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Notes: Torts — Wrongful Discharge — Maryland Limits the Scope of the Wrongful Discharge Tort Where Statutory Civil Remedies Are Available. Makovi v. Sherwin-Williams Co., 316 Md. 603, 561 A.2d 179 (1989)

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TORTS—WRONGFUL DISCHARGE—MARYLAND LIMITS THE SCOPE OF THE WRONGFUL DISCHARGE TORT WHERE STATUTORY CIVIL REMEDIES ARE AVAILABLE. *Makovi v. Sherwin-Williams Co.*, 316 Md. 603, 561 A.2d 179 (1989).

Under the traditional doctrine of employment at-will, an employer may discharge employees without cause, for any reason, at any time absent a specific contract of employment for a fixed duration.[1] The freedom of the employer under this doctrine has been eroded through statutory exceptions, contract theories, and in a less defined sense, through public policy exceptions developed under the tort theory of wrongful discharge. In *Makovi v. Sherwin-Williams Co.*,[2] the Court of Appeals of Maryland, in a 4-3 decision, limited the public policy exception by precluding a discharged employee from bringing a wrongful discharge tort action under the public policy exception because the policy allegedly affronted was contained in a statute that provided its own remedial scheme. This holding restricted further the already narrow scope of the wrongful discharge tort.[3] Consequently, it is likely that tort remedies will not be readily available as an alternative or an addition to the arsenal of statutory protections available to discharged employees.

Until the 1981 decision in *Adler v. American Standard Corp.*,[4] Maryland courts had adhered to the employment at-will doctrine.[5] Despite the inflexibility of the at-will doctrine, employees are not totally unprotected. Since 1935, a variety of statutes have been enacted at both the federal and state levels providing protection to employees from unjust discharge. For example, federal and state laws protect employees from discharges motivated by discrimination based on race, color, religion, national origin, age, sex, marital

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1. For a discussion of the history and evolution of the at-will doctrine, see Comment, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933-34 (1983).
2. 316 Md. 603, 561 A.2d 179 (1989).
3. The terms wrongful discharge, abusive discharge, and retaliatory discharge are synonomous. Adler v. American Standard Corp., 291 Md. 31, 36 n.2, 432 A.2d 464, 467 n.2 (1981). In this note, the term "wrongful discharge" is used.
4. 291 Md. 31, 432 A.2d 464 (1981).
5. *See id.* at 35, 432 A.2d at 467; *see also* State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc., 278 Md. 120, 126, 360 A.2d 1, 5 (1976); Vincent v. Palmer, 179 Md. 365, 370-71, 19 A.2d 183, 187 (1941); Washington, B & A.R.R. v. Moss, 127 Md. 12, 21, 96 A. 273, 276 (1915).

status, or physical or mental handicap.[6] Additionally, employment may not be terminated because employees engage in protected union activity,[7] file worker's compensation claims,[8] refuse polygraph examinations,[9] have their wages garnished,[10] or serve on jury duty.[11] Legislatures have been inconsistent, however, in enacting remedies for violations of those statutes. While some statutes provide civil remedies,[12] other statutes provide criminal sanctions against employers, but no civil remedy for the discharged employee.[13]

In addition to the statutory exceptions, state courts have created common law exceptions to the at-will doctrine under three basic theories. First, the employer's discretion to terminate employees at-will is limited where an express or implied contract exists. Where an employee enters into an express contract for employment, the terms and conditions of that contract will govern the termination of that employee.[14] Similarly, an implied contractual obligation may be de-

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6. *See, e.g.*, Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1988) (making it unlawful for an employer to discharge an individual because of that person's age); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (1988) (making it unlawful for otherwise qualified individuals with handicaps to be excluded from participation, denied benefits, or to be subjected to discrimination under any federal program or program receiving federal aid); Civil Rights Act of 1964, § 703, 42 U.S.C § 2000e-2 (1988) (this act is commonly referred to as Title VII, and it prohibits terminations based on race, color, religion, sex, or national origin); MD. ANN. CODE art. 49B, §§ 14-18 (1986 & Supp. 1990) (prohibiting discriminatory discharges paralleling those classes protected at the federal level).
7. National Labor Relations Act of 1935, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1988).
8. MD. ANN. CODE art. 101, § 39A(a) (1985).
9. MD. ANN. CODE art. 100, § 95 (1985 & Supp. 1990).
10. MD. COM. LAW CODE ANN. § 15-606(a) (1990).
11. MD. CTS. & JUD. PROC. CODE ANN. § 8-105 (1989).
12. *See, e.g.*, 42 U.S.C. § 2000e-5(g) (1988) (providing equitable relief for employees subjected to employment discrimination including reinstatement and back pay); MD. ANN. CODE art. 49B, § 11(e) (Supp. 1990) (remedy for violation may include reinstatment or hiring of employees with or without back pay).
13. *See, e.g.*, MD. LABOR & EMP. CODE ANN. §§ 3-702(c), (h) (1991). Section 3-702(c) provides: "An employer may not require or demand as a condition of employment, prospective employment, or continued employment, that an individual submit to or take a lie detector or similar test." Section 3-702(h) provides: "An employer who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $100."
14. Maryland has recognized this proposition since 1876 when the court of appeals held that a discharge breached an express employment contract. *See* Cumberland & Pa. R.R. v. Slack, 45 Md. 161 (1876); *see also* Pittman v. Larson Distrib. Co., 724 P.2d 1379, 1383 (Colo. Ct. App. 1986) (discharge before the expiration of an express contract period without cause establishes basis for prima facie case of wrongful discharge); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 99 (Me. 1984) (employer's promise not to terminate except for cause in consideration for services establishes express contract on which a breach of

rived from the language contained in an employee handbook.[15] Unless sufficiently specific, however, personnel policy statements by the employer do not establish a contractual obligation.[16] Second, some courts have recognized an implied covenant of good faith and fair dealing in the employment relationship, a covenant that the employer may not breach.[17] Third, the employer's discretion to terminate at-will is limited where the employer's motivation for the termination contravenes a clear mandate of public policy.[18] Maryland has recognized both the contract and public policy exceptions, but has not adopted the implied covenant of good faith exception.[19]

The public policy exception to the at-will doctrine took root in the 1959 California case of *Petermann v. International Brotherhood of Teamsters, Local 396*.[20] In *Petermann*, an employee was discharged after giving truthful testimony before a legislative committee contrary to his employer's directions to commit perjury.[21] The *Petermann* court held that as a matter of "public policy and sound morality," the employer's conduct could not be condoned.[22] The court reasoned that to "hold that one's continued employment could be made contingent upon his commission of a felonious act . . . would be to encourage criminal conduct."[23] Since *Petermann*, the public policy

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contract action may be maintained); Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 406 (Tex. Ct. App. 1987) (written contract must meaningfully provide that the employer does not have the right to terminate at will).

15. *See* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).
16. *See* MacGill v. Blue Cross of Md., Inc., 77 Md. App. 613, 620, 551 A.2d 501, 504, *cert. denied*, 315 Md. 692, 556 A.2d 673 (1989); Staggs v. Blue Cross of Md., Inc., 61 Md. App. 381, 392, 486 A.2d 798, 803-04, *cert. denied*, 303 Md. 295, 493 A.2d 349 (1985). In addition, handbooks do not create a contract if they contain a disclaimer. Castiglione v. Johns Hopkins Hosp., 69 Md. App. 325, 341, 517 A.2d 786, 793 (1986), *cert. denied*, 309 Md. 325, 523 A.2d 1013 (1987).
17. *See, e.g.*, Price v. Federal Express Corp., 660 F. Supp. 1388 (D. Colo. 1987); Prevost v. First W. Bank, 193 Cal. App. 3d 1492, 239 Cal. Rptr. 161 (1987); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Dare v. Montana Petroleum Mktg. Co., 212 Mont. 274, 687 P.2d 1015 (1984); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).
18. *See* Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Holien v. Sears Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).
19. *See supra* note 14 (contract); Adler v. American Standard Corp., 291 Md. 31, 42-43, 432 A.2d 464, 471 (1981) (public policy).
20. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
21. *Id.* at 186, 344 P.2d at 26.
22. *Id.* at 188-89, 344 P.2d at 27.
23. *Id.* at 187, 344 P.2d at 27.

exception to at-will employment has been recognized in thirty-nine states.[24]

Cases subsequent to *Petermann* have revealed that actionable employer motivations for discharging employees in violation of public policy fall within three distinct categories. First, employees have found redress under the wrongful discharge tort theory when discharged for refusing to commit an unlawful act. Included are discharges for refusal to commit perjury,[25] refusal to violate antitrust laws,[26] and refusal to violate pollution control laws.[27] Second, employees have found redress in tort when discharged for performing important public obligations such as insisting that the employer comply with state and federal product labeling and licensing laws[28] and performing jury duty against the employer's instructions.[29] Within this category are the commonly known "whistleblower" cases where employees are discharged for reporting suspected illegal activity of the employer or co-employees.[30] Third, tort remedies have been extended to employees discharged for exercising statutory or constitutional rights,[31] such as refusing to take polygraph examinations[32] and filing worker's compensation claims.[33]

The reach of the public policy exception is broad in some states,[34] and narrow in others.[35] For example, New Hampshire plaintiffs must

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24. *See* Employment At-Will State Rulings Chart, [9A Individual Employment Rights Manual] Lab. Rel. Rep. (BNA) 505:51-52 (Aug. 1989).
25. *See* Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
26. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
27. *See* Trombetta v. Detroit, T. & Ironton R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978).
28. *See* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).
29. *See* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).
30. *See, e.g.*, Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (criminal activity by co-employee); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (criminal activity by employer).
31. Several courts have implied that the constitutional right to free speech might extend to a private sector employment relationship. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Ring v. River Walk Manor, Inc., 596 F. Supp. 393 (D. Md. 1984).
32. *See* Townsend v. L.W.M. Management, Inc., 64 Md. App. 55, 494 A.2d 239, *cert. denied*, 304 Md. 300, 498 A.2d 1186 (1985); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).
33. *See* Kern v. South Baltimore Gen. Hosp., 66 Md. App. 441, 504 A.2d 1154 (1986).
34. *See, e.g.*, Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir. 1982), (age discrimination and wrongful discharge actions permissible); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (firing based on refusal to date supervisor contravened public policy); Lally v. Copygraphics, 173 N.J.

show only that the discharge was motivated by their performance of an act that public policy would encourage, or refusal to perform an act that public policy would discourage.[36] Conversely, Wisconsin requires a plaintiff both to identify the public policy and to establish that the motivation for the discharge was in contravention of that policy.[37] In each case, however, the overriding public policy considerations have tempered the employer's discretion to discharge.

When the Court of Appeals of Maryland was confronted with the issue of whether to adopt the public policy exception to employment at-will in *Adler v. American Standard Corp.*,[38] the court adopted a narrow, conservative application of that exception. In response to certified questions from the United States District Court for the District of Maryland, the court of appeals held that "a cause of action for [wrongful] discharge by an employer of an at-will employee [will lie] when the motivation for the discharge contravenes some clear mandate of public policy."[39] The court in *Adler* limited the factual basis on which a wrongful discharge action could lie and required consideration of a balance among the employer's interests,[40]

Super. 162, 413 A.2d 960 (App. Div. 1980), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981) (plaintiff may elect either a common law or statutory remedy).

35. *See, e.g.*, Smith v. Atlas Off-Shore Boat Serv., 653 F.2d 1057 (5th Cir. 1981) (plaintiff must establish employer's objective as substantial motivating factor for discharge).
36. *See* Howard v. Door Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980).
37. *See* Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980).
38. 291 Md. 31, 432 A.2d 464 (1981).
39. *Id.* at 47, 432 A.2d at 473. The court adopted the following definition of public policy:

> 'Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to administration of the law.'

Id. at 45, 432 A.2d at 472 (citing Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 605, 386 A.2d 1216, 1228 (1978) (citation omitted). The court in *Adler* further noted that declarations of public policy are normally the function of the legislative branch and to extract public policy from other sources "involves the application of a very nebulous concept to the facts of a given case." *Adler*, 291 Md. at 45, 432 A.2d at 472. In the view of one commentator, the *Adler* court's definition of public policy in the context of wrongful discharge raises considerable questions as to the scope of the public policy exception and borders on judicial legislation. *See* Abramson & Silvestri, *Recognition of a Cause of Action for Abusive Discharge in Maryland*, 10 U. BALT. L. REV. 257, 271 (1981).

40. *Adler*, 291 Md. at 42, 432 A.2d at 470. The court identified the employer's interests as important relative to the ability to discharge because of business needs. *Id.*

the employee's interests,[41] and the interests of society as intended to be protected by the public policy involved.[42] The court cited sources of public policy to include constitutions, statutes, prior judicial decisions, and administrative regulations.[43]

Adler involved an at-will employee who contended that his discharge was motivated by his employer's desire to conceal illegal corporate activities and that, therefore, his discharge was in contravention of public policy.[44] The employee had informed higher corporate officials of the improprieties of company personnel, including claims of commercial bribery, alteration of financial records, and misuse of corporate funds.[45] The court of appeals held that the employee had failed to make out a cause of action for wrongful discharge because his complaint was "too general, too conclusory, too vague and lacking in specifics to mount up to a prima facie showing that the claimed misconduct contravened" the public policy of Maryland.[46]

Since *Adler*, Maryland courts have allowed both contractual employees[47] and those who have resigned because the employer has made the working conditions intolerable[48] to bring an action for wrongful discharge. Generally, however, the courts have interpreted the action very narrowly. The court of appeals, apparently content with the conservative application favored by the court of special appeals, has displayed a marked hesitancy even to consider lower court rulings.[49] The evolution of the wrongful discharge tort in

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41. *Id.* In the court's view, the employee's interests center upon the uncertainty and financial hardship that discharge could bring, particularly where continued employment is threatened for failure to act unlawfully or acting within a statutorily prescribed manner. *Id.*
42. *Id.* The court found that society's interests consisted of "ensuring that its laws and important public policies are not contravened." *Id.*
43. *Id.* at 45, 432 A.2d at 472.
44. *Id.* at 34, 432 A.2d at 466.
45. *Id.* at 33, 432 A.2d at 466.
46. *Id.* at 44, 432 A.2d at 471.
47. *See* Ewing v. Koppers Co., 312 Md. 45, 49, 537 A.2d 1173, 1175 (1988).
48. *See* Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 653, 477 A.2d 1197, 1203, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984). The employer's actions in *Beye* consisted of allegedly failing to provide proper protection for an employee who had informed the police about illegal activities of co-employees. *Id.* at 645-47, 477 A.2d at 1199-1200. The court explained that constructive discharge is recognized where the employer's conduct deliberately causes or allows the employee's working conditions to become so intolerable that a reasonable person in the employee's position would have been compelled to resign. *Id.* at 653, 477 A.2d at 1203.
49. The court of appeals has routinely denied certiorari even though the issues presented were significant relative to the scope of *Adler*. *See, e.g.*, Townsend v. L.W.M. Management, Inc., 64 Md. App. 55, 494 A.2d 239, *cert. denied*,

Maryland cases since *Adler* has reduced the scope of the cause of action to one requiring a quite narrow and specific factual basis before a wrongfully discharged employee may even proceed beyond the summary judgment motions of defendant employers.[50]

The decision of the court of special appeals in *Kern v. South Baltimore General Hospital*[51] is illustrative of the restrictive application and narrow factual basis on which a claim for wrongful discharge may be brought. In *Kern*, a former employee filed a wrongful discharge claim contending that her discharge for absenteeism due to work related injuries was in contravention of the clear mandate of public policy embodied in Maryland's worker's compensation laws and in contravention of the state's public policy intended to protect employees from wrongful discharge for claiming statutorily mandated benefits.[52] Looking to the controlling statute, which precludes termination of employees "solely" because they file claims for benefits,[53] the court held that because the termination was for absenteeism related to occupational injuries, and not "solely" because a claim was filed, the employee did not state a cause of action based upon the statutory public policy.[54] The court reasoned that the language of the statute only precludes termination for "filing" a worker's compensation claim and that termination for other reasons, even though related to the claim, is not prohibited by the statute.[55] The court recognized that for an *Adler* wrongful discharge action to lie, there must be a violation of a sufficiently clear mandate of public policy.[56] Rejecting the employee's request to read the statute broadly for purposes of extracting public policy, the court concluded that such an expansion from the clear and unambiguous meaning of the statute is for the Legislature, not the courts.[57]

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304 Md. 300, 498 A.2d 1186 (1985); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985); Teays v. Supreme Concrete Block, Inc., 51 Md. App. 166, 441 A.2d 1109, *cert. denied*, 293 Md. 547 (1982). In other significant cases, petitions for a writ of certiorari were not sought. *See, e.g.*, Kern v. South Baltimore Gen. Hosp., 66 Md. App. 441, 504 A.2d 1154 (1986).

50. *See* Comment, *supra* note 1, at 1948 ("The *Adler* court's definition of public policy is surprisingly restrictive"); *see also*, Silkworth v. Ryder Truck Rental, 70 Md. App. 264, 269, 520 A.2d 1124, 1127, *cert. denied*, 310 Md. 2, 526 A.2d 954 (1987) (stating that the court in *Adler* recognized a very limited exception to the employment at-will rule).
51. 66 Md. App. 441, 504 A.2d 1154 (1986).
52. *Id.* at 445, 504 A.2d at 1156.
53. MD. CODE ANN. art. 101 § 39A (1985).
54. *Kern*, 66 Md. App. at 448, 504 A.2d at 1157.
55. *Id.*
56. *Id.* at 444, 504 A.2d at 1155.
57. *Id.* at 449, 504 A.2d at 1158.

The narrow application of *Adler*, as illustrated in *Kern*, has precluded plaintiffs from recovering in tort for wrongful discharge even where the employer's actions were unlawful. For example, in *Townsend v. L.W.M. Management, Inc.*,[58] the court of special appeals held that the state statute precluding discharge of an employee for refusing to take a polygraph examination is a clear mandate of public policy on which an action for wrongful discharge may be based.[59] The employer in *Townsend*, after discovering a cash theft from his business, requested four employees including the plaintiff to submit to a polygraph examination.[60] After taking the test, the plaintiff was discharged.[61] The court held that the plaintiff was discharged for theft and not for refusing to take a polygraph examination.[62] Reading the statute literally, the court reasoned that discharge for theft does not violate the public policy reflected in the statute even though the determination that the plaintiff was the thief may have been based on the results of an unlawfully required polygraph examination.[63]

In *Townsend*, the court rejected the employer's contention that the criminal sanctions for violation of the statute were exclusive remedies which would preclude a wrongful discharge action.[64] The court in *Townsend* cited the court of appeals decision in *White v. Prince George's County*[65] to distinguish exclusive remedies from others. In *White*, there existed a special "comprehensive remedial scheme" embodied in the statute for resolution of a particular

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58. 64 Md. App. 55, 494 A.2d 239, *cert. denied*, 304 Md. 300, 498 A.2d 1186 (1985).
59. *Id.* at 62, 494 A.2d at 243. The relevant statute in *Townsend* was Maryland's anti-polygraph law. *See* MD. CODE ANN. art. 100, § 95 (Supp. 1990). Both sections 95(b) and 95(g) were at issue. Section 95(b) provides:

> *Test prohibited; exemption.*—An employer may not demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof.

Id. § 95(b). Section 95(g) provides "*Penalty.*—Any employer who violates the provisions of this subtitle is guilty of a misdemeanor and subject to a fine not to exceed $100." *Id.* § 95(g).
60. *Townsend*, 64 Md. App. at 64, 494 A.2d at 244.
61. *Id.*
62. *Id.* at 70, 494 A.2d at 247.
63. *Id.* Although the court conceded that the employee probably had been required to submit to the polygraph in contravention of the statute, the court found that theft was the reason for the discharge and was dispositive of the issue. *Id.* at 69, 494 A.2d at 247.
64. *Id.* at 62, 494 A.2d at 243.
65. 282 Md. 641, 387 A.2d 260 (1978).

violation.[66] The court in *White* noted that "absent a legislative intention to the contrary, it will usually be deemed that the Legislature intended the special statutory remedy to be exclusive."[67] The court in *Townsend* reasoned that the statutory criminal remedies did not constitute a special comprehensive remedial scheme and did not apply to a class of persons protected by its provisions.[68] The analysis of the court of special appeals illustrates that the wrongful discharge tort action based on public policy is available to a plaintiff where the statute in which the public policy is embodied contains criminal sanctions but no civil remedies for employees alleging an unjust discharge.[69]

Because the damages which may be recovered in other tort actions are also available in wrongful discharge suits, discharged employees have increasingly sought to fashion their pleadings as sounding in tort.[70] The holding of the court of special appeals in *Moniodis v. Cook*[71] illustrates the benefit of this preference. In

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66. *Id.* at 647-48, 387 A.2d at 264 (citing MD. CODE ANN. art. 81, §§ 213-219 (repealed 1985)). The scheme provided that where a taxpayer erroneously or mistakenly pays to a state, county, or municipal agency more for special taxes than the taxpayer was properly and legally required to pay, the taxpayer is authorized to file a written claim for a refund and is entitled to a hearing. *Id.* at 649, 387 A.2d at 264.
67. *Id.* at 649, 387 A.2d at 265.
68. *Townsend*, 64 Md. App. at 63, 494 A.2d at 243. The court observed that the anti-polygraph statute was far from comprehensive and that discretionary prosecutorial authority for civil suits rested with the Attorney General. *Id.*
69. *See id.* The crucial distinction in *Townsend* was that the civil remedies available reached only applicants for employment. The plaintiff was not an applicant, but rather a full-time employee. Therefore, the remedial scheme set forth by the legislature in the statute did not extend to the plaintiff.
70. *See* Bacon, *See You In Court*, NATION'S BUSINESS, July 1989, at 18-20. The author describes at length the plethora of wrongful discharge cases pending nationwide and points to how plaintiffs often link a wrongful discharge claim to other tort claims for presentation to a jury. Based on juror hostility to employers, punitive damage awards have "ranged into the stratosphere." *Id.* at 20. Although Maryland has not been immune to this practice by plaintiffs, pendent tort claims do carry rather stringent requirements. For example, Maryland has strictly applied the elements of the tort of intentional infliction of emotional distress in wrongful discharge actions. *See, e.g.*, Silkworth v. Ryder Truck Rental, Inc., 70 Md. App. 264, 520 A.2d 1124 (1987) (employee's allegation that employer's act of firing was outrageous without supporting facts failed to meet outrageous requirement); Leese v. Baltimore County, 64 Md. App. 442, 472, 497 A.2d 159, 174-75, *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985) (employee's allegations of physical pain, emotional suffering, and great mental anguish were not sufficient to satisfy severity element); Continental Casualty Co. v. Mirabile, 52 Md. App. 387, 405, 449 A.2d 1176, 1187 (1982) (supervisor's actions in frequently moving employee's work station, verbally abusing him, and touching him on the nose were not sufficiently extreme and outrageous).
71. 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

Moniodis, several contractual employees were discharged following their refusal to submit to a polygraph examination.[72] Holding that the discharge was in violation of the clear mandate of public policy embodied in the state statute prohibiting polygraph examinations as a condition of employment, the court upheld a jury award of over one million dollars in compensatory and punitive damages.[73] Naturally, aggrieved employees prefer the remedies available under common law tort theories over federal and state employment statutes which often preclude jury trials as well as compensatory and punitive damages.[74] Consequently, many employees contending, for example, that their discharges were discriminatory, have sought to bypass remedial administrative procedures established in federal and state laws prohibiting discrimination, and instead have brought tort claims for wrongful discharge.[75]

The majority of the courts considering whether to extend tort relief over the statutory framework established to resolve discrimination claims have declined to do so.[76] In *Makovi v. Sherwin-Williams*

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72. *Id.* at 6-7, 494 A.2d at 214-15.
73. *Id.* at 25-26 & nn.2-4, 494 A.2d at 224-25 & nn.2-4. The statute at issue in *Moniodis* was the same as the one in *Townsend*. *See supra* note 59.
74. *See* Bacon, *supra* note 70, at 24.
75. *See, e.g.*, Parlato v. Abbott Laboratories, 850 F.2d 203 (4th Cir. 1988) (age and race discrimination); Bernstein v. Aetna Life & Casualty Co., 843 F.2d 359 (9th Cir. 1988) (age discrimination); Grubba v. Bay State Abrasives, 803 F.2d 746 (1st Cir. 1986) (age discrimination); Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (sex discrimination); Bruffet v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) (handicap discrimination); Lapinad v. Pacific Oldsmobile-GMC, Inc., 679 F. Supp. 991 (D. Haw. 1988) (sex discrimination); Napoleon v. Xerox Corp., 656 F. Supp. 1120 (D. Conn. 1987) (race discrimination); Reeder-Baker v. Lincoln Nat'l Corp., 644 F. Supp. 983, (N.D. Ind. 1986) (race discrimination), *aff'd*, 834 F.2d 1373 (7th Cir. 1987); Lofton v. Wyeth Laboratories, Inc., 643 F. Supp. 170 (E.D. Pa. 1986) (race discrimination); Salazar v. Furr's, Inc., 629 F. Supp. 1403 (D. N.M. 1986) (sex discrimination); Krushinski v. Roadway Express, Inc., 627 F. Supp. 934 (M.D. Pa. 1985) (religion discrimination); Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985) (age and sex discrimination); Crews v. Memorex Corp., 588 F. Supp. 27 (D. Mass. 1984) (age discrimination); Chekey v. BTR Realty, Inc., 575 F. Supp. 715 (D. Md. 1983) (age discrimination); Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 238 Cal. Rptr. 360 (1987) (sex discrimination); Gamble v. Levitz Furniture Co., 759 P.2d 761 (Colo. Ct. App. 1988) (handicap discrimination), *cert. dismissed*, 782 P.2d 1197 (Colo. 1989); Melley v. Gillette Corp., 19 Mass. App. 511, 475 N.E.2d 1227 (1985) (age discrimination), *aff'd*, 397 Mass. 1004, 491 N.E.2d 252 (1986); Holmes v. Haughton Elevator Co., 404 Mich. 36, 272 N.W.2d 550 (1978) (age discrimination); Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980) (age discrimination); Kofoid v. Woodard Hotels, Inc., 78 Or. App. 283, 716 P.2d 771 (1986) (sex discrimination).
76. *See infra* note 98.

Co.,[77] the Court of Appeals of Maryland joined the majority of jurisdictions rejecting the plaintiff's efforts to bypass available statutory remedies in an attempt to achieve the more liberal tort recoveries under the public policy exception to employment at-will.

Carolyn M. Makovi, employed at-will as a chemist, had been employed for nearly twenty-six months by the Sherwin-Williams Company at its paint manufacturing plant in Baltimore when she became pregnant.[78] Two months later, her employer informed her that "'she could not work at her job while pregnant' [and] 'that her pay and medical benefits would cease until she became disabled because of her pregnancy.'"[79] Makovi remained out of work for eight months and then returned to her position.[80] Construing the intervening period as a discharge motivated by sex discrimination, Makovi filed a complaint with the Equal Employment Opportunity Commission.[81] Finding no reasonable cause to believe that her allegation was true, the Commission dismissed her complaint and notified her of the right to sue in federal court under Title VII.[82] Rather than pursue the statutory remedies available under Title VII, Makovi filed a private cause of action in tort for wrongful discharge in the Circuit Court for Baltimore City.[83] The circuit court granted the employer's motion to dismiss.[84] The Court of Special Appeals of Maryland affirmed, and the Court of Appeals of Maryland granted certiorari.[85]

In *Makovi*, the Court of Appeals of Maryland held that a cause of action for wrongful discharge will not lie "where the public policy sought to be vindicated by the tort is expressed in a statute which

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77. 316 Md. 603, 561 A.2d 179 (1989).
78. *Id.* at 605, 561 A.2d at 180.
79. *Id.*
80. *Id.* at 606, 561 A.2d at 180.
81. Brief for Appellee at 6, Makovi v. Sherwin Williams Co., 75 Md. App. 58, 540 A.2d 494 (1988) (No. 87-377). Makovi referred to the intervening period of unemployment as a termination of employment. *Id.* Neither the court of special appeals nor the court of appeals considered this intervening period as anything less than a discharge. Although the plaintiff in *Makovi* did not succeed in the wrongful discharge action, an unpaid administrative leave could suffice as a discharge and could potentially subject the employer to wrongful discharge liability.
82. *Makovi*, 75 Md. App. at 60, 540 A.2d at 495.
83. *Makovi*, 316 Md. at 605, 561 A.2d at 180.
84. *Id.* at 606, 561 A.2d at 180. The circuit court treated the employer's motion to dismiss as a motion for summary judgment pursuant to Md. Rule 2-322(c). *Id.* at 606 n.3, 561 A.2d at 180 n.3.
85. *Id.* at 606, 561 A.2d at 180. Prior to reaching the court of appeals, the plaintiff had to overcome both the circuit court and court of special appeals dismissal of her claim based on an inaccurate interpretation of the force of a premature order of appeal. *See* Makovi v. Sherwin-Williams Co., 311 Md. 278, 533 A.2d 1303 (1987).

carries its own remedy for vindicating that public policy."[86] The court reasoned that the wrongful discharge tort is inherently limited to remedying discharges in violation of a clear mandate of public policy which would not otherwise be vindicated by a civil remedy.[87] Although the court recognized that the remedies available under the state and federal discrimination statutes are not exclusive and could be expanded by state legislative or judicial action,[88] the court nonetheless disallowed the cause of action because the tort was established to fill a void in the law.[89] Therefore, the court concluded that a public policy cause of action will lie only where no adequate statutory remedy is available to a plaintiff to redress a wrongful discharge by an employer.[90]

The *Makovi* court explained that the judiciary, when creating tort remedies in addition to those legislatively created, must not consider the public policy goal in a vacuum without a balanced consideration of the legislated remedies.[91] In this regard, the court found persuasive the reasoning of the Supreme Court in *Bush v. Lucas*.[92] In *Bush*, the claimant sought a new nonstatutory damage remedy to vindicate a first amendment violation.[93] The Court noted that it is not enough simply to determine that existing remedies do not provide complete relief, but that it instead required a determination of "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy."[94] The Court concluded that "Congress is in a better position to decide whether or not the public interest would be served by creating" a new substantive liability in addition to that already provided.[95] In support of its holding in *Makovi*, the court of appeals examined the legal effect of superimposing a wrongful discharge cause of action on the existing framework of employment discrimination legislation. Consistent with the Supreme Court's analysis in *Bush*, the court in *Makovi* reasoned that because the statutory exceptions to employment at-will prohibiting discriminatory employment practices also limited the remedies for such discrimination, a

86. *Makovi*, 316 Md. at 609, 561 A.2d at 182.
87. *Id.* at 605, 561 A.2d at 180.
88. *Id.* at 621-22, 561 A.2d at 188.
89. *Id.* at 605, 561 A.2d at 180.
90. *Id.* at 611-12, 561 A.2d at 183 (quoting Makovi v. Sherwin-Williams, Co., 75 Md. App. 58, 64, 540 A.2d 494, 497 (1988)).
91. *Id.* at 623, 561 A.2d at 189.
92. 462 U.S. 367 (1983).
93. *Id.* at 368.
94. *Id.* at 388.
95. *Id.* at 390.

judicial holding expanding those remedies would upset the balance between the employee's legislated rights and the remedies established by the legislature to vindicate violations of those rights.[96]

Moreover, the court examined cases in both federal and state courts in which plaintiffs sought to extend a wrongful discharge action to reach status-based[97] discharges in contravention of public policy embodied in federal and state discrimination statutes. A large majority of the other jurisdictions considering the issue declined to extend the public policy exception where a statutory civil remedy already existed to protect the aggrieved employee.[98] The few cases permitting tort recovery in addition to the statutory remedies were based on the absence of legislative preemption.[99] The court of appeals distinguished those cases because those courts had before them only preemption issues and were not confronted with the employer's argument in *Makovi* that the very nature of the tort was to fill a void in the law in order to provide a remedy where none had previously existed.[100]

The court in *Makovi* also considered the Eighth Circuit's decision in *Lucas v. Brown & Root, Inc.*[101] In *Lucas*, an employee, discharged allegedly for refusing to sleep with her foreman, based her wrongful discharge claim on public policy embodied in two separate statutes.[102] One was a discrimination statute that provided a civil remedy, and the other reflected a clear public policy statement without providing a remedy.[103] The court in *Lucas*, applying Arkansas law, held that a tort of wrongful discharge would lie on the statute with no remedy despite the available remedy under the other.[104] The court in *Makovi* left no hint as to how it would resolve a case comparable to *Lucas*.

In dissent, Judge Adkins[105] agreed that the cause of action created in *Adler* was intended to fill a void in the law.[106] The dissent,

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96. *Makovi*, 316 Md. at 626, 561 A.2d at 190.
97. "Status-based discharges" refers to persons discharged in contravention of public policy statements contained in both the federal and state employment discrimination statutes and includes employees discharged because of their status relative to race, color, religion, national origin, age, sex, marital status, or physical or mental handicap.
98. *Makovi*, 316 Md. at 613-21, 561 A.2d at 184-88. Of thirty cases, representing twenty-one states, considering an expansion of the public policy exception as asserted by the plaintiff in *Makovi*, twenty-four cases, representing sixteen states, rejected the expansion of tort remedies. *See id.*
99. *Id.* at 621, 561 A.2d at 188.
100. *Id.*
101. 736 F.2d 1202 (8th Cir. 1984).
102. *Id.* at 1203.
103. *Id.*
104. *Id.*
105. Judge Adkins was joined by Judges Eldridge and Cole. *Makovi*, 316 Md. at 626, 561 A.2d at 190.
106. *Id.* at 628, 561 A.2d at 191 (Adkins, J., dissenting).

however, disagreed with the majority's application of *Adler*. The dissent concluded that the element of the tort set forth in *Adler* which prohibits discharges based on motivations that contravene a clear mandate of public policy was the only prerequisite to the tort cause of action.[107] The dissent read *Adler* as permitting an independent tort claim whenever a discharged employee could show that the employer's motivation for the discharge contravened a clear mandate of public policy, regardless of available statutory remedies.[108] The dissent noted that in *Ewing v. Koppers Co.*[109] the court of appeals allowed a wrongful discharge action based on a public policy embodied in a statute that provided criminal remedies against the violating employer.[110] The dissent perceived *Ewing* as a positive illustration "that the existence of *some* statutory remedy will not bar a common law [wrongful] discharge action."[111]

The dissent also argued that the issue presented in *Makovi* turned on statutory preemption.[112] Although the majority and dissent agreed that the remedies contained in the state and federal discrimination statutes were not exclusive,[113] the dissent concluded that absent legislative preemption of independent tort remedies, an independent *Adler* tort action should lie.[114] Finally, the dissent concluded that such tort remedies would not upset the balance of the legislative framework of employment discrimination statutes because common law remedies supplement rather than hinder the goals of statutes.[115]

Makovi presented the court of appeals with a choice of expanding tort remedies to extend relief in addition to the remedies contemplated by the legislature or of limiting the tort to situations in which a discharge in violation of clear public policy leaves an at-will employee without a remedy. Adopting the latter position, the majority opinion clearly comports with the majority of jurisdictions that have consid-

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107. *Id.* at 628-29, 643, 561 A.2d at 191-92, 199.
108. *Id.* at 628, 561 A.2d at 191.
109. 312 Md. 45, 537 A.2d 1173 (1988).
110. *Makovi*, 316 Md. at 628-29, 561 A.2d at 191-92 (Adkins, J., dissenting).
111. *Id.* at 628, 561 A.2d at 191.
112. *Id.* at 639, 561 A.2d at 197. Following a lengthy analysis of the legislative history of the remedial schemes of both Title VII and Article 49B, and subsequent judicial interpretations of employment discrimination remedies, Judge Adkins summarized by stating, "[g]iven the established absence of legislative preemption and related doctrines, as well as the established availability of diverse remedies for employment discrimination, it is difficult for me to follow the majority's argument that the statute establishing the policy against employment discrimination itself operates to bar the common law remedy." *Id.*
113. *Id.* at 631, 561 A.2d at 192-93 (Adkins, J., dissenting).
114. *Id.* at 643, 561 A.2d at 199 (Adkins, J., dissenting).
115. *Id.* at 644-45, 561 A.2d 199-200 (Adkins, J., dissenting).

ered the issue,[116] and it represents a sound continuation of the principles set forth in *Adler*. The court in *Adler*, while not confining itself to legislative enactments, prior judicial decisions, or administrative regulations when determining the public policy of Maryland, nonetheless expressed a preference for legislative enactments as the favored source of public policy.[117] It is a logical conclusion, as the court of appeals explained in *Makovi*, that the statutory remedies provided to eliminate violations of public policy are are also a part of the policy and are not to be viewed in isolation.[118]

It is on this foundation that the court of appeals correctly rejected Makovi's position that the judicially created tort of wrongful discharge must lie unless legislatively preempted. Pointing to the policy of Congress as expressed in Title VII that nothing in the Act "shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State,"[119] the court of appeals appropriately concluded that a state's discretion to expand wrongful discharge to employment discrimination cases "is neither barred nor preordained by federal law."[120]

In declining to provide expanded remedies for discharged plaintiffs, the court of appeals chose not to combine the remedies available under two separate and distinct exceptions to the at-will doctrine. It is clear that the statutory exception to the at-will doctrine made the initial inroads to the otherwise intact employment at-will doctrine.[121] The public policy exception need not have been judicially created in the first instance had a statutory exception controlling the employer's actions already been in place.

Thus, it follows that where a statutory exception exists which provides a considered, albeit limited remedy, a second exception to the at-will doctrine need not be required because protection of the employee's interests, the employer's interests, and the interests of society have been legislatively balanced and set forth as public policy in the form of a statute. In *Makovi*, the court of appeals has made clear that the wrongful discharge cause of action is available only where an employer's actions contravene a clear mandate of public policy and leave an injured plaintiff without available redress under a remedial statutory scheme.[122] This conjunctive requirement leaves intact the legislative exceptions to the at-will doctrine established by

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116. *See supra* note 98.
117. Adler v. American Standard Corp., 291 Md. 31, 45, 432 A.2d 464, 472 (1981).
118. *Makovi*, at 621, 561 A.2d at 188.
119. *Id.* at 621, 561 A.2d at 188 (quoting 42 U.S.C. § 2000e-7 (1988)).
120. *Id.* at 621-22, 561 A.2d at 188.
121. *See supra* notes 6-13 and accompanying text.
122. *Makovi*, 316 Md. at 605, 561 A.2d at 180.

state and federal employment discrimination statutes and presumably any other employment statutes providing both a public policy and a remedy for the plaintiff for violations of that policy by his employer.

Were the court to extend tort remedies to plaintiffs discharged in contravention of public policy for which a statutory remedy exists, it would serve to encourage plaintiffs to circumvent the statutory remedial schemes legislatively developed. In addition to the back pay remedy presently provided in the discrimination statutes, for example, plaintiffs might seek the economic benefits of punitive damages under the tort theory. Discharged or constructively discharged employees, including both contract and at-will employees, would be left with no motivation to pursue claims under the statutory framework, thereby adversely affecting the entire legislative scheme.

In sum, where statutory remedies are not available to unjustly discharged employees, they may potentially reap the benefits of tort damages for wrongful discharge. Conversely, where statutory remedies are provided, the court will preclude discharged employees from pursuing a tort remedy.

Daniel S. O'Connor