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## *Brockmeyer v. Dun & Bradstreet*: The Narrow Public Policy Exception to the Terminable-At-Will Rule

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# CASE COMMENT

## **Brockmeyer v. Dun & Bradstreet: The Narrow Public Policy Exception to the Terminable-At-Will Rule**

### I. INTRODUCTION

From June 1977, until his termination in May, 1980, Charles J. Brockmeyer held a management position in the credit services division of Dun & Bradstreet.<sup>1</sup> He had no contract of employment. When Brockmeyer's former secretary filed a sex discrimination claim against Dun & Bradstreet, the company asked Brockmeyer to submit a written report concerning the course of events that led to her resignation. Brockmeyer refused because "he feared he would become Dun & Bradstreet's scapegoat for the alleged discrimination actions taken against his former secretary."<sup>2</sup> Brockmeyer also stated that he would be candid about the incident if called to testify at a hearing or trial. Dun & Bradstreet settled the claim with the former secretary and fired Brockmeyer.

At the time of the discharge, Dun & Bradstreet offered Brockmeyer \$8,500 if he would sign a release agreeing not to sue the company.<sup>3</sup> Brockmeyer refused the offer and initiated a wrongful discharge action against the company. He also sought damages on an intentional infliction of emotional harm theory. Dun & Bradstreet, however, claimed that they terminated Brockmeyer because he smoked marijuana in front of the employees, did not attend to job duties, had an open affair with his secretary, and precipitated a low morale among the employees in his office.<sup>4</sup>

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1. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 564, 335 N.W.2d 834, 836 (Ct. App. 1983).

2. *Id.*

3. *Id.*

4. *Id.* at 565, 335 N.W.2d at 836-37. The court noted that Brockmeyer freely admitted the first three allegations at a meeting with his supervisors but that he assured them the situation would improve. *Id.* at 564, 335 N.W.2d at 836. An initial reading of these facts supports the finding of the court of appeals and the supreme court. Neither court, however, adequately addressed the secretary's sex discrimination claim or Brockmeyer's reasons for not submitting a report on the incident. The jury found for Brockmeyer. Unless they based

In the Circuit Court for Milwaukee County, the jury found that Dun & Bradstreet had wrongfully discharged Brockmeyer and awarded him \$250,000 in compensatory damages and \$250,000 in punitive damages. The jury rejected Brockmeyer's claim for intentional infliction of emotional harm. On appeal, the court held that "recovery will be permitted if termination offends clearly defined public policy, or results from the exercise of bad faith, or results from malicious or retaliatory activity on the part of the employer."<sup>5</sup> The court of appeals reversed the judgment and remanded the case with instructions to dismiss the complaint on the merits because the record contained insufficient evidence to sustain Brockmeyer's claim that the company wrongfully discharged him. The Wisconsin Supreme Court affirmed, holding that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by a constitutional or statutory provision. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

## II. PRIOR LAW AND THE EFFORT OF THE *Brockmeyer* DECISION

The principal issue in *Brockmeyer* is whether Wisconsin has any judicial exceptions to the employment-at-will doctrine. Examination of the development and modifications of the at-will doctrine reveals the narrowness of Wisconsin's public policy exception, and isolates the issues and problems facing any court that must choose between adherence to or departure from a rigid and outmoded rule.

The employment-at-will doctrine supplanted English employment law. The Statute of Labourers<sup>6</sup> provided that "no master can put away his servant" during or at the end of his term of employment and that apprentices could be dismissed only upon "reasonable cause."<sup>7</sup> The statute influenced the English courts and the law

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their verdict entirely on sympathy and prejudice, there is an inference that Dun & Bradstreet acted improperly. See *infra* text accompanying notes 63-64. Also, Dun & Bradstreet offered Brockmeyer a settlement in exchange for a covenant not to sue. This may support the inference of oppressive conduct by the company as well.

5. *Brockmeyer v. Dun & Bradstreet*, 109 Wis. 2d 44, 46-47, 325 N.W.2d 70, 72 (Wis. Ct. App. 1982) (footnote omitted).

6. 5 Eliz., ch.4 (1562).

7. W. BLACKSTONE, COMMENTARIES 425-26 (1969) (footnotes omitted). For a discussion of the development of the at-will rule in England, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-22 (1976); Murg and Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332-33

of employment relations. The courts determined that when an employment contract contained the mention of an annual salary, the employer implicitly agreed to a one-year term of employment unless there was reasonable cause to discharge.<sup>8</sup> This rule made it difficult for an employer to dismiss an employee without breaching the contract and incurring liability.

American courts originally followed the English rule. In the late nineteenth century,<sup>9</sup> however, the advent of the industrial revolution and the growth of a *laissez-faire* spirit changed the nature of employment relations. Responding to these societal changes, the American courts departed from the English rule and created the employment-at-will doctrine. The nineteenth century climate also fostered a reverence for individual freedom of choice and action that translated into an opposition to governmental interference with economic affairs. In addition, the rapid growth of industry witnessed a depersonalization of the employment relationship. Thus, employers began to assume less responsibility for their employees' work conditions and job security.<sup>10</sup> Also, courts relied on formalistic contract doctrines and only enforced employers' promises that were definite and express. As a result, employers were liable only when they breached promises to which they clearly and unequivocally intended to be bound. The courts restricted liability in order to promote the growth of business and encourage employees to assume the risks of an enterprise.

Horace Wood's 1877 *Treatise on the Law of Master and Ser-*

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(1982); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1814-28 (1980) [hereinafter cited as Note, *Protecting At Will Employees*]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-45 (1974) [hereinafter cited as Note, *Implied Contract Rights*]; Note, *Limiting the Right to Terminate At Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 205-10 (1982) [hereinafter cited as Note, *Limiting the Right to Terminate*].

8. *Brockmeyer*, 113 Wis. 2d at 566, 335 N.W.2d at 837 (footnote omitted); see also *Turner v. Robinson*, 5 B. & Ad. 791, 110 Eng. Rep. 982 (K.B. 1833) (where there is an annual stated salary the usual presumption is that the employment term is one year). See generally Annot., 11 A.L.R. 469, 470 (1921) (discussion of the general rule on terms of employment and the English cases that follow the rule).

9. For a discussion of the development of the American rule within the *laissez-faire* climate, see Murg and Scharman, *supra* note 7, at 333-35; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976); Note, *Implied Contract Rights*, *supra* note 7, at 340-43; Note, *Limiting the Right to Terminate*, *supra* note 7, at 205-10.

10. See Murg and Scharman, *supra* note 7, at 334; Note, *Protecting At Will Employees*, *supra* note 7, at 1824.

*vant*,<sup>11</sup> the leading authority on employment relations, agreed with the promotion of industrial growth and the protection of freedom-of-contract espoused by the American courts. Wood stated that unless the understanding between the parties "was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party."<sup>12</sup> The earliest crystallized American rule appeared in *Payne v. The Western & Atlantic Railroad Co.*<sup>13</sup> The court held: "All [employers] may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."<sup>14</sup> Under this rule, the employer did not assume the burden of proving that the parties intended a contract duration of less than a year. Instead, the employee had to establish that his service was intended to extend for a definite period.

By the turn of the nineteenth century the at-will doctrine, protected by the interest in preserving freedom of contract, achieved constitutional proportions. In *Adair v. United States*,<sup>15</sup> the United States Supreme Court invalidated a federal statute that made it a criminal offense for a carrier engaged in interstate commerce to discharge an employee simply because of the employee's membership in a labor organization. The Court found that the statute invaded personal liberty and interfered with the right of property guaranteed by the fifth amendment to the Constitution. The Court explained that

in the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.<sup>16</sup>

Shortly thereafter, in *Coppage v. Kansas*,<sup>17</sup> the United States Supreme Court invalidated a Kansas statute that declared it a misde-

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11. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). For a discussion of Wood's rule and its justification, see Note, *Implied Contract Rights*, *supra* note 7, at 341-43.

12. *Id.*

13. 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

14. *Payne*, 81 Tenn. at 519-20 (1884).

15. 208 U.S. 161 (1908).

16. *Id.* at 175.

17. 236 U.S. 1 (1915).

meanor punishable by fine or imprisonment for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of employment.<sup>18</sup> The Court found that the employer's right to hire and fire at-will was a property right protected by the Constitution.

After the *Adair* and *Coppage* decisions, the state and federal legislatures became increasingly aware of the disparity in bargaining power between employer and employee. In the 1930's the Court withdrew its support from the rigid view that Congress could not interfere with the employer's discretionary discharges. In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>19</sup> the Court upheld Congress' authority to safeguard the right of employees in a manufacturing plant to organize and select representatives for collective bargaining. The Court, however, clearly expressed respect for the terminable-at-will doctrine when it stated that the National Labor Relations Act did not interfere with the normal right of the employer to hire, or with the right of discharge when exercised for other reasons than intimidation and coercion.<sup>20</sup> Although the at-will doctrine remained intact, the National Labor Relations Act marked the beginning of increased regulation of the work place.

Along with the efforts to protect the employee from the employer's abuse of power and to stabilize labor relations in general, legislatures enacted numerous statutes that eroded the effect of the at-will rule.<sup>21</sup> Yet, despite the over-abundance of legislation mitigating the harsh and absolute application of the at-will doctrine, many employees still are not unionized or do not fall within

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18. *Id.* at 26.

19. 301 U.S. 1 (1937).

20. *Id.* at 45-46.

21. In the private sector, state and federal regulations protect union members, National Labor Relations Act of 1935, 29 U.S.C. § 158 (1982); Wisconsin Employment Peace Act, Wis. Stat. § 111.06(1)(c)(1) (1975); veterans, 38 U.S.C. §§ 2021-22 (1976 & Supp. V 1982); and debtors, Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1982). Also, statutes and ordinances make it unlawful for an employer to discharge an employee because of race, color, religion, sex, natural origin, or age. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976 & Supp. V 1982). Furthermore, employment practices and procedures protect employees in the public sector and civil service provisions permit dismissal of the public employee only for just cause. Statutes also protect political activists and jurors. In addition, certain statutes prevent employers from attempting to control the votes of employees or from forcing an employee to take a lie detector test. Finally, there is statutory protection for at-will employees who testify at a minimum wage law proceeding and who suffer worker's compensation illness or injury. For a general discussion of these statutes, see *Brockmeyer*, 113 Wis. 2d at 567-68 & n.9, 335 N.W.2d at 837-38 & n.9; Summers, *supra* note 9, at 492-95; Note, *Protecting At Will Employees*, *supra* note 7, at 1816 & n.1 cited in Note, *Limiting the Right to Terminate*, *supra* note 7, at 201 n.1.

a statutorily protected class.<sup>22</sup>

In addition to these legislative efforts to regulate the work place, the common law has developed limitations to the at-will rule which roughly fall into three categories. First, a distinct minority rule is the imposition upon an employer of an implied duty to terminate an employee only in good faith. In *Fortune v. National Cash Register Co.*,<sup>23</sup> a former salesman brought an action against a former employer to recover bonuses allegedly due for the sales the employee made. The Supreme Judicial Court of Massachusetts stated that parties to contracts or commercial transactions are bound by the standard of good faith and fair dealing. The court applied this to employment contracts and found that the termination made in bad faith in order to prevent the salesman from collecting bonuses constituted a breach of contract.

A second approach the courts have taken to modify the at-will doctrine is the enforcement of statements contained in personnel policy manuals. In *Toussiant v. Blue Cross & Blue Shield*,<sup>24</sup> two employees commenced actions against their former employers claiming that the discharges violated their employment agreements. The employers not only orally promised the employees that they could expect job security if they did their work, but a policy handbook guaranteed that they could only be discharged for just cause. The court held that these written statements of policy gave rise to contractual rights. It stated that through these practices and policies, "[t]he employer secures an orderly, cooperative and loyal work force."<sup>25</sup> In addition, the court believed the employee gains peace of mind and a sense of job security. The statements in the handbook make pre-employment negotiations unnecessary. The employer, through stated policies, practices, and goals creates "a situation 'instinct with an obligation.'"<sup>26</sup> The *Toussiant* approach provides the nonunion private sector employee protection from employers who make express representations and then refuse to be bound by them.<sup>27</sup>

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22. See *The Development of Exceptions to At-Will Employment: A Review of the Case Law From Management's Viewpoint*, 51 CIN. L. REV. 616 (1982); Note, *Protecting At Will Employees*, *supra* note 7, at 1816; Note, *Limiting the Right to Terminate*, *supra* note 7, at 201.

23. 373 Mass. 96, 364 N.E.2d 1251 (1977).

24. 408 Mich. 579, 292 N.W.2d 880 (1980).

25. *Id.* at 613, 292 N.W.2d at 892.

26. *Id.* (footnote omitted).

27. See also *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Weiner v. McGraw Hill*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). As a result

A third and most significant erosion of the at-will doctrine is the public policy exception. The broadest application of this exception appears in *Monge v. Beebe Rubber Co.*<sup>28</sup> In that case a female employee was terminated when she refused to respond to her foreman's advances. She sued to recover damages for alleged breach of an oral contract of employment. The New Hampshire Supreme Court held "that a termination by the employer of a contract of employment at-will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."<sup>29</sup> In the opinion, the court did not cite a constitutional provision or statute to define what constitutes "public good." Instead, the court suggested a balancing of three interests: the "employer's interest in running his business as he sees fit," the employee's interest "in maintaining his employment," and "the public's interest in maintaining a proper balance between the two."<sup>30</sup> The *Monge* court's rule is broader than the rule promulgated by the courts that require that discharges violate clear expressions of public policy.

Within the narrower public policy exception cases, there are four overlapping situations that arise. First, courts apply the public policy exception to cases where employers fire employees who refuse to violate a criminal statute. In a leading California case, *Petermann v. Teamsters Local 396*,<sup>31</sup> an employer instructed an employee to testify falsely before a legislative committee. The employer fired the employee when he insisted on giving correct and

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of this approach, employers are attempting to remove such promises or statements from handbooks and manuals; see, e.g., Brown, *Limiting Your Risks in the New Russian Roulette—Discharging Employees*, 8 EMPLOYEE REL. L.J. 380, 391-92 (1982-1983).

28. 114 N.H. 130, 316 A.2d 549 (1974). The New Hampshire court found that a termination motivated by bad faith is not in the best interest of our economy or the public good. *Monge* who in 1968 worked for \$1.84 per hour on a conversion machine in the factory recovered her lost wages amounting to \$1,416.20.

29. *Id.* at 133, 316 A.2d at 551.

30. *Id.* New Hampshire retreated from this position in *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980). *Howard* found that *Monge* only applies "to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Id.* at 297, 414 A.2d at 1274. In *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1980), the court said that *Howard* had limited *Monge* and established a two-part test: first, the employee must show that the employer was motivated by bad faith, malice, or retaliation; second, an employee must prove that the discharge is in violation of public policy. See also *The Development of Exceptions*, *supra* note 22, at 623-24.

31. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). But see *Ivy v. Army Times Publishing Co.*, 428 A.2d 831 (D.C. 1981).



truthful answers to all the questions. The court held that in order to more fully effectuate the state's policy against perjury, civil law will deny the employer's generally unlimited right to discharge an employee. The court believed that a company that makes continued employment contingent upon the commission of a felony blatantly encourages criminal conduct.

Second, some courts recognize the public policy exception in situations where the employee is discharged for refusal to violate a noncriminal statute. In the West Virginia case of *Harless v. First National Bank*,<sup>32</sup> a former at-will bank employee alleged that his discharge was in retaliation for his attempts to require his employer to operate in compliance with the state and federal consumer credit protection laws. The court found that such a discharge frustrates the public policy that consumers of credit covered by the act were to be given protection. Furthermore, in *Sheets v. Teddy's Frosted Foods, Inc.*,<sup>33</sup> the Connecticut Supreme Court found that a quality control director, hired at-will, sufficiently alleged a cause of action for wrongful discharge. The employee claimed that the employer dismissed him in retaliation for his insistence that the company comply with the requirements of the Food, Drugs and Cosmetics Act.

Third, in some cases judicially conceived notions of public policy fall within the rubric of this exception. In an Illinois case, *Palmateer v. International Harvester Co.*,<sup>34</sup> an employer fired an employee for supplying information to local law enforcement authorities. The employee disclosed that a colleague might be involved in criminal activities and he offered to assist in the investigation and trial. The court said: "[P]ublic policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions."<sup>35</sup> Although no specific constitutional provision or statute required individuals to participate in the battle against crime, the court found a general public policy favoring "citizen crimefighters."<sup>36</sup> The Illinois court rejected the employer's contention that this application of the public policy exception is too broad and that it allows employees to

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32. 246 S.E.2d 270 (W. Va. 1978).

33. 179 Conn. 471, 427 A.2d 385 (1980). But see *Geary v. United States Steel*, 456 Pa. 171, 319 A.2d 174 (1974).

34. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

35. *Id.* at 130, 421 N.E.2d at 878.

36. *Id.* at 132, 421 N.E.2d at 880.

"recklessly and precipitously [resort] to the criminal justice system to handle . . . personnel problem[s]." <sup>37</sup>

Fourth, a narrower public policy exception includes cases where employers fire employees who exercise a statutory right. In an Indiana case, *Frampton v. Central Indiana Gas Co.*,<sup>38</sup> an employee injured herself while working. Her employer fired her after she filed a workmen's compensation claim and received a settlement for her injury. The court explained that the acts were designed to afford injured workers an adequate and expeditious remedy.<sup>39</sup> It noted that such legislation shifts the economic burden for work injuries from the employee to the employer. The court found that a retaliatory discharge that counters the effect of the act is unconscionable. Therefore, it recognized that an exception to the at-will rule arises when an employee is discharged solely for exercising a right conferred by statute.

Courts also recognize a cause of action for employees who are fired for complying with the statutory duty of jury service. In *Nees v. Hocks*,<sup>40</sup> employers requested that an employee ask to be dismissed from jury duty because they could not spare her for a whole month. When the employers discovered that she had not sought to be relieved of her service, they fired her. The employee brought an action to recover compensatory and punitive damages. The Oregon Supreme Court concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that an employer must respond in damages for any injury done."<sup>41</sup> The court examined Oregon's constitution, statutes, and case law and found clear indications of a community interest in having citizens perform jury duty. Therefore the court imposed liability on the employers for the compensatory damages.

Unfortunately, this narrow approach to modifying the at-will doctrine leads to an extreme reluctance on the part of the courts to provide redress for the wrongfully discharged employee. Some states merely recognize the exception in principle without actually applying it. They take a strict position in regard to the policies that support an action for wrongful discharge and effectively deny the employee the protection of an availing exception. In Pennsyl-

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37. *Id.* at 133, 421 N.E.2d at 880.

38. 260 Ind. 249, 297 N.E.2d 425 (1973).

39. *Id.* at 250, 297 N.E.2d at 427.

40. 272 Or. 210, 536 P.2d 512 (1975).

41. *Id.* at 218, 536 P.2d at 515.

vania's *Geary v. United States Steel Corp.*,<sup>42</sup> a former salesman for a steel manufacturer brought an action against his former employer seeking damages for wrongful discharge. The employee believed that the company's product was unsafe, but when he expressed his doubts to his superiors, they ordered him to "follow directions."<sup>43</sup> Although he agreed to comply with their instructions, he eventually complained to a vice president who reevaluated the product and withdrew it from the market.<sup>44</sup> Immediately thereafter, the superiors discharged the employee without notice. The Pennsylvania Supreme Court held that the employee at-will has no right of action against an employer for wrongful discharge when no clear mandate of public policy is violated. The court noted the "praiseworthiness of Geary's motives,"<sup>45</sup> but they expressed that these motives did "not detract from the company's legitimate interest in preserving its normal operational procedures from disruption."<sup>46</sup> The court agreed in principle that employees should be "encouraged to express their educated views"<sup>47</sup> on the quality and safety of company products. Nevertheless, the court was not "persuaded that creating a new non-statutory cause of action . . . is the best way to achieve this result."<sup>48</sup>

The New Jersey Supreme Court expressed a similar reluctance to actually apply the public policy exception in *Pierce v. Ortho Pharmaceutical Corp.*<sup>49</sup> A medical doctor employed by a drug manufacturing company refused to work on developing a saccharine product because she felt that the work would violate her Hippocratic Oath. The court stated that at-will employees seeking to recover for wrongful discharge must identify "a specific expression of public policy" on which to base their claims.<sup>50</sup> The court found that under the circumstances, the oath did not contain a clear mandate of public policy: "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 suffi-

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42. 456 Pa. 171, 319 A.2d 174 (1974). For a discussion of this case, see Summers, *supra* note 9, at 281-82.

43. *Geary*, 456 Pa. at 173, 319 A.2d at 175.

44. *Id.* at 173-74, 319 A.2d at 175.

45. *Id.* at 183, 319 A.2d at 180.

46. *Id.* (footnote omitted).

47. *Id.*

48. *Id.*

49. 84 N.J. 58, 417 A.2d 505 (1980).

50. *Id.* at 72, 417 A.2d at 512.

cient.”<sup>51</sup> Moreover, the court reasoned that to hold otherwise would discourage drug manufacturers from developing new drugs in accord with their best judgment.<sup>52</sup>

### III. THE *Brockmeyer* COURT’S REASONING

The decision in *Brockmeyer v. Dun & Bradstreet*<sup>53</sup> falls within the narrow approach to the public policy exception. Initially, the Wisconsin Supreme Court considered Brockmeyer’s contention that the court should adopt the good faith theory. The court refused to impose such a duty to terminate in good faith upon the employer for two reasons—the difficulty of defining “bad faith” and the undesirability of “unduly restrict[ing] an employer’s discretion in managing the work force.”<sup>54</sup> In support of the former reason, the court cited a Hawaii case, *Parnar v. Americana Hotels, Inc.*,<sup>55</sup> in which an employee brought an action alleging that her employer discharged her in order to induce her to leave the jurisdiction and prevent her from testifying before a grand jury investigating antitrust violations. The Hawaii Supreme Court rejected the good faith exception because this would “seem to subject each discharge to judicial incursions into the amorphous concept of bad faith.”<sup>56</sup>

The *Brockmeyer* court not only reasoned that the adoption of this exception imposes an added burden on the courts, but also suggested that the implied covenant of good faith and fair dealing interferes with the employment relationship.<sup>57</sup> Underlying a rejection of the good faith duty is a fear that the requirement that an employer may terminate an employee only for “just cause” will transfer from the employee to the employer the uncertainty concerning continued employment. Although this approach gives the employee a sense of job security, it could inhibit employers from exercising their freedom in making personnel choices and changes. These hiring and firing decisions that are often confidential can shape the direction of a company and promote the growth of the economy at large. In a jurisdiction where *Fortune*<sup>58</sup> has preceden-

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51. *Id.*

52. *Id.* at 76, 417 A.2d at 514.

53. 113 Wis. 2d 561, 335 N.W.2d 834 (Wis. 1983).

54. *Id.* at 569, 335 N.W.2d at 838.

55. 65 Hawaii 370, 652 P.2d 625 (1982).

56. *Id.* at 377, 652 P.2d 629.

57. *Brockmeyer*, 113 Wis. 2d at 569, 335 N.W.2d at 838.

58. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). For a

tial value, an employer must be sure that he or she can justify each termination. It is possible that the *Brockmeyer* court and others like it hope to avoid creating a situation where employers will, contrary to the best interest of the company, elect to retain an employee rather than face the costs of defending a wrongful discharge action. The *Brockmeyer* court, however, did not carefully weigh these potential burdens on and costs to the employer against the unfairness to the employee, who cannot expect "good faith and fair dealing" with respect to the job. While undue restriction on the employer's freedom to hire and fire may not encourage business growth, the absence of job security and the collective adverse impact on employee morale also does not promote economic health.

Instead of accepting the "good faith" theory, the Wisconsin Supreme Court adopted the public policy exception. It defined public policy broadly as "community common sense and common conscience."<sup>59</sup> Therefore, a "wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest."<sup>60</sup> The court, however, limited the concept of public welfare to those interests reflected in the provisions of and amendments to the constitution and statutes, and suggested that only these explicit declarations of public policy are "inherently incorporated into every employment at-will relationship."<sup>61</sup> The court never explored why the at-will relationship incorporates only constitutional and statutory expressions of policy and not those more nebulous notions of "community common sense" and "common conscience." Within the parameters of the *Brockmeyer* modification of the at-will doctrine, an actionable wrongful discharge is extremely narrow: "An employee cannot be fired for refusing to violate the constitution or a statute."<sup>62</sup>

At this point, it is interesting to speculate on the basis for the jury verdict in the lower court. At trial, the judge instructed the jury that a terminated employee can recover damages from his or her employer "where the discharge violates some clear and specific public policies or where the discharge is retaliatory or is motivated by bad faith or malice."<sup>63</sup> The jury's award of \$250,000 in

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discussion of *Fortune*, see text accompanying note 28.

59. 113 Wis. 2d at 573, 335 N.W.2d at 840.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 565-66, 335 N.W.2d at 837.

compensatory damages and \$250,000 in punitive damages suggest two possibilities: the verdict could have been the result of the jurors' excessive sympathy with the plight of the employee or could have been the product of a real community sense that the employer violated public policy. If we accept the latter as the predominant basis behind the verdict, then the award below indicates that there are public interests and policies that transcend the contours of the qualified definition of "public policy" forged by the Wisconsin Supreme Court. A narrow public policy exception appears more predictable and manageable. Nevertheless, the narrow approach fails to acknowledge legitimate public concerns and notions of public welfare not yet embodied in constitutions and statutes.

The court also confronted another difficult question encountered by courts that modify the harsh at-will rule: Should the wrongfully discharged employee maintain an action in tort or contract? The cases that apply the "good faith" theory sound in contract,<sup>64</sup> whereas most of the states that have the public policy exception recognize a tort action.<sup>65</sup> A clear exposition of the tort action in wrongful discharge situations appears in *Tameny v. Atlantic Richfield Co.*<sup>66</sup>

In *Tameny*, an employee brought action against an employer who discharged him for refusing to participate in an illegal scheme to fix gasoline prices. The California Supreme Court held that the employee could maintain a tort action. It rejected the employer's argument that because the parties' relationship is contractual in nature, improper termination actions are only based on breach of contract.<sup>67</sup> The court pointed out that "[t]he days when a servant was practically the slave of his master have long since passed."<sup>68</sup> The court also noted that the employer is not an absolute "sovereign of the job" that may condition continued employment upon

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64. See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). For a discussion of these cases, see text accompanying notes 23 & 28-30, respectively.

65. See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978). But see *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (this was a contract action); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (recognizing that wrongful discharge actions within the public policy exception can sound in either tort or contract).

66. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

67. *Id.* at 174, 610 P.2d at 1334, 164 Cal. Rptr. at 843.

68. *Id.* at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845 (citation omitted).

the employee's participation in unlawful conduct.<sup>69</sup> Furthermore, the employer's obligation to refrain from firing an employee who refuses to break the law "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes."<sup>70</sup> The court recognized that such a suit "exhibits the classic elements of a tort cause of action."<sup>71</sup> The court examined the protected interests in order to reach its conclusion. It stated that contract actions protect "the interest in having promises performed" <sup>72</sup> and tort actions "protect the interest in freedom from various kinds of harm." <sup>73</sup>

The *Brockmeyer* court, however, rejected the prophylactic approach of *Tameny*. Instead, the court emphasized the remedial distinctions between the two causes of action pointing out that damages in tort are limited only by the notions of "proximate cause" or by considerations of public policy.<sup>74</sup> Furthermore, the court noted that "punitive damages are also allowed"<sup>75</sup> in tort actions. In contrast, the court found that the concepts of foreseeability and mitigation limit damages in contract actions.<sup>76</sup> The court examined the wrongful discharge statutes in Wisconsin and found that the majority of statutes established the contractual remedies of reinstatement and backpay. It concluded that contract remedies are the most appropriate form of relief in the public policy exception wrongful discharge actions, and that in Wisconsin, the employee cannot bring an action in tort to recover for wrongful discharge. The court reasoned that "[t]he contract action is essentially 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."<sup>77</sup>

The court's determination that a wrongfully discharged employee must bring an action in contract ignores two realities of employment in American society: the structure of the labor market and the importance of work to the average individual. First, the

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69. *Id.*

70. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

71. *Id.*

72. *Id.*

73. *Id.* (citation omitted).

74. 113 Wis. 2d at 575, 335 N.W.2d at 841.

75. *Id.*

76. *Id.*

77. *Id.* In contrast, the courts that recognize a tort cause of action for violations of public policy perceive the discharge as a breach of a duty to uphold the law.

dual market theorists note that there are two labor markets.<sup>78</sup> Primary-level jobs are managerial positions that pay favorable wages and offer job stability. Secondary-level positions lack power, pay low wages and produce little, if any, expectation of job security. A recent note in the *Harvard Law Review* points out that these lower-level employees receive little benefit from any public policy exception.<sup>79</sup> Furthermore, these employees often find that a public policy exception sounding in contract is completely unavailing.<sup>80</sup> Even if lower-level employees decide to bring an action against the discharging employer, they must deal with the high cost of legal services.<sup>81</sup> Unfortunately, there is no incentive for an attorney to accept the lower-level employee as a client on a contingent-fee basis because the employee's recovery is limited to their meager lost earnings. Also, wage recovery is often subject to a duty to mitigate, the employee must seek and, if possible, procure alternate employment.

Nevertheless, secondary-level employees possess a better chance of recovery if they file a suit in a state that allows tort actions. Although there are many restrictions on recovery,<sup>82</sup> a tort action allows at least some possibility of punitive damages, damages for pain and suffering and reimbursement of the expense of the suit.<sup>83</sup> Not only is the tort action more favorable to secondary-level employees, but its continued use might also improve the long-range conditions in the secondary market. Its use could ultimately mean more job stability and better working conditions. Although the approach could impose greater costs on the employer, the presence of less obvious reciprocal benefits may lessen the employer's burden. For instance, a secondary work force that perceives a greater sense of job security may invest more creative energies in their work. The increased job awareness may lead to greater efficiency and greater productivity.

Second, a wrongful discharge action that only sounds in contract ignores another reality of employment in American society—work and life are often inextricably combined.<sup>84</sup> A disturb-

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78. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

79. *Id.*

80. See *id.* at 1942-44.

81. See *id.*

82. See *id.* at 1944.

83. See W. PROSSER, *LAW OF TORTS* 9 (4th ed. 1971).

84. For a discussion of the employee's need for a personal damage remedy, see Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Em-*



ance "in the office" frequently breaks through the boundaries of the employment context and poisons other aspects of the individual's life. The fired employees are sometimes stigmatized. They must search for a new job and their efforts are often thwarted by the overall lack of available jobs. Furthermore, their opportunities are frustrated, if not altogether impeded, by the failure implied in losing a previous position. Even when the quest proves successful, the employee may compromise and work at a lower salary, accept a less prestigious title, or relocate in another town or state.

Regardless of its effect on the employee's job status and chances for recovery, a wrongful termination affects the employee on an emotional level as well. Even the stoic experience mental stress and anguish caused by an abusive firing. Moreover, the disruption frequently impairs the individual's physical well being. Another important consideration is that the repercussions of a wrongful termination are often exacerbated by the situation inherent in the public policy context. An employee fired for refusing to break the law, or for complying with a statutory provision, or for attempting to save the public from a dangerous product may experience an even greater sense of injustice and unfairness which only adds to the strain.

Tort actions provide adequate redress for the emotional and physical injuries that accompany a wrongful discharge. Tort law compensates "individuals for injuries sustained as the result of the unreasonable conduct of another" and therefore, tends to have a precautionary effect.<sup>85</sup> In addition, the recovery of punitive dam-

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*ployer Power*, 67 COLUM. L. REV. 1404, 1413-16 (1967). See also *Comerford v. International Harvester Co.*, 235 Ala. 376, 178 So. 894 (1938). In *Comerford*, the employee alleged that:

[he] was greatly humiliated and embarrassed, and was caused to suffer great mental anguish and was caused to lose a lucrative and profitable position, and was put to great trouble, expense, annoyance and inconvenience in and about obtaining new employment and was caused to be without employment for a long period of time . . . .

235 Ala. at 377, 178 So. at 895.

Commentators also suggest that a job is a property right protected by the Constitution against unjust employer deprivation. See Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22nd Annual Conference on Labor 171, 181-84, 215 (1970) ("For the vast majority of men their most valuable property is not their TV set, their home, or their car, but their job, their profession, their franchise, their contracts. The right to use their labor and skill has become their most valuable property right.") (footnote omitted); see also Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979). This is distinctly a minority view. Courts show no movement away from the historical doctrine that the job belongs to the employer who creates it and employees, like invitees, are present only at the employer's sufferance.

85. *Merten v. Nathan*, 108 Wis. 2d 205, 211, 321 N.W.2d 173, 177 (1982).

ages and damages for pain and suffering is most appropriate for wrongful discharge injuries. The *Brockmeyer* court conceded that the "primary concern in . . . [wrongful discharge] actions is to make the wronged employee 'whole.'"<sup>86</sup> Nevertheless, the court's holding that contract damages are the measure of recovery contradicts its previous statement and infers that the court's determination to compensate the wronged employee is only theoretical. In the majority of cases, fired employees, who basically suffer the collapse of their entire world, derive little benefit from mere reinstatement and backpay and are not made "whole" again.<sup>87</sup>

The *Brockmeyer* court's tendency to only pay lip service to the notions of compensation is also reflected in its response to the employer's arguments. The court rejected the employer's contention that recognizing an action for wrongful discharge usurps legislative power and that modifications of the traditional rule are "a policy question within the special province of the legislature."<sup>88</sup> When presented with the same issue, the Court of Appeals of New York adopted a contrary position. In *Murphy v. American Home Products Corp.*,<sup>89</sup> the court refused to recognize a cause of action for abusive discharge, but rather deferred to the state legislature to institute such a change in the law. The *Brockmeyer* majority noted the *Murphy* holding<sup>90</sup> but stressed that "the legislature has not and cannot cover every type of wrongful termination that violates a clear mandate of public policy."<sup>91</sup> The court also stated that the common law is most "susceptible of growth and adaptation to new

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86. 113 Wis. 2d at 575, 335 N.W.2d at 841.

87. For a discussion of the tort remedies available to the abusively discharged employee, see *Blades*, *supra* note 84.

88. 113 Wis. 2d at 576, 335 N.W.2d at 841.

89. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). In *Murphy*, a discharged employee brought an action for abusive discharge, prima facie tort, intentional infliction of emotional distress, breach of contract, and age discrimination. The court refused to recognize a cause of action for abusive discharge and concluded that modification of the at-will rule is best "accomplished through a principled statutory scheme." *Id.* at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. The court explained its position:

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

*Id.* at 302, 448 N.E.2d at 89, 461 N.Y.S.2d at 236.

The New York court believed that the legislative branch is best suited to establish standards for the multifarious employment settings and the broad spectrum of discharge situations.

90. 113 Wis. 2d at 572 n.13, 335 N.W.2d at 840 n.13.

91. *Id.* at 576, 335 N.W.2d at 841-42.

circumstances and situations.”<sup>92</sup>

In the concurring opinion in *Brockmeyer*, Justice Day departed from the majority and took a position similar to the one articulated by the *Murphy* court. He believed that specific legislation should work out wrongful discharge rights and define the penalties for their violation.<sup>93</sup> Justice Day further stated, “[t]he legislature has the advantage of being able to hold hearings, conduct investigations, and determine if there are further rights that need to be created to protect the ‘at-will’ employee.”<sup>94</sup>

Closer analysis reveals, however, that neither the concurring nor the majority opinion arrived at the optimum conclusions. The majority’s finding that the public policy exception does not usurp legislative prerogative but rather serves to “advance an already declared legislative policy,”<sup>95</sup> appears valid. Wrongful termination does seem to embrace diverse situations and the concept of public policy appears to be equally varied. As a result, the courts may be best suited to apply judicial standards on a case by case basis. Nevertheless, if we accept the majority’s position we cannot readily accept its restrictive definition of public policy. The court assumed two contrary positions at once and thereby neutralized its own impact on the law: it modified the at-will doctrine because extant legislation is inadequate and then limited itself to policy that has already been legislated.

With regard to the concurrence, Justice Day conceded that the state legislature promulgated numerous standards and protections for the employee and that federal law provides additional safeguards.<sup>96</sup> What the concurrence fails to note is that a large sector of the work force remains unprotected despite this abundant legislation. If the contrary position is assumed, cases like *Brockmeyer* would not arise so persistently. Additionally, the concurrence offered no persuasive reason why courts are incapable of devising a workable standard to limit the application of the at-will doctrine.

The problem of tempering the effect of the at-will rule is a treacherous tug of war with many ropes extending in all different directions. Unfortunately, the *Brockmeyer* court isolated only some of the many interests involved. In addition to jurisdictions

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92. *Id.* at 576, 335 N.W.2d at 842 (citation omitted).

93. *Id.* at 581, 335 N.W.2d at 844.

94. *Id.*

95. *Id.* at 576, 335 N.W.2d at 842.

96. *Id.* at 580, 335 N.W.2d at 843.

that defer to the legislature,<sup>97</sup> some courts still adhere to more formalistic contractual tenets and favor the employers' interests in running their business as they see fit.<sup>98</sup> This anachronistic refusal to modify the rule neglects to afford the employee a necessary sense of permanence and ignores important interests of the public at large. It is the public's right to enjoy a society composed of employment relationships in which the fear of termination does not provoke people into committing acts that violate a criminal code, the constitution, and a statute, or does not force an employee to remain silent while an unsafe product is injected into the market.<sup>99</sup> Finally, the courts themselves are extremely interested in the outcome of the problem. The courts must protect the public interests and at the same time devise a viable means of warding off a deluge of cases, some possibly frivolous, brought by disgruntled former employees. Striking such a balance, however, is difficult. Although the courts need to recognize the at-will employees' right to job security, they must at the same time attempt to avoid a situation where they second guess business decisions and interfere in the work place.

In response to these concerns, the *Brockmeyer* court opined that "a narrowly circumscribed public policy exception properly

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97. See, e.g., *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). For a discussion of *Murphy*, see *supra* note 89 and accompanying text.

98. See *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977) (The Alabama Supreme Court did not allow an employee terminated for refusing to falsify medical records to sue for wrongful discharge because the public policy exception is simply "too nebulous a standard," *Id.* at 1131); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976) (The Kansas Supreme Court held that there was no contract, either express or implied, for a fixed term of employment between the employer and the former employee. The court's holding is contrary to the Michigan approach of *Toussiant*. The *Johnson* court rejected the employee's contention that the company's policy manual which stated that "[n]o employee shall be dismissed without just cause" constituted a contract, *id.* at 54, 551 P.2d at 781. The court regarded the manual as a unilateral statement of policy, and, since the parties did not bargain for its terms, the benefits conferred were mere gratuities. The court stated that "an agreement to give permanent employment simply means to give a steady job of some permanence . . ." *Id.*, 551 P.2d at 782). See also *Demarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980) (The court stated "[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract"). For a discussion of employment at-will in Florida and Florida's adherence to the rule, see Note, *Employment at Will: A Proposal to Adopt the Public Policy Exception in Florida*, 34 U. FLA. L. REV. 614 (1982).

99. For a discussion of the plight of the employee who must face the choice of exposing an employer's wrongdoing or of being fired, 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.

balances the interests of employees, employers and the public.”<sup>100</sup> The weakness in this argument is that a public policy exception based on constitutional or statutory grounds may be too narrow to protect anyone (except perhaps the courts) from unwanted litigation. In fact, the *Brockmeyer* approach is not a vast improvement on the courts that completely refuse to modify the rule.

Justice Day, in his concurring opinion, suggested the contrary proposition that the new exception not only creates an unstable job market, but also promotes litigation: “more and more discharges that at present are known to be non-actionable will be vehicles to test the ingenuity of the advocate to find some constitutional, or statutory or regulatory provision that can be cited in a complaint for ‘wrongful discharge.’”<sup>101</sup>

Justice Day’s prediction, however, is illogical and ignores the specific result of the *Brockmeyer* case. Faced with *Brockmeyer* as precedent, an advocate for the wrongfully discharged employee must diligently hunt through the constitution and statutes in hopes of discovering the relevant and applicable expression of public policy. If this quest proves fruitful, the court can accept or reject the provision cited in the complaint as a relevant expression of public policy. In fact, *Brockmeyer* supported his argument with statutory provisions. He contended that Dun & Bradstreet’s actions violated a statute that prohibits wilfully and maliciously injuring others in their “reputation, trade, business or profession”<sup>102</sup> and a statute that prohibits the use of “threats, intimidation, force or coercion” to keep a person from working.<sup>103</sup> The court con-

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100. 113 Wis. 2d at 574, 335 N.W.2d at 841.

101. *Id.* at 580-81, 335 N.W.2d at 844.

102. Wis. Stat. § 134.01 (1975) (cited in *Brockmeyer*, 113 Wis. 2d at 577 n.18, 335 N.W.2d at 842 n.18). The statute states the following:

134.01 Injury to business; restraint of will

Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding \$500.

Wis. Stat. § 134.01 (1975).

103. Wis. Stat. § 134.03 (1975) (cited in *Brockmeyer*, 113 Wis. 2d at 577 n.19, 335 N.W.2d at 842 n.19). The text of the statute reads as follows:

134.03 Preventing pursuit of work

Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing any lawful work or employment, either for himself or as a wage worker, or who shall at-

cluded that there was "no evidence that Dun & Bradstreet engaged in any behavior of this sort,"<sup>104</sup> and that to hold to the contrary "would completely abolish the at-will doctrine."<sup>105</sup> The court further expressed its intent to only recognize public policy reflected in the constitution and statutes and it stated that "[w]hile Dun & Bradstreet's discharge of Brockmeyer may have constituted bad faith, which is what the jury in this case presumably believed, its actions did not contravene the policies [of the statutes]."<sup>106</sup>

In addition, Brockmeyer cited a statute in support of his contention that his employer was asking him to commit perjury.<sup>107</sup> The court rejected this stating that, "[T]he record is devoid of any evidence demonstrating that Dun & Bradstreet asked Brockmeyer to lie."<sup>108</sup> The court, however, admitted that "an inference can be drawn from this record that Dun & Bradstreet was concerned that Brockmeyer would tell the truth if asked to testify at proceedings concerning his former secretary's sex discrimination claim."<sup>109</sup> Not-

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tempt to so hinder or prevent shall be punished by fine not exceeding \$100 or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to prohibit any person or persons off of the premises of such lawful work or employment from recommending, advising or persuading others by peaceful means to refrain from working at a place where a strike or lockout is in progress.

104. 113 Wis. 2d at 578, 335 N.W.2d at 842.

105. *Id.*

106. *Id.*

107. Wis. Stat. § 946.31(1) (1975) (cited in *Brockmeyer*, 113 Wis. 2d at 578 n.20, 335 N.W.2d at 842 n.20). The full text appears as follows:

946.31 Perjury

(1) Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class D felony:

- (a) A court;
- (b) A magistrate;
- (c) A judge, referee or court commissioner;
- (d) An administrative agency or arbitrator authorized by statute to determine issues of fact;
- (e) A notary public while taking testimony for use in an action or proceeding pending in court;
- (f) An officer authorized to conduct inquests of the dead;
- (g) A grand jury;
- (h) A legislative body or committee.

(2) It is not a defense to a prosecution under this action that the perjured testimony was corrected or retracted.

Wis. Stat. § 946.31 (1975).

108. 113 Wis. 2d at 578, 335 N.W.2d at 842.

109. *Id.* at 578, 335 N.W.2d at 843.

withstanding this inference, the court refused to characterize the company's actions as asking the employee to commit perjury. Instead the court portrayed the behavior as a company "discharging an employee because his testimony may be contrary to an employer's interests,"<sup>110</sup> an activity that is a "far cry" from perjury and that possesses no "clearly defined mandate of public policy" prohibiting it.<sup>111</sup> Under the circumstances, the "ingenuity of the advocate" could not make the exception work for the client. This finding tends to prove that, at least in Wisconsin, Justice Day's prediction will not occur.

The concurring opinion's alternate reason for opposing the exception is as equally unpersuasive. Justice Day claimed that the majority's modification of the at-will rule injures the small business person because "settlements will often be made of meritless claims to avoid the high cost of litigation."<sup>112</sup> It is certainly possible that there will be situations when the employee utilizes the public policy exception as a form of blackmail and successfully extracts a generous settlement. Nevertheless, it seems more likely that many wrongfully discharged employees who, in all honesty, cannot come up with the citable statutory or constitutional provision, will discover that this restrictive exception shuts the courthouse doors.<sup>113</sup> Although the trial courts may encounter situations that fall within the public policy exception, the *Brockmeyer* opinion weighs heavily against any action proceeding beyond the complaint stage.<sup>114</sup>

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110. *Id.* at 578-79, 335 N.W.2d at 843.

111. *Id.* at 578, 335 N.W.2d at 843.

112. *Id.* at 580-81, 335 N.W.2d at 844.

113. There may be cases where the facts fit within the statutory language. In these cases, extensive prelitigation expenses may force settlements of meritorious claims, especially when the employer is a small businessperson without the capital needed to even begin to defend the suit. Nevertheless, the *Brockmeyer* decision decreases the likelihood that an employee will prevail at trial. The court spoke in terms of protecting the employee, *see supra* text accompanying notes 85-92, yet it made two determinations that virtually foreclose the wrongfully discharged employee's opportunities for adequate redress.

First, the finding that only contract damages are recoverable in suits for wrongful discharge precludes lower-level employees from obtaining adequate counsel. *See supra* text accompanying notes 78-82. Second, the finding that relevant public policy must be contained in a statute or the constitution limits the protection all employees receive, because it is evident that even if a statute is found, the trial courts when faced with the weight of the *Brockmeyer* opinion won't construe its provisions liberally enough to include the discharge. *See supra* text accompanying notes 101-10.

114. *See supra* note 113. *See also*, Note, *supra* note 78.

"But the scope of this protection is substantially narrowed by preemption doctrine: in many cases the legislation that provides the plaintiff with a source of public policy also provides a statutory remedy, the availability of which has been

## IV. CONCLUSION

The *Brockmeyer* opinion articulates the crucial questions a court or legislature must face when attempting to devise a workable exception to the at-will rule. Until all employees enjoy the protections given to civil servants and union members who can only be fired for "just cause," courts should not restrict themselves to the recognition of public policies expressed exclusively by the constitution or statutes. Courts should also not limit the wrongfully discharged employee to contractual remedies which keep the lower-level employees out of court and fail to redress their injuries. In addition, the courts are obligated to refuse to sanction misconduct motivated by bad faith. Wisconsin did not recognize this obligation. The *Brockmeyer* court found the employer's behavior indicative of bad faith, but not violative of public policy. In contrast, the conclusion in *Monge v. Beebe*,<sup>115</sup> which recognized that retaliations motivated by bad faith, malice or retaliatory desires are not in the public interest, is more sound and adaptable.<sup>116</sup>

If indeed the concept of public policy is as "amorphous" as the *Brockmeyer* court insists it is, the narrowing of it totally defeats its effectiveness. Such results are often rooted in the fallacious assumption that the employee's interests and the employer's interests are eternally at odds. A contented and secure work force could promote as much growth and expansion as an unrestrained employer. Next to the complete abolition of the rule, the broader approaches to its modification at least look toward this productive symbiosis.<sup>117</sup> 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.

AMY D. RONNER\*

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held by some courts to bar a common law claim for wrongful discharge. . . . [S]tatutory remedies are often less satisfactory than those available under common law . . . ."

Note, *supra* note 78 at 1946-47.

115. 114 N.H. 130, 316 A.2d 549 (1974). For a discussion on *Monge*, see *supra* notes 28-30 and accompanying text.

116. *Id.* at 134, 316 A.2d at 552. However, *Monge* was not entitled to recover damages attributable to mental suffering.

117. See *supra* text accompanying notes 23-37.

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