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REINSTATEMENT: A REMEDY FOR AN EMPLOYER'S VIOLATION OF A HANDBOOK OR WRITTEN EMPLOYMENT POLICY

*Kurt S. Decker**

I. INTRODUCTION

Few areas of the law are as complex or as volatile as employment law, a bewildering maze of often conflicting statutes, common law doctrines, contract-established rules and administrative agency edicts. Moreover, the applicable law can vary considerably depending on the forum.

The impact of the conflict between labor and management on our economic and social structure makes employment law one of the most political of legal areas. Judicial and legislative decisions in this area reflect the shifting balance of economic forces between employer and employee, a shift which has also affected the rights of at will employees.¹

At will employment refers to a relationship which allows termination of employment without cause by either party.² Recently,

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This article was suggested by David F. Weiner of Gallo, Weiner & Coletta, Pittsburgh, Pennsylvania and for this I extend my appreciation.

1. For a discussion of the labor movement in the United States, see 1 THE DEVELOPING LABOR LAW 1-66 (2d ed. 1983). See also Huge & McCarthy, *Collective Bargaining in the 1980's—Comments and Observations*, 1 HOFSTRA LAB. L.F. 23 (1983).

2. RESTATEMENT (SECOND) OF AGENCY § 442 (1958) refers to at will employment as follows:

Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by

courts and legislatures have created certain exceptions to the traditional at will employment relationship, based on public policy limitations³ or the implied covenant of good faith and fair dealing which exists in every employment relationship.⁴ Despite wide-spread criticism,⁵ some jurisdictions still remain faithful to the traditional at

either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

3. These "public policy" exceptions permit employees to bring actions for wrongful discharge, and therefore limit the at will employment concept when motivation for the firing cuts against public policy. *See generally* Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1982).

Courts in at least sixteen jurisdictions have recognized a judicially created public policy exception to at will employment. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981); *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1982); *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981); *Siles v. Travenol Labs., Inc.*, 13 Mass. App. Ct. 354, 433 N.E.2d 103 (1982); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 23, 386 A.2d 119 (1978); *Krystad v. Lau*, 65 Wash. 2d 817, 400 P.2d 72 (1965); *Harless v. First. Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Courts in at least nine jurisdictions, including the District of Columbia, have indicated that they might adopt the public policy exception to at will employment under appropriate facts and circumstances. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Ivy v. Army Times Pub. Co.*, 428 A.2d 831 (D.C. 1981) (dissenting opinion); *Abrisz v. Pulley Freight Lines*, 270 N.W.2d 454 (Iowa 1978); *Kenneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980); *K.W.S. Mfg., Inc., v. McMahon*, 565 S.W.2d 368 (Tex. Civ. App. 1978); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

Six jurisdictions have specifically rejected a judicially created public policy exception to at will employment. *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 393, 244 S.E.2d 272, *appeal denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981).

4. *See, e.g.*, *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Cleary v. American Airlines, Inc.*, 11 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

5. For an extensive list *see* Decker, *At-Will Employment: A Proposal for Its Statutory Regulation*, 1 HOFSTRA LAB. L.F. 187 n.8 (1983). *See also* J. KAUFF & M. McCLAIN (co-ch), UNJUST DISMISSAL 1984—EVALUATING, LITIGATING, SETTLING AND AVOIDING CLAIMS (1984); L. LORBER, J. KIRK, K. KIRSCHNER, C. HANDORF, FEAR OF FIRING (1984); H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE (1984); A. WESTIN, WHISTLEBLOWING, LOYALTY AND DISSENT (1980); Decker, *At-Will Employment in Pennsylvania—A Proposal For Its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); Decker, *Federal Regulation of At-Will Employment*, U. DET. J. URB. L. (1984); Flaxman, *Employment*

will employment concept.⁶

Documents such as handbooks and employment policies⁷ have increasingly influenced the at will employment relationship.⁸ Handbooks and other printed employment policies are used by employers to communicate with their employees on a variety of subjects, including work rules, discipline policies, wages, and fringe benefits. Courts have in certain circumstances considered these employer communications to be binding commitments.⁹ Because of this judicial attitude, the remedies granted to successful wrongful termination litigants have become noteworthy. Reinstatement, a remedy generally considered unavailable in the past, deserves serious consideration.¹⁰

For many years, arbitrators have considered reinstatement to be an acceptable remedy for an unjustified termination arising under a collective bargaining agreement.¹¹ If handbooks and published employment policies are deemed to be binding employer commitments, they will have the same effect as a collective bargaining agreement. Consequently, employers must now carefully review their materials in order to limit their liability.

This article examines the extent to which reinstatement may legitimately be regarded by the courts as a remedy in wrongful termination actions arising under handbooks and written employment policies.

II. HANDBOOKS AND EMPLOYMENT POLICIES

Employers are aware that negotiations with unions over the

Manuals in Pennsylvania—Contract or Unenforceable Gratuity, 21 THE PHILA. LAW. 1 (1984); St. Antoine, *You're Fired*, 10 HUM. RTS. 32 (1982); Comment, *Wrongful Discharge of Employees Terminable At Will—A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981); Note, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227 (1984). Additionally, law firms have begun warning their clients regarding exceptions to the at will employment relationship. See 112 LAB. REL. REP. (BNA) News and Background Information 148 (February 21, 1983).

6. These are the jurisdictions which do not subscribe to judicially created exceptions to the traditional at will employment concept. See *supra* notes 4-5 and accompanying text.

7. In this article, the term "employment policy" is used to refer to any written materials disseminated or conspicuously posted by the employer, but which are less formal than the term "handbook" would connote.

8. If courts continue to find that handbooks and employment policies are binding commitments, the purpose of the at will employment relationship will be defeated. Employers will no longer be able to hire and fire employees at will. See *infra* note 31.

9. See cases cited *infra* note 31.

10. See, e.g., O. FAIRWEATHER, PRACTICE & PROCEDURE IN LABOR ARBITRATION 499-500 (1983).

11. *Id.*

terms and conditions of collective bargaining agreements will result in enforceable contracts. Consequently, employers are very careful about what rights are given up to the unionized employees and what rights are retained by the employer. However, employers have always enjoyed considerable unilateral discretion when dealing with non-union employees. Statements in handbooks and other printed materials were general guidelines regarding conduct that would be subject to withdrawal, modification, exceptions, or interpretation at any time by the employer.¹² Courts are now consistently finding these statements to be binding contracts.¹³

As a result, employers should now regard these materials in the same manner as collective bargaining agreements, that is, as binding commitments.¹⁴ An aggressive stance may in fact benefit an employer with a nonunion workforce. By making employees aware that the employer regards the policies as binding commitments, the employer may deter or prevent employees from organizing.¹⁵ It can be particularly effective if the terms and conditions equal or exceed what employees could gain from a collective bargaining agreement and a union organizing campaign. If the provisions in a handbook are perceived as fair by the employees, the employer may be able to avoid or deter unionization. However, the same considerations create additional pressure for employers and courts to deal with a reinstatement remedy when faced with a wrongful termination case.

A. A General View of Handbooks and Employment Policies

Handbooks and employment policies gained importance as large organizations became more common, and a system of rules became essential for orderly and efficient employer functioning.¹⁶

12. See cases cited *infra* note 30.

13. See cases cited *infra* note 31.

14. See *Reviewing the Employee Handbook*, HUM. RESOURCES MGMT. (CCH) No. 61 (March 23, 1984).

15. Handbooks that contain some form of job protection counteract the most important reason for employees to unionize. The value to an employee of job security and the power to appeal employer determinations should not be underestimated by an employer. See St. Antoine, *supra* note 5, at 35.

16. See A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 7 (1977).

At any one time, the rights and duties of workers and of managers, indeed of all those in the hierarchy, must be established and understood by all those involved in the hierarchy. . . . The industrial system creates an elaborate "government" at the work place and work community. It is often said that primitive societies have extensive rules, customs, and taboos, but a study of the industrial society reflects an even greater complex and a different set of detailed rules.

C. KERRY, J. DUNLOP, F. HARBISON, C. MYERS, *INDUSTRIALISM AND INDUSTRIAL MAN* 41

Employers with a small number of employees can usually operate without articulated rules. When the employment force is small, activities can be individually directed.¹⁷ However, when there are many employees, individualized decision making becomes impractical because the number of employment decisions that must be made exceeds the ability of one person to make them.¹⁸ Delegation of the decision making authority to lower-level employees creates the risk of inconsistency.¹⁹

Employers with a large number of employees often use formal rules to explain policy to employees and to reduce the number of individual unilateral decisions. Rules are promulgated with respect to operations, procurement, capital investment, accounting, and public relations. Policies control supervisory discretion regarding time off, compensation, and other benefits, as well as promotions and discipline.²⁰

Handbooks and employment policies are useful in promoting order. These materials standardize employee production and provide standards for employer instructions without depending on often inconsistent individual communication through supervisory personnel. However, to achieve the predictability and order for which they were designed, these standards must be applied uniformly.²¹ By reducing the opportunity for arbitrary supervisory action, established policies may enhance employee perception of employer fairness.²² When used with internal procedures for appealing adverse supervisory actions, handbooks and written employment policies can promote the concept that employees are treated with respect and concern.²³

Handbooks and employment policies usually outline: (1) rules of expected employee behavior; (2) disciplinary or termination procedures if those rules are violated; (3) compensation; and (4) benefit

(1960).

17. H. PERRITT, JR., *supra* note 5, at 306.

18. *Id.* at 306-07.

19. *Id.* at 307.

20. *Id.*

21. *Id.* at 309.

22. *Id.*

23. *Id.* To deal with the erosion of the at will employment relationship, many employers have instituted internal mechanisms for resolving employee complaints. Some have also agreed in advance to arbitrate employee claims. Employers have adopted dispute-resolution systems that range from the very informal to systems that are as formal as those typically found in collective bargaining agreements. These systems are commonly referred to as: (1) open door; (2) formal appeal to management; and (3) arbitration. For an in-depth discussion of these systems see C. BAKALY, JR. & J. GROSSMAN, *MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH* 169-79 (1983).

items regarding hours of work, overtime, lay-off, recall, health care insurance, pensions, leaves of absence, holidays and vacations. Often, they are the only vehicle for the employer to set forth these policies, and are commonly intended to create a cooperative relationship between employer and employees by establishing and fostering communication.

Employers' handbooks and employment policies vary. They reflect the employer's particular operational and management style. However, handbooks and employment policies must also reflect the current law.²⁴ Therefore, they must be carefully and regularly reviewed by employers in order to limit improper employer actions.

B. Handbooks and Employment Policies: Binding and Non-Binding Contracts

For years, courts supported the traditional view that handbooks and employment policies did not affect the employee's at will status. These materials were considered to be unenforceable unilateral employer expressions, lacking definiteness, mutuality and consideration.²⁵ *Johnson v. National Beef Packing Co.*,²⁶ exemplifies this view of employer generated material. In *Johnson*, a handbook provision provided that termination could not occur without "just cause."²⁷ Al-

24. Because some state courts have found that handbooks and employment policies are in certain circumstances binding contractual commitments, they should be reevaluated with this in mind. See cases cited *infra* note 31. Furthermore, since laws regulating overtime, vacation pay and jury duty, etc., may vary from state to state, such state laws must be considered in formulating employer policy. For example, state legislatures have also provided some protection for at-will employees. Several states have statutes prohibiting discharges based upon political activity. See, e.g., MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1975). For a collection of state laws regarding firing for political activity, see 1984, LAB. L. REP. (CCH) (State Laws) ¶ 43,045. Some states prohibit discharges because of physical handicaps. See, e.g., CAL. GOV'T CODE § 12940(a) (West 1981); MASS. GEN. LAWS ch. 151(b), § 4 (16) (West Supp. 1985); MINN. STAT. ANN. § 363.03, Subd. 1(2) (West Supp. 1981). A few states, for example, Idaho, Massachusetts, Michigan, North Dakota, and Vermont, do not permit employers to take action against employees for serving as jurors or for indicating their availability as jurors. For a collection of state laws regarding termination for serving on a jury, see 1984 LAB. L. REP. (CCH) (State Laws) ¶ 43,035. Other states, for example, Connecticut, Hawaii, Idaho, Maryland, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, and Washington, prohibit termination for refusing to take a lie detector test. For a collection of relevant state laws, see 1984 LAB. L. REP. (CCH) (State Laws) ¶ 43,035. Another common provision in state laws is a prohibition against retaliatory termination for filing a workers' compensation claim. See, e.g., TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980). See also M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 3 (1966); Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U.L. REV. 907 (1967).

25. See cases cited *infra* note 31. See also Flaxman, *supra* note 5, at 10.

26. 220 Kan. 52, 551 P.2d 779 (1976).

27. *Id.*

though the plaintiff claimed that the handbook provision created an express or implied contract, the court concluded that this was only a unilateral employer expression of policy and procedure.²⁸ "Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities [N]o meeting of the minds was evidenced by the [employer's] unilateral act of publishing [this] policy."²⁹ This rationale was for many years followed by the courts and there are still a number of jurisdictions which remain faithful to the rationale expressed in *Johnson*, and reject the argument that handbooks and employment policies may indeed bind the employer.³⁰ However, courts in other jurisdictions have held that statements made in handbooks and employment policies create binding employer commitments.³¹ For example, in *Toussaint v. Blue Cross &*

28. *Id.* at ___, 551 P.2d at 782.

29. *Id.*

30. Handbooks and employment policies have been found to be non-binding in the following states: Alabama—*White v. Chelsea Indus., Inc.*, 425 So. 2d 1090 (Ala. 1983); Delaware—*Heideck v. Kent General Hosp. Inc.*, 446 A.2d 1095 (Del. 1982); Indiana—*Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975); Louisiana—*Williams v. Delta Haven, Inc.*, 416 So. 2d 637 (La. Ct. App. 1982); Maine—*Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); Montana—*Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 668 P.2d 1063 (1982); New Jersey—*Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 89 A.2d 237 (1952); *but see Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357 (D. N.J. 1982); North Carolina—*Roberts v. Wake Forest University*, 55 N.C. App. 430, 286 S.E.2d 120, *pet. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982); Texas—*Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536 (Tex. Ct. App. 1982).

31. Handbooks and employment policies have been found in certain circumstances to be binding contractual commitments in the following states: Arizona—*Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); California—*Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Colorado—*Salimi v. Farmers Ins. Group*, 684 P.2d 264 (Colo. Ct. App. 1984); Florida—*Falls v. Lawnwood Medical Center*, 427 So. 2d 361 (Fla. Dist. Ct. App. 1983); *but see Muller v. Stromberg Carlson Corp.*, 427 So. 2d 266 (Fla. Dist. Ct. App. 1983); Illinois—*Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974); Kentucky—*Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); Massachusetts—*Garrity v. Valley View Nursing Home, Inc.*, 10 Mass. App. Ct. 822, 406 N.E.2d 423 (1980); Michigan—*Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); Minnesota—*Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); Nebraska—*Morris v. Lutheran Medical Center*, 215 Neb. 677, 340 N.W.2d 388 (1983); Nevada—*Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983); New Mexico—*Vigil v. Arzola*, 101 N.M. 687, 687 P.2d 1038 (1984); New York—*Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); Ohio—*Hedrick v. Center for Comprehensive Alcoholism Treatment*, 7 Ohio App.3d 211, 454 N.E.2d 1343 (1982); Oklahoma—*Langdon v. Saga Corp.*, 569 P.2d 524 (Okla. Ct. App. 1976); Oregon—*Yartzoff v. Democrat-Herald Publishing Co.*, 281 Or. 651, 576 P.2d 356 (1978); Pennsylvania—*Banas v. Matthews Int'l*, 116 L.R.R.M. (BNA) 3110 (1984); Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983); *but see Richardson v. Charles Cole Memorial Hosp.*, 320 Pa. Super. 106, 466 A.2d 1084 (1983); South Dakota—*Osterkamp v. Alkota Mfg.*, 332 N.W.2d 275 (S.D. 1983); Tennessee—*Hamby v. Genesco, Inc.*, 627 S.W.2d 373 (Tenn. Ct. App. 1982); Washington—*Thompson v. St. Regis Paper Co.*, 102 Wash. 2d

Blue Shield,³² an employee was told at the time of hiring that he would be employed as long as he did his job. This promise was supported by the handbook stating that it was the employer's policy to terminate an employee for "just cause" only.³³ These oral and written promises were found to be enforceable as an express or implied agreement that set forth legitimate employee expectations based on the employer's representations.³⁴

Toussaint has been followed in other jurisdictions.³⁵ The courts have reasoned that the handbook or employment policy is the offer of a unilateral contract; the employee expresses his acceptance of the contract by working and consideration is the employee's continuation of work, since he is always free to leave.³⁶ However, the courts have also held that such unilateral employment offers may be augmented, modified or withdrawn unilaterally by the employer.³⁷ For instance, when an employer distributes a new handbook or employment policy, the employer makes a new offer of employment to the at will employee. This new offer is limited to the new handbook's or employment policy's contents and becomes effective on the date it is distributed. The at will employees must again accept the new offer and provide consideration by continuing their employment.³⁸

Handbooks and employment policies have also been given legal recognition in unemployment compensation disputes.³⁹ In most states, the employer has the burden of establishing that an employee

219, 685 P.2d 1081 (1984).

32. 408 Mich. 579, 292 N.W.2d 880 (1980).

33. 408 Mich. at ___, 292 N.W.2d at 884.

34. *Id.*

35. See *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982); *Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982). *Dew v. City of Florence*, 378 S.C. 115, 303 S.E.2d 664, *cert. denied*, 464 U.S. 936 (1983). See also cases cited *infra* note 39.

36. See, e.g., *Brooks v. Trans World Airlines*, 457 F. Supp. 805, 809 (D. Colo. 1983); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626-27 (Minn. 1983); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 152-53 (Mo. Ct. App. 1983); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, ___, 668 P.2d 261, 261-62 (1983).

37. See, e.g., *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983).

This is unlike the employer's situation under a union contract, where the employer is prohibited from making unilateral changes without first bargaining with the union. In the union setting, if no agreement is reached between the union and employer it is very difficult, if not impossible, for the employer to institute change. See, e.g., *Decker, Pennsylvania's Public Employee Relations Act (Act 195) and Impasse—The Public Employer's Right to Make Unilateral Changes in Employment Conditions*, 86 DICK. L. REV. 1 (1981).

38. See *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626-27 (Minn. 1983).

39. See, e.g., *James v. Unemployment Compensation Bd. of Review*, 59 Pa. Commw. 230, 429 A.2d 782 (1981); *Lingenfelter v. Unemployment Compensation Bd. of Review*, 58 Pa. Commw. 52, 426 A.2d 1307 (1981).

who seeks unemployment compensation was terminated for a deliberate or willful violation of an existing employer policy. Employers commonly show the existence of policies upon which the discharge is based, by proving the distribution of a handbook or written employment policy where in the rule is printed. Here, ironically, it is the employer and not the employee who asserts that the handbook or employment policy is a binding employment commitment.

C. Oral Employment Policies: Binding and Non-Binding Contracts

An employer's oral promises of continued employment can support a binding commitment. In most cases in which recovery was permitted, there was an oral promise communicated by the employer in addition to a statement in the handbook indicating that the employee would be terminated only for cause or after dispute settlement procedures had been exhausted.⁴⁰

In *Toussaint v. Blue Cross & Blue Shield*,⁴¹ and its companion case, *Ebling v. Masco Corp.*,⁴² sufficient evidence was presented to imply a contract based on assurances that termination would occur for just cause only.⁴³ In *Toussaint*, the court found two independent promises, either of which would have been binding,⁴⁴ one oral,⁴⁵ and one contained in a handbook.

Other cases support the rationale that oral promises may become binding employer commitments.⁴⁶ Sometimes the direct oral promise can be clearly established. In *Terrio v. Millinocket Commu-*

40. See, e.g., *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

41. 408 Mich. 572, 292 N.W.2d 880 (1980).

42. 408 Mich. 579, 292 N.W.2d 880 (1980).

43. *Toussaint*, 408 Mich. at 599, 292 N.W.2d at 885.

44.

A provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable . . . such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

Id. at 598, 292 N.W.2d at 885.

45. Regarding the oral promise, the court determined,

[w]hen a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning a cause and may discharge only for cause.

Id. at 610, 292 N.W.2d at 890.

46. See, e.g., *Wiener v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

nity Hospital,⁴⁷ an oral statement by the employer's agent was found to be binding. The employee had been assured that she was secure in [her] job "for the rest of her life,"⁴⁸ and the court determined that "the context of her long service in a position of substantial responsibility . . . provided the critical evidentiary support for her contract claim."⁴⁹

A number of other cases have also held that oral statements and handbooks, when combined with other factors, may be construed as binding promises.⁵⁰ For example, in *Schipani v. Ford Motor Co.*,⁵¹ the employee maintained that an oral agreement combined with a personnel manual and employment practices was sufficient to constitute an implied contract of continued employment until age 65, even though there was a signed written contract which stated that employment was terminable at will. The court held that the question of whether the written contract was altered by the alleged oral and written assurances was one for the jury to determine.⁵² Although an oral contract may be unenforceable under the statute of frauds,⁵³ the doctrine of promissory estoppel may negate this employer defense.⁵⁴

Other courts have found that, in the absence of written policy statements or collective bargaining agreements, oral promises are insufficient to constitute binding employer commitments. For example, in *Griffith v. Sollay Foundation Drilling*,⁵⁵ the court applied the traditional rule that a promise of permanent employment created an indefinite hiring, terminable at will. A former employee alleged breach of an oral "permanent" contract after the employer terminated the employee on grounds that his services were no longer

47. 379 A.2d 135, 138 (Me. 1977).

48. *Id.*

49. *Id.*

50. *See, e.g.,* Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

51. 102 Mich. Ct. App. 606, 302 N.W.2d 307 (1981).

52. 102 Mich. Ct. App. at —, 302 N.W.2d at 311.

53. It is the general rule that an oral contract for an indefinite term of employment is outside the statute of frauds. *See, e.g.,* Reynier v. Associated Dyeing & Printing Co., 116 N.J.L. 481, 184 A. 780 (1936). A contract for an indefinite period is an at will contract; i.e., it may be terminated by either party at any time and for any cause. For this reason, the contract is capable of being performed within one year, and is, therefore, outside the Statute of Frauds. *See, e.g.,* Haupt v. International Harvester Co., 582 F. Supp. 545, 549 n.7 (N.D. Ill. 1984). Additionally, because the employee's death could terminate the contract within a year, some courts hold that the contract could be fully performed within one year. *See, e.g.,* Bussard v. College of St. Thomas, 294 Minn. 215, 200 N.W.2d 155, 161 (1972).

54. *Schipani v. Ford Motor Co.*, 102 Mich. Ct. App. 606, 302 N.W.2d 307 (1980).

55. 373 So. 2d 979 (La. Ct. App. 1979).

needed.⁵⁶ The court held that because the contract was not for a fixed term, and because no special consideration was given by the employee beyond the rendering of services, the employment agreement was terminable at the will of either party.⁵⁷

III. REINSTATEMENT

A. An Overview

"Reinstatement" is commonly regarded as the restoration of an employee to his or her former position after termination, layoff, leave of absence or a strike.⁵⁸ Historically, courts have resisted ordering an employer to reinstate an employee in the absence of a statute specifically granting such a remedy.⁵⁹ As late as 1936, courts held that a reinstatement order was unenforceable.⁶⁰ Courts indicated that the common law did not permit specific performance of an employment contract. Therefore, the employee would be permitted only money damages for back pay, or for punitive damages.⁶¹ Several reasons were advanced to support this view. First, because money damages was considered an adequate remedy to fully compensate any employee for an employer wrong,⁶² equitable intervention through reinstatement was not necessary. Furthermore, because an employment relationship depended on employer-employee cooperation, the status quo could not be restored.⁶³ In addition, no practical way might exist to supervise the employee's work so as to assure good performance.⁶⁴

56. *Id.* at 980.

57. *Id.* at 982.

58. LAB. REL. EXPDITER (BNA) 545 (1984).

59. See Van Hecke, *Changing Emphases in Specific Performance*, 49 N.C.L. REV. 1 (1961).

60. See, e.g., *Louisville & Nashville R.R. v. Bryant*, 263 Ky. 578, 92 S.W.2d 749 (1936).

61. See, e.g., *Valentine v. General Am. Credit, Inc.*, 123 Mich. App. 533, 332 N.W.2d 591 (1983); *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213 (Mont. 1983).

62. *North Am. Co. for Life, Acc. & Health Ins. v. Bolling*, 275 Ala. 457, 156 So. 2d 144 (1963); *Masetta v. National Bronze & Alum. Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953).

63. *Rautenberg v. Westland*, 227 Cal. App. 2d 566, 38 Cal. Rptr. 797 (1964).

64. For example, in *De Rivafrinoli v. Corsetti*, 4 Paige 264, 264 (N.Y.Ch. 1833), an employer attempted to force a "primo basso" to perform a contract "to sing, gesticulate and recite." The Chancellor in denying specific performance stated:

I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest the peculiar beauties of the Italian opera. . . . There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what

Finally, an employer could not get specific performance against an employee because this would constitute involuntary servitude or employment slavery.⁶⁵ Therefore, under the mutuality of remedy theory, neither could an employee enforce a reciprocal commitment, forcing the employer to accept the services of the employee.

Today, all of the above reasons are susceptible to closer scrutiny in light of the general belief that it is fair to protect at will employees from wrongful termination.⁶⁶ In addition, uncertain economic conditions,⁶⁷ unsteady interest rates,⁶⁸ and fluctuating levels of excessive unemployment⁶⁹ have made at will employees more concerned with protecting their jobs.

Consequently, any request for reinstatement should not be summarily dismissed as unworkable, but should be examined according to the facts of the particular termination. This notion of the propriety of using reinstatement as a remedy under appropriate circumstances corresponds with the general notion that at will employees who do not possess the bargaining power equal to that of their employers may also need protection.⁷⁰ For example, where a job carries with it prestige, opportunity for personal learning, special career development, or other unique advantages, money damages may be an inadequate remedy. It may be difficult for an employee to locate a comparable position even if he or she prevails in a wrongful termination action. A slowdown of the economy, or the specialized nature of a position make finding comparable employment difficult. Furthermore, a wrongfully terminated employee should not be compelled to relocate to obtain a comparable position. Money damages cannot always totally compensate an employee for an employer wrong and are inadequate where termination carries with it connotations of unsuitability or incompetence. A wrongful termination can injure the employee's career elsewhere, and have a lingering impact. Money dam-

effect coercion might produce upon the defendant's singing, especially in the livelier airs. . . .

65. See Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235 (1921).

66. See Decker, *supra* note 5, at 189.

67. 112 LAB. REL. REP. (BNA), News and Background Information, 14 (Jan. 3, 1983).

68. 111 LAB. REL. REP. (BNA), News and Background Information, 127 (Oct. 18, 1982).

69. 111 LAB. REL. REP. (BNA), News and Background Information, 201 (Nov. 15, 1982).

70. Approximately 60% to 65% of all American employees are hired on an at will basis. Another 22% are unionized and about 15% are federal or state employees. See U.S. Bureau of the Census, Dep't of Commerce, Statistical Abstract of the United States: 1979, at 427 (table 704) (union membership); *id.* at 392 (table 644) (total labor force); *id.* at 313 (table 509); (government employees).

ages generally do not compensate for future harm.⁷¹

The mutuality argument may on the surface appear fair and reasonable, but it denies a wrongfully terminated employee continued employment, and rewards the employer by limiting liability to money damages.

The justifications offered by the courts for denying reinstatement hardly seem adequate to justify a blanket refusal of the remedy.⁷² Of course, if a court were to find that an employee would not perform adequately if reinstated, it would be justified in refusing such a remedy. There is really no justification, however, for refusing to consider it as an alternative because a problem may exist in some instances. Reinstatement has been considered a viable remedy in other areas of employment law. In reviewing those arbitrators' decisions in which state and federal statutes have been applied, the manner in which these arbitrators have dealt with the reinstatement remedy under collective bargaining agreements becomes clear.

B. Statutory Exceptions Permitting Reinstatement

The most common statutory exceptions which permit reinstatement for a wrongful termination are found in state civil service statutes⁷³ and the National Labor Relations Act (NLRA).⁷⁴ These statutory remedies are ordinarily administrative, but they may receive judicial enforcement.⁷⁵ In many of the cases, the problems of possible supervisory conflict or lack of employer cooperation, have been given little or no consideration.⁷⁶ For example, in one case, an employee was terminated after he challenged his supervisor to a fight.⁷⁷ The court reinstated the employee and found that the employment relationship could be renewed if the judiciary insisted upon it.⁷⁸

Similar remedy provisions are found in state⁷⁹ and federal⁸⁰

71. In the area of employment discrimination, courts have found it appropriate to award "front pay." Front pay is similar to back pay; however, it is awarded to compensate for lost future earnings. *See, e.g.,* Thompson v. Sawyer, 678 F.2d 257, 292-93 (D.C. Cir. 1982).

72. For a general discussion, see D. DOBBS, REMEDIES 429-31 (1973).

73. *See, e.g.,* PA. STAT. ANN. tit. 71, § 741.950 (Purdon's Supp. 1985-86). *See also* Baron v. State Civil Serv. Comm'n, 8 Pa. Commw. 6, 301 A.2d 427 (1973).

74. 29 U.S.C. § 160(c) (1980). The National Labor Relations Board may order a "reinstatement of employees with or without back pay" where employees have been terminated. *Id.*

75. For example, orders of the National Labor Relations Board compelling reinstatement may be enforced by the courts. 29 U.S.C. § 160(e). *See, e.g.,* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

76. *See, e.g.,* Department of Transp. v. Jones, 5 Pa. Commw. 263, 290 A.2d 434 (1972).

77. NLRB v. Yazoo Valley Elec. Power Ass'n, 405 F.2d 479 (5th Cir. 1968).

78. *Id.*

79. *See, e.g.,* PA. STAT. ANN. tit. 43, § 959(f) (Purdon's Supp. 1985-86).

anti-discrimination laws, which may require an employer to hire an individual or to reinstate a terminated employee to prevent discrimination. The Fair Labor Standards Act⁸¹ authorizes reinstatement of an employee who is terminated for claiming minimum wage benefits.⁸² Other federal legislation restricting the right to terminate and permitting possible reinstatement include: (1) the Occupational Safety and Health Act of 1970;⁸³ (2) the Vietnam Era Veterans Readjustment Assistance Act;⁸⁴ (3) the Rehabilitation Act of 1973;⁸⁵ (4) the Employee Retirement Income Security Act of 1974;⁸⁶ (5) the Energy Reorganization Act of 1974;⁸⁷ (6) the Clean Air Act;⁸⁸ (7) the Federal Water Pollution Control Act;⁸⁹ (8) the Federal Railroad Safety Authorization Act of 1980;⁹⁰ (9) the Consumer Credit Protection Act;⁹¹ (10) the Civil Service Reform Act of 1978;⁹² and (11) the Judiciary and Judicial Procedure Act.⁹³ State statutes also contain similar limitations where reinstatement could be considered as an appropriate remedy.⁹⁴

In cases decided under Title VII of the Civil Rights Act of

80. Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2-3 (1980) (title VII).

81. 29 U.S.C. §§ 201-219 (1982).

82. 29 U.S.C. §§ 215, 217 (1982). This has been taken to mean that reinstatement may be a proper remedy. *See Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960).

83. 29 U.S.C. § 660(c)(1) (1982) (prohibiting discrimination against an employee for assertion of rights guaranteed under the Occupational Safety and Health Act).

84. 38 U.S.C. §§ 2021(a)(A)(i), 2021(a)(B), 2021(b)(1) (1982) (guaranteeing the right to re-employment upon satisfactory completion of military service and prohibiting termination "without cause" within one year after re-employment).

85. 29 U.S.C. § 796h (1982) (requiring affirmative action to advance the employment of handicapped individuals by government contractors or subcontractors).

86. 29 U.S.C. §§ 1140-1141 (1982) (prohibits terminating employees to prevent them from attaining vested pension rights).

87. 42 U.S.C. § 5851 (1982) (prohibits terminating employees who assist, participate, or testify, or are about to do same, in any proceeding to carry out purposes of the Act or the Atomic Energy Act of 1954).

88. 42 U.S.C. § 7622 (1982) (prohibits terminating employees who commenced, caused to commence, or testified at proceedings against employer for violation of the Act).

89. 33 U.S.C. § 1367 (1982) (prohibits termination of employees who institute or testify at a proceeding against the employer for violation of the Act).

90. 45 U.S.C. § 441(a), (b)(1) (1982) (prohibits railroad company from terminating employees who filed complaints, instituted or caused to be instituted any proceeding under or related to enforcement of federal railroad safety laws, or testified, or are about to, at such proceeding; or who refuse to work under conditions they reasonably believe to be dangerous).

91. 15 U.S.C. § 1674(a) (1982) (prohibits terminating employees because of garnishment of wages for any one indebtedness).

92. 5 U.S.C. § 7513(a) (1982) (permits removal of federal civil service employees "only for such cause as will promote the efficiency of the service").

93. 28 U.S.C. § 1875 (1982) (prohibits terminating employees for service on grand or petit jury).

94. *See supra* note 24.

1964,⁹⁵ and the Age Discrimination and Employment Act (ADEA),⁹⁶ courts have not been reluctant to order reinstatement. Reinstatement has been ordered under Title VII where an employee was terminated for taking action to enforce the provisions of Title VII⁹⁷ for being married,⁹⁸ for being pregnant and unmarried,⁹⁹ and for being overweight.¹⁰⁰ These courts have assumed, without discussion, that the presumption created by the Supreme Court in *Albemarle Paper Co. v. Moody*,¹⁰¹ in favor of awarding back pay, applied equally to awarding reinstatement.¹⁰²

Although courts may simply "order" the employer to reinstate the employee, occasionally a court will articulate the desired effect of the reinstatement remedy more clearly. In *Laffey v. Northwest Airlines*,¹⁰³ the airline had a policy conditioning the employment of stewardesses upon their maintaining a prescribed weight, and the plaintiff, who exceeded that weight, was terminated. The court illustrated the distinction between prospective and compensatory relief by issuing both a negative and an affirmative injunction. The negative injunction essentially precluded any further discriminatory activ-

95. 42 U.S.C. §§ 2000e-2000e(17) (1982). See, e.g., *EEOC v. Liberty Mutual Ins. Co.*, 346 F. Supp. 675 (N.D. Ga. 1972), *aff'd*, 475 F.2d 579 (5th Cir. 1973), *cert. denied*, 414 U.S. 854 (1973); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971). Recent examples include: *EEOC v. Eazor Express Co.*, 499 F. Supp. 1377 (W.D. Pa. 1980), *aff'd*, 659 F.2d 1066 (3d Cir. 1981) (The district court ordered the employee's reinstatement at the position she would have had in the absence of discrimination at the rate of pay she would have been earning and with the same seniority benefits); *Jones v. Trailways Corp.*, 477 F. Supp. 642 (D.D.C. 1979) (The court ordered reinstatement and awarded back pay, attorney's fees, and \$2,500 as compensation for humiliation and degradation); *EEOC v. Lithographers, Local 2P*, 412 F. Supp. 530 (D.Md. 1976) (Within the scope of equitable relief, the court granted the claimants back pay, reinstatement, and retroactive seniority rights).

96. 29 U.S.C. §§ 621-634 (1982). See, e.g., *Frith v. Eastern Air Lines*, 611 F.2d 950 (4th Cir. 1979).

97. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969).

98. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

99. *Doe v. Osteopathic Hospital*, 333 F. Supp. 1357 (D. Kan. 1971).

100. *Laffey v. Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974).

101. 422 U.S. 405 (1975).

102. For example, *McCormick v. Attala County Bd. of Educ.*, 541 F.2d 1094 (5th Cir. 1976), involved a race discrimination action in which the appellate court vacated the order and remanded the suit to the district court. The lower court had held that the defendant school board's policy of replacing outgoing teachers with new teachers of the same race was racially discriminatory, but it had also denied the plaintiff, a black teacher, both reinstatement and back pay. No grounds were stated for these denials. The appellate court noted that, once discrimination had been proven, a presumption arose that its victim was entitled to reinstatement and back pay. Consequently, the district court was to award the requested relief unless it found that extraordinary circumstances justified its denial.

103. 374 F. Supp. 1382 (D.D.C. 1974).

ity by the airline based on an employee's weight. The affirmative injunction required the airline to notify all stewardesses that the company's weight policy would no longer be enforced, to adjust its employment procedures accordingly, and to offer immediate reinstatement with full seniority to each stewardess who had been terminated for excess weight.¹⁰⁴

Reinstatement has also been ordered to remedy age discrimination. Upon a judicial determination that an employee covered by the ADEA has been unlawfully discriminated against by an employer, relief in the form of "judgments compelling employment, reinstatement or promotion" may be granted where appropriate.¹⁰⁵ Under the ADEA, courts may also compel employment of an unsuccessful applicant upon a finding of a wrongful refusal to hire.¹⁰⁶

In deciding cases under the various discrimination laws, courts have only been reluctant to order reinstatement where prolonged litigation has engendered ill will, especially where an employee has received a substantial backpay award. For example, in *Cancellier v. Federated Department Stores*¹⁰⁷ three former executives of I. Magnin alleged that their terminations violated the ADEA and stated pendant state claims for breach of contract and breach of an implied covenant of good faith and fair dealing. The jury, after a six week trial, awarded a general verdict of \$800,000, \$600,000 and \$500,000 for a total of \$1,900,000, plus attorneys' fees and costs of \$467,000,¹⁰⁸ but the court refused to order reinstatement of the plaintiffs, citing acrimony between them and their employer and the

104. *Id.*

105. 29 U.S.C. § 626(b) (1982). *See, e.g., Frith v. Eastern Air Lines*, 611 F.2d 950 (4th Cir. 1979). In *Babb v. Sun Co.*, 562 F. Supp. 491 (D. Minn. 1983), the court noted that reinstatement is a favored remedy under the ADEA and should be denied only under "exceptional circumstances." *Id.* at 492. Defendant urged that front pay in lieu of reinstatement was the better remedy, especially because some acrimony may have resulted from the course of the litigation, but the court rejected the argument. It found that there was no "poisoned relationship" as a result of the litigation, and there was no other reason not to order reinstatement. *Id.* at 493. All three plaintiffs were ordered reinstated, including one who had unsuccessfully looked for other employment, one who had found employment with reduced benefits, and one who had not sought other employment because he had few employable years ahead of him.

106. For example, in *Dickerson v. Deluxe Check Printers*, 703 F.2d 276 (8th Cir. 1983), the district court refused to compel the employment of the plaintiff, who had been denied a job with the defendant solely because of her age. The court's intransigence was based on its perception of a jury verdict for the defendant as *res judicata* for the purposes of her reinstatement claim. The Eighth Circuit saw no reason not to reinstate the plaintiff. The job sought was not so sensitive that to hire the plaintiff would engender antagonism, nor was there such animosity between parties that an amicable future working relationship would be impossible.

107. 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).

108. *Id.* at 1315.

fact that plaintiffs were made "whole" by the size of the verdicts.¹⁰⁹

C. Current Status of the Reinstatement Remedy in Wrongful Termination Litigation

Lack of a statutory mandate should not preclude courts from ordering reinstatement as a remedy. Prior to the 1970's and 1980's surge of at will employment litigation,¹¹⁰ there had been special situations allowing wrongfully terminated employees to be reinstated.¹¹¹ In *Staklinski v. Pyramid Electric Co.*,¹¹² a high level executive employee had an eleven year employment contract which provided for retirement upon disability. The employer decided that the employee was disabled and terminated his employment. The employee invoked the contract's provisions providing for arbitration, claiming that he was not disabled. The arbitrators found in favor of the employee and ordered reinstatement.¹¹³

Recently, some courts have renewed their interest in the reinstatement remedy by ordering it in wrongful termination cases. In *Duhon v. Slickline, Inc.*,¹¹⁴ a father was wrongfully terminated by his sons when the parent disapproved of one son's beard. Reinstatement was ordered. Here an employment contract that was found to be relevant listed the father's duties and stated: "The services to be rendered are Chairman of the Board, Advisor, and items actually related thereto, including supervision on jobs."¹¹⁵

The sons testified that the termination resulted from the father's failure to perform job duties. Both sons further testified that their father had been disturbed about one son's beard. According to the sons, the father flatly refused to do any sales work until the beard was removed.

109. The Court of Appeals explained that:

[t]he trial judge in this case denied reinstatement because he found evidence of acrimony in the record and because he was "fully satisfied that [the verdict] has made the plaintiffs whole." The court noted the testimony of an I. Magnin officer who referred to plaintiff Ritter as a "cancer." I. Magnin's numerous attacks during the trial on plaintiffs' abilities support the trial judge's conclusion that plaintiffs and I. Magnin could no longer "[c]oexist in a business relationship that could be productive to the consumer, community or the business itself."

Id. at 1319-20.

110. See *supra* note 3.

111. See *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1950). See also *Colvig v. RKO Gen., Inc.*, 232 Cal. App. 2d 56, 42 Cal. Rptr. 473 (1965).

112. 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1950).

113. *Id.* at 163, 160 N.E.2d at 79, 188 N.Y.S.2d at 542.

114. 449 So. 2d 1147 (La. Ct. App. 1984).

115. *Id.* at 1149.

The lower court found that the father was wrongfully terminated and that the incidents upon which the sons relied to establish cause for the termination were minor.¹¹⁶ In reviewing the record, the appellate court agreed with the lower court.¹¹⁷ The appellate court affirmed the trial court's order of specific performance and ordered the father reinstated to his former position as well as the award of back pay and benefits as damages for the breach.¹¹⁸

In *Ellis v. Glover and Gardner Construction Co.*,¹¹⁹ an employee who was terminated because of a wage garnishment brought suit alleging that the termination violated the Federal Consumer Credit Protection Act.¹²⁰ The defendant maintained that Ellis had been terminated because of alcoholism, poor job performance, insubordination, and dishonesty. However, the separation notice stated: "This man was discharged do [sic] to his wages being garnishee [sic]—it is a company policy to discharge any employee this happens [to]."¹²¹ Ellis sought reinstatement, backpay, and other relief. The court's interpretation of the statute held reinstatement to be an ap-

116. *Id.* at 1152.

117. The appellate court stated:

Our review of the record convinces us that the plaintiff was hired primarily to supervise and advise, due to his expertise and extensive experience in wireline work. Although the plaintiff stated that he considered sales a part of his job duties, it appears that such work was not envisioned as a primary function of the plaintiff when he signed the employment contract. We find support for this proposition in the testimony regarding the amendment of the contract at the time it was signed. At the insistence of Guy Duhon, the contract was amended to show that supervision on jobs would be considered a part of the plaintiff's job duties. This testimony evidences a concern on the part of Guy Duhon with more precisely defining the plaintiff's job duties. The absence of any mention of sales work leads us to believe that, if it was intended that the plaintiff do sales work, such intention was not a primary consideration in the negotiation of the employment contract. Thus, the defendants' suggestion that the alleged failure of the plaintiff to do sales work constitutes a blanket refusal to perform his duties is not supported by the record.

It is also important to observe that the plaintiff held a position of authority with Slickline, Inc. While we may disagree with the position taken by the plaintiff on the issue of his son's beard, the record makes clear that the plaintiff, by virtue of his position, was entitled to have some input into policy-making, a function apparently shared with his sons. Thus, the plaintiff's strong stand on the issue, in our view is not in the nature of insubordination, but rather a policy conflict with those with whom he shared authority.

Id. at 1152.

118. *Id.* at 1153. A party who establishes a breach of his employment contract due to wrongful dismissal, is entitled to either damages or specific performance of the contract, or to dissolution of the contract. In all these cases, the plaintiff is entitled to damages where they accrue. *Id.* (citations omitted).

119. 562 F. Supp. 1054 (M.D. Tenn. 1983).

120. 15 U.S.C. § 1674(a) (1982).

121. *Ellis*, 562 F. Supp. at 1056.

propriate remedy,¹²² and analogized it to the area of employment discrimination.¹²³

In *Brockmeyer v. Dun & Bradstreet*,¹²⁴ a management level employee with no contract was reinstated following a wrongful termination.¹²⁵ In analyzing Brockmeyer's claim the court discussed the need to distinguish between cases sounding in tort and cases sounding in contract when basing a decision on the public policy excep-

122. *Id.* at 1066

It appears to this Court that under Section 1674(a) reinstatement is implicitly available to the private plaintiff and that back pay should follow as a matter of course. The administrative remedies used by the Secretary of Labor to enforce Section 1674(a) include civil actions to compel the employer to reinstate a discharged employee and to pay back pay. . . . Moreover, the very considerations leading this Court to conclude that Congress intended to allow suits by private individuals indicate that Congress intended reinstatement and backpay to be available in order to make wrongfully discharged members of the protected class whole.

Id. (citations omitted).

123. *Id.* at 1066-67.

In the field of employment discrimination, by way of analogy, reinstatement and back pay are required in order to make the plaintiff whole for past injuries suffered as result of the unlawful discrimination. (citations omitted) The employment discrimination cases under Title VII are instructive because, in the face of rather vague statutory language, the courts have had to develop a standard of discretion that will effectuate the legislation's purpose To deny reinstatement and back pay in the instant case would appear, to this Court, unjustifiable in light of Section 1674(a)'s central purpose of protecting a particular class of debtor-employees from discharge by reason of garnishment.

Id.

124. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

125. The facts and circumstances leading up to the plaintiff's discharge were as follows: [His immediate superiors] were informed that Brockmeyer, who was married but separated, was vacationing in Montana with his secretary when it was believed that he was performing his normal duties as district manager. Additional inquiries revealed that Brockmeyer had also smoked marijuana in the presence of company personnel. . . . [S]upervisory personnel were directed to confront Brockmeyer with the information received to resolve the problem. [Brockmeyer] acknowledged the relationship with his secretary. He apologized for his absenteeism without notice. He admitted smoking marijuana and promised not to do it again.

Brockmeyer was firmly told that he would be terminated or reassigned if existing conditions did not improve. Shortly thereafter, Brockmeyer's former secretary filed a sex discrimination claim against Dun & Bradstreet. On a variety of separate occasions, Brockmeyer was asked by his superiors to submit a written report about the course of events which led to her resignation. Brockmeyer refused because he feared he would become Dun & Bradstreet's scapegoat for the alleged discrimination actions taken against his former secretary. He also indicated that if called to testify at a hearing or trial, he would tell the truth.

Dun & Bradstreet settled the claim with Brockmeyer's former secretary. Three days later, Brockmeyer was terminated. At the time of the termination, he was offered \$8,500 if he would sign a release agreeing not to sue Dun & Bradstreet. Brockmeyer refused the offer and initiated a wrongful termination action.

Id. at ___, 335 N.W.2d at 836.

tion.¹²⁶ This concept for determining the availability of a reinstatement remedy has been supported by other cases.¹²⁷

Reinstatement is available in common law tort actions as a form of injunctive relief.¹²⁸ Although the availability of injunctive relief in torts depends on a variety of factors,¹²⁹ it is foreseeable that courts, when faced by requests for orders to reinstate employees in the pub-

126. The court stated:

Whether the cause of action for wrongful discharge should be maintained in tort or contract or both needs to be resolved Those cases implying a contractual term of good faith dealing sounded in contract. Most, though not all of the public policy exception cases from other states were tort actions The most significant distinction in our view between the two causes of action in wrongful discharge suits is in the damages that may be recovered. In tort actions, the only limitations are those of "proximate cause" or public policy considerations. Punitive damages are also allowed. In contract actions, damages are limited by the concepts of foreseeability and mitigation. The remedies established by the majority of Wisconsin wrongful discharge statutes are limited to reinstatement and backpay, contractual remedy concepts. We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole." Therefore, we conclude that a contract action is most appropriate for wrongful discharges The contract action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Tort actions cannot be maintained.

Id. at 574, 335 N.W.2d at 841.

127. See, e.g., *Jerry Dvorak v. Pluswood Wisconsin, Inc.*, 121 Wis. 2d 199, 358 N.W.2d 544 (1984). In *Dvorak*, the court stated:

Our decision in this case is consistent with *Brockmeyer*. In that case, our supreme court held that an employee has a cause of action for wrongful discharge only when the discharge is contrary to public policy. The supreme court reached this decision by implying a public policy provision into all employment contracts. The supreme court concluded that a breach of the implied provision created a contract action, rather than a tort action. The court specifically rejected the argument that a wrongful discharge can be maintained as a tort action; the court held that contract damages, especially backpay and reinstatement, are the appropriate remedies for breach of an employment contract.

Id. at ___, 335 N.W.2d at 545-46. (citations omitted).

128. Injunctive relief, as used in the Restatement includes both mandatory and prohibitory injunctions. RESTATEMENT (SECOND) OF TORTS ch. 48, Note on Terminology (1977).

129. Some of these factors can be found in RESTATEMENT (SECOND) OF TORTS § 936 (1977) and are as follows:

- (a) the nature of the interest to be protected,
- (b) the relative adequacy to the plaintiff of injunction and of other remedies,
- (c) any unreasonable delay by the plaintiff in bringing suit,
- (d) any related misconduct on the part of the plaintiff,
- (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
- (f) the interests of third persons and of the public, and
- (g) the practicability of framing and enforcing the order or judgment.

lic policy tort context, may order reinstatement.¹³⁰

From these cases, it is evident that the reinstatement remedy is no longer refused outright. Depending upon the particular case's facts, a wrongfully terminated employee may compel a court to order reinstatement.

D. Towards a Comprehensive Rationale for Awarding Reinstatement as a Remedy for Wrongful Termination Under a Handbook or Written Employment Policy

In light of the arbitration and administrative remedies arising under collective bargaining agreements, reinstatement may be a successful remedy for an employer's breach of a handbook or employment policy. It is suggested that a handbook or a printed employment policy is comparable to a collective bargaining agreement in that it establishes such items as work rules, discipline policies, wages and fringe benefits.

An employee's right to employment, a contractual right based on the collective bargaining agreement, is of paramount importance.¹³¹ Where an arbitrator under a collective bargaining agreement finds that a termination was not for "just cause," a traditional part of the remedy has been reinstatement.¹³²

An arbitrator's reinstatement order was a very fundamental change in the United States labor relations system after enactment of the National Labor Relations Act. Collective bargaining agreements enforced through arbitration clauses became an almost universal part of the employer-union relationship under the stimulus of the War Labor Board established during World War II.¹³³ Today, little doubt remains about the authority of an arbitrator to direct reinstatement as the remedy for a wrongful termination, and like any other arbitration awards, they are enforceable in the courts.¹³⁴

130. See, e.g., *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

131. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

132. See *Reece v. Westmoreland Coal Co.*, 340 F. Supp. 695 (W.D. Va. 1972).

133. O. FAIRWEATHER, *supra* note 10, at 500.

134. [A]rbitration is the substitute for industrial strife . . . [I]t is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. (citation omitted) The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant

A collective bargaining agreement is an effort to erect a system of industrial

Most collective bargaining agreements in the private and public sectors do, in fact, require a "cause" or "just cause" standard for termination or other discipline. Where this standard is not expressed in a collective bargaining agreement, many arbitrators imply a "just cause" limitation.¹³⁵ The general significance of the terms "cause" or

self-government. . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . .

. . . .
 "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.***" (citation omitted)

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82 (1960).

In *Chester City School Authority v. Aberthaw Constr. Co.*, 460 Pa. 343, 333 A.2d 758 (1975), the Pennsylvania Supreme Court stated that "[s]ettlements of disputes by arbitration are no longer deemed contrary to public policy. In fact, our statutes encourage arbitration and with our dockets crowded and in some jurisdictions congested, arbitration is favored by the Courts." *Id.* at 352, 333 A.2d at 763.

135. For instance, Arbitrator Walter E. Boles held that "a 'just cause' basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement." *Cameron Iron Works, Inc.*, 25 Lab. Arb. (BNA) 295, 301 (1955) (Boles, Pennington, and Hampton, Arbs.).

Another arbitrator gave this reason:

If the Company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply by invoking its claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement—the security of a worker in his job.

Atwater Mfg. Co., 13 Lab. Arb. (BNA) 747, 749 (1949) (Donnelly, Sviridoff, and Clark, Arbs.).

"just cause" was highlighted by Arbitrator Joseph D. McGoldrick¹³⁶ and may be comprised of any number of factors.¹³⁷

Many collective bargaining agreements also contain progressive discipline clauses. These impose a kind of procedural due process through an escalating series of disciplinary steps before termination may be imposed.¹³⁸ Even if progressive discipline is not explicitly required, collective bargaining agreements frequently enumerate "car-

136. [I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," . . . or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or, perhaps more properly as part of a new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or conversely, the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

Worthington Corp., 24 Lab. Arb. (BNA) 1, 6-7 (1955) (McGoldrick, Sutton and Tribble, Arbs.).

137. Some of the factors to be considered are as follows:

- (a) The "law of the shop," that is, the response by an employer over a period of years and in a consistent manner to a particular offense.
- (b) A consistent pattern of enforcement of rules and regulations and of notifying employees as to the existence of those rules;
- (c) Case histories of other incidents of enforcement;
- (d) Known practices of severe discipline for certain offenses because of the potential for harm from the product or the manufacturing process;
- (e) Offenses that call for immediate suspension and those not requiring removal;
- (f) On-premises and off-premises offenses, and the differences in their treatment;
- (g) General "arbitral authority," derived from publication of awards, articles, etc.;
- (h) The arbitrator's own sense of equity and his/her subjective judgment as to the significance, seriousness and weight to be given to the incident involved, the record of the employee, or the circumstances causing the termination;
- (i) The severity of the case's facts;
- (j) Attempts made by the employer to rehabilitate the employee;
- (k) Progressive discipline steps that may or may not have been taken;
- (l) The discipline penalty imposed as it relates to the case's facts;
- (m) Whether a "second chance" is warranted from the employee's prior record; and
- (n) Whether the employee is unreclaimable as indicated by his or her prior record and the facts of the case.

For a general discussion of "cause" and "just cause" see F. ELKOURI & E.A. ELKOURI, *HOW ARBITRATION WORKS* 611-13 (3d ed. 1973).

138. F. ELKOURI & E.A. ELKOURI, *supra* note 137, at 630.

dinal sins" for which no prior warning is necessary before an employer terminates the employee. Employees committing lesser "sins" are subject to progressive discipline. Among the most common "cardinal sins" are dishonesty, insubordination, using drugs or drinking alcohol while on duty, fighting, using company vehicles without permission, and possessing firearms on company property. Other misconduct of equal magnitude will also justify termination for cause.¹³⁹

The ultimate penalty that can be imposed for wrongdoing is termination. Lesser penalties may include warnings and suspensions. Termination is recognized as the extreme industrial penalty because the employee's job, contractual benefits, and future employability are at stake.¹⁴⁰ In termination cases, the burden almost always is on the employer to prove wrongdoing, and always so where the agreement requires just cause for termination. The quantum of required proof, however, is an unsettled issue.¹⁴¹

Reinstatement and back pay together constitute a major sanction for enforcement of the National Labor Relations Act, state labor relations acts, discrimination laws, and collective bargaining agreements. Probably nothing is as effective in discouraging a spurious or capricious employee termination. The employer is always aware that it may have to reinstate the employee with backpay in addition to incurring the trouble and expense of arbitration, court action, or an administrative proceeding, unless the termination is justified. Reinstatement and/or a back-pay bill may constitute a considerable sum.

Awarding the same remedy for wrongful terminations occurring under a handbook or an employment policy breach may result in the same employer constraint. This is especially appropriate where handbooks and employment policies have been considered binding employer commitments.¹⁴² Under these circumstances, handbooks and

139. *Genuine Parts Co.*, 79 Lab. Arb. (BNA) 220, 224 (1982) (Reed, Arb.).

140. *Stylemaster, Inc.*, 79 Lab. Arb. (BNA) 76, 77-78 (1982) (Winton, Arb.).

141. J. REDEKER, *DISCIPLINE: POLICIES AND PROCEDURES* 55-251 (1983).

142. See cases cited *supra* note 31. Throughout the remainder of the industrial world, reinstatement is considered as a viable remedy. The reports of the 10th International Congress of the International Society for Labor Law and Social Security indicated the following regarding employment termination and the reinstatement remedy:

Most effective is the reinstatement of the employee. There may be various terms used to identify this remedy. However, they all translate into the same idea; the discharge lacks all effect because the labor contract continues its course.

We must differentiate between reinstatement and re-engagement. The latter connotes the celebration of a new contract, with the effect that there exists a lapse between the original and subsequent contracts. British legislation affords both reinstatement and re-engagement as remedies.

employment policies are equivalent to a collective bargaining agreement. A "just cause" standard can likewise be implied and reinstatement ordered as an appropriate remedy.

IV. A "FAIRNESS" RATIONALE FOR DEALING WITH EMPLOYMENT TERMINATIONS TO LIMIT A REINSTATEMENT REMEDY

Because the area of at will employment is undergoing massive changes, employers are advised to take some general preventive measures to prevent a reinstatement remedy. Although most jurisdictions have not gone as far as California has in drastically circumscribing the at will employment relationship,¹⁴³ the trend has been for courts to grant reinstatement and employers are well advised to "act as if" their terminations and other personnel decisions will be held to the most restrictive standards. Even if the employer is operating in a nonunion setting, every termination should be treated as if subject to labor arbitration under a collective bargaining agreement. An employer should be prepared to meet a "just cause" standard for every

There is an issue as to whether "restitution" may be equally accomplished by reinstatement or simply by payment of the employee's salary notwithstanding his absence. This problem has particular significance where an employer wishes to discharge an employee for union activity. The employer may wish to continue payment of the employee's salary so long as that employee does not contact his fellow workers. After vacillation somewhat, Italian law looks with disfavor upon the attempt to force reinstatement. Obviously, what is sought is the effective reinstatement of the worker and not simply the payment of a salary.

Small firms. Some laws have set forth that reinstatement is not available against small firms (Peru and Sweden).

Eliminated jobs. Reinstatement may not be possible because the company has ceased to exist, or the position has been eliminated. In Romania, the employee maintains his rights as if he had continued on the job. In Great Britain, the employee must be indemnified for his losses. Moreover, where the employer cites incompatibility as an obstacle to reinstatement, the employer must pay twice the normal indemnification and give a 90 day prior notice to the worker.

Exercise of the right. In some countries, the employee may proceed to seek reinstatement once there has been a decision that the discharge was unjustified (Fed. Rep. Germany, Italy, Norway, Paraguay, Romania, Spain, and Sweden). Other countries provide reinstatement as a judicially-imposed remedy, left to the discretion of the judge, to be decided on a case-by-case basis (Brazil, Columbia, Great Britain, India, Israel, Japan, Morocco, Norway, Turkey, and U.S.).

Option. There are countries that provide employers with the option of indemnification as an alternative to reinstatement (Great Britain, Italy, Sweden, Spain). Although a discharged employee may have the right to be reinstated, he may elect otherwise (Brazil, Czechoslovakia, Fed. Rep. Germany, and Italy).

INTERNATIONAL SOCIETY FOR LABOR LAW AND SOCIAL SECURITY, REPORTS AND PROCEEDINGS, II EMPLOYMENT TERMINATIONS 105-06 (B. Aaron & D. Farwell eds. 1984).

143. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

adverse employee action taken. In this way, the employer will be better able to defend its actions and minimize the chances of any reinstatement order.

Fair treatment of employees will go a long way to minimize this risk. Many employees sue because they believe they have been unfairly treated. Employers should take steps to soften the financial blow of a termination. Conduct that might be perceived as humiliating, such as public statements about employee performance should be avoided. The employer should always act to preserve the dignity and respect of the employee.

Termination of the employee should never be a hasty decision. Even if a business judgment has been made that a formal documentation/performance evaluation system would be inappropriate, progressive discipline should still be used. Written warnings should be issued, the affected employee should acknowledge in writing receipt of any warnings, and opportunities for employee rehabilitation should be afforded. Where an employer can document that progressive discipline was provided and rehabilitation was sincerely attempted, a court may be less likely to view the case in the employee's favor and award reinstatement.

If an internal grievance system exists, it should be available to all. If more than one employee is guilty of the same offense, an employer should not discriminate among them when disciplining, unless strong business reasons exist for the distinctions. A detailed documentation for any disciplinary action is essential. These efforts will decrease the possibility of a reinstatement order.

V. CONCLUSIONS

The foregoing examination of the reinstatement remedy has presented an analysis with suggestions for employers to conduct their affairs in order to avoid reinstatement orders by the judiciary. Until the final impact of the limitations on at will employment is assessed, employers are advised to keep abreast of any changes that occur in their employment procedures. Failure to do so may result in costly litigation and increased exposure to damages, including possible reinstatement.

Increasingly, courts are finding that handbooks and employment policies may become binding employer commitments. Courts will be asked to treat the remedy of reinstatement as arbitrators have been using it under collective bargaining agreements. Employers must prepare now for the increased use of reinstatement by realistically reviewing their internal employment practices.