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RECOGNITION OF A CAUSE OF ACTION FOR
ABUSIVE DISCHARGE IN MARYLAND

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In recent years, courts in other jurisdictions have created certain exceptions to the general rule that an at-will employee may be terminated without cause. The Court of Appeals of Maryland, in the recent case of Adler v. American Standard Corp., limited the at-will rule by recognizing a cause of action for abusive discharge. In this article, the authors trace the development of the at-will rule and exceptions to it carved out by courts and legislatures. After reviewing certain facets of the law of abusive discharge in other jurisdictions, the authors examine the Adler case and discuss the possible ramifications of this decision.

I. INTRODUCTION

For decades, despite widespread criticism,¹ courts in Maryland and other jurisdictions have remained faithful to the common law rule that an employment contract for an indefinite period of

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time is terminable at the will of either the employer or the employee. Notwithstanding its lengthy tenancy as part of the common law of the employment relationship, a number of legislatures and an increasing number of courts have carved out exceptions to the at-will rule. These exceptions limit the right of an employer to discharge an employee.

In Maryland, the at-will rule has not remained unscathed. Recently, in Adler v. American Standard Corp., the Court of Appeals of Maryland limited the at-will rule by recognizing a cause of action for abusive discharge. Accordingly, discharges contrary to "clear mandate of public policy" may be considered abusive, and terminated employees may have access to judicial review even in the absence of any statutory protection.

Seeking redress for the termination of his employment, Gerald Adler filed suit against his employer, American Standard, in the United States District Court for the District of Maryland. The complaint alleged that, in the course of his employment as Assistant General Manager, Adler discovered many inadequate and possibly illegal practices and methods of operation. After reporting these improprieties to his employer's headquarters, Adler received a letter from his immediate supervisor terminating his employment for unsatisfactory performance. The complaint further alleged that the motivation for Adler's discharge was the employer's desire to conceal the illegalities that Adler might have disclosed and that the discharge was contrary to the public policy of the law of Maryland.

Citing the long-standing employment at-will rule, American Standard moved to dismiss the complaint. Adler contended that

3. See text accompanying notes 24-94 infra.
5. Id. at 47, 432 A.2d at 471.
6. Id.
7. Id.
8. The amended complaint identified the potential illegalities as the following:
   a. Attempts to treat capital expenditures as expenses.
   b. Payment of commercial bribes.
   c. Falsification of sales and income information, and alteration of commercial documents to support the falsified information.
   d. Misuse of corporate funds by officers for their personal benefit.
   e. Manipulation of work-in-process inventory information.
   f. Alteration of forecasts in connection with intra-corporate financial reporting.
   Id.
9. Id. The complaint alleged that Adler was praised by high level management for his candor and that he was assured that his disclosure of the improprieties would not endanger his employment. Id.
10. Adler's immediate superiors first requested his resignation. Id.
11. Id.
Abusive Discharge

he was entitled to maintain his cause of action for abusive discharge. The district court, through Judge Alexander Harvey II, certified to the Court of Appeals of Maryland the question of whether Maryland law recognizes an action for abusive discharge.12

In its opinion, the court of appeals compared the uniform long-standing acceptance of the at-will rule in Maryland with decisions in other jurisdictions, which have recognized a cause of action for abusive discharge pursuant to some legislatively expressed public policy.13 Citing these decisions as a basis for its reasoning, the court recognized an exception to the at-will rule and concluded that an action for abusive discharge may be maintained against an employer who acts in violation of a clear mandate of public policy.14 The court also indicated that continued employment should not be jeopardized by an employee’s refusal to act unlawfully or by an employee’s insistence on performing an act required by law.15

While the court of appeals recognized the existence of a cause of action for abusive discharge, the court found that the allegations of the complaint were insufficient to maintain such an action because Adler failed to describe the manner in which any specific statute he cited was violated by his employer.16 In addition, the court found that his averments did not “otherwise demonstrate a violation of a clear mandate of the public policy of this State.”17

This article examines the at-will rule and the exception to it recognized in Adler, in light of the development of the law of abusive discharge in other jurisdictions. The possible ramifications of the decision are also discussed.

II. THE EVOLUTION OF THE AT-WILL EMPLOYMENT RELATIONSHIP

A. The At-Will Rule

It was established early in Maryland’s history that no action for breach of an employment contract would lie unless the employ-

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12. The court certified the following questions:
1. Is a cause of action for “abusive discharge” recognized under the substantive law of the State of Maryland?
2. Do the allegations of the Amended Complaint, if taken as true, state a cause of action for “abusive discharge” under the substantive law of Maryland?

Id. at 32, 432 A.2d at 465. See generally Md. CTS. & JUD. PROC. CODE ANN. § 12-601 (1980).
14. Id. at 47, 432 A.2d at 471.
15. See id. at 38–39, 42, 43, 432 A.2d at 468–69, 470, 471.
16. Id. at 46, 432 A.2d at 471. For a discussion of the court’s analysis, see notes 95–106 and accompanying text infra.
ment agreement was for a definite term. Indeed, for many years after the Industrial Revolution, the at-will rule remained unchanged: in the absence of an express or implied contractual provision regarding termination, an employment agreement was terminable at the will of either party. Thus, under the at-will rule, an employee could be discharged for any reason, even whim, caprice, prejudice, or malice.

The development of the at-will doctrine in Maryland did not differ from the application of the rule in other jurisdictions. Accordingly, in most states the at-will rule permitted an employer to discharge an employee for good cause, bad cause, or no cause at all without incurring liability for breach of the employment contract or for abusive or wrongful discharge. The at-will rule was so firmly embedded in the common law of the United States that it was codified in several jurisdictions and recognized by the United States Supreme Court. Although the at-will rule still exists today in most jurisdictions, courts and legislatures in many states and the federal government have carved out certain exceptions to this rule.

B. Statutory Restrictions on the Right to Discharge At Will

Congress and various state legislatures have prohibited the summary discharge of an at-will employee for specified reasons or

18. Washington, B. & A. R.R. v. Moss, 127 Md. 12, 96 A. 273 (1915). See also Lemlich v. Board of Trustees, 282 Md. 495, 385 A.2d 1185 (1978) (A contract fixing a definite term of employment can only be terminated by just cause or with mutual consent.). The measure of damages recoverable in a breach of employment contract action is the amount of salary the employee would have earned in his position less the amount he actually earned after his discharge or the amount he might have in the exercise of reasonable diligence in seeking similar employment. See Atholwood Dev. Co. v. Houston, 179 Md. 441, 446, 19 A.2d 706, 708 (1941). See also Lemlich v. Board of Trustees, 282 Md. at 505, 385 A.2d at 1191.


upon a specified motive. The primary statutory schemes that limit an employer's right to discharge an at-will employee are the Labor Management Relations (Taft-Hartley) Act and Title VII of the Civil Rights Act of 1964. The Taft-Hartley Act prohibits, inter alia, discharge for exercising the right to organize and select an employee representative. Title VII prohibits any discharge based upon discrimination with regard to race, color, religion, sex, or national origin. In enforcing these statutes, courts have maintained that an employer is free to discharge an employee for any reason except those specifically prohibited by the statutes. Similar statutes limiting the right to discharge include the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act of 1970, the Vietnam Era Veterans Readjustment Assistance Act, the Fair Labor Standards Act, and the Rehabilitation Act of 1973. While various state statutes contain similar limitations on the right to discharge, some states have expanded their prohibitions to include restrictions on termination for failure to take a polygraph or lie detector test or because of discrimination based upon criminal conviction.

24. United States government employees, as well as various state and municipal employees, cannot be discharged without a hearing and, in some instances, government employees cannot be fired except upon a showing of cause. See Civil Service Reform Act of 1978, 5 U.S.C. § 7513 (Supp. IV 1980). This Act provides that a covered government agency may remove or otherwise discipline a covered employee only for such cause as will promote the efficiency of the Civil Service. The statute also provides a notice period prior to adverse action and affords the employee the right to be represented by an attorney and the right to a written decision enumerating the reasons for the action taken. Id.
29. See, e.g., NLRB v. Condenser Corp. of America, 128 F.2d 67, 77 (3d Cir. 1942). But see Blumrosen, Strangers No More: All Workers Are Entitled To "Just Cause" Protection Under Title VII, 2 INDUS. REL. L.J. 519, 520, 561-63, 565 (1978) (Title VII erases the common law at-will rule by requiring equal treatment of all employees).
32. 38 U.S.C. § 2021(a)(A)(i), (B), (b)(1) (1976) (guaranteeing the right to re-employment upon satisfactory completion of military service and prohibiting discharge "without cause" within one year after re-employment).
Under the Maryland Code, it is unlawful to discharge any employee "because of . . . race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment." 37 Similarly, other statutes limit the right of a Maryland employer to discharge an at-will employee for participating in proceedings under the Maryland Occupational Safety and Health Act, 38 for filing a workmen's compensation claim, 39 for refusing to take a polygraph or similar test as a condition of continued employment, 40 for having his wages attached, 41 or for serving on a jury. 42

This seemingly abundant cache of statutory limitations on the right to discharge at will belies the fact that no state, including Maryland, has enacted any legislation providing any general alteration or abolition of the at-will rule. Rather, the piecemeal restriction of the right to discharge at will by the legislatures may be the result of their tacit acknowledgement of the continued vitality of that common law doctrine.

C. The Public Policy Exception

In recent years, courts have created exceptions to the at-will rule in order to defeat the harshness of its application in certain circumstances. Generally, in limiting the at-will rule, these courts have adopted one of three theories to justify the departure from established precedent. The courts have held that a cause of action exists when the termination violated some expressed public policy, 43 when the employer acted in bad faith without justification, 44 or when the employer violated a duty of good faith and fair dealing implied in every at-will employment contract. 45 Because Adler v. American Standard Corp. 46 appears to adopt the public policy theory, this article focuses on the scope of that exception to the at-will rule.

While the public policy exception is the most limited intrusion upon the scope of the at-will rule, it has the largest judicial follow-

ing. Simply stated, this exception provides that an employer is not free to discharge an employee at will when the reason for that discharge is an intention on the part of the employer to contravene the public policy of the state.

The parameters of the public policy exception adopted in Adler can best be examined by a review of the analyses employed by other jurisdictions in adopting this exception. The numerous cases that arise as a result of discharge for filing a workmen’s compensation claim provide one framework for review of the Adler decision. In Frampton v. Central Indiana Gas Co., one of the first cases in which a court recognized a cause of action for abusive discharge, the plaintiff was discharged after filing a claim with the Indiana Workmen’s Compensation Commission. She then brought a tort action against her employer, alleging that the employer intentionally violated the legislative intent underlying the workmen’s compensation laws. After discussing the intent of the legislature in enacting the workmen’s compensation laws, the Indiana Supreme Court concluded that an employee who alleges that she was retaliatorily discharged for filing a workmen’s compensation claim states a cause of action for damages. Although the Frampton court permitted a cause of action for retaliatory discharge, it carefully limited the tort as an exception to the common law at-will rule. While the court reasoned that a dismissal of the


51. Id. at 250, 297 N.E.2d at 426–27. She claimed actual and punitive damages as a result of her discharge. Id. at 250, 297 N.E.2d at 426.

52. Id. at 253, 297 N.E.2d at 428. The court analogized a retaliatory discharge in the workplace to the retaliatory eviction of a tenant for reporting housing code violations. Id.

53. Id. The court stated that absent a retaliatory discharge, or “under ordinary circumstances,” an employee at will may be discharged without cause. Id.
case would chill the exercise of an expressly stated right to file a compensation claim, it based its decision on the conclusion that a retaliatory discharge was a "device" which operated to relieve the employer from liability and, as such, was expressly prohibited by the Indiana statute.\textsuperscript{54}

In recognizing a cause of action for retaliatory discharge, the \textit{Frampton} court was able to identify a specific provision of the workmen's compensation statute that was violated by the employer. In \textit{Sventko v. Kroger Co.},\textsuperscript{55} however, a Michigan court found a similar cause of action in the absence of any express violation of the workmen's compensation statute.\textsuperscript{56} As in \textit{Frampton}, the \textit{Sventko} court limited the newly created action to complaints alleging that the reason for the discharge was an employer's intention to violate public policy.\textsuperscript{57} Similarly, in \textit{Kelsay v. Motorola, Inc.},\textsuperscript{58} the Supreme Court of Illinois recognized a tort action for retaliatory discharge for filing a workmen's compensation claim only as a limited exception to the general proposition that the employer may discharge an at-will employee without cause.\textsuperscript{59}

The \textit{Frampton} line of cases, however, has not been followed consistently. In \textit{Christy v. Petrus},\textsuperscript{60} the Supreme Court of Missouri found that a new civil cause of action for retaliatory discharge for filing a workmen's compensation claim would not be created unless the cause of action was expressly stated in the statute or appeared to be sanctioned by clear legislative intent.\textsuperscript{61} Citing provisions for criminal and civil causes of action in other Missouri statutes, the court concluded that the absence of similar pro-

\textsuperscript{54} Id. The statute provides that "[n]o contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by . . . this article." \textsc{Ind. Code Ann.} § 22-3-2-15 (Burns 1974).
\textsuperscript{56} Id. at 647, 245 N.W.2d at 153. The court did conclude that the compensation statute prohibiting discharge before employees qualified for benefits provided sufficient evidence for creation of the tort action. \textsc{Id.} at 648–49, 245 N.W.2d at 154; \textsc{see Mich. Comp. Laws} § 418.125 (1976). Concurring, Judge Allen reasoned that the result did not extend the workmen's compensation statute because the statute's clear purpose was to protect employees from work injuries. 69 Mich. App. 644, 652, 245 N.W.2d 151, 155 (1976) (Allen, J., concurring).
\textsuperscript{57} 69 Mich. App. 644, 647, 245 N.W.2d 151, 153 (1976).
\textsuperscript{58} 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
\textsuperscript{59} Id. at 184, 384 N.E.2d at 357. Rejection of the cause of action, the court stated, would erode the Workmen's Compensation Act by eliminating any statutory remedies for employees with compensable injuries. The cause of action was implicit in the "fundamental purpose of [the act] which is to ensure rights and remedies to employees who have compensable claims." \textsc{Id.} at 186, 384 N.E.2d at 358. \textsc{See also Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978); Texas Steel Co. v. Douglas, 553 S.W.2d 111 (Tex. Civ. App. 1976).}
\textsuperscript{60} 365 Mo. 1187, 295 S.W.2d 122 (1956).
\textsuperscript{61} Id. at 1192, 295 S.W.2d at 126.
visions in the workmen's compensation statute indicated a legislative intent to bar creation of a remedy for wrongful discharge.\(^\text{62}\) On this basis, other courts have refused to follow the reasoning of \textit{Frampton} and \textit{Sventko}.\(^\text{63}\)

A second area of limitation on the right to discharge at will lies in actions brought for discharge based on a failure during the scope of employment to perform an act that is forbidden by law. In \textit{Petermann v. International Brotherhood of Teamsters},\(^\text{64}\) the plaintiff was instructed by his employer to give false testimony under oath and, after testifying truthfully, he was discharged. The California court refused to dismiss a wrongful discharge action alleging a breach of the employment contract and concluded that the strong state policy against perjury compelled the denial of the employer's unlimited right to discharge at-will employees.\(^\text{65}\) As in \textit{Frampton}, the \textit{Petermann} court relied on an express statutory provision, which in this case prohibited the solicitation of perjury, and reasoned that the prohibition fosters strong public policies that support the creation of the civil remedy.\(^\text{66}\) Similarly, in \textit{Tameny v. Atlantic Richfield Co.},\(^\text{67}\) the plaintiff alleged that he was wrongfully discharged for refusing to participate in an illegal price-fixing scheme.\(^\text{68}\) Finding a cause of action based on contract and tort principles, the California Supreme Court concluded that, even in the absence of an explicit statutory provision prohibiting the discharge of a worker on such grounds, fundamental principles of public policy and "adherence to the objectives underlying the state's penal statutes required the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act."\(^\text{69}\)

\begin{thebibliography}{99}
\bibitem{62} Id. at 1193–94, 295 S.W.2d at 126–27.
\bibitem{63} \textit{See} Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Dockerey v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, \textit{cert. denied}, 295 N.C. 465, 246 S.E.2d 215 (1978). In \textit{Dockerey}, the North Carolina Court of Appeals refused to limit the at-will rule, concluding that the creation of the retaliatory discharge tort would best be left to the legislature. Id. at 300, 244 S.E.2d at 276.
\bibitem{64} 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
\bibitem{65} Id. at 185, 344 P.2d at 27.
\bibitem{66} \textit{Id. But see} Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 174 n.8, 610 P.2d 1330, 1334 n.8, 164 Cal. Rptr. 839, 843 n.8 (1980). (\textit{Petermann} decision not based upon finding that employer violated the statutory provision prohibiting solicitation of perjury).
\bibitem{67} 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
\bibitem{68} \textit{Id.} at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840. According to the complaint, defendants had violated express provisions of the Sherman Antitrust Act, the Cartwright Act, and a consent decree entered in federal litigation. \textit{Id.} at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 840.
\bibitem{69} \textit{Id.} at 174, 610 P.2d at 1333–34, 164 Cal. Rptr. at 843.
\end{thebibliography}
In other cases, courts have permitted a cause of action for wrongful discharge when an employee was terminated for attempting to force an employer to operate within the requirements of state and federal consumer acts,70 for requesting jury duty after receiving a state summons,71 and for refusing to submit to a polygraph examination.72 Some courts appear to be willing to permit employees to maintain abusive discharge actions in the wake of termination for complaining that a company product was dangerous.73 Generally, courts creating a non-statutory cause of action for wrongful discharge premise a decision upon an explicit finding that some legislatively expressed public policy has been violated by the employer's act of terminating the employee.

This premise is most evident in those decisions which have restricted the application of the public policy exception. In Geary v. United States Steel Corp.,74 the Supreme Court of Pennsylvania held that a plaintiff must allege and prove a violation of a "clear mandate" of public policy in order to maintain an action against his employer for wrongful discharge.75 Furthermore, the court announced that liability would be found only if the employer had specific intent to violate public policy or to harm the employee as evidenced by its actions.76 Thus, a mere perception by an emp-

70. See Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978). The Harless result was based in part on the finding that the Credit Reporting Act provides for civil remedies for people subjected to violations of the Act. Id. at 276. But see McCabe v. City of Eureka, 500 F. Supp. 59 (E.D. Mo. 1980) (no private right of action implied from the Consumer Credit Act prohibition of discharge of employee whose earnings have been subjected to garnishment for any single indebtedness).

71. See Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (community interest and participation on jury is so important that the employer's intentional termination would give rise to compensation); cf. Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978) (cause of action recognized for intentional termination of an employee who left employment for one week for jury duty; the trial court erred in dismissing plaintiff's action because he was fired for failing to notify the employer that he would be away for jury duty).


73. See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). While the Geary court refused to permit the plaintiff to prosecute his wrongful discharge action, finding that there was no evidence supporting an inference that he was fired for refusing to perform an illegal act or otherwise endangering the safety of others, it intimated that such a cause of action would exist if the employer transgressed from expressed public policy by terminating the plaintiff. Id. at 175, 319 A.2d at 178. Cf. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (discharge for refusal to test or promote dangerous product in violation of statute or regulation may give rise to cause of action for abusive discharge).


75. Id. at 179, 319 A.2d at 180.

76. The court in Geary concluded:

If a general intent in the sense that an employer knew or should have known the probable consequences of his act were all that a disgruntled employee need show in order to make out a cause of action, the privilege of discharge would be effectively eradicated for some degree of harm is normally foreseeable whenever an employee is dismissed.

Id. at 175, 319 A.2d at 177.
ployee that a public policy may have been violated is insufficient to support a cause of action for retaliatory discharge.\textsuperscript{77}

Similarly, in \textit{Jackson v. Minidoka Irrigation District},\textsuperscript{78} the plaintiff was discharged for selling scrap to fill an unauthorized employee Christmas fund.\textsuperscript{79} The Idaho court dismissed the allegation of wrongful discharge because the plaintiff failed to demonstrate that the effect of the discharge infringed upon public policy.\textsuperscript{80} In \textit{Pierce v. Ortho Pharmaceutical Corp.},\textsuperscript{81} a New Jersey court concluded that the discharge of an employee for actions consistent with her interpretation of duties arising under the Hippocratic Oath did not satisfy the requirement of a violation of a clear mandate of public policy.\textsuperscript{82} A number of courts have dismissed complaints upon similar grounds, concluding that the conduct alleged did not violate any express public policy.\textsuperscript{83}

Further restrictions on the applicability of the public policy exception have been imposed to extinguish causes of action for abusive discharge when the acts alleged can be remedied by other means. For example, in \textit{Hughes Tool Co. v. Richards},\textsuperscript{84} a grievance contesting the plaintiff’s discharge was filed by his collective bargaining representative.\textsuperscript{85} After an initial adverse determination, the union requested review of the matter in conformance with the

\textsuperscript{77} \textit{Id.} at 176, 319 A.2d at 178; see \textit{Lampe v. Presbyterian Medical Center}, 41 Colo. App. 465, 590 P.2d 513 (1978) (no cause of action when discharge premised upon plaintiff's refusal to reduce staff overtime as requested, despite employee's contention that the reduction would endanger patients).

\textsuperscript{78} 98 Idaho 330, 563 P.2d 54 (1977).

\textsuperscript{79} \textit{Id.} at 332, 563 P.2d at 56. The plaintiff was fired for participation in a “Christmas party fund” receiving monies from the unauthorized sale of company products and waste. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 334, 563 P.2d at 58.

\textsuperscript{81} 84 N.J. 58, 417 A.2d 505 (1980).

\textsuperscript{82} \textit{Id.} at 72, 417 A.2d at 512. The employee refused to participate in work on a product she thought was unsafe. \textit{Id.} at 62–63, 417 A.2d at 507.


\textsuperscript{84} 610 S.W.2d 232 (Tex. Civ. App. 1980).

\textsuperscript{85} \textit{Id.} at 234.
next step of the grievance and arbitration procedure of the collective bargaining agreement and, upon review, the initial determination was upheld. After the union did not pursue the matter, the plaintiff brought suit alleging that he was wrongfully terminated for filing a workmen's compensation claim. The court dismissed the action concluding that "one who elected to proceed through a grievance procedure provided in a contract between his Union and his employer may not file suit... after 'a final settlement of determination' has been made following a grievance hearing pursuant to the employment contract." While the court concluded that an employee must elect to file suit or to proceed under the employment contract before final settlement of the grievance occurs, it specifically refused to define a general rule for identification of the type of "final settlement" that would preclude an action for abusive discharge.

Similarly, state and federal employment relations statutes may foreclose a discharged employee from fashioning a tort or contract action for wrongful discharge because of race, age, color, sex, or national origin without first exhausting administrative remedies provided by statute. In Wehr v. Burroughs Corp., the plaintiff argued that the Pennsylvania human relations statute established a clear public policy permitting an action for abusive discharge based upon age discrimination, but the court concluded that the mere finding that certain conduct contravenes public policy is not sufficient in itself to warrant creation of a contract remedy for wrongful discharge. Reasoning further that the cases creating a right for abusive discharge are based, in part, upon the fact that before creation of the action the employees were otherwise without a remedy, the court dismissed that portion of the plaintiff's case alleging breach of contract: "If these [public] poli-

86. Id. The plaintiff, who was discharged for, inter alia, using profane language before a supervisor, interrupted the grievance review meeting with outbursts, and the employer and the union agreed to adjourn the meeting upholding the discharge. Id.
87. Id. at 233.
88. Id. at 235.
89. Id.
90. The Hughes Tool court compared the facts of the case before it with those found in Carnation v. Broner, 610 S.W.2d 450 (Tex. 1980). In Carnation, the court permitted the plaintiff to maintain an abusive discharge suit after he had filed a grievance but before the grievance was resolved. Id. at 452.
93. Id. at 1054.
cies or goals are preserved by other remedies, then the public policy is sufficiently saved." 94

Most jurisdictions recognizing the public policy exception seem to have carefully ensured the continued vitality of the at-will rule by requiring that the effect of the discharge violate some public policy as expressed by a legislative enactment. Adler, however, seems to indicate that this legislative pronouncement may not be necessary in all circumstances.

III. ADLER V. AMERICAN STANDARD CORP.: APPLICATION OF THE PUBLIC POLICY EXCEPTION IN MARYLAND

In Adler, the Court of Appeals of Maryland relied on the reasoning of Frampton95 and Tameny96 to establish the public policy exception as part of the common law of the state.97 The analysis of the Adler court focused upon judicial attempts to structure and define the public policy exception. The cases cited presented wide and varying patterns that suggested the parameters of the action for abusive discharge. For example, the court of appeals cited the Pierce requirement that there be a violation of a clear mandate of public policy.98 Similarly, the court of appeals adopted the limitation regarding specific intent constructed in Geary.99 The Adler court seemed to emphasize that no cause of ac-

94. Id. at 1055. The court further reasoned that the breadth of the human relations statute firmly closed any interstices depriving an aggrieved individual of a remedy for employment discrimination. Id. at 1056. Contra, McKenney v. National Dairy Council, 491 F. Supp. 1108, 1118 (D. Mass. 1980) (Massachusetts doctrine of applied covenant of good faith in employment contracts supports a cause of action for wrongful discharge based upon age in the face of a comprehensive remedy contained in the Massachusetts Employment Relations Act).
97. 291 Md. 31, 37, 38, 43, 432 A.2d 464, 468, 471 (1981). The court cited Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), with approval. Among the numerous cases cited and discussed by the court were two that significantly alter the at-will rule. In Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), the Supreme Court of New Hampshire concluded that a cause of action in contract for abusive discharge is proper when the termination is motivated by bad faith or malice or is based on retaliation. Id. at 133, 316 A.2d at 551. By implying a good faith commitment in every at-will relationship, the Monge rule all but erases the at-will doctrine. Similarly, in Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977), the court, citing Monge, fashioned an implied covenant of good faith and fair dealing in the at-will contract which would bar any discharge in bad faith. Id. at 104, 364 N.E.2d at 1257. Like Monge, the Fortune court’s reasoning represents a nearly complete alteration of the at-will rule. See also Pugh v. See’s Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).
99. Id. at 43-44, 432 A.2d at 471. The court concluded that Adler’s complaint did not assert that the company’s actions were done with an intent to defraud stockholders or the public in violation of Maryland law. Id.
tion can be maintained in the absence of a clear mandate of public policy; however, it did not limit the newfound cause of action to situations in which the legislature had explicitly or implicitly declared the public policy of the state.

In this regard, the court of appeals hinted that a suit based upon notions of public policy undeclared by the legislature may be proper by reserving for itself and the circuit courts the prerogative to determine when a particular discharge contravened expressed or undeclared principles of public policy. Moreover, the court identified sources of public policy other than statutory, including judicial pronouncements. The court forewarned, however, that a divination of public policy without statutory basis would involve a “very nebulous concept.”

Further, the court of appeals ignored the employer’s assertion that any alteration of the at-will doctrine should be relegated to the legislature. However, while the court concluded that it had authority to create the public policy exception upon a finding that “the common law is no longer suitable to the circumstances of our people,” the court did not make any express findings that the circumstances had changed sufficiently to support the creation of a new cause of action.

IV. ANALYSIS OF THE ADLER DECISION

At most, Adler strikes a balance between the employee’s interest in job security in the face of a refusal to act in an unlawful manner with an employer’s interest in discharging an at-will employee for the benefit of the business. The court, by permitting public policy to be created without legislative guidance, fosters an ad hoc determination of public policy in each case, while doing lit-
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tle to assist employers in making any determination concerning continuing employment of their employees. Likewise, the vague concept of public policy will not guide employees in their actions in the workplace. Nevertheless, the court adopted this seemingly expansive public policy exception despite recognition of the continued vitality of the at-will rule. In view of this, Maryland courts will face a difficult task of reconciling the public policy exception with the at-will doctrine.

Conceptually, the Adler decision creates some confusion over the scope of the public policy exception. The difficulty is the result of the inability to define adequately the term "public policy" in the context of wrongful discharge actions. It is submitted that adoption of parameters of the public policy exception beyond those clearly expressed by the legislature is an action perilously close to judicial legislation. The public policy exception should be based upon commission of some act prohibited by a state or federal statute and the Maryland courts should adopt a single process for determining whether a private cause of action by a discharged employee should be allowed.

The United States Supreme Court has adopted such an approach to recognize private causes of action based upon federal statutes that do not expressly provide for such a remedy, by outlining specific factors that must be considered in the analysis: (1) whether the plaintiff is a member of the class of persons for whose benefit the statute was enacted; (2) whether the legislature has implicitly or explicitly manifested any intent to create or deny such a remedy; and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy. Although this method of analysis was fashioned for federal courts construing federal statutes, it will suffice to provide a framework for creation of causes of action in state courts based upon alleged conduct that does not violate a specific statutory scheme. This approach has been adopted in at least one instance to bar an action for wrongful discharge based upon an alleged violation of the Customer Credit Protection Act.

107. Id. at 43-45, 432 A.2d at 471-72.
108. Similarly, relegating the definition and/or application of the public policy to the jury is inconsistent with the principle premise of the public policy exception: the employer's act must transgress some public policy clearly defined by the legislature.
The absence of a clear definition of public policy presents an additional concern. Creation of a common law cause of action for wrongful discharge based upon a violation of a clear mandate of declared public policy, coupled with a vague and incomplete description of the scope and meaning of the term, may load the dockets of the circuit courts with myriad actions that are based on a variety of fact scenarios. Moreover, the differing bases of each termination decision may undercut the precedential effect of prior rulings concerning other employees and may postpone disposition of otherwise meritless cases until evidence can be taken.

While Adler constructed the abusive discharge cause of action as an intentional tort, this theory is most difficult to reconcile with a number of long-standing principles. Adoption of the tort basis for abusive discharge actions may expose employers to compensatory and punitive damages. However, the remedies of punitive damages and, in some regard, compensatory damages are inconsistent with the relief afforded under the Taft-Hartley Act and Title VII, as well as various Maryland statutes, all of which pervasively regulate many aspects of employment relations. Additionally, the availability of punitive damages for wrongful discharge places the at-will employee in a better position than his counterpart who is a member of a collective bargaining unit employed under a written contract with procedures for resolution of discharge grievances. Since the basis of an action for wrongful discharge is the at-will relationship and the contract for employment for an indefinite period, remedies should attempt to make the discharged employee whole and not punish the employer.

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112. In 1977, it was estimated that the rate of terminations, forced or voluntary resignations, or separations from employment was 3.8 per every 100 employees per month. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES Table No. 662, at 406 (99th ed. 1978).


116. See text accompanying notes 37–42 supra. Indeed, most of these Maryland statutes are couched in prohibitory rather than compensatory terms.

117. Arbitrators generally do not award compensatory or punitive damages when reinstating a grievant. See F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 356 (3d ed. 1977).
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Adler may also undermine the right to exclusive representation enjoyed by collective bargaining representatives in Maryland. Under the court’s decision, an employee represented by a union that has entered into a collective bargaining agreement could forego the grievance and arbitration provisions, if any, contained in the contract in favor of suing the employer and possibly the union in a circuit court under the theory of abusive discharge. While the rationale of Hughes Tool may preclude an abusive discharge suit at some point in the contractual grievance procedure, the employee is still free to frustrate the collective bargaining mechanism by instituting an action in the circuit court before the grievance is filed or while it is pending. A properly certified union is the exclusive bargaining representative of all employees in the unit with regard to wages, hours, terms, and conditions of employment. Consequently, any grievance procedure constructed by the union and the employer in the collective bargaining agreement should be exhausted before an abusive discharge action is filed. If a court’s decision on a discharge is made before the grievance procedure is conclusive, the court would be injecting itself into the collective bargaining relationship by functioning as a quasi-arbitrator. This, of course, conflicts with the national labor policy favoring the settlement of employment disputes by means agreed upon by the employer and the bargaining representative and is another reason why all grievance procedures should be exhausted before an action for abusive discharge is available.

118. See 29 U.S.C. § 159(a) (1976). The Taft-Hartley Act establishes that the employees’ duly elected representative must function as the exclusive agent to all the unit employees for purposes of collective bargaining with regard to all terms and conditions of employment. Id.

119. For a discussion of Hughes Tool, see text accompanying notes 84–90 supra.

120. The Labor Management Relations (Taft-Hartley) Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


Individual bargaining unit employees do not retain any right to bargain over terms and conditions of employment; workers must look exclusively to the bargaining representative for protection of their interests. See National Ass’n of Letter Carriers v. NLRB, 595 F.2d 808, 811 (D.C. Cir. 1979).

V. CONCLUSION

The suggestion by Adler that there exists a need to balance the employer’s, the employee’s, and the public’s interests, coupled with the court’s pronouncement of a variable standard of public policy, should produce a plethora of opportunity to define and describe further the parameters of the tort of abusive discharge in Maryland. Until further explanation, Maryland courts will have to reconcile Adler with specific statutory schemes describing remedies for aggrieved employees. Moreover, the notion that an abusive discharge action can be based upon some public policy that has not been declared by the legislature deserves further analysis, for it may require the courts to establish the labor policy of the State of Maryland by defining undeclared public policy in the discharge scenario. It is submitted that the long-standing status of the at-will doctrine and the implied legislative approval of that doctrine require that the policy-making branch of government be heard on the development of the future protection of the employee.