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A Maryland Whistleblowers' Statute

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leblowers' Statute

The wrongful discharge cause of action for at will employees, as the leading labor law issue of the 80's, has highlighted employer-employee relations and has been analyzed extensively.[1] The attraction of the subject does not stem solely from the number of jurisprudential issues, nor from the possibility of socioeconomic commentary. It is also a subject that from the practical standpoint allows the potential for recovery of punitive damages by plaintiffs and the resultant impact upon corporate deep pockets. The potential economic impact upon a business as well as the enhanced power given to employees forces consideration by employers.

At will employment encompasses all non-contractual workers. Based upon 19th century concepts of free enterprise, the common law provides that employment, for an indefinite term, may be terminated by either party at will.[2] The benefits of such an arrangement are undisputed. The very essence of business management may require the ability of the employer to dismiss employees at will. Arguments can be made that an employer need not be saddled with employees who are unable or unwilling to perform, or who the employer finds unsatisfactory for whatever reason. At the same time, the at will arrangement permits termination by employees with no explanation to the current employer. In its purest form, the doctrine does not consider the motive of either party. Termination may be arbitrary or with no reason at all. The wrongful discharge cause of action acknowledges that the benefits of at will employment may be weighted more heavily on the side of the employer. Courts which have recognized the cause of action have restricted the employer's absolute right to discharge on either a public policy theory or on implied contract terms.[3]

Maryland's Wrongful Discharge

In *Adler v. American Standard Corp.*,[4] on questions certified from the United States District Court for Maryland, the court of appeals held that Maryland recognizes the cause of action of wrongful discharge "when the motivation for the discharge contravenes some clear mandate of public policy."[5] The court did not proclaim that *Adler* was the first abrogation of the at will employment doctrine, since the purest form of the common law doctrine of at will employment which gave the employer the absolute right to discharge, had previously been abrogated by statute in Maryland.[6] Those statutes, cited in footnote 1 of the *Adler* decision, provide that an employee may not be discharged from his employment for: (1) a worker's compensation claim filed; (2) a Maryland Occupational Safety and Health Act (MOSHA) report; (3) jury service; or (4) a wage attachment under certain circumstances.[7] Although not cited in the *Adler* footnote, MD. ANN. CODE art. 49B, § 16 (1979), prohibits discrimination in the discharge of employees on the basis of race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated to the employment.[8] Further, by statute employers may not discharge the employee for failure to submit to a lie detector test.[9] Of these statutes, only the MOSHA statute and the discrimination statute provide specific remedies to the employee. The others provide penalties, fines and/or imprisonment, for their violation.

The socioeconomic reality of the work force of the 1980's is that at will employees represent the majority of all employees. Businesses in general are larger than they were at the time of the creation of the at will doctrine. Acknowledging economic changes, the *Adler* court devised a very careful balancing of interests. The court recognized that in today's economy, an employee cannot meet financial obligations without employment and that the current job market is not such that one can expect that after termination, he would be hired immediately for another job. Such marketplace and economic conditions add to the value of job security to the individual; however, that interest in job security does not outweigh the interest of business in being able to dismiss an employee with whom there is genuine dissatisfaction. When there is termination, the court would not substitute judicial review for business judgment in an effort to protect the job security interest of an individual. The only examples by the court specifying the interests of the employee that would outweigh the interests of the business are when the employee has been terminated for refusal to act in an unlawful manner or for the performance by the employee of a statutorily prescribed duty. The court suggests a difference between employees who are asked by employers to commit illegal acts and employees who discover illegal activity within the corporation.

The balance is between the individual interest in job security versus the business interest in being able to discharge any employee. The third interest that the court considered important was the interest of society "in ensuring that its laws and important public policies are not contravened."[10] What the court secured for the at will employee – a cause of action, sounding in tort with the potential of punitive damages – was very carefully limited by cloaking it with the requirement that the motivation for discharge must be contrary to a "clear mandate of public policy." The law of *Adler* leads to the conclusion that an at will employee may recover for wrongful discharge, however, absent a statute to demonstrate the mandate of public policy, the burden of pleading such a discharge may, in fact, be nearly impossible. Therefore, the result is that a statute may be necessary to provide the mandate of public policy.

Allegations of Illegal Corporate Activities

Adler, a $60,000.00 per year management employee alleged that termination by his employer was motivated by his previously reported suspicions of improper and possible illegal practices of the defendant-corporation. The alleged improprieties included payment of commercial bribes and falsification of corporate records in violation of the criminal law. Adler alleged that such practices were contrary to public policy; that the criminal law prohibiting fraudulent representations concerning corporate affairs expressed the public policy that prohibited such illegal practices.[11] The Court dismissed the Adler complaint with leave to amend. The failure to plead a violation of the criminal statute, without which there was no violation of public policy, resulted in the dismissal. The inference is that

when a plaintiff alleges that the motivation for his discharge was the result of his report of some criminal activity of his employer, to that employer, then he must allege all the elements of the crime, including the necessary criminal intent of his employer.

In *Petrik v. Monarch Printing Corporation*,[12] a case similar to *Adler*, a vice-president of the defendant-corporation alleged that he had been discharged because he had reported to his superiors that there was a possible embezzlement of corporate funds. This discovery was made in the course of his employment and brought to the attention of the president and the chief operating officer. The Illinois court held that the employee had alleged facts sufficient to withstand the employer's motion to dismiss because "public policy . . . favors citizen crime fighters."[13] The difference between the two cases stems from the required specificity of pleading and not significant differences between the courts on the broad spectrum covered by public policy.

Adler and *Petrik* both involved employees who learned of alleged criminal activity from their positions that gave them access to the information while acting within the scope of their employment. Both cases involved management level employees who discovered illegal activities and reported them within the corporate structure. Each employee demonstrated loyalty to at least the corporate hierarchy when he reported the alleged wrongdoing first within the corporation. In effect, both employees expected to be rewarded for venting their concerns internally before notifying outsiders. Should either have reasonably expected rewards for revealing knowledge of illegal acts of superiors? It can be asked why either plaintiff was motivated to pursue the wrongful discharge cause of action, when the possibility of relief was so remote. The answer, short of vindication, probably rests with the stigma that would result from the termination by an employer who could tell future employers that the reason for discharge was dissatisfaction with the employee. The result is that the employee is not only left without a current job, but may be left without job prospects in the future.

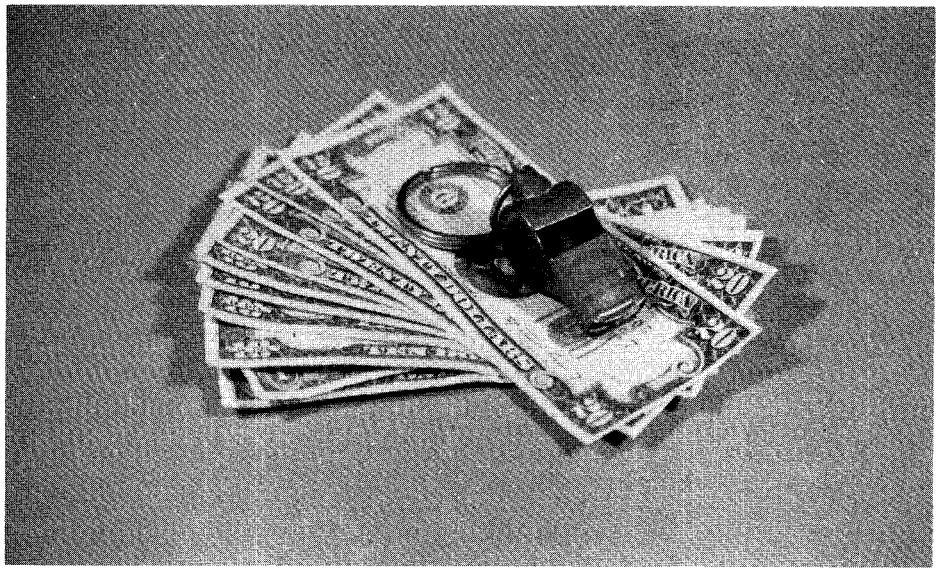
Statutory Expressions of Public Policy

There is no universally accepted definition of public policy. The conservative interpretation of courts in the wrongful discharge cause of action context is in terms of legislative enactments. The most liberal definition is in terms of what is in the best interest of the general public. Although *Adler* appears sweeping in its protection of at will employees, the decision is restrictive because the court requires a clear mandate of public policy and "that declaration of public policy is normally the function of the legislative branch."[14] In addition, in *Chekey v. BTR Realty*,[15] Judge Miller, applying Maryland law, stated that "when a statutory scheme provides a remedy for injury, that statutory scheme provides an exclusive remedy which preempts application of general civil common law, absent indication by the legislature to the contrary."[16]

It is suggested, therefore, that the Maryland legislature must take action to provide the court with specific statutory provisions upon which it can find a clear mandate of public policy in situations where an employee is privy to information which suggests possible criminal activity of the employer, without the necessity of the employee pleading the necessary elements of the criminal violation. Other jurisdictions have enacted such statutes, referred to as "Whistleblowers' statutes," to protect employees. The purposes of these statutes are to provide protection and civil remedies to employees who report a violation or suspected violation of federal, state, or local law by his employer. In addition, the statutes provide protection for employees who participate in hearings, investigations, legislative inquiries or court actions.

Three jurisdictions with protective employee statutes are Connecticut, Michigan and Maine.[17] The basic similarities of the statutes are that all three provide protection and remedies for the employee, who on his own or through another acting on his behalf, reports, verbally or in writing, a violation or suspected violation of a state, local, or federal law or regulation to a public body. The Maine statute extends the protection to an employee who reports the alleged violation to the employer, as well as a public body. It requires, however, that the employee first bring the violation to the attention of a supervisor unless the employee has "specific reason" to believe that the employer will not remedy the violation. The employee is not required to be certain, or be able to prove, that the act of the employer is a violation of the law. In Michigan, the statute requires that the employee prove by clear and convincing evidence that "he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body."[18] Likewise, the Maine statute requires proof of each element by a preponderance of the evidence. The available remedies provided in all three statutes include reinstatement, back wages, fringe benefits, seniority, costs of litigation, attorneys' fees and in Maine and Michigan, witness fees and injunctive relief.

The enactment of a Whistleblowers' statute in Maryland would provide the clear mandate of public policy sought by the *Adler* Court. Adler, a management employee, had responsibility for the analysis and accuracy of certain divisional information. Inadequacies, as well as improper and possibly illegal practices, discovered in the course of his employment were reported to his supervisors. Adler acted within the corporate structure in reporting his findings. There is no suggestion that Adler ever considered reporting the possible illegal practices to anyone outside the corporation. The Maine stat-



ute would provide a remedy to Adler since he made the report to the employer. Adoption of a statute similar to those in Michigan and Connecticut would not provide a remedy, since he did not report his suspicions to a public body; however, the statute could represent the clear mandate of public policy that is required by *Adler*. Further, the Michigan statute does not require that the employee actually report the alleged violation to a public body, but only that his discharge occurred and he "was about to report" the suspected violation.[19] The employee does not bear the burden of pleading the actual violation of law.

Arguments against enactment of a Whistleblowers' statute include the basic business management position that a business cannot properly or profitably operate if every employee has the right to second guess the legality and/or morality of all management decisions. Simply stated, an employee who thinks that his employer is acting illegally should be so dissatisfied that he should terminate his employment unilaterally. Ideally, if an employee suspects that the business is not operating legally, he should not want to be employed by that business. Realistically, financial considerations of an individual employee may not allow him the luxury of such idealism. At the same time, an employee who has reported to supervisors that he believes that illegal activities are taking place must realize the risk that he is taking and expect that supervisors may question his loyalty to the employer.

The employee, however, deserves the protection of a Whistleblowers' statute because job security is valuable, particularly when unemployment is high. Termination may leave the employee with depressed job prospects when his only failing was the refusal to ignore what reasonably appeared to him to be illegal practices of his employer. With the demand for less government, the question arises of whether wrongful discharge or a Whistleblowers' statute infuse unnecessary governmental interference with private industry. According to *Adler*, that question is answered by the balancing of the three interests: individual, business and society. The interest of society in enforcement of its criminal laws may tip the scale in favor of the enactment of a Maryland Whistleblowers' statute.

Notes

[1]Wrongful discharge has been called interchangeably wrongful, abusive or retaliatory discharge. *Adler v. American Standard Corp.*, 291 Md. 31, 36, 432 A.2d 464 n. 2 (1981).

[2]*The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1 (1984).

[3]*Recognition of a Cause of Action for Abusive Discharge in Maryland*, 10 U. BALT. L. REV. 257 (1981).

[4]291 Md. 31, 432 A.2d 464 (1981).

[5]291 Md. at 47, 432 A.2d at 473.

[6]291 Md. 31, 432 A.2d 464 (1981).

[7]MD. ANN. CODE art. 101, § 39(a) (1979); MD. ANN. CODE art. 89, § 43 (1979); MD. CTS. & JUD. PROC. CODE ANN. §§ 8-105, 8-401 (1984); MD. COM. LAW CODE ANN. § 15-605 (1983).

[8]*Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981).

[9]MD. ANN. CODE art. 100, § 95 (1979).

[10]291 Md. at 42, 432 A.2d at 470.

[11]291 Md. 31, 432 A.2d 464 (1981).

[12]111 Ill. App. 3d 502, 444 N.E.2d 588 (1982).

[13]111 Ill. App. 3d at 508, 444 N.E.2d at 592 (quoting *Palmateer v. International Harvester*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981)).

[14]291 Md. at 45, 432 A.2d at 472.

[15]575 F. Supp. 715 (D. Md. 1983).

[16]575 F. Supp. at 717.

[17]CONN. GEN. STAT. ANN. §§ 31-51M (West Supp. 1985); MICH. COMP. LAWS ANN. §§ 15.361-369 (West Supp. 1985); ME. REV. STAT. ANN. tit. 26 §§ 831-840 (Supp. 1984).

[18]MICH. COMP. LAWS ANN. § 15.363 (West Supp. 1985).

[19]MICH. COMP. LAWS ANN. § 15.363 (West Supp. 1985).

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The dissent of Justice Brennan, with whom Justice Marshall joined, stressed that the delay in the search removes any exigency that may impair reasonable efforts to obtain a warrant. Accordingly, the dissent insisted that there lacked any of the justifications for not adhering to the fourteenth amendment's warrant requirement.

The Court's decision is dangerous because it shows a total disregard for that tenuous connection between rules and their justifications. The automobile exception was based on narrow justifications; the impracticality of obtaining a warrant on something as mobile as a vehicle, the diminished expectation of privacy, and the safety of law enforcement officers. But once a closed container is taken from the automobile and placed in a warehouse, those justifications have evaporated. Departing from the established justifications makes it easier for future courts to make further unsupported extensions, which jeopardize the fourteenth and fourth amendments' protection against unreasonable searches and seizures.

In addition, by not narrowly applying the warrant requirement, the Court runs the risk that otherwise diligent police officers will momentarily become unobservant so that the stated focus of the search will be the vehicle, and not the package contained within the vehicle. This momentary lapse removes the search from *United States v. Chadwick*, 433 U.S. 1 (1977) which states that if the suspicion is focused on the closed container, a warrant is required, and puts it within *United States v. Ross*, 456 U.S. 798 (1982). This becomes an unwise rule when it rewards otherwise trivial differences in police surveillance by dispensing with the warrant requirement. A better position would be to resist the temptation to extend the automobile exception, and limit the exceptions to the warrant requirement to those within the ambit of the original justifications.

—Michael Burgoyne