DISCRIMINATORY DISCHARGE AND THE EMERGING COMMON LAW OF WRONGFUL DISCHARGE

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The doctrine of employment at will,[1] which was so well-entrenched by the beginning of the 20th century as to be elevated to constitutional status,[2] has eroded substantially as the century nears its end.[3] Federal and state legislatures have enacted an array of statutes that prohibit termination for specified reasons,[4] such as the employee's serving on a jury,[5] participating in political activities,[6] filing a workmen's compensation claim,[7] or reporting certain statutory violations.[8] Among the most notable statutes limiting employers' power to terminate are Title VII of the Civil Rights Act of 1964,[9]

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1. The doctrine of employment at will holds that employment for an uncertain duration can be terminated at any time and for any reason by either party. *See, e.g.*, Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), "[a]ll 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," *overruled* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). *See also* Empl. Coordinator (Research Inst. Am.) EP-22,681 n.3 (1984) (compiling cases approving the doctrine of employment at will). It has been estimated that 60-65% of American workers are employees at will. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 n.2 (1980).

2. At one time, state and federal statutes that interfered with employers' power to terminate at will were held to be unconstitutional. *See* Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). This line of cases was later discredited. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937); Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 570-71 (1930).

3. Numerous commentators have chronicled the demise of employment at will. *E.g.*, Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMPLE L.Q. 65, 72-80 (1985); Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1 (1984); Peirce, Mann & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1982); Note, *Protecting at Will Employees, supra* note 1.

4. *See* W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION 425-62 (1985), listing state and federal statutes that prohibit discharges from employment for specified reasons.

5. *E.g.*, 28 U.S.C. § 1875 (1982); WIS. STAT. § 756.25(1) (1981).

6. *E.g.*, CAL. LAB. CODE §§ 1101 and 1102 (West 1971).

7. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 8307(c) (Vernon Supp. 1984); CAL. LAB. CODE § 132a (West 1971 and Supp. 1986).

8. *E.g.*, 29 U.S.C. § 660(c) (1982) (prohibits retaliatory discharge for reporting violation of Occupational Safety and Health Act of 1970).

9. 42 U.S.C. § 2000e-2 (1982) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

the Age Discrimination in Employment Act (ADEA),[10] and state fair employment laws,[11] which make it illegal to discharge an employee because of his membership in a class protected by the statute.

Recently, courts have joined this assault on the power of termination by formulating several new causes of action through which an employee who was wrongfully discharged could recover damages from his former employer.[12] Different standards have been articulated to distinguish the wrongful discharge from a permissible exercise of managerial discretion. Some courts have applied the implied covenant of good faith and fair dealing to employment contracts, and will permit an employee to recover damages for breach of this implied covenant.[13] More widely accepted is the notion that a discharge is wrongful (and tortious) if it violates some clear public policy.[14] At least three-fifths of the states have recognized some form of a common law remedy for wrongful discharge.[15]

As the common law of wrongful discharge matures, the focus of courts' attention has shifted from determining whether a cause of action should be recognized to determining how the cause of action should be limited. One issue that has arisen repeatedly is whether common law remedies for wrongful discharge should be available to a person who was discharged in violation of a state or federal statute that prohibits employment discrimination.

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against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII also forbids discrimination against any individual who opposes practices that are forbidden by the statute. 42 U.S.C. § 2000e-3(a) (1982).

10. 29 U.S.C. §§ 621-34 (1982). Section 623 of the ADEA states that:

(a) [i]t shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Individuals within the class protected by the ADEA are those between the ages of 40 and 70. 29 U.S.C. § 631(a) (1982). The ADEA further prohibits retaliatory action against any employee who opposes a practice that violates the Act. 29 U.S.C. § 623(d) (1982).

11. All but four states have some form of fair employment statute forbidding discrimination in employment. W. HOLLOWAY & M. LEECH, *supra* note 4, at 277 n.149 (1985). For a complete listing of state fair employment practice statutes, see *id.* at 430-62. *See also* STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION (BNA) (1964).

12. One of the earliest cases to articulate a cause of action for wrongful discharge was decided in 1959. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 186, 344 P.2d 25, 27 (1959). However, the trend toward recognition of a common law right of action did not gather strength until the middle of the 1970s. *See* authorities cited at note 3, *supra*, for discussion of the development of the action for wrongful discharge.

13. *See infra* notes 62-67 and accompanying text.

14. *See infra* notes 45-61 and accompanying text. Arizona recognized a claim for wrongful discharge in Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (wrongful discharge when discharged for refusing to violate indecent exposure laws).

15. *See* Lopatka, *supra* note 3, at 1. *See also* Empl. Coordinator (Research Inst. Am.) EP-22,695, at 82,689-701 (1984) (table illustrating jurisdictions that have recognized common law theories of wrongful discharge).

Individuals who lose their jobs because of status-based discrimination have a strong incentive to seek common law remedies for wrongful discharge. Common law actions for wrongful discharge emphasize litigious solutions. A plaintiff may submit a case to a jury[16] and, if successful, recover potentially large sums in damages.[17] This occurs without the tortuous procedures,[18] short statutes of limitations, administrative efforts at conciliation, and limited remedies that characterize statutory enforcement schemes.[19] Employment discrimination statutes, on the other hand, provide enforcement mechanisms that typically feature short statutes of limitation,[20] limited remedies for successful plaintiffs,[21] and an emphasis on conciliation and out-of-court settlement.[22] In addition, employment discrimination plaintiffs are unlikely to receive a jury trial.[23]

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16. *See* Lopatka, *supra* note 3, at 4, discussing the significance of trial by jury in a wrongful discharge case:

> [M]ost commentators fail to reckon with the implications of permitting juries sympathetic to the "common man" to second-guess managerial judgments regarding an employee's attitude, loyalty, exertion, creativity, and fit, or to choose freely between the nasty reasons for termination proffered by the disgruntled ex-employee and the wholly different explanations given by the employer, and then to award enormous damages.

17. The measure of damages in a common law wrongful discharge action depends on whether the action is considered to lie in contract or tort, but even then the measure varies from state to state. In states in which the action lies in tort (as is typical for the public policy theory), the compensatory remedy may include such items as past and future wages, mental anguish, loss of professional reputation, and moving expenses. *E.g.*, Wiskotoni v. Michigan Nat. Bank-West, 716 F.2d 378, 388-92 (6th Cir. 1983) (discharge for being subpoenaed to appear before a grand jury, plaintiff was entitled to lost wages, mental anguish, and loss of professional reputation damages). *But see* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (limiting compensatory remedy to reinstatement and back pay); Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983) (action for wrongful discharge sounds in tort, but measure of damages is limited to contract remedies with possibility of punitive damages in appropriate cases), *rev'd*, 101 N.M. 687, 687 P.2d 1038 (1984) (consideration of dismissal for failure to state a claim is legal rather than evidentiary matter). For a general discussion of damages for wrongful discharge, see W. HOLLOWAY & M. LEECH, *supra* note 4, at 397-421.

Punitive damages are available in wrongful discharge cases in some states. *See generally*, Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985).

18. *See* S. AGID, FAIR EMPLOYMENT LITIGATION (2d ed. 1979) 6-11 for an overview of the mechanics of filing a Title VII claim. For an example of the procedural prerequisites to recovery under the ADEA, *see* Hovey v. Lutheran Medical Center, 516 F. Supp. 554, 556-57 (E.D.N.Y. 1981).

19. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION, 739-40 (2d ed. 1983).

20. For example, Title VII requires that a claim be filed within 180 days from the date of the discriminatory act. 42 U.S.C. § 2000e-5(e) (1982). *See* Greenbaum, *supra* note 3, at 86 n.138, for a list of statutory filing periods for state fair employment laws.

21. For a discussion of the remedies available under Title VII, see B. SCHLEI & P. GROSSMAN, *supra* note 19, at 1395-1465; Note, Kyriazi v. Western Electric Co.: *Damages for Sexual Harassment Title VII and State Tort Law*, 10 CAP. U.L. REV. 657, 662-66 (1981). For a discussion of the remedies available under the ADEA, see B. SCHLEI & P. GROSSMAN, *supra* note 19, at 520-27. *See supra* note 17, for a discussion of the range of damages that may be recovered in a common law wrongful discharge case.

It should be noted, however, that the successful Title VII or ADEA plaintiff will be awarded attorneys' fees. B. SCHLEI & P. GROSSMAN, *supra* note 19, at 528-29, 1466-1511. Under the "American rule," which requires each party to bear his own transactional costs in the absence of a contract or statute providing otherwise, a successful plaintiff in a common law wrongful discharge suit normally would not be reimbursed for his attorneys' fees. *See* Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 614, 615-19 (1983).

22. Greenbaum, *supra* note 3, at 87. For a discussion of EEOC conciliation, see S. AGID, *supra* note 18, at 10-11; B. SCHLEI & P. GROSSMAN, *supra* note 19, at 492-93.

23. Jury trials are not permitted in Title VII actions. *E.g.*, United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 940 (10th Cir. 1979) citing Great American Fed. Savings & Loan Ass'n

A number of courts have permitted victims of discrimination to pursue common law remedies for wrongful discharge.[24] They reason that employment discrimination statutes make it abundantly clear that it is against public policy for a discharge to be motivated by illegal discrimination, and such a discharge amounts to a public policy tort or a breach of the implied covenant of good faith. The majority of courts that have considered the issue have rejected this approach, however.[25] The usual grounds given are that no common law remedy is needed when a statutory remedy is available or that permitting common law actions for wrongful discharge interferes with the statutory scheme developed by the legislature.

If common law wrongful discharge actions increase the likelihood of full compensation for victims of employment discrimination, their availability can be viewed as an effective deterrent to employment discrimination which serves the substantive policies underlying the various statutory schemes. On the other hand, permitting common law wrongful discharge actions in cases in which the legislature has developed a specific procedural and remedial framework can be seen as a usurpation of legislative prerogatives defeating the balance of countervailing interests struck by the legislature.

The purpose of this Article is to suggest a resolution of this unsettled area of law. It first discusses the wrongful discharge theories that are implicated by discriminatory discharge. It then examines the current cases in which courts have considered whether common law remedies for wrongful discharge should be available when the discharge violated an employment discrimination statute. Finally, it contends that the application of common law remedies in cases of discriminatory discharge furthers the policies that underlie both employment discrimination statutes and the common law of wrongful discharge.

COMMON LAW ACTIONS FOR WRONGFUL DISCHARGE APPLICABLE TO DISCRIMINATORY DISCHARGE

The Development of the Common Law of Wrongful Discharge

Traditional English law presumed that employment contracts of uncertain duration were for a term of one year.[26] During that term, the employ-

v. Novotny, 442 U.S. 366 (1979). *See also* B. SCHLEI & P. GROSSMAN, *supra* note 19, at 740 n.9; Greenbaum, *supra* note 3, at 69.

24. *E.g.*, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982); Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985); Holien v. Sears, Roebuck & Co., 66 Or. App. 911, 677 P.2d 704, *aff'd*, 298 Or. 76, 689 P.2d 1292 (1984). *Cf.* Deramo v. Consolidated R. Corp., 607 F. Supp. 100 (E.D. Pa. 1985) (employee's action for breach of implied contract not foreclosed by action under state and federal law for age discrimination).

25. *E.g.*, Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982); Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984); Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985); Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d 1137 (1984) *aff'd* 109 Ill. 2d 1, 485 N.E.2d 312 (1985).

26. L. LARSON & P. BOROWSKY, UNJUST DISMISSAL § 2.02 at 2-2 (1986); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 121 (1976).

ment could not be terminated without just cause or reasonable notice.[27] This rule protected agricultural workers from being left without support during the winter, but it was not limited to agricultural workers.[28] Early American courts may have followed the English rule, but not uniformly.[29]

The American rule that employment for an uncertain duration is terminable at will can be traced to 1877, when Horace Gray Wood published a treatise on the law of master and servant that contained the statement that "a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."[30] Although the authority for this proposition was questionable,[31] Wood's employment at will rule was rapidly adopted by American courts. This is not surprising, given the historical context in which the rule was introduced. In an era of legal formalism, Wood's rule was attractive because it made possible easy and consistent decisions.[32] It also meshed with prevailing laissez-faire social and economic theory.[33]

The employment at will rule, which was originally stated as a presumption that could be rebutted,[34] eventually hardened into a substantive limitation on contracts of employment.[35] Evidence that could establish an implied-in-fact contract term in other contractual contexts was insufficient to establish an implied-in-fact term of employment.[36] Even express promises of continued employment were deemed to be unenforceable unless the employee had given some special, independent consideration beyond his or her personal services.[37]

Employers' unfettered power to terminate employees began to wane in the 1930s, when social and political pressures to improve the protection of American workers' economic interests led to the enactment of the 1935 National Labor Relations Act.[38] This statute made it possible for workers to

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27. [I]f the hiring be general without any particular time limited, the law construes it to be a hiring for a year;. . .and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of this term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace, but they may part by consent, or make a special bargain.

1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 425-26 (5th ed. 1872). *See also* P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 123-31 (1969), discussing the characteristics of the traditional English law of master and servant.

28. L. LARSON & P. BOROWSKY, *supra* note 26, § 2.02 at 2-2 to 2-3.

29. *Id. See also* Feinman, *supra* note 26, at 122-29.

30. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

31. A number of modern commentators have criticized Wood on the ground that the precedents he cited as authority did not support his assertion of the rule of employment at will. *E.g.*, L. LARSON & P. BOROWSKY, *supra* note 26, § 2.04 at 2-7; Feinman, *supra* note 26, at 125-27. *But see* W. HOLLOWAY & M. LEECH, *supra* note 4, at 27-28, defending Wood's scholarship.

32. L. LARSON & P. BOROWSKY, *supra* note 26, § 2.04 at 2-7.

33. *Id.* at 2-7 to 2-9.

34. W. HOLLOWAY & M. LEECH, *supra* note 4, at 27.

35. H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.3 at 6 (1984).

36. *Id.*

37. *Id.* § 1.3 at 7. *See, e.g.*, McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); Ohio Table Pad Co. of Indiana, Inc. v. Hogan, 424 N.E.2d 144, 147 (Ind. Ct. App. 1981). *But see* Pine River St. Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983). *See also* W. HOLLOWAY & M. LEECH, *supra* note 4, at 43-55 for a complete discussion of consideration principles applicable to the employment relationship.

38. 29 U.S.C. §§ 151-68 (1982). *See also* L. LARSON & P. BOROWSKY, *supra* note 26, § 2.05 at 2-11.

organize and bargain collectively for job security[39] and prohibited retaliatory discharge of workers who had exercised these rights.[40] Many other state and federal statutes that protect employment in certain specified contexts have been enacted since that time.[41] These statutes indicated legislative judgment that the power of termination was to be subordinated to the dictates of public policy.

Statutory protection against termination was spotty at best, however. The statutes focused on protecting specific types of workers, such as civil service employees, union members, or members of groups that had been the victims of discrimination.[42] Many instances of discharges that contravened important public policies or were palpably unfair remained unaddressed by any statute.

Encouraged by the policies indicated by these statutes, courts began to extend remedies to employees discharged in contexts not addressed by statutes. Courts modified traditional contract doctrines so as to ease the establishment of implied-in-fact contracts, even where the promise of job security was contained in handbooks and personnel literature.[43] They also created causes of action whereby an employer would be liable for damages if it discharged the employee for a reason that violated public policy. In some states, courts imposed on the employer an extra-contractual duty to act fairly and in good faith. These last two theories of recovery are implicated when an employee is discharged for a reason that violates an employment discrimination statute. Each will be discussed in more detail below.

Despite the fact that courts have amplified the legislative judgment that employers' power to terminate is subordinate to the public good, they have not gone so far as to require just cause for every discharge.[44] Instead, courts have attempted to articulate theories that would permit managers to retain necessary flexibility and control over the workplace, while prohibiting various abuses of this power.

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39. *See* 29 U.S.C. §§ 157, 158 (1982). Most collective bargaining agreements require just cause for dismissal. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320-21 n.5, 171 Cal. Rptr. 917, 921 n.5 (1981) (citing Peck, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979), estimating that 80% of collective bargaining agreements include just cause clauses).

40. L. LARSON & P. BOROWSKY, *supra* note 26, § 2.05 at 2-11.

41. *See, e.g.*, the authorities cited at notes 4-10, *supra*.

42. H. PERRITT, *supra* note 35, §§ 1.4-1.7 at 8-10.

43. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Weiner v. McGraw-Hill, Inc., 57 N.Y.S.2d 458, 465-66, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982). *But see* Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (Mont. 1982) *rev'd on other grounds* 668 P.2d 213 (1983). *See generally* Note, *Employee Handbooks and Employment-At-Will Contracts*, 1985 DUKE L.J. 196.

44. *See* W. HOLLOWAY & M. LEECH, *supra* note 4, at 261-63, distinguishing retaliatory discharge from arbitrary discharge.

The case that comes the closest to requiring just cause in the absence of explicit assurances of continued employment is Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980) (termination of employment after 18 years of service without good cause offends implied covenant of good faith and fair dealing).

The Public Policy Theory

Under the public policy theory, an employee who was discharged for a reason that violates an independent public policy has a right of action against his employer, usually one in tort.[45] This theory can be traced to the 1959 case of *Petermann v. International Brotherhood of Teamsters*.[46] In *Petermann*, the California Court of Appeals held that the plaintiff, who had been discharged because he had refused to commit perjury, had a cause of action against his former employer for breach of contract.[47] The court stated that it would be patently contrary to the public welfare to permit an employer to make continued employment dependent on the employee's commission of a felonious act.[48] *Petermann* did not have much influence outside of California until the 1970s,[49] when it began to be cited by courts of other states as authority for the creation of a right of action for workers who were discharged in retaliation for filing a workmen's compensation claim.[50]

Courts in other states adopted this new right of action and applied it in other contexts,[51] basing this new right of action on the public interest in preventing employers from using their power of termination to subvert important public policies.[52] The public policy theory has proliferated; today courts in approximately half of the states have adopted it.[53] Commentators

45. *E.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 131, 421 N.E.2d 876, 879 (1981); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984); McQuary v. Bel Air Convalescent Home, Inc., 69 Or. App. 107, 109, 684 P.2d 21, 23 (1984). Some public policy cases state that the recovery of successful plaintiffs would be limited to contract remedies. *See* Vigil v. Arzola, 101 N.M. 682, 699 P.2d 613 (Ct. App. 1983), *rev'd on other grounds*, 101 N.M. 687, 687 P.2d 1984); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 569, 335 N.W.2d 834, 841 (1983).

46. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

47. *Id.* at 190, 344 P.2d at 28.

48. *Id.* at 189, 344 P.2d at 27.

49. L. LARSON & P. BOROWSKY, *supra* note 26, § 2.06 at 2-14.

50. *See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). For a general discussion of retaliatory discharge in this context, see Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551 (1986).

51. *E.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (employee discharged for reporting company's violation of state food and drug law to superior); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee discharged for serving on a jury); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (employee discharged for attempting to correct employer's violations of federal and state banking laws); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (employee discharged in violation of state law prohibiting lie detector test as condition of employment) *cert. denied* 304 Md. 631, 500 A.2d 649 (1984); Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982) (employee discharged for following state regulation and code of ethics of profession).

52. As one court stated, "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy." Palmateer v. International Harvester Co., 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981).

For discussions of the types of public policies that have been recognized as giving rise to a cause of action, see W. HOLLOWAY & M. LEECH, *supra* note 4, at 264-96 and L. LARSON & P. BOROWSKY, *supra* note 26, § 6.02-6.06 at 6-5 to 6-44.

53. H. PERRITT, *supra* note 35, § 5.7 at 175. Professor Love reports that since 1973, 27 jurisdictions have provided some form of a remedy for retaliatory discharge of employees fired for pressing workmen's compensation claims. Love, *supra* note 49, at 555. Some jurisdictions have rejected the public policy theory. *See* Parker v. National Corp. for Housing Partnerships, 619 F. Supp. 1061 (D.D.C. 1985); Johnson v. Gray, 443 So. 2d 924 (Ala. 1983); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 481 N.Y.S.2d 232 (1983); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978); Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. Ct. App. 1981); Maus v. National Living Centers, 633 S.W.2d 674 (Tex. Ct. App. 1982). *But see* Suchodolski v. Michigan Consol. Gas Co.,

Holloway and Leech ascribe the relatively sudden acceptance of the public policy theory to courts' recognition that the doctrine of employment at will "conflicts with the true expectations of the parties and exposes employees to abuse."[54]

The primary focus of the public policy theory is on the public interest rather than on any property interest the employee might have in continued employment. This theory does not require that the employer have good cause to discharge an employee. In fact, courts have been careful to distinguish situations in which the employee was embroiled in a purely personal dispute with the employer from those in which the public interest was clearly implicated by the discharge.[55]

The major weakness of the public policy theory is that it is difficult to define the type of a public policy that, if violated, would give rise to a cause of action.[56] A broad concept of public policy based on some ill-defined notion of the public good could result in a significant loss of predictability and a greater intrusion into managerial decisionmaking. Because a manager could not predict whether a given discharge would be wrongful, he or she might retain an unproductive or troublesome employee rather than risk liability.[57] A broad conceptualization of public policy would also be likely to produce high litigation costs[58] and promote nuisance suits by reducing the requirements for a prima facie case.[59] If the public policy theory is to place only specific outer limits on an employer's power of termination and not to permit judicial review of all discharges, the concept of public policy applied by a court should be relatively concrete.

Although a few courts have rejected the need for an explicit declaration of public policy,[60] most of the courts that have adopted the public policy theory condition recovery on the plaintiff's ability to identify a "clear mandate of public policy," as expressed in a specific statute, constitutional provi-

412 Mich. 692, 695-96, 316 N.W.2d 710, 711-12 (1982) (per curiam) (citing other Michigan cases and Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979), which allowed claims based on a wrongful discharge after filing a worker's compensation claim).

54. W. HOLLOWAY & M. LEECH, *supra* note 4, at 252.

55. *E.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 131, 421 N.E.2d 876, 879 (1981); Scroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977). For examples of some circumstances under which discharges have been deemed to be purely personal, see Boresen v. Rohn & Haas, Inc., 526 F. Supp. 1230 (E.D. Pa. 1981) (dispute about personnel policies); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982) (dispute about quality of internal management); Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668 (Ind. Ct. App. 1984) (worker destroyed pair of work gloves).

56. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981) (imprecision of public policy is the "Achilles heel" of the public policy theory). *See* the discussion in L. LARSON & P. BOROWSKY, *supra* note 26, § 6.01 at 6-3 to 6-5.

57. *See* Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 226-28 (1982).

58. *See* Geary v. United States Steel Co., 456 Pa. 171, 181, 319 A.2d 174, 179 (1974).

59. *See* Whittaker v. Care-More, Inc., 621 S.W.2d 395, 397 (Tenn. Ct. App. 1981). *See also* Note, *supra* note 57, at 228.

60. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Petrik v. Monarch Printing Co., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982); Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981).

sion, or prior decision.[61] Because a statutory declaration of public policy affords greater predictability than does a judicial declaration, there appears to be a strong preference for enacted law as a source of public policy.[62]

There can be no doubt that employment discrimination statutes show the existence of strong public policies against unfair discrimination and deprivation of opportunity with sufficient clarity to meet the criteria that courts have set out for the type of public policy that can give rise to a cause of action. It would be difficult to contend that statutes such as Title VII and the ADEA do not reveal an important public policy or that managers were unaware of the statutory prohibitions and were unable to predict the types of discharges that would be illegal under the statutes. As we shall see, however, it can be argued that because these statutes remedy discharges that violate the public policy against discrimination, an additional remedy provided by the public policy theory would be duplicative.

The Implied Covenant of Good Faith and Fair Dealing

A second theory of wrongful discharge applicable to discharges in violation of employment discrimination statutes is breach of the implied covenant of good faith and fair dealing.[63] The theory, which is an extension of the extracontractual duty applied in sales and insurance law,[64] implies a duty on the part of the employer to deal with the employee in good faith.[65] This approach focuses both on policing unsavory conduct and on preventing frustration of the employee's reasonable expectations.[66] Under the implied covenant of good faith, judicially declared policies and notions of fairness are treated as being incorporated into the contract,[67] although a violation of public policy is not a prerequisite for a cause of action under the implied covenant.[68]

Although the concept of good faith is highly malleable,[69] it is clear that requiring good *faith* is not synonymous with requiring good *cause* for a dis-

61. *E.g.*, Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

62. *E.g.*, Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 379, 652 P.2d 625, 630 (1982); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980), *petition for trans. denied*, 421 N.E.2d 1099 (Ind. 1981).

63. *See* Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982) (age discrimination); McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980) (age discrimination).

64. *E.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). Several courts have cited insurance cases as authority for the extension of the implied covenant of good faith and fair dealing in employment contracts. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063, 1066 (1982), *rev'd on other grounds*, 668 P.2d 213 (Mont. 1983).

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

66. *E.g.*, Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985).

67. *See* Note, *supra* note 57, at 216-22.

68. Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 263-64, 215 Cal. Rptr. 860, 867-68 (1985).

69. A number of courts have rejected the application of the implied covenant of good faith in employment contracts because the concept of good faith is so amorphous. *E.g.*, Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 377, 652 P.2d 625, 629 (1982); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 569, 335 N.W.2d 834, 838 (1983).

charge.[70] Good faith means the absence of a bad faith reason for the discharge or bad faith conduct in the discharge.[71] Most of the cases in which employees have been successful in establishing breach of the implied covenant of good faith have involved an employer's reasons for terminating the employee. In these cases, the essence of the employer's wrongful conduct has been an ulterior motive for the discharge that was not related to the employee's job performance.[72] For example, bad faith has been found where the employer discharged the employee to avoid paying him some benefit that otherwise would have been due him,[73] to retaliate against the employee for refusing a supervisor's sexual advances,[74] and for filing a lawsuit against the employer.[75]

The discharge of an employee on grounds of race, sex, age, or other forbidden criteria would fit squarely within the concept of breach of the implied covenant of good faith and fair dealing. Such a discharge is based on an unsavory motive not related to job performance, which frustrates the employee's reasonable expectations. Thus, it would appear to provide ample grounds for an action in a state that recognizes the implied covenant of good faith and fair dealing.

COMMON LAW REMEDIES FOR DISCRIMINATORY DISCHARGE: THE CASE LAW

The availability of common law remedies for wrongful discharge in instances of employment discrimination has been tested in a number of cases, but an active controversy remains regarding the use of a common law remedy when a statutory remedial framework exists.

Common Law Remedies Available for Discriminatory Discharge

One of the earliest cases to recognize the availability of a wrongful discharge remedy in a case of status-based discrimination was *McKinney v. National Dairy Council.*[76] The plaintiff in *McKinney*, an employee at

70. *See* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); Magnan v. Anaconda Indus., Inc., 37 Conn. Supp. 38, 429 A.2d 492 (1980); Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 429 N.E.2d 21 (1981); Siles v. Travenol Laboratories, Inc., 13 Mass. App. 354, 433 N.E.2d 103 (1982). *Cf.* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (longevity of plaintiff's service and defendant's expressed personnel policies operate as form of estoppel to preclude discharge without good cause).

71. *See* Krauskopf, *supra* note 3, at 215.

72. In a few cases, however, the employer's bad faith is more procedural than substantive. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employment of 18 years terminated without fair and honest investigation and hearing and appeal); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982) (employer's bad faith found in its deceptive conduct in obtaining the employee's resignation) *rev'd on other grounds*, 668 P.2d 213 (Mont. 1983).

73. *See* Mitford v. Lasala, 666 P.2d 1000 (Alaska 1983); Maddaloni v. Western Mass. Bus Lines, Inc., 386 Mass. 877, 438 N.E.2d 351 (1982); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

74. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). *Monge* was the original case articulating a right of action for "bad faith" discharge. Subsequent New Hampshire case law restricts *Monge* by requiring both bad faith and a violation of public policy. *See* Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981).

75. Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985).

76. 491 F. Supp. 1108 (D. Mass. 1980). *McKinney* was not the first such case. *See also* McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975) (dismissal of ADEA claim did not require

will,[77] was discharged at the age of 60, after 19 years of employment. Asserting that his discharge violated the implied covenant of good faith and fair dealing, he brought suit against his former employer.[78] In effect at the time of McKinney's discharge were a Massachusetts statute[79] and the ADEA,[80] both of which forbid age discrimination in employment against persons of McKinney's age.

The district court first noted that there were strong arguments against finding a cause of action.[81] The relevant statutes provided for relief that was conditioned on compliance with specific requirements, such as timely filing and submission of a complaint with an administrative agency.[82] The court suggested that the remedial scheme might indicate legislative intent to preempt the area, since the statutory remedies would not be necessary if they were designed to augment common law rights.[83] The statutory schemes were the products of "the respective legislatures' weighing and balancing of the competing concerns of employer and employee."[84] Because the statutory schemes could be easily circumvented by the recognition of a common law cause of action based on the same policies that the statutes were designed to vindicate, the court indicated that it would not lightly undertake an action that would alter the balance struck by the legislatures.[85]

Although the court was well aware of the arguments that could be made against applying a common law remedy, it viewed the facts presented as falling squarely within the logical application of the implied covenant of good faith and fair dealing.[86] Noting that the statutes in question clearly enunciated a public policy against age discrimination in employment, the court said that it would be but a short step to conclude that an action in violation of such a public policy would constitute a breach of the implied covenant.[87] In fact, the court stated, it would be a striking limitation of the scope of the implied covenant if it were held inapplicable to a decision to terminate because of age, but applicable to other types of terminations.[88]

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dismissal of state implied contract claim based on public policy against age discrimination); Holmes v. Haughton Elevator Co., 404 Mich. 36, 272 N.W.2d 550 (1978) (cumulative judicial remedy for age discrimination); Pompey v. General Motors Corp., 385 Mich. 537, 189 N.W.2d 243 (1971) (common law cause of action for race discrimination).

77. McKinney alleged the existence of an express oral contract that provided for his continued employment until his death or normal retirement date. *McKinney*, 491 F. Supp. at 1110. Applying the New York statute of frauds, which requires a writing to evidence a contract that cannot be performed within one year or within a lifetime, the court held that his oral contract was unenforceable and that he was an employee at will. *Id.* at 1114-17.

78. *Id.* at 1118. The implied covenant of good faith and fair dealing had previously been recognized in Massachusetts. *See* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

79. MASS. GEN. LAWS ch. 151B, § 4 (1976).

80. 29 U.S.C. § 623 (1982).

81. *McKinney*, 491 F. Supp. at 1120.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. The court stated that the "analogy to the statute moves in confluence with the greater flow of the principles and policies underlying the implied covenant of good faith and fair dealing. . . ." *Id.* at 1122.

87. *Id.* at 1121.

88. *Id.*

The court said that there was no indication that the Massachusetts legislature had explicitly considered the possibility of the development of the implied covenant of good faith and fair dealing, and therefore no reason to infer that the legislature had intended to foreclose other avenues of relief for employment discrimination.[89] For these reasons, the court concluded that the defendant had violated the implied covenant of good faith and fair dealing by terminating McKinney because of his age.[90]

Several other courts that have decided that a common law wrongful discharge remedy should be available in cases of discriminatory discharge have based the cause of action squarely on the public policy against employment discrimination.[91] Other courts that have reached the same result have indicated discomfort with the common law remedy's vindicating the identical policy addressed by an employment discrimination statute or duplicating the statutory relief.[92] These courts base the wrongful discharge action on an interest or policy that is different from the statutory policy against employment discrimination.[93] They have also emphasized ways in which a common law remedy is complementary to statutory schemes dealing with employment discrimination rather than competitive with them.

For example, in *Cancellier v. Federated Department Stores*,[94] department store executives who were discharged because of their age recovered damages under both the ADEA and a state law claim for breach of the implied covenant of good faith and fair dealing. The Court of Appeals for the Ninth Circuit noted that California had applied the implied covenant of good faith and fair dealing in cases in which the employee alleged long service and the existence of personnel policies that showed an implied promise not to act arbitrarily in dealing with employees.[95]

Noting that the ADEA does not preempt the award of tort damages on pendent state claims,[96] the court also stated that the award of damages

89. *Id.* at 1122.

90. *Id. McKinney* has been repudiated in subsequent state and federal cases in Massachusetts. *See* Walters v. Harvard College, 616 F. Supp. 471 (D. Mass. 1985); Flynn v. New England Tel. Co., 615 F. Supp. 1205 (D. Mass. 1985); Crews v. Memorex Corp., 588 F. Supp. 27 (D. Mass. 1984); Melley v. Gillette Corp., 19 Mass. App. 511, 475 N.E.2d 1227 (1985).

91. *See* Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985); Wynn v. Boeing Military Airplane Co., 595 F. Supp. 727 (D. Kan. 1984); High v. Sperry Corp., 581 F. Supp. 1246 (S.D. Iowa 1984); Placos v. Cosmair, Inc., 517 F. Supp. 1287 (S.D.N.Y. 1981); Holmes v. Haughton Elec. Co., 404 Mich. 36, 272 N.W.2d 550 (1978); Pompey v. General Motors Corp., 385 Mich. 537, 189 N.W.2d 243 (1971).

92. *See, e.g.*, Cancellier v. Federated Dept. Stores, 672 F.2d 1312, 1318 (9th Cir. 1982); Pompey v. General Motors Corp., 385 Mich. 537, 552, 189 N.W.2d 243, 251 (1971).

93. *See, e.g.*, Deramo v. Consolidated Rail Corp., 607 F. Supp. 100 (E.D. Pa. 1985) (discharged employee initiated valid claims under state and federal law asserting age discrimination while also maintaining separate claim based on breach of implied contract); Savage v. Holiday Inn Corp., Inc., 603 F. Supp. 311 (D. Nev. 1985) (discharged employee had claim for age and sex discrimination under Title VII and the ADEA as well as common law claim of breach of implied covenant of good faith and fair dealing); Wynn v. Boeing Military Airplane Co., 595 F. Supp. 727 (D. Kan. 1984) (employee filed claim under § 1981 and Title VII alleging racial discrimination and also stated a cause of action by alleging breached covenant of good faith).

94. 672 F.2d 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982).

95. *Id.* at 1318. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

96. 672 F.2d at 1318, citing Kelly v. American Standard, Inc., 640 F.2d 974, 983 (9th Cir. 1981).

under state law did not duplicate the plaintiffs' relief under the ADEA.[97] The ADEA claims, which were based on age discrimination, were distinct from the state law claim, which was based on the defendant's obligation not to deal arbitrarily with the plaintiffs.[98] The source of the implied covenant of good faith and fair dealing was the employee's long service, not his status as a person covered by the ADEA.[99] Although long service makes it more likely that successful plaintiffs will be older, the implied covenant claim is not dependent on age. It could be brought by a person who was not within the age group protected by the ADEA.[100] Similarly, the damages recovered by the plaintiffs under their state tort claim did not duplicate the damages they recovered under their ADEA claim because damages for emotional distress and punitive damages are unavailable under the ADEA.[101]

The court expressed some doubt about "the wisdom of allowing open-ended state claims for breach of the implied covenant to coexist with ADEA claims, whose financial redress Congress has carefully limited to specific damage requirements. . . ."[102] It stated, however, (in an interesting twist on deference to legislative prerogatives) that it was for Congress to determine whether state law claims trenched too closely on the legislative scheme.[103]

A more extreme example of distancing the basis of the wrongful discharge action from the public policy against employment discrimination can be seen in *Lucas v. Brown & Root, Inc.*[104] In *Lucas,* the plaintiff alleged that she had been discharged for refusing her foreman's advances. She filed Title VII and state law actions for wrongful discharge and intentional infliction of emotional distress against her former employer. The Title VII action was dismissed as untimely because she filed it one day too late.[105]

Rejecting the defendant's claim that Lucas should not be allowed to circumvent Title VII and pursue a state law claim after having failed to comply with the statutory time limits, the Court of Appeals for the Eighth Circuit stated that Title VII did not preempt the claim for wrongful discharge.[106] Lucas had stated a claim for wrongful discharge on the public policy theory,[107] reasoned the court, because a woman invited to trade herself for a job is in effect being asked to become a prostitute, a crime de-

97. 672 F.2d at 1318.

98. *Id. See also* Hovey v. Lutheran Medical Center, 516 F. Supp. 554 (E.D.N.Y. 1981); Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980) (both basing the abusive discharge action of an employee who had also complained of age discrimination on the public policy favoring integrity of pension rights). The viability of these decisions as precedents is cast in doubt by the New York Court of Appeals' subsequent refusal to adopt the public policy exception to the doctrine of employment at will. Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

99. 672 F.2d at 1318.

100. *Id.* at 1318 n.6. The court used an example of a 37-year-old plaintiff who had 20 years of service.

101. *Id.* at 1318. The court acknowledged earlier, however, that the liquidated damages permitted under the ADEA for willful violations functions as a substitute for punitive damages. *Id.* at 1317 n.4.

102. *Id.* at 1318.

103. *Id.*

104. 736 F.2d 1202 (8th Cir. 1984).

105. *Id.* at 1203.

106. *Id.* at 1206.

107. The Supreme Court of Arkansas previously had indicated willingness to adopt a public

nounced by statute.[108] Instead of grounding Lucas's public policy claim on the statutory policy against discrimination, the Eighth Circuit grounded it on an implied term of employment that neither party can be required to do what the law forbids.[109]

In another sexual harassment case, *Holien v. Sears, Roebuck and Co.*,[110] the Supreme Court of Oregon found that the plaintiff had a cause of action for wrongful discharge, but not because she had been subject to discriminatory sexual harassment.[111] Rather, the discharge was wrongful because it constituted a retaliation for exercising her right to be gainfully employed without submitting to sexual advances and harassment.[112] Thus, the court viewed Holien's discharge as a *retaliatory* discharge for asserting a legally protected right rather than as one motivated by status-based discrimination.[113]

The court also determined, after a lengthy and detailed examination of the legislative history of the Oregon fair employment practices statute, that the legislature had not intended to supersede any common law remedy for damages because it had not recognized that such an action existed.[114] It also found no inherent inconsistency between the availability of equitable relief through a statutory action and the availability of legal remedies for wrongful discharge[115] and no reason why the two actions could not coexist.[116] As to the adequacy of statutory remedies, the court stated:

> ORS 659.121 and Title VII fail to capture the personal nature of the injury done to a wrongfully discharged employee as an individual and the remedies provided by the statutes fail to appreciate the relevant dimensions of the problem. Reinstatement, back pay, and injunctions vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care. Legal

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policy exception to the doctrine of employment at will in an appropriate case. M.B.M. Co. v. Counce, 268 Ark. 269, 273, 596 S.W.2d 681, 683 (1980).

108. 736 F.2d at 1205.

109. *Id.*

110. 298 Or. 76, 689 P.2d 1292 (1984).

111. *Id.* at 90, 689 P.2d 1300.

112. *Id.*

113. *Id.* In his concurring opinion, Justice Linde stated that:

> [i]f plaintiff's tort claim were one for "discriminatory discharge," that is to say, if her claim were that she was discharged by reason of her sex, there would be serious doubt that the remedies for employment discrimination enacted by the legislature leave room for an action for damages or that the common law would recognize it. But this plaintiff's case does not hinge on showing that her employer. . .discharged her by reason of her sex. Her case depends on showing that Sears discharged her for exercising a legal right to resist a supervisor's sexual advances, which is a very different thing. *Id.* at 100, 689 P.2d 1305 (Linde, J., concurring). *But see* Brudnicki v. General Elec. Co., 535 F. Supp. 84 (N.D. Ill. 1982), in which the plaintiff, who was allegedly discharged for his opposition to his employer's discriminatory hiring and promoting practices, argued that the policy furthered by his wrongful discharge action was one that favored his right to be free from undue pressure and threats as distinguished from the statutory policy against discrimination. The district court replied that this was a "distinction without a difference." *Id.* at 89.

114. *Holien*, 289 Or. at 91-96, 689 P.2d at 1300-03.

115. *Id.* at 97, 689 P.2d at 1303.

116. *Id.* at 97 n.8, 689 P.2d at 1303 n.8.

as well as equitable remedies are needed to make the plaintiff whole.[117]

Many courts reaching this result have indicated awareness of the possible overlap of values protected by the two actions and the possible interference with the statutory administrative scheme that may result from parallel actions.[118] Many of them have accorded victims of discrimination relief by distinguishing the bases for the common law and statutory actions. It should be noted that this is consistent with the approach of a number of courts that reject the availability of a common law wrongful discharge action for discriminatory discharge but permit the maintenance of other tort and contract claims based on the vindication of somewhat different interests than those protected by employment discrimination statutes.[119]

Common Law Remedy "Neither Necessary nor Proper"

Most of the courts that have considered the question have rejected the notion that a discharged employee who has a possible cause of action under an employment discrimination statute might have an alternative cause of action for wrongful discharge.[120] In a few cases, this result was based on statutory language indicating clear legislative intent that the administrative mechanism and remedies established by the statute be exclusive.[121] In the remaining cases, the availability of a statutory remedy was held to foreclose a parallel common law action even though the statutes in question did not contain exclusivity provisions. These courts hold the view that the "[c]reation of a new tort would duplicate the remedies already provided for the statutorily-created right to be free from . . . discrimination, and is, therefore, not necessary or proper."[122] They reject the notion that a violation of the policy against employment discrimination is sufficient to permit plaintiffs

117. *Id.* at 97, 689 P.2d at 1303-04, citing OR. REV. STAT. § 659.121(1) (1985) which had been amended in 1977.

118. *See* cases cited *supra* notes 91-93.

119. *E.g.*, Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221 (3d Cir. 1984) (breach of contract claim); Cory v. Smithkline Beckman Corp., 585 F. Supp. 871 (E.D. Pa. 1984) (intentional infliction of emotional distress); Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318 (E.D. Va. 1983) (breach of contract claim); Shaffer v. National Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983) (intentional infliction of emotional distress). *But see* Crews v. Memorex Corp., 588 F. Supp. 27 (D. Mass. 1984) (count for intentional infliction of emotional distress dismissed because foreclosed by exclusivity provision of workmen's compensation statute). *See* L. LARSON & P. BOROWSKY, *supra* note 26, § 6.10[6] at 6-67 (discussing availability of tort actions independent of wrongful discharge claims).

120. Some federal courts have also declined to exercise pendent jurisdiction over state wrongful discharge claims. *E.g.*, Ritter v. Colorado Interstate Gas Co., 593 F. Supp. 1279 (D. Colo. 1984); James v. Kid Broadcasting Corp., 559 F. Supp. 1153 (D. Idaho 1983); Frye v. Pioneer Logging Mach., Inc., 555 F. Supp. 730 (D.S.C. 1983); Mazzare v. Burroughs Corp., 473 F. Supp. 234 (E.D. Pa. 1979). *But see* Medina v. Spotnail, Inc., 591 F. Supp. 190 (N.D. Ill. 1984); Amos v. Church of Latter Day Saints, 594 F. Supp. 791 (D. Utah 1984); Shanahan v. WITI-TV, Inc., 565 F. Supp. 219 (E.D. Wis. 1982). *See generally* Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to the Federal Courts*, 32 AM. U.L. REV. 777 (1983); Comment, *Pendent Jurisdiction in Employment Discrimination Claims: Implementing Congressional Intent to Allow Alternative Modes of Redress in a Single Action*, 31 MERCER L. REV. 781 (1980).

121. *E.g.*, Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221 (3d Cir. 1984) (interpreting Pennsylvania law); Bruffett v. Warner Communication, Inc., 692 F.2d 910 (3d Cir. 1982) (interpreting Pennsylvania law); Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d 1137 (1984), *aff'd.*, 109 Ill. 2d 1, 485 N.E.2d 312 (1985); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis. 2d 617, 305 N.W.2d 149 (1981).

122. Greene v. Union Mut. Life Ins. Co., 623 F. Supp. 295, 299 (D. Me. 1985).

to maintain alternate common law actions for wrongful discharge.[123]

Crews v. Memorex Corporation[124] is representative of the body of cases that reject the availability of common law actions in cases of discriminatory discharge. Asserting that he was discharged because of his age, the plaintiff in *Crews* brought a multicount age discrimination suit against his employer which included a count for breach of the implied covenant of good faith and fair dealing. The district court rejected his contention that age discrimination resulted in a breach of the implied covenant of good faith and fair dealing. It noted that while Massachusetts recognized the implied covenant theory,[125] and had held that a violation of public policy could give rise to a cause of action under the implied covenant,[126] none of the cases adopting such a theory involved a public policy that was already protected by a detailed, remedial statute.[127]

The fact that age discrimination was addressed by a separate statutory remedy was significant for three reasons. First, the availability of a common law action might create a duplicate remedy, which would be disfavored by state law.[128] Second, the theoretical justification for the public policy exception, that a judicially created remedy designed to vindicate public policy was necessary when no other redress for the violation existed, was absent when a statutory remedy was available.[129] Third, the availability of a common law action for wrongful discharge would interfere with the comprehensive remedial scheme. The court stated that:

> [a]n antidiscrimination statute such as Chapter 151B reflects the legislature's balancing of competing interests. Employees are protected against certain types of discharge. Employers are protected from unnecessary litigation by a relatively short statute of limitations. . .and a mandatory conciliation process. . . .The creation of a common law action would allow an employee to bypass the legislatively mandated prerequisites for judicial review.[130]

For these reasons, the court dismissed Crews's implied covenant count.[131]

The first objection expressed in *Crews*, that a common law remedy would create a duplicative remedy, presumably means that there is a danger that a more lucrative alternative avenue of recovery might increase the burden on courts or the risk to employers. Other courts have expressed the same concern.[132] It is interesting to note that even some of the courts that would not permit a common law action for discriminatory discharge have

123. *E.g.*, Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 917 (E.D. Mich. 1977); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1054-55 (E.D. Pa. 1977).

124. 588 F. Supp. 27 (D. Mass. 1984).

125. *Id.* at 28, citing Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 429 N.E.2d 21 (1981) and Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

126. *Crews*, 588 F. Supp. at 28, citing Cort v. Bristol-Myers, 385 Mass. 300, 431 N.E.2d 908 (1982).

127. *Crews*, 588 F. Supp. at 28-29.

128. *Id.*

129. *Id.* at 29.

130. *Id.* citing MASS. GEN. LAWS ANN. ch. 151B (1982).

131. *Crews*, 588 F. Supp. at 30.

132. *See* Greene v. Union Mut. Life Ins. Co., 623 F. Supp. 295, 299 (D. Me. 1985); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1056 (E.D. Pa. 1977); Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 512, 475 N.E.2d 1227, 1229 (1985).

stated that the discharged plaintiff may maintain an action for intentional infliction of emotional distress.[133] Courts have also perceived no duplication of remedies problem in permitting plaintiffs to maintain a common law action for breach of implied-in-fact contract in addition to statutory discrimination actions.[134] Apparently, the duplication problem centers around permitting the pursuit of two causes of action designed to effectuate the same policy, rather than permitting two causes of action that vindicate somewhat different interests to redress injuries that have a common factual origin.

The second objection raised in *Crews* has been echoed by a number of courts, who share the opinion that common law actions for wrongful discharge should be limited to situations in which a statute or other law states a public policy but does not provide a remedy for its violation.[135] These courts agree that the underpinnings for a wrongful discharge action are absent when a remedy for the particular public policy in question already exists.[136] They emphasize language in early wrongful discharge cases that justified the creation of a new cause of action upon the lack of any other redress for the violation of public policy.[137] These courts appear to see discriminatory discharge as distinct from other types of abuses of the power of termination, either because the particular abuse is already addressed and at least partially remedied by existing law or because the employee is discharged because of who he is rather than because of something he has done or refused to do.[138]

The final rationale of *Crews*, that judicial creation of a common law action would disrupt the statutory scheme, is perhaps the most compelling. Legislation concerning employment discrimination generally has been the subject of a great deal of debate and has required accommodation of a variety of competing interests.[139] Even procedural aspects of the legislation re-

133. *See* Cory v. Smithkline Beckman Corp., 585 F. Supp. 871, 875 (E.D. Pa. 1984); Pierce v. New Process Co., 580 F. Supp. 1543, 1546 (W.D. Pa.), *aff'd*, 749 F.2d 27 (3d Cir. 1984); Shaffer v. National Can Corp., 565 F. Supp. 909, 914 (E.D. Pa. 1983); Carsner v. Freightliner Corp., 69 Or. App. 666, 673-74, 688 P.2d 398, 402-03 (1984).

134. *See* Cory v. Smithkline Beckman Corp., 585 F. Supp. 871, 874-75 (E.D. Pa. 1984); Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318 (E.D. Va. 1983).

135. *E.g.*, Flynn v. New Eng. Tel. Co., 615 F. Supp. 1205 (D. Mass. 1985); Kamens v. Summit Stainless, Inc., 586 F. Supp. 324 (E.D. Pa. 1984); Chekey v. BTR Realty, Inc., 575 F. Supp. 715 (D. Md. 1983); Shanahan v. WITI-TV, Inc., 565 F. Supp. 219 (E.D. Wis. 1982); McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24 (E.D. Wis. 1980); Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980). *Cf.* Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. Ct. App. 1984) (plaintiff allegedly discharged in violation of employee safety statutes had no cause of action for wrongful discharge when statutes in question provided a remedy for the discharge).

136. *E.g.*, Medina v. Spotnail, Inc., 591 F. Supp. 190, 196 (N.D. Ill. 1984); Brudnicki v. General Elec. Co., 535 F. Supp. 84, 89 (N.D. Ill. 1982); Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1054-55 (E.D. Pa. 1977); Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985); Melley v. Gillette Corp., 475 N.E.2d 1227, 1228 (Mass. App. 1985).

137. *E.g.*, Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1054-55 (E.D. Pa. 1977), citing language in Frampton v. Central Ind. Gas Co., 260 Ind. 249, 252, 297 N.E.2d 425, 428 (1973); Nees v. Hock, 272 Or. 210, 216-18, 536 P.2d 512, 514-15 (1975); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 186, 344 P.2d 25, 27 (1959).

138. Some courts have contended that discharge motivated by status-based discrimination does not fit into the rubric of wrongful discharge, because state decisions had only recognized retaliatory discharge. Medina v. Spotnail, Inc., 591 F. Supp. 190, 198 (N.D. Ill. 1984); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 917 (E.D. Mich. 1977).

139. *See generally* Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043 (1967).

flect policy determinations about how those conflicting interests should be balanced.[140] The typically short statute of limitations indicates the decision that employers should not be subjected to stale claims.[141] The administrative structure for conciliation demonstrates a decision that out-of-court settlement is preferable to litigation.[142] The exclusion of damages for pain and suffering and emotional distress under Title VII,[143] the ADEA,[144] and many of their state analogues was a deliberate legislative policy decision.[145] If common law actions are available for discriminatory discharge, it seems likely that many aggrieved persons will choose to file them instead of, or in addition to, statutory actions because of the obvious benefits of a broader range of remedies, the availability of a jury trial, and a longer statute of limitations.

SHOULD COMMON LAW REMEDIES BE AVAILABLE FOR DISCRIMINATORY DISCHARGE?

When a legislature enacts a remedial statute to redress a given wrong and expresses its intent that the remedies provided should be the exclusive means of enforcing the policy addressed by the statute, the doctrine of legislative supremacy requires that courts refrain from fashioning additional remedies.[146] If all employment discrimination legislation contained exclusivity provisions, common law remedies for wrongful discharge clearly would be foreclosed in cases of employment discrimination. Few employment discrimination statutes contain exclusivity provisions, however. Title VII does not preempt state statutory, contract, or tort actions.[147] In fact, it specifically states that it was not intended to "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State."[148] The ADEA expressly states that it does not deprive a state agency of jurisdiction in age discrimination proceedings.[149] Courts have held that the ADEA does not foreclose

140. Crews v. Memorex Corp., 558 F. Supp. 27, 29 (D. Mass. 1984) (discussing statute of limitations).

141. *See* Greenbaum, *supra* note 3, at 70-71.

142. *Id.* at 71-72.

143. *E.g.*, Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981). Punitive damages are also unavailable in Title VII actions. *Id.*

144. *E.g.*, Haskell v. Kaman Corp., 743 F.2d 113, 120, 121 n.2 (2d Cir. 1984); Kolb v. Goldring, 694 F.2d 869, 872 (1st Cir. 1982).

145. *See* Holien v. Sears, Roebuck and Co., 298 Or. 76, 98-100, 689 P.2d 1292, 1304-05 (1984).

146. *See* Greenbaum, *supra* note 3, at 98; Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 566-67 (1982).

147. B. SCHLEI & P. GROSSMAN, *supra* note 21, at 739-40. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975) (despite comprehensive nature of Title VII, aggrieved individual not limited to Title VII in his search for relief); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (Title VII designed to supplement, not supplant, existing laws and institutions relating to employment discrimination); Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318, 321 (E.D. Va. 1983) (Title VII not preemptive; language and legislative history demonstrate that Title VII designed to provide additional source of rights rather than exclusive statutory scheme to remedy discrimination).

148. 42 U.S.C. § 2000e-7 (1982).

149. 29 U.S.C. § 633 (1982). Under the ADEA, a federal action supersedes a state agency action for age discrimination to the extent that the state proceeding will be stayed, but not dismissed. Dunlop v. Pan Am. World Airways, 672 F.2d 1044, 1049 n.7 (2d Cir. 1982).

state common law tort and contract actions either.[150] In addition, only six of the state employment discrimination statutes contain exclusivity provisions.[151]

Despite the fact that few employment discrimination statutes contain language expressing legislative intent that the statutory mechanism is to be exclusive, the question remains whether to presume from legislative silence disapproval or license. The courts rejecting the use of wrongful discharge actions in actionable discrimination cases presume that the statutory mechanism was intended as the exclusive means of redress, not just a preferred means or the exclusive route to one possible remedy.[152] These courts subscribe to the view that when Congress and the state legislatures selected, from among all the possible approaches to redressing employment discrimination, an elaborate administrative mechanism and equitable remedies for the enforcement of the public policy against discrimination, they impliedly foreclosed the procedures and remedies that they did not select.[153]

It is certainly possible for an employment discrimination statute to be construed as exclusive by negative implication. Such a determination, however, should be made only on the basis of exploration of the history and context of an individual statute, and not inferred from the mere fact that the statute contains procedures and remedies.[154] Given the strong federal precedent for permitting alternative avenues of relief for discrimination,[155] silence on the matter of exclusivity cannot fairly be interpreted as intent to foreclose alternative actions. In fact, such a conclusion in the face of legislative silence and ambiguous legislative history would make sense only if the judicially created remedy for wrongful discharge conflicted with the policy promoted by the statute.[156] It is important to remember that while the administrative procedures and remedies established in employment discrimination statutes do reflect policy decisions, these policies are collateral or subordinate to the primary policy furthered by employment discrimination laws.[157] Statutes such as Title VII and the ADEA were enacted for the primary purpose of eradicating employment discrimination and encouraging employment opportunity based on individual merit, not for the purpose of creating administrative agencies and complicated administrative procedures.

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150. *E.g.*, McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975); Holmes v. Haughton Elec. Co., 404 Mich. 36, 272 N.W.2d 550 (1978); Hillman v. Consumers Power Co., 90 Mich. App. 627, 282 N.W.2d 422 (1979).

151. Greenbaum, *supra* note 3, at 84 n.120, lists the following states: PA. STAT. ANN. tit. 43 § 962(b) (Purdon 1964 & Supp. 1982); KY. REV. STAT. § 344.270 (Supp. 1984); MASS. ANN. LAWS ch. 151B (West 1982 & Supp. 1984-1985); N.H. REV. STAT. ANN. § 354-A:13 (1984); N.J. STAT. ANN. § 10.5-27 (West 1976); N.Y. EXEC. LAW § 300 (McKinney 1982); W. VA. CODE § 5-11-13 (Supp. 1984).

152. *See* Greenbaum, *supra* note 3, at 97.

153. *See* Olsen, *The Public Policy Against Public Policy Wrongful Discharge Claims Premised on State and Federal Fair Employment Statutes*, 62 DEN. L. REV. 447, 462-63 (1985).

154. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 41-42 (1975) (implied meanings depend on context and are not necessarily deductible from express statements).

155. *See* Bonfield, *supra* note 139, at 1061-88 (discussing the development of Title VII); Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U. L. REV. 449, 459 (1971).

156. *See* R. DICKERSON, *supra*, note 154, at 201-02 (1975).

157. *See* Greenbaum, *supra* note 3, at 95, 109.

The public policy against discrimination is one of the most important in our society.[158] In the absence of clear evidence that a legislature intended exclusivity, it is preferable to select a course of action that furthers the primary policy of the statute. A court should not exalt the collateral policies reflected in the statutory enforcement mechanism at the expense of the primary policy that animates the statute. It seems likely that the availability of a cause of action that facilitates compensation of those who are injured by employment discrimination will operate to deter discrimination. It is difficult to see how the maintenance of a common law action that enhances the deterrent force of statutory prohibitions can conflict with the statute.

Wrongful discharge actions do not duplicate statutory discrimination actions. It is important to recognize that permitting the maintenance of a wrongful discharge suit based on public policy or implied covenant theories is not the same as implying a civil remedy for a violation of statute.[159] The wrongful discharge action is concerned with the broader question of avoiding abuses of the power of termination. Although the threshold question in a public policy suit is whether the discharge violated a public policy, it is the court's perception of public policy as indicated by some source of law or code of ethics that forms the basis of the suit.[160]

The public policy that is vindicated by the wrongful discharge action may transcend the language of the statute. A wrongful discharge suit involving discriminatory discharge is grounded in a public policy that is basic to our society and revealed in a number of sources, not just in Title VII or the ADEA. For example, a court would be within it rights to accord a common law remedy to a victim of discriminatory discharge who was not covered by Title VII because his employer employed fewer than 15 people, because the public policy against discrimination exists independently of the administrative prerequisites of Title VII.[161] In addition to grounding a discriminatory discharge suit on the public policy against discrimination existing outside of Title VII, case law demonstrates that a discriminatory discharge may implicate other policies, such as a policy favoring the integrity of pension plans.[162]

There is even less overlap between employment discrimination statutes and the implied covenant of good faith and fair dealing. While sensitive to extrinsic public policy, the implied covenant of good faith and fair dealing is concerned with dismissals that reflect bad faith and an intent to frustrate the employee's enjoyment of a contract right.[163]

The availability of common law remedies for discriminatory discharge

158. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) (Congress indicated that the policy against discrimination is of the "highest priority").

159. H. PERRITT, *supra* note 35, § 5.14, at 194, distinguishing the issue at hand from the implication of private rights of action under Cort v. Ash, 422 U.S. 66 (1975), and RESTATEMENT (SECOND) OF TORTS § 874A (1979).

160. H. PERRITT, *supra* note 35, § 5.14, at 193-95.

161. *See* 42 U.S.C. § 2000e(b) (1982). This example is discussed in L. LARSON & P. BOROWSKY, *supra* note 26, § 6.10[6] at 6-69 to 6-71, citing Williamson v. Provident St. Bank, 7 Equal Employer § 276 (Cir. Ct. Caroline County, Md., Oct. 6, 1983).

162. *See, e.g.*, Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980).

163. Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 263-64; 215 Cal. Rptr. 860, 867-68 (1985).

is logically consistent with both the public policy theory and the implied covenant theory. It is true that the theories were developed in situations in which no statute prescribed a remedy, and that the "wrong without a remedy" factor lent weight to the development of the common law of wrongful discharge. Given the procedural obstacles to recovery and the relatively paltry remedies available to successful plaintiffs under most employment discrimination statutes,[164] however, discriminatory discharge is at best a wrong with an incomplete remedy. Rather than viewing the common law of wrongful discharge as an *ad hoc* measure to fill in the gaps left by sporadic legislative protection of at will employees, one should view that body of law as an all-encompassing theory grounded on the need to protect the public from violation of its interests and employees against abuses that threaten their reasonable expectations of earning a livelihood. Discriminatory discharge fits squarely within the concept of abuse of the power of termination, which the private rights of action developed by courts were designed to remedy and deter.

As the court in *McKinney*[165] noted, it would be a striking limitation of this new body of law to accord a right of action to plaintiffs discharged in bad faith or in violation of other, more amorphous public policies and to withhold such compensation from those injured by one of the most specific and important public policies in our society.

CONCLUSION

In developing the common law of wrongful discharge, courts viewed Title VII and other antidiscrimination laws as indications of legislative intent that the power of termination was to be subordinated to the dictates of public policy. By holding that declarations of public policy and concepts of good faith and fair dealing were incorporated into the employment relationship, they embarked on a course that has had more far reaching implications for American employment law than have any of the specific statutory protections of at will employees. A decade after this trend began, courts are again considering the significance of antidiscrimination legislation. This time, the question is whether violation of such legislation is included among the class of wrongs for which the judicially created causes of action should grant recovery.

Although the answer to the question depends on a consideration of language and history of each statute in question, a court must not presume that legislative silence regarding the exclusivity of a statute means that it forecloses alternative relief for a victim of employment discrimination. The court must be guided by the primary policy underlying antidiscrimination legislation. The common law of wrongful discharge should not be viewed as a conflicting force that frustrates the enforcement scheme of antidiscrimination laws, but as a complementary force that facilitates the achievement of the goals for which such laws were created.

164. *See* B. SCHLEI & P. GROSSMAN, *supra* note 21, at 739.
165. McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980).