedy, such as that provided in the workers' compensation statute. The court cited several cases in which courts have recog-

\textsuperscript{76} 85 Ill. 2d at 124, 421 N.E.2d at 876.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 132, 421 N.E.2d at 880.
\textsuperscript{79} See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980). However, "a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient." Id. One commentator fears that a nonstatutory approach to public policy would result in a flood of litigation and would render employers and employees uncertain about the status of their relationship. Note, Pierce v. Ortho Pharmaceutical Corp.: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?, 33 Rutgers L. Rev. 1187, 1197 (1981). Furthermore, small employers would be most vulnerable to the burdens of litigation and thus would be forced to retain unsatisfactory employees or to keep extensive records that would interfere with informal employment relationships. Id. at 1196.
\textsuperscript{81} See *Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876.
\textsuperscript{83} See supra note 5.
\textsuperscript{84} Perjury and subornation of perjury are felonies punishable by N.C. GEN. STAT. §§ 14-209, -210 (1981); intimidation of witnesses is a misdemeanor punishable by N.C. GEN. STAT. § 14-226 (1981).
nized a cause of action when an employee was discharged for asserting workers' compensation rights, but noted that "not all of the compensation laws involved in these cases specifically provide a remedy, as North Carolina now does." Given this language it is unlikely that the court of appeals would provide additional relief to a plaintiff when the general assembly has provided a specific remedy.

It is also unclear whether the court intended to limit the public policy exception to statutory expressions of policy. Several cases the court cited take a broad approach to the public policy exception and allow policy to be discerned from judicial decisions. Although the Sides court did not discuss these cases, it did note that other courts' discussions of the at-will rule had not focused on "the fundamental fact upon which the at will doctrine rests." The court explained:

We refer to the obvious and indisputable fact that in a civilized state where reciprocal legal rights and duties abound the words "at will" can never mean "without limit or qualification," . . . for in such a state the rights of each person are necessarily and inherently limited by the rights of others and the interests of the public. An at will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counter-balancing rights and obligations that holds such societies together.

This statement suggests that the court intended to define the public policy exception broadly.

Broad definitions of public policy, however, do not necessarily indicate a broad view of the sources of such policy. In Brockmeyer v. Dun & Bradstreet, the Wisconsin Supreme Court defined public policy as "community common sense and common conscience," but limited the public policy exception to constitutional and statutory expressions. Unfortunately, the North Carolina Court of Appeals never explicitly identified the sources on which public policy could be based. The court's reference, however, to "policies that have been enacted or otherwise established for the protection and benefit of the public" suggests that the court may be willing, under appropriate circumstances, to consider nonstatutory sources of public policy.

86. Id; see supra note 39 and accompanying text.
87. Palmateer, 85 Ill. 2d at 130-32, 421 N.E.2d at 878-79; see supra notes 76-79 and accompanying text.
88. Sides, 74 N.C. App. at 342, 328 S.E.2d at 826.
89. Id.
90. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).
91. Id. at 573, 335 N.W.2d at 840.
92. Sides, 74 N.C. App. at 337, 328 S.E.2d at 823 (emphasis added).
After holding that Sides had stated a claim in tort for wrongful discharge, the court considered whether she had stated a claim for breach of contract. Finding that the same public policy concerns that applied in the tort action applied in the contract action, the court held that Duke had no right to terminate the employment contract. Moreover, the court recognized that Sides had given independent consideration for the employment contract, apart from services, thus removing the contract from the at-will rule. Thus, a breach of contract had occurred because the discharge had not been for unsatisfactory performance.

The Sides court did not consider the possibility of implying a covenant of good faith and fair dealing in employment contracts as a basis for recovery. A few courts, borrowing from the Uniform Commercial Code's requirement of good faith in commercial contracts, have implied an obligation of good faith and fair dealing in employment contracts. The most frequently cited case using this theory is Monge v. Beebe Rubber Company, in which the New Hampshire Supreme Court allowed a plaintiff who had been sexually harassed to recover for wrongful discharge. The court held that a discharge made in bad faith was contrary to the public interest and constituted a breach of contract even though the employment was at will.

The application of a covenant of good faith to employment contracts, however, is not widely accepted. Even in New Hampshire, subsequent court decisions narrowly construed Monge to apply only to violations of specific public policies. A duty to terminate in good faith has been criticized as unduly re-

93. Id. at 344, 328 S.E.2d at 828.
94. Id. at 344-45, 328 S.E.2d at 828. Most wrongful discharge actions based on the public policy exception are tort actions, although some have been contract actions. See, e.g., Petermann, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Brockmeyer, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). New Jersey recognizes that such actions may be in tort or contract. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). In addition to damage awards for back pay, tort actions may also result in punitive damages. In Sides, the court awarded punitive damages for both wrongful discharge and interference with contract. Sides, 74 N.C. App. at 349, 328 S.E.2d at 830.
95. Sides, 74 N.C. App. at 345, 328 S.E.2d at 828. North Carolina courts have recognized that employees who provide consideration for the employment contract beyond merely performing the work for which they were hired may not be discharged without cause. See Tuttle v. Kernersville Lumber Co., 263 N.C. 216, 139 S.E.2d 249 (1964). Sides had moved from Michigan to accept the job at DUMC, and the court found this action sufficient independent consideration to remove the contract from the at-will rule. Sides, 74 N.C. App. at 345, 328 S.E.2d at 828.
96. Sides, 74 N.C. App. at 345, 328 S.E.2d at 828.
99. Id.
100. Id. at 133, 316 A.2d at 551. The court stated: "[T]he employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two." Id.; see also Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (eighteen years of service and grievance policy of employer operate as a form of estoppel to preclude discharge); Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977) (breach of covenant of good faith when salesman with forty years of service discharged to deprive him of commission on $5 million dollar sale).
strictive of an employer’s discretion to manage the work force. Moreover, such a step would “subject each discharge to judicial incursions into the amorphous concept of bad faith.”

Some commentators have recommended adopting a “just cause” requirement for discharging employees to provide greater protection to employees than either the public policy exception or the covenant of good faith. Lower-level employees receive little benefit from the public policy exception, partly because they are less likely to file lawsuits and partly because the conduct giving rise to the public policy exception is more likely to involve upper-level employees. Moreover, courts have drawn an essentially ad hoc distinction between private and public rights, which has resulted in inconsistent opinions.

Despite these valid observations, a “just cause” standard for discharge does not have wide support. The New York City Bar Association Committee on Labor and Employment Law (the Committee) has termed “just cause” protection “the maximalist model” because it represents an extreme modification of the at-will rule. The Committee feared that under such a standard any discharge would be potentially actionable and would require judicial determination of “cause.” In addition, a “just cause” standard would discourage employers from discharging marginal employees and thus would compromise the employer’s economic interests.

Courts have been most willing to limit the at-will rule when the discharge contravenes an established public policy, particularly a legislatively declared policy. The Committee has termed the public policy exception “the minimalist model,” because it represents the least extreme modification of the at-will rule. The public policy exception, because it is more clearly defined than

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102. See Brockmeyer, 113 Wis. 2d at 569, 335 N.W.2d at 838.
104. See, e.g., Peck, supra note 46, at 48-49; Summers, supra note 46, at 508, 521; Note, supra note 46, at 1948 n.11. For example, most Canadian provinces require that, absent “just cause,” notice must precede discharge. In Nova Scotia, employees who have been with the same employer for ten years are protected against unjust discharge even with notice. In France, employees with two years of service at firms with at least eleven employees cannot be discharged without “serious and genuine cause;” an employee who is dismissed without “cause” is entitled to severance pay and either six months’ compensation or reinstatement, at the employer’s option. Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310, 312, 316 (1985).
105. Note, supra note 46, at 1937.
106. Id. at 1942-47. The public policy exception has been defined in a way that offers more protection to upper-level than lower-level employees. For example, upper-level employees have greater access to information and are more likely to be asked to falsify records or to give false testimony at a hearing. In addition, upper-level employees have a greater opportunity to detect dangerous products or illegal practices, and are more likely to question employer decisions. Id. at 1945-46.
107. Id. at 1949.
110. Id. at 190.
111. Id. at 188.
112. See supra notes 61-67 and accompanying text.
113. Committee on Labor and Employment Law, supra note 108, at 191.
good faith or "just cause," would minimize the "burden on the courts, the costs to business efficiency and the interference with our national policy in favor of private ordering and free collective bargaining." Under the public policy exception, employers retain the discretion to discharge for any reason that does not contravene public policy, while employees receive protection from the harshness of the at-will rule.

Contemporary economic conditions and employment practices demand protection of employees' rights. Today, unlike the latter part of the nineteenth century, most employees depend solely on private nonfarm employment for economic security. Employees generally lack the power to bargain for protection against arbitrary discharge. Those who are discharged may be unable to find other employment because of economic conditions or the blemish of dismissal. Further, it is inefficient to discharge employees for reasons unrelated to performance, and such arbitrary dismissals may have a demoralizing effect on the workforce.

The public policy exception strikes a proper balance between protecting an employee's right to job security and an employer's right to discharge unsuitable employees. By adopting the exception, the Sides court put North Carolina in accord with most other jurisdictions that have limited the at-will rule. The exception ensures that North Carolina employers will not be able to use the threat of dismissal to coerce employees to commit violations of fundamental public policy. Other states yet to recognize the public policy exception to the at-will rule should follow North Carolina's example.

Susan K. Datesman

114. Id. at 191-92.
115. One commentator has stated:

We have become a nation of employees. We are dependent upon others for our means of livelihood and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world.

F. Tannenbaum, A Philosophy of Labor 9 (1951).
117. Note, Employment at Will, supra note 116, at 621.
118. Blades, supra note 46, at 1405.
119. Committee on Labor and Employment Law, supra note 108, at 188.