DEVELOPMENT OF THE PUBLIC POLICY EXCEPTION TO THE AT-WILL DOCTRINE

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The employment-at-will doctrine has received considerable attention by the courts in recent years. As a result of this judicial examination, the employer's strength in the employer-employee relationship has been significantly diluted, particularly when the employee has been terminated for a "bad reason." Arizona is participating in the movement toward an equitable solution to what is perceived by some as an unfair bias against employees in the employee-employer relationship.

This Note looks at the history of the employment-at-will doctrine and the various jurisdictional responses to an application of this rule. The focus will be on Arizona's analysis of the doctrine and the recognition of exceptions to be carved from the rule. Finally, the law in Arizona as it now stands on this subject is discussed with the conclusion that fears of those reluctant to adopt exceptions to the at-will doctrine appear unfounded.

TRADITION OF EMPLOYMENT AT-WILL

The employment at will rule was formulated in the United States in the late nineteenth century.[1] The rule was a deviation from English employment law and reflected principles of contract law and laissez-faire economics of the late nineteenth century.[2] For example, the English contract law presumed that when an employment contract contained a provision for an annual salary, the employer impliedly agreed to an employment term of one year.[3] In *Martin v. New York Life Insurance Co.*,[4] however, the court held that an annual salary term contained in an employment contract did not raise the presumption of a one year contract period of employment. As the "employment-at-will" rule became accepted in the United States following the *Martin* decision and others, the courts presumed that parties intended

1. The rule was announced by H. G. Wood in his treatise on master-servant relationships: "with us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will.... [I]t is an indefinite hiring and is determinable at the will of either party...." H. WOOD, MASTER AND SERVANT, § 136 at 283 (2d ed. 1886). *See* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982).

2. Murg & Scharman, *supra* note 1, at 333.

3. Fawcett v. Cash, 110 Eng. Rep. 1026, 1027 (1834). *See generally* Murg & Scharman, *supra* note 1, at 332; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340 n.46 (1974).

4. 148 N.Y. 117, 42 N.E. 416 (1895).

employment contracts to be for no definite duration.[5] Therefore, the courts would not interfere with the employment contract, thus creating a presumption that the employee could be discharged at any time.[6]

Another illustration of the justification for the employment-at-will doctrine was the court's reasoning that the employee was effectively free to quit his employment at any time.[7] The employer could sue the employee for damages under a breach of contract theory but the employer's recovery was limited to actual losses.[8] Furthermore, the courts were not permitted to specifically enforce the contract because to do so would violate the prohibition against involuntary servitude in the thirteenth amendment.[9] Therefore, if the employee is not obligated to continue his employment, then the employer also should not be obligated to continue to provide employment.[10] Consequently, unless otherwise stated, employment contracts were interpreted to be in effect for an indefinite period of time.[11]

The traditional right of employers included the ability to discharge em-

5. *See, e.g.*, Watson v. Gugino, 204 N.Y. 535, 98 N.E. 18 (1912); Gressing v. Musical Instruments Sales Co., 169 App. Div. 38, 154 N.Y.S. 420 (1915); Gibney v. National Jewelers Bd. of Trade, 144 N.Y.S. 321 (N.Y. App. Div. 1913); Aldrich v. New York Life Ins. Co., 121 App. Div. 18, 105 N.Y.S. 493 (1907); Lichtenhein v. Fischer, 6 App. Div. 385, 39 N.Y.S. 553 (1896); Feiber v. Home Silk Mills, 143 N.Y.S. 1014 (Sup. Ct. 1913); Alger v. New York Post Grad. Med. School and Hosp., 140 N.Y.S. 394 (Sup. Ct. 1913); Donoghue v. City of Yonkers, 67 Misc. 637, 123 N.Y.S. 315 (Sup. Ct. 1910); Robinson v. Adolph Raudnitz Co., 123 N.Y.S. 117 (Sup. Ct. 1910); Reitzfeld v. Sobel, 114 N.Y.S. 27 (Sup. Ct. 1909); Stein v. Kooperstein, 52 Misc. 481, 102 N.Y.S. 578 (Sup. Ct. 1907); Frank v. Manhattan Maternity & Dispensary, 107 N.Y.S. 404 (Sup. Ct. 1907); Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N.Y.S. 226 (Sup. Ct. 1906); Messenio v. Atchison, T. & S.F. Ry., 50 Misc. 317, 98 N.Y.S. 647 (Sup. Ct. 1906); Lertora v. Central Fruit Co., 87 N.Y.S. 425 (Sup. Ct. 1904); Outerbridge v. Campbell, 87 App. Div. 597, 84 N.Y.S. 537 (1903); Byrne v. Weir, 38 Misc. 741, 78 N.Y.S. 1110 (Sup. Ct. 1902); Foreman v. Goldberg, 30 Misc. 785, 62 N.Y.S. 753 (Sup. Ct. 1900); McIntosh v. Miner, 37 App. Div. 483, 55 N.Y.S. 1074 (1899); Copp v. Colorado Coal & Iron Co., 20 Misc. 702, 46 N.Y.S. 542 (City Ct. N.Y. 1897). *See generally* Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (discussing the origin of the employment-at-will rule).

6. *See* sources cited *supra* note 5.

7. Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 139 So. 760 (1932). In *Pitcher*, the court states:

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of 'mutuality.'

Id. at 70, 139 So. at 761. *See also* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419-21 (1967).

8. Murg & Scharman, *supra* note 1, at 336. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 367 comment c (1981).

9. H.W. Gossard Co. v. Crosby, 132 Iowa 155, 109 N.W. 483 (1906). Here, the court reasoned:

> When a court of equity intervenes to compel the employee to specifically perform a contract for personal service, his service becomes involuntary, and his position becomes one of involuntary servitude, a condition utterly incompatible with our institutions, and the fundamental law of the land.

Id. at 170, 109 N.W. at 488-89. *See also* American Broadcasting Co. v. Wolf, 438 N.Y.S.2d 482, 485 (1981) ("courts of equity historically have refused to order an individual to perform a contract for personal services"); Murg & Scharman, *supra* note 1, at 336.

10. Blades, *supra* note 7, at 1419-21; Murg & Scharman, *supra* note 1, at 337-38.

11. *See generally* A. CORBIN, 1 CORBIN ON CONTRACTS § 96 (1950 & Supp. 1971); Murg & Scharman, *supra* note 1, at 337.

ployees "for good cause, for no cause or even for cause morally wrong."[12] Arizona adopted this concept in 1932 by stating that "[t]he general rule in regard to contracts for personal services . . . where no time limit is provided, is that they are terminable at pleasure by either party. . . ."[13]

The at-will rule has been the subject of much debate and litigation over the last several years. Discharge for "good cause," "bad cause" or "no cause" may at times results in unjust dismissals. The attraction to claims of wrongful discharge can be explained by a variety of factors. For instance, the claims raise questions of personal and industrial justice and questions of economic utility and equity. Furthermore, wrongful termination claims challenge the historical premise of the at-will doctrine and, in addition, arouse socioeconomic questions particularly with reference to the validity of the freedom-of-contract notions underlying the justification of the at-will doctrine.[14]

The nature of the employment relationship has changed since the at-will rule gained acceptance at the turn of the century. Non-union employees in today's society are perceived to be more dependent on their corporate employers for economic survival and suffer from unequal bargaining power in the employer-employee relationship.[15] Consequently, there has been discontent with a strict application of the at-will rule, the trend being to create exceptions which modify the operation of the doctrine.[16] These exceptions are grounded in the public policy theory or implied contract theory.[17]

Courts in twenty-two states have recognized an exception to the at-will rule on public policy grounds.[18] The erosion of a strict application of the at-will doctrine began in Arizona with the Arizona Supreme Court's recognition of the tort of wrongful discharge in *Fleming v. Pima County*.[19] Thereafter, the supreme court held that the employer's right to discharge an at-will employee may be limited by the terms and conditions contained in a personnel manual.[20]

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12. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1 (1984) (citing Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *rev'd on other grounds sub nom*, Huton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

13. Dover Copper Min. Co. v. Doenges, 40 Ariz. 349, 357, 12 P.2d 288, 291-92 (1932).

14. Lopatka, *supra* note 12, at 3.

15. *Id.* at 5. *See also* Palmateer v. International Harvester Co., 85 Ill.2d 124, 129, 421 N.E.2d 876, 878 (1981) (employer and employee do not stand on equal footing; proper balance must be maintained among (1) the employer's interest in operating a business efficiently; (2) the employee's interest in earning a livelihood; and (3) society's interest in seeing its public policies carried out.)

16. *See generally* Lopatka, *supra* note 12; Murg & Scharman, *supra* note 1; Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 701 P.2d 1025 (1985).

17. *See* Loptaka, *supra* note 12, at 5.

18. The following states have recognized the public policy theory of liability to some degree, either explicitly or through strong dictum: Arizona, Arkansas (federal court), California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Washington, West Virginia, and Wisconsin. At least six additional states have left the question open: Alabama, Colorado, Iowa, Louisiana, South Carolina, and Vermont. *See* Lopatka, *supra* note 12, at 6-7 n.30.

19. 141 Ariz. 149, 685 P.2d 1301 (1984).

20. Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 546, 688 P.2d 170, 172 (1984). *See also* Comment, *Limiting Employment-At-Will in Arizona*: Leikvold v. Valley View Community Hospital, 27 Ariz. L. Rev. 235 (1985).

The atmosphere of at-will employment in Arizona thus began to collect particles of the notion that employees were in need of protection in the employment relationship, particularly when the employee termination disregards or desecrates an expression of public policy. In *Vermillion v. AAA Pro Moving and Storage*,[21] the Arizona Court of Appeals recognized a public policy exception in the instance where an employee was discharged for refusal to conceal a violation of Arizona's theft statute, holding that to require the employee to do otherwise was contrary to public policy. Relying on the background of *Fleming*, *Leikvold* and *Vermillion*, the supreme court found it difficult to justify any further adherence to a rule which permitted an employer to terminate someone's employment for a cause "morally wrong."[22] In *Wagenseller v. Scottsdale Memorial Hospital*,[23] the Arizona Supreme Court expressly adopted the tort of wrongful discharge as an exception to the employment at-will rule. An employer may not discharge an employee for reasons which would violate public policy.[24] In addition, the court recognized the implied covenant of good faith and fair dealing as part of the at-will employment contract. The court, however, did not construe the covenant to give to either party of the contract any rights, such as tenure, different from those which they contracted.[25] The factual background of *Wagenseller* is significant particularly in understanding the supreme court's rationale for adopting the public policy exception to the at-will rule.

Catherine Wagenseller was employed in 1975 by Scottsdale Memorial Hospital as at at-will employee.[26] She was hired as a staff nurse and was personally recruited by the manager of the Emergency Department, Kay Smith. Smith was Wagenseller's supervisor. During the four-year course of her employment, Wagenseller was assigned to the position of ambulance charge nurse and ultimately was promoted to the position of paramedic coordinator. On November 1, 1979, three months following her promotion to paramedic coordinator, Wagenseller was terminated.

Wagenseller and Smith maintained a professional and friendly working

21. 146 Ariz. 215, 704 P.2d 1360 (Ct. App. 1985).

22. Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 378, 710 P.2d 1025, 1033 (1985).

23. *Id.* at 370, 710 P.2d at 1025.

24. *Id.* at 378, 710 P.2d at 1033.

25. *Id.* at 389, 710 P.2d at 1044.

A number of additional issues were addressed by the court which are not discussed in this Note. For example, the court considered the extent of a supervisor's privilege to interfere in the beneficial employment relationship between a supervised employee and the common employer. In essence, the court rejected the notion of a supervisor's "privilege" to interfere in the employer-employee relationship. The Arizona Supreme Court instead adopted the Restatement approach which requires a showing of "improper" interference. *Id.* at 388, 710 P.2d at 1043. In addition to proving the necessary elements stated in Antwerp Diamond Exchange v. Better Business Bureau of Maricopa County, 130 Ariz. 523, 637 P.2d 733 (1981), a plaintiff bringing a tortious interference action must show that the defendant acted improperly. *Wagenseller*, 147 Ariz. at 388, 710 P.2d at 1043.

Besides the supervisory "privilege" concept, the court also entertained Wagenseller's claim of breach of implied-in-fact provisions of the employment contract. The court concluded that whether the provisions of the employment manual were part of the contract of employment was a question of fact to be left for the jury and reversed the trial court's grant of summary judgment against Wagenseller. In reaching this conclusion, the court relied on its reasoning set forth in *Leikvold*, *supra* note 20.

26. The facts of *Wagenseller* are set forth in 147 Ariz. at 374-75, 710 P.2d at 1029-30.

relationship over the four years of Wagenseller's employment. In May, 1979, Wagenseller joined Smith and a group of individuals from other hospitals for an eight-day rafting trip down the Colorado River. Wagenseller maintained Smith's attitude towards her began to change during this trip. Wagenseller attributed this change of attitude to her refusal to participate in certain activities with Smith and other rafters. These activities included public urination, defecation and bathing, heavy drinking, and "grouping up" with other rafters. In addition, Wagenseller also refused to join in a skit performed to the song "Moon River" which concluded with the members of the group "mooning" the onlookers. This skit was performed at the hospital following the river trip, but Wagenseller again did not participate.

Wagenseller asserted that her refusal to become involved in these events caused the change in her relationship with Smith and was the proximate cause of her termination.[27] She argued she was fired for reasons that contravened public policy and without legitimate cause related to job performance. Wagenseller claimed the termination was wrongful and sought damages under both contract and tort theories. Since Wagenseller was hired as an "at-will" employee, the hospital alleged that it could terminate her employment for cause, without cause, or for "bad" cause.

The trial court entered summary judgment in favor of the defendants and Wagenseller appealed. The court of appeals affirmed in part and remanded the matter for trial.[28] Wagenseller petitioned the Arizona Supreme Court to review the appeals court decision. The supreme court accepted review and vacated the decision of the court of appeals,[29] ultimately holding, *inter alia*, that the employer may not fire for cause that is contrary to public policy.[30]

The court noted some could argue the economic system might be better served by allowing employers great latitude in dealing with their employees, and the court assumed it was in the public interest to allow employers to continue to have that freedom.[31] The supreme court, however, felt that the interests of the economic system would be fully served if employers could fire for good cause or without cause.[32] Balancing the economic interests against that of society, the court found that society's interests as a whole would be promoted if employers are not allowed to terminate for a cause "morally wrong."[33] Hence, the public policy exception to the at-will rule: an employer may fire for good cause or for no cause; an employer, however,

27. Following her termination, Wagenseller initiated appeal proceedings with the hospital administrative and personnel departments claiming violations of the disciplinary procedures contained in the hospital's personnel policy manual. When this appeal was denied, suit was filed against the hospital, its personnel administrators, and Kay Smith. *Wagenseller*, 147 Ariz. at 374, 710 P.2d at 1029.

28. Wagenseller v. Scottsdale Memorial Hospital, 148 Ariz. 242, 714 P.2d 412 (Ct. App. 1984), *vacated*, 147 Ariz. 370, 710 P.2d 1025 (1985).

29. *Wagenseller*, 147 Ariz. at 370, 710 P.2d at 1025.

30. *Id.* at 378, 710 P.2d at 1033.

31. *Id.*

32. *Id.*

33. *Id.*

may not fire for cause that "violates public policy."[34]

The Wagenseller court considered what kind of discharge would violate the at-will rule. The court looked to other jurisdictions which had required, as a threshold, a showing of a "clear mandate" of public policy.[35] A "clear mandate" has been found in three areas. In one area, courts have allowed a cause of action where the employee termination was as a result of refusing to commit an illegal act.[36] Secondly, courts have recognized a cause of action where the termination resulted due to the employee performing a public duty or obligation.[37] Finally, an employee has been successful in bringing an action where the termination was as a result of the employee exercising a legal right or privilege.[38]

WHAT IS PUBLIC POLICY?

A disturbing aspect of the public policy theory is the difficulty in determining the type of public policy that will ground a wrongful discharge claim.[39] The leading case recognizing a public policy exception states, in essence, that a "clearly mandated policy" is an amorphous concept.[40]

The Arizona Supreme Court, in an effort to define the concept of public policy, indicated that expressions of public policy can be found in statutory and constitutional law, and recognized that judicial decisions can be a source of public policy as well.[41] The court was careful to point out, however, that

34. *Id.* The decision of *Dover Copper, supra* note 13, was therefore overruled to the extent contrary to findings of *Wagenseller.*

35. *See, e.g.,* Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 379-80, 652 P.2d 625, 631 (1982); Geary v. United States Steel Corp., 456 Pa. 171, 184, 319 A.2d 174, 180 (1974); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 232-33, 685 P.2d 1081, 1089 (1984).

36. *See, e.g.,* Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (termination for refusal to engage in price-fixing); Petermann v. International Bhd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee discharged for refusing to commit perjury).

37. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee discharged from being absent from work to serve on jury duty).

38. *See, e.g.,* Kelsay v. Motorola, Inc., 74 Ill.2d 172, 384 N.E.2d 353 (1978) (termination following pursuit of worker's compensation claim). In Fulford v. Burndy Corp., 623 F. Supp. 78 (N.H. 1985), the court recognized a cause of action where the plaintiff (Fulford) had been discharged, allegedly in violation of his state constitutional rights which guaranteed every citizen a remedy for injuries received. The plaintiff entered into an employment contract with Burndy Corp. in March of 1979. In June of 1979, plaintiff's minor son was bitten and injured by a dog while on the property of Gerald Fenner. Fenner was also employed by Burndy and was plaintiff's supervisor. Plaintiff informed Fenner that he considered Fenner and the dog's owner liable for his son's injuries. Shortly thereafter Fulford was terminated from his employment. The court specifically 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 public. Therefore, such a termination constitutes a breach of the employment contract. *Fulford,* 623 F. Supp. at 80. The facts of *Fulford* present the sole question of whether the defendant Burndy Corp., through its agent, Fenner, acted maliciously in discharging plaintiff. The court concluded that the plaintiff was being penalized because he took steps to insure a right guaranteed by the New Hampshire Constitution. A tort had been committed against his son for whom he was responsible. In attempting to exercise his rights, he was fired. Thus, Fulford was retaliated against by the defendant through its agent, and therefore had stated a cause of action sufficient to withstand a motion to dismiss. *Fulford,* 623 F. Supp. at 81.

39. Lopatka, *supra* note 12, at 13. *See also Palmateer,* 85 Ill.2d at 130, 421 N.E.2d at 878 ("But the Achilles heel of the principle lies in the definition of public policy.")

40. *Palmateer,* 85 Ill.2d at 130, 421 N.E. 2d at 878.

41. *Wagenseller,* 147 Ariz. at 378-79, 710 P.2d at 1033-34. The Arizona Supreme Court was in agreement with the following:

these sources will not *always* provide a basis for a claim of wrongful discharge; only those sources which have a public purpose will qualify.[42] Thus, although an employee faced with a question which may conflict with her or his own personal morals may refuse to do that work, that employee may not also claim a right to continued employment.[43]

On the other hand, there are certain legal principles which have a clear and extensive public purpose. An example of such is a state's criminal statutes.[44] Even though the Arizona Supreme Court did not limit the recognition of a public policy exception to cases involving a criminal violation, it stated that the court's duty could hardly be clearer when such a violation is involved.[45] The facts of *Wagenseller*[46] indicate that Wagenseller refused to join in activities which, in effect, could have violated Arizona's indecent exposure statutes.[47] The supreme court felt that while the statute may not

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> Public policy is usually defined by the political branches of government. Something "against public policy" is something that the Legislature has forbidden. But the Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field. It is the courts, to give one example, that originated the whole doctrine that certain kinds of businesses—common carriers and innkeepers—must serve the public without discrimination or preference. In this sense, then, courts make law, and they have done so for centuries.

Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984). *See also Palamateer*, 85 Ill.2d at 130, 421 N.E.2d at 878; Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

42. *Wagenseller*, 147 Ariz. at 379, 710 P.2d at 1034. Where the interest involved is merely private or proprietary, the exception does not apply. *Id. See, e.g., Pierce*, 84 N.J. at 75, 417 A.2d at 514 (plaintiff did not have a cause of action for wrongful discharge based on her refusal to do research where plaintiff had failed to show violation of a clear public policy).

Cf. Phung v. Waste Management, Inc., 491 N.E.2d 1114, 23 Ohio St.3d 100 (1986), where the court refused to recognize a public policy exception to the employment-at-will doctrine. Phung was employed as the chief chemist for Waste Management at its toxic waste disposal site in Vickery, Ohio. His at-will employment relationship with Waste Management was terminated and Phung alleged his discharge was the result of his demands that Waste Management cease committing violations of its "legal and societal" obligations. *Phung*, 491 N.E.2d at 1115, 23 Ohio St.3d at 101. In considering Phung's case, the court stated his claims were nothing more than "broad, conclusory" allegations that Waste Management, Inc. was violating certain nonspecified "legal and societal obligations." *Phung*, 491 N.E.2d at 1116, 23 Ohio St.3d at 102. Since the allegations failed to state a violation of "sufficiently clear public policy" to warrant creation or a cause of action, the court reinstated the judgment of the trial court granting the motion to dismiss. *Phung*, 491 N.E.2d at 1116-17, 23 Ohio St.3d at 102. In doing so, the court noted that "[n]o jurisdiction has allowed a cause of action to proceed based only on vaguely alleged violations of 'societal obligations.' " *Phung*, 491 N.E.2d at 1117, 23 Ohio St.3d at 102. Therefore, the court held that an at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of law does not have a cause of action against the employer for wrongful discharge. *Phung*, 491 N.E.2d at 1117, 23 Ohio St.3d at 103.

43. *Wagenseller*, 147 Ariz. at 379, 710 P.2d at 1034 (citing *Pierce*, 84 N.J. at 75, 417 A.2d at 514).

44. *Wagenseller*, 147 Ariz. at 379, 710 P.2d at 1034. *See also Petermann, supra* note 36 (employee's right to refuse to commit perjury upheld).

45. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035.

46. *See supra* notes 26-27 and accompanying text.

47. ARIZ. REV. STAT. ANN. § 13-1402 (1983), provides:

> § 13-1402. Indecent exposure; classifications
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> A. A person commits indecent exposure if he or she exposes his or her genitals or anus or she exposes the areola or nipple of her breast or breasts and another person is present, and the defendant is reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.
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> B. Indecent exposure is a class 1 misdemeanor. Indecent exposure to a person under the age of fifteen years is a class 6 felony.

embody a policy which "strikes at the heart of the citizen's social right, duties and responsibilities"[48] as plainly as a statute prohibiting perjury, the Arizona statute was enacted to preserve and protect a recognized sense of public privacy and decency.[49] Arizona's indecent exposure statute recognizes this privacy as a "citizen's social right."[50] The supreme court disagreed with the Arizona Court of Appeals' conclusion that a "minor" violation of the statute would not violate public policy.[51]

With the *Wagenseller* facts, the court indicated that relevant inquiry was not whether the alleged "mooning" incidents were technical violations of the statute, but whether those incidents infringed upon the public policy interests embodied in such law or statute.[52] Here, the law[53] sets forth a public policy that to publicly expose one's anus or genitals contravenes public standards of morality.[54] Moreover, the court concluded that termination for refusal to participate in such activity would violate public policy of this state even if onlookers were voyeurs and would not be offended.[55] Therefore, there may be no crime, but to compel an employee to act in a way which ordinarily would be prohibited by law would be a violation of public policy.[56]

In reaching the conclusion to adopt a public policy exception to the at-will rule, the court stated that by doing so it did not require the court to make a new contract for the parties.[57] The court will continue to recognize a presumption or imply the covenant of termination at the pleasure of either party, for cause or without cause. On the other hand, termination for a cause which is contrary to public policy pronounced by constitutional, statutory or judicial decision is not a right inherently recognized in the at-will contract or any other contract, even if expressly stated.[58] Such a dismissal would violate the rights of the employee protected by law and would be a tortious act on the part of the employer.[59]

Arizona has now expanded the public policy exception to include those instances where the employee has been terminated for performing a public obligation. In *Wagner v. City of Globe*,[60] the plaintiff was hired as a police officer for the City of Globe.[61] During Wagner's six-month probationary pe-

48. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035 (citing *Palmateer*, 85 Ill.2d at 130, 421 N.E. at 878-79).
49. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035.
50. *Id.*
51. *Id.* The Arizona Supreme Court stated "[t]he nature of the act, and not its magnitude, is the issue." *Id.*
52. *Id.*
53. ARIZ. REV. STAT. ANN. § 13-1402 (1983), *supra* note 47.
54. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035.
55. *Id.*
56. *Id.* The court went on to explain that:
> Compelled exposure of the bare buttocks, on pain of termination of employment, is a sufficient violation of the *policy* embodied in the statute to support the action, even if there would have been no technical violation of the statute.

Wagenseller, 147 Ariz. at 380 n.5, 710 P.2d at 1035 n.5 (emphasis in original).
57. *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035.
58. *Id.* at 381, 710 P.2d at 1036.
59. *Id.*
60. 150 Ariz. 82, 722 P.2d 250 (1986).
61. The facts of *Wagner* are set forth in 150 Ariz. at 84, 722 P.2d at 252.

riod, Wagner became aware of the situation concerning Mr. Hicks. Hicks had previously been arrested by two other officers for vagrancy and was eventually given a ten-day jail term. Some time later, Hicks approached Wagner and inquired about his arraignment. Wagner determined Hicks had been in jail for twenty-one days notwithstanding his original sentence of ten days, and had not yet been arraigned. Wagner also discovered that Hicks was being held under a statute that had been amended at least a year prior to Hick's arrest. At Hick's arraignment, Wagner pointed out to the judge that Hicks' arrest was illegal and, further, that Hicks had been jailed longer than his original sentence. The judge did suspend Hicks' sentence; however, he became upset and told Wagner he would speak with Wagner's chief.[62] Shortly thereafter, Wagner received written notice of his termination. Exhausting his administrative remedies, Wagner filed suit against the City of Globe[63] alleging, *inter alia*, wrongful discharge.[64] Wagner raised two theories of wrongful discharge: breach of contract and violation of public policy.[65]

Wagner claimed his discharge was in violation of the City's personnel rules and thus a breach of contract. The court was guided by the previous cases of *Leikvold*[66] and *Wagenseller*[67] and concluded that whether the personnel rules became part of Wagner's at-will contract was a factual question inappropriate for summary judgment.[68]

Wagner's public policy argument was evaluated by the court in much the same manner as *Wagenseller*. The court discussed three of the different fact patterns that have found recognition in the public policy exception.[69] A fourth type of public policy exception was included in the court's analysis in *Wagner*. This exception involves the situation where the employee exposes wrongdoing on the part of the employer and is thereafter discharged. These "whistleblowing" cases are the most difficult for the courts.[70] The difficulty arises because the employee who chooses to report illegal conduct on the part of his employer differs from the employee who must choose between his job and his own participation in illegal conduct.[71] In this comparison, the whistleblower faces the less onerous choice of either ignoring the known or suspected violation or becoming a part of appropriate law enforcement.[72] The court, however, did recognize that whistleblowing activity is beginning

62. *Id.*

63. Wagner's suit named the City of Globe, the city council members and Van Buskirk, the chief of police.

64. *Wagner*, 150 Ariz. at 84, 722 P.2d at 252. The trial court granted the defendant's motion for summary judgment on all counts. Wagner appealed only the allegation of wrongful discharge.

65. *Wagner*, 150 Ariz. at 85, 722 P.2d at 253.

66. *Leikvold*, *supra* note 20 and accompanying text.

67. *Wagenseller*, *supra* notes 22 and 25 and accompanying text.

68. *Wagner*, 150 Ariz. at 86, 722 P.2d at 254.

69. *Id.* at 88, 722 P.2d at 256. These areas are: (1) where the employee has refused to participate in illegal behavior, (2) the employee is discharged for performing an important public obligation, and (3) the employee is discharged after exercising a legal right or privilege. *See also supra* notes 36-38 and accompanying text.

70. *Wagner*, 150 Ariz. at 88, 722 P.2d at 256.

71. *Id.*

72. *Id.*

to receive judicial protection.[73] Wagner argued that had he ignored Hick's illegal detention, he could have been personally liable to Hicks for claims under 42 U.S.C. §1983 and claims of false imprisonment. Therefore, Wagner argued his behavior would be protected as a refusal to participate in proscribed activity,[74] much the same as Wagenseller.

The court felt Wagner's behavior was best characterized under the whistleblowing category[75] and concluded that whistleblowing activity which serves a public purpose should be protected.[76] The same caveat as was applied in *Wagenseller* was applied in Wagner: so long as employee's actions are not merely personal or proprietary, but rather seek to further the public good, the employee's decision to expose the employer's illegal or unsafe practices should be encouraged.[77] The relevant inquiry will not be limited to whether a particular law or regulation has been violated, but instead will emphasize whether an "important public policy interest embodied in the law" has been furthered by the employee's whistleblowing activity.[78]

The court concluded that Wagner's activity, if proven, would give rise to a valid cause of action for wrongful discharge. The public policy furthered by Wagner was that of protecting the civil rights of citizens from abuse; Wagner's activity in disclosing the illegal detainment of Hicks should be encouraged and not punished.[79]

GOOD FAITH AND FAIR DEALING EXCEPTION

Wagenseller claimed that her discharge without good cause breached the implied-in-law covenant of good faith and fair dealing incorporated in every contract.[80] In considering Wagenseller's claim, the Arizona Supreme Court noted substantial scrutiny in the law concerning whether a duty to terminate only for good cause should be implied in employment-at-will contracts.[81] Generally, courts have rejected an invitation to imply a duty of good faith and fair dealing in employment contracts due to a concern that to do so would unduly restrict management and would infringe upon the employer's "legitimate exercise of management discretion."[82]

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73. *Id.*

74. *Wagner*, 150 Ariz. at 89, 722 P.2d at 257.

75. *Id.*

76. *Id.*

77. *Id.* The court also took note of the fact that the Arizona legislature has recognized whistleblowing activity worthy of protection. ARIZ. REV. STAT. ANN. § 38-532, protects state and county employees from retaliation for their whistleblowing activity. The court stated that although § 38-532 is not applicable to the facts of *Wagner*, it did indicate a legislative expression of public policy in keeping with the court's decision. *Wagner*, 150 Ariz. at 89, 722 P.2d at 257.

78. *Wagner*, 150 Ariz. at 89, 722 P.2d at 257 (citing comparison to *Wagenseller*, 147 Ariz. at 380, 710 P.2d at 1035 (employee may refuse to participate in behavior which violates policy of the law, even though no technical violation of the law might result)).

79. *Wagner*, 150 Ariz. at 90, 722 P.2d at 258.

80. *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); Savoca Masonry Co. v. Homes & Son Constr. Co., 112 Ariz. 392, 396, 542 P.2d 817, 821 (1975)).

81. *Wagenseller*, 147 Ariz. at 384, 710 P.2d at 1039.

82. *Id.* (citing Pugh v. See's Candies, 116 Cal. App.3d 311, 330, 171 Cal. Rptr. 917, 928 (1981); *Parner*, 65 Hawaii at 377, 652 P.2d at 629; *Thompson*, 102 Wash.2d at 226-27, 685 P.2d at 1086; Brockmeyer v. Dunn & Bradstreet, 113 Wis.2d 561, 569, 335 N.W.2d 834, 838 (1983)).

The Arizona Supreme Court recognized that California has come closer than any other jurisdiction in implying a good cause duty in all at-will contracts.[83] In *Cleary v. American Airlines*,[84] the plaintiff was discharged after 18 years of employment with the defendant. Mr. Cleary alleged that the discharge violated both an express policy of the company regarding employee grievances and the implied covenant of good faith and fair dealing.[85] The court agreed and held that the employer could not discharge the employee without good cause, based on both the longevity of the employee's service and the express policy of the employer.[86]

Tort recovery for breach of the implied covenant of good faith and fair dealing has been acknowledged in Arizona in the insurance contract setting.[87] Justification for permitting such a recovery in the insurance context, however, has been due largely to the relationship existing between insurer and insured.[88] The Arizona Supreme Court found neither the logic of the California cases nor their factual circumstances compelling for recognition of such a broad rule in this jurisdiction. The court felt that if the rule were adopted, the at-will doctrine may be abolished completely and benefits which employees can and should get *only* through collective bargaining agreements or tenure provisions would be established by judicial fiat.[89] In reaching this conclusion, the court stated that employment contracts would not be treated as a special type of arrangement in which the law refuses to imply the covenant of good faith and fair dealing that it implies in all other contracts. Instead, the relevant inquiry will focus on the contract to determine the parties' agreement.[90] The court stated it will recognize an implied covenant of good faith and fair dealing in the employment-at-will contract and the covenant will protect an employee from a discharge to avoid payment of benefits already earned.[91] The covenant will not protect the employee for any claim for a prospective benefit, nor will it protect an employee from a "no cause" dismissal.[92]

CURRENT STATUS OF EMPLOYMENT-AT-WILL DOCTRINE IN ARIZONA

Arizona is now following the trend in embracing a more liberalized approach to the employment-at-will doctrine. In recognizing the public policy exception to the at-will rule and expressly adopting the tort of wrongful discharge, the supreme court has answered the questions left unresolved in *Leikvold v. Valley View Community Hospital*.[93]

In doing so, however, some argue the court has created yet more difficult questions to answer. Is morality now to be a question for the court,

83. *Wagenseller*, 147 Ariz. at 384, 710 P.2d at 1039.
84. 111 Cal.App.3d 443, 168 Cal. Rptr. 722 (1980).
85. *Id.* at 447, 168 Cal. Rptr. at 724.
86. *Id.* at 455-56, 168 Cal. Rptr. at 729.
87. Noble v. National American Life Ins. Co., 128 Ariz. 188, 624 P.2d 866 (1981).
88. *See* Egan v. Mutual of Omaha Ins. Co., 169 Cal. Rptr. 691, 620 P.2d 141 (1979).
89. *Wagenseller*, 147 Ariz. at 385, 710 P.2d at 1040 (emphasis in original).
90. *Id.*
91. *Id. See* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).
92. *Wagenseller*, 147 Ariz. at 385, 710 P.2d at 1040.
93. *See supra* note 20.

especially in those instances where there are no statutorily defined parameters or constitutional provisions? This seems to be a commonly expressed fear by those concerned with the adoption of a public policy exception. This would appear to be a somewhat illogical reaction to the question as no better prepared forum exists to handle such matters. The question of morality is just that: a question of fact left to be decided by a jury. The standards of a community may vary from time to time but if statutory or constitutional law does not provide a definition for public policy, then that which offends the standards of decency should appropriately be left for determination by a jury comprised by members of that community.

The additional area within the public policy exception recognized by the court in *Wagner* takes a step in tipping the balance of the employer-employee relationship in favor of society. Although this recognition of an exception to protect an employee while performing a "public obligation" in the context of whistleblowing may seem to some a final assault on the employer's autonomy, this is yet another feeble attempt to mask the injustice of the employee's plight. By allowing an employee to receive protection for guarding the public good, any detriment suffered by the employer in his power loss is sufficiently outweighed by the interests of society as a whole.

CONCLUSION

With the Arizona Supreme Court adopting the tort of wrongful discharge and acknowledging the public policy exception, at-will employees may now experience additional job security. Although the court did not expressly recognize a rule implying a duty of good faith and fair dealing in the at-will employment contract, the net effect of the court's holding does provide protection to an employee for benefits previously earned by that employee. This covenant will not, however, provide protection for future benefits or for "no cause" dismissals. It seems that this result overlaps that of the public policy exception. An employee will be protected to the extent [s]he has earned the benefits. Once a dismissal has occurred that infringes on this premise, the covenant has been breached. The dismissal could at the same time violate public policy if the dismissal involved factors which fell within the areas mandating public policy. Consequently, the court has extended further safeguards for unjust dismissals as an employee may have a claim under a public policy exception, under the good faith and fair dealing exception, or both.

Those fearing a potential for abuse because of meritless claims based on vague concepts of public policy can be reassured in the fact that for a claim to be acknowledged, the policy violated must have been one protecting the public and not just an infringement upon personal values. Furthermore, defining "public policy" is a function that our courts and legislature are equipped to handle. As a result of these considerations, it seems the arguments raised against the adoption of a public policy exception rest on shaky foundation.