MANUFACTURING SOLIDARITY:
ADVENTURE TRAINING FOR MANAGERS

Joan Vogel*

INTRODUCTION

Largely in response to competition from Japanese corporations whose employees are renowned for teamwork and esprit de corps, many American corporations have turned to outdoor adventure programs to develop trust among their managers and identification with the corporation’s mission. These programs take managers to wilderness areas for several days of intense physical activities such as rock climbing, white water rafting, and ropes courses. Many of these

* Professor of Law, Vermont Law School. J.D., UCLA School of Law, 1981. I gratefully acknowledge the comments and criticism of Richard Delgado, Gilbert Kujovich, Pamela Stephens and Orrin Judd during the preparation of this manuscript.

1. The inspiration for corporate adventure programs may have come from Japanese corporations, which often subject new employees, especially managers, to a physically and psychologically demanding initiation. See T. Rohlen, For Harmony and Strength 192-211 (1974). For example, in an exercise called “roto” a bank’s new managerial employees were required to spend a day going from house to house in a strange community, begging for work without pay. Trainees did any job household members asked them to do. This exercise was intended to teach new employees the value of work and the need to serve customers. See id. at 204-05. Other activities, including grueling physical exercises and forms of spiritual training, tie the employees, hired for their working lives, to the corporation. See id. at 192-211. The Disney Corporation has even imported the “hell camp” stress techniques (called Kanrihisa Yosei Gakko). See Conlin, The Making (or Brainwashing) of a Manager, SUCCESSFUL MEETINGS, Dec. 1988, at 35. The basic outline of these programs is not unlike that of most adventure programs. See infra notes 13-40 and accompanying text.

2. At the present time, it is difficult to determine how many companies are using adventure training programs. The literature indicates only those that have used them in the past. Adventure program brochures and other literature list somewhere around sixty-six companies, large and small, that have used adventure programs. The list includes a number of large, well-known companies such as Coca-Cola, Federal Express, AT&T, Adolph Coors and Weyerhauser. See North Carolina Outward Bound School brochure; SportsMind, Inc. brochure; Project Adventure’s Executive Reach brochure; Black, Inside the Corporate Boot Camps, M MAGAZINE, Feb. 1988, at 62; Conlin, supra note 1, at 31; Kane, Executive Training in the Wild, SIGNATURE J., Oct. 1985, at 36-37; Petrini, Over the River and Through the Woods, TRAINING & DEV. J., May 1990, at 25, 32; Long, The Wilderness Lab Comes of Age, TRAINING & DEV. J., Mar. 1987, at 30 [hereinafter The Wilderness Lab].

3. See generally Black, supra note 2 (discussing common corporate adventure program activities).

657
activities are designed to create apprehension, which the participants learn to overcome by "facing their fear," e.g., of heights or white water, and by working with others to accomplish physical goals. As with military boot camps, these challenges are supposed to bind participants to each other and instill greater unity once they return to the workplace. Further, like military basic training, these programs are designed to "remake" executives in the image of the organization and to erase individual differences.

This article will examine the operation of various outdoor programs, the psychological harms they may cause, and the means for  

4. See id. at 61.
5. See id. at 63.
7. These outdoor adventure programs are designed to appear more dangerous than they are. Each participant wears appropriate safety equipment and harnesses, and adventure counselors carefully guide participants in order to prevent physical injury. Although there is a potential for physical injury, I discuss only psychological harm in this article. Liability for physical injury is fairly straightforward. If the employer sponsors the program and expects employees to participate and if the employee is physically injured, then the employer will be liable for the injury under the workers' compensation system. See, e.g., Ezzy v. Workers' Compensation, 146 Cal. App. 3d 252, 194 Cal. Rptr. 90 (1983); Illinois Bell Tel. Co. v. Indus. Comm'n, 61 Ill. 2d 139, 334 N.E.2d 136 (1975); Tobias v. Stormco Co., 282 A.D. 1087, 126 N.Y.S.2d 120 (App. Div. 1953). See also Gahin & Chesteen, Executives Contemplate the Call of the Wild, RISK MGMT, July, 10 1988, at 44 (discussing the impact of adventure programs on executives). According to Gahin and Chesteen, physical injuries, even fatalities, in outdoor training programs are not uncommon. The authors strongly advise corporations contemplating use of outdoor programs to select the school carefully, to make sure only medically fit employees go, and to make the program optional. See id. at 51. They also recommend having employees sign a waiver of liability form. Id. For a discussion of the effectiveness of these forms, see infra note 150.

One recent case involving fatalities on a white water rafting trip indicates the potential for liability in the event that participants are injured on corporate outings. DDB Needham, an advertising agency, organized a white water rafting trip down a treacherous stretch of the Chilko River in British Columbia. The purpose of the trip was to entertain and woo clients for the firm. During passage on the river, the raft hit a rock, overturned and threw eleven of the twelve participants into the water. Five high-level executives were killed, including a retired DDB Needham employee, whose widow sued the company in federal court. The jury held DDB Needham liable for the death of the retired employee and awarded damages of $1.1 million. At least two more cases growing out of this incident are pending. See Corsello, Big Suits, AM. LAW., Jan.-Feb. 1991, at 31; Hume & Teinowitz, $1.1 M Verdict in Chilko, ADVERTISING AGE, Dec. 3, 1990, at 1; King & Hinge, DDB Needham Liable For Death at Outing, Wall St. J., Dec. 4, 1990, at B4, col. 4-5. The widow of one of the agency's employees who also drowned recovered for the death in workers' compensation. Telephone Interview with Bruce Crowe, attorney for Lenore Fasules, Chicago, Illinois (Jan. 24, 1991). Although this case did not involve a corporate adventure program like the ones discussed in this article, the case is similar to adventure programs in that the president of DDB Needham thought that a rafting trip away from the city would "bond" the clients to the ad agency. The rafting trip was designed to be so challenging and eventful that the participants would
redressing injuries when they occur. Section I will analyze different types of outdoor training programs, their stated rationales and the evidence of their effectiveness. Section II will analyze potential tort and contract remedies for the psychological trauma these programs can cause, including actions for wrongful discharge, intentional infliction of emotional distress and invasion of privacy. The final section will propose a statute that prohibits the worst forms of outdoor and other motivational training courses.

I. OUTDOOR TRAINING PROGRAMS

Although wilderness training programs such as Outward Bound have been in existence for many years, their widespread use in the corporate setting began in the 1980's, when American companies faced fierce competition from abroad and major upheavals at home resulting from deregulation, mergers and acquisitions, leveraged buyouts and forced downsizing. These programs are, in part, an effort by corporations to recreate the cohesiveness and camaraderie of more affluent times. This section will analyze and critique the background of a permanent relationship from “touching the face of death” together. Telephone interview with Bruce Crowe, attorney for Lenore Fasules, Chicago, Illinois (Jan. 25, 1991). Unfortunately, the trip turned out to be memorable in the worst way. See also Hume, Fatal Business Trip?: Chilko Case Hangs on DDB Needham’s Role, ADVERTISING AGE, Nov. 19, 1990, at 6.

Although most of the planners of corporate adventure programs take greater care to protect participants from injury than those who organized this trip, there is always the possibility of injuries, especially in the risk-taking exercises. See infra notes 31-40 and accompanying text. Employers are likely to be held liable for any injuries that occur. Unlike James Fasules, injured employees are restricted to recovering for physical injuries under workers’ compensation. 8. See infra notes 11-84 and accompanying text. 9. See infra notes 85-358 and accompanying text. 10. See infra notes 359-87 and accompanying text. 11. See Bolt, How Executives Learn: The Move from Glitz to Guts, TRAINING & DEV. J., May 1990, at 83, 87 [hereinafter How Executives Learn]; Conlin, supra note 1, at 30; Dingle, Peak Performance, BLACK ENTERPRISE, May 1989, at 64-66; Isenhart, An Investigation of the Interface Between Corporate Leadership Needs and the Outward Bound Experience, 32 COMM. EDUC. 123 (1983); J. BOLT, EXECUTIVE DEVELOPMENT 3-7, 24-27 (1989) [hereinafter BOLT]. 12. See Conlin, supra note 1, at 30. Until recently, managers were almost exclusively white males from upper middle class or upper class backgrounds who attended the same colleges, belonged to the same social clubs, and came from similar ethnic backgrounds. W. Whyte, THE ORGANIZATION MAN (1956). The camaraderie that existed in the past is due in part to those similarities. Today, the workforce, managerial or otherwise, is far more heterogeneous. See P. Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 5-6 (1990). Managers now come from diverse backgrounds with little social
sic theory for the use of adventure programs in the corporate setting.\textsuperscript{13}

\textbf{A. The Theory of Experiential Learning}

Experiential education is said to teach self-esteem, teamwork and risk-taking by removing individuals from their normal environment and challenging them to accomplish outdoor physical tasks such as rope climbing, white water canoeing, or other survival activities.\textsuperscript{14} The emphasis is on learning by doing rather than by lectures or classroom discussions.\textsuperscript{15} These physical activities are intended as "metaphors" for other areas of the participant's life.\textsuperscript{16} If the participant is able to ford a rushing stream, climb a steep cliff, or paddle through rough white water, then he or she should have the confidence to meet challenges in other areas of life.\textsuperscript{17} The exercises are also designed to foster teamwork.\textsuperscript{18} By facing physical challenges together, a group of diverse individuals with little in common should be "bound together" by this experience.\textsuperscript{19}

These same principles are thought to apply to corporate adventure programs.\textsuperscript{20} The corporation sends managers and executives to a

\textsuperscript{13} The basic philosophy of wilderness or adventure programs was established by Outward Bound, the first adventure training organization. Outward Bound was established during World War II to train British merchant sailors to survive the rigors of merchant shipping. See Isenhart, \textit{supra} note 11, at 123; Gahin & Chesteen, \textit{supra} note 7, at 44. Most of the other adventure programs, such as Project Adventure, Rockpoint Reach and SportsMind, were started by individuals who worked for or were trained by Outward Bound. See Schoel, \textit{The Early Days}, 9 ZIP LINES 1, 6 (Fall/Winter 1986) (Project Adventure Newsletter). Later, founders of Outward Bound programs applied survival training to young people in schools. Following this pattern, Project Adventure started as an alternative educational program in the Massachusetts public schools. \textit{Id.}

\textsuperscript{14} See Gahin & Chesteen, \textit{supra} note 7, at 30-31; Gall, \textit{You Can Take the Manager Out of the Woods, but . . .}, TRAINING & DEV. J., Mar. 1987, at 54; Isenhart, \textit{supra} note 11, at 123; Kane, \textit{supra} note 2, at 36-37; \textit{The Wilderness Lab}, \textit{supra} note 2, at 58; Wagel, \textit{An Unorthodox Approach to Leadership}, 63 PERSONNEL 4, 4-6 (1986); Schoel, \textit{supra} note 13, at 6-7.

\textsuperscript{15} See Wagel, \textit{supra} note 14, at 4.

\textsuperscript{16} See \textit{supra} note 14; Gall, \textit{supra} note 14, at 55; Isenhart, \textit{supra} note 11, at 123-29.

\textsuperscript{17} See Gahin & Chesteen, \textit{supra} note 7, at 44.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} See Isenhart, \textit{supra} note 11, at 123-29; Prouty, \textit{The Team as Hero: A Theme for the Nineties}, 15 ZIP LINES 1, 14 (Fall 1989/Winter 1990) (Project Adventure Newsletter) \[hereinafter Prouty\]; Somolowe, \textit{Executive Reach}, 9 ZIP LINES 7 (Fall/Winter 1986) (Project Adventure Newsletter); Gall, \textit{supra} note 14, at 55.

\textsuperscript{20} Although there are a number of corporate adventure programs, the following are the
rural or wilderness setting for a course that usually lasts three or four days.21 During that time, the employees participate in a series of team-building and risk-taking exercises.22 The “trust fall” and the “spider’s web” are examples of the former.23 In the trust fall, one participant stands on a tree stump with his or her back to other group members who line up and hold out their arms. The participant is then told to fall back, and is caught by the others before he or she hits the ground.24 The spider’s web requires participants to pass through a series of ropes strung between two trees in a pattern resembling a web.25 The web consists of a series of holes each of which the group may use only once.26 The group is asked to pretend that the ropes are electrified and should not be touched.27 To complete the exercise successfully, participants must lift and carefully pass each

---


22. Most corporations send only executives and managers to these programs, in part because of the costs. These programs often cost several hundred dollars a day per participant. In a large company, training all employees would be too expensive. Another reason for limiting the programs to managers is that the emphasis on “risk-taking” assumes that the employee is in a position to make decisions, and most important decisions in American business are made by management.

23. I observed these and other exercises on July 24, 1990, at a one-day course conducted by the Rockpoint Reach School in Burlington, Vermont. Rockpoint Reach is part of the physical education program for a private school. Its ropes course was designed by Project Adventure, a nonprofit organization dedicated to promoting adventure training for schools and, more recently, for businesses. When not being used at the school, the ropes course is used for corporate adventure training. On the day I attended, the course participants were employees of a nonprofit association. Interview with Alison Stringer, Director of the Rockpoint Reach School, Burlington, Vermont (July 24, 1990).

24. For a more detailed discussion of this and other ropes exercises, see K. RoHnKE, Cowstails and CobRas II 53-55 (1989). The assumption is that employees who help each other go through the ropes exercises will do the same with other projects in the workplace.

25. See ROHnKE, supra note 24, at 106-08.

26. See id.

27. Id.
person through most of the holes. In the process of planning and executing this task, group members are supposed to listen and work together as a team. With this and the other team exercises, the assumption is that members of the group will apply these lessons to the workplace. One responsibility of the group leader or facilitator, who works for the adventure program, is to make the connections between the exercises and the workplace.

The physical exercises used to encourage risk-taking are designed to appear difficult and to induce fear in the average participant, even when undertaken with appropriate safety equipment. Participants might be required to climb up a steep rock, to walk across a six inch beam twenty feet off the ground, or to climb down a steep cliff. The objective is to require participants to face their fears and take a chance with the encouragement of other group members. The physical exercises are said to give participants new confidence in their ability to take risks on the job and accomplish tasks that they believed were beyond their capabilities. In one course, risk-taking is taught by having the participants climb thirty-five feet up a "pamper pole" and onto a small platform. They are then urged to leap off the platform and catch hold of a trapeze swing some seven feet away. Few are able to do so successfully. Later, participants are told to jump off the platform. Although ropes attached to a hip and shoulder harness prevent participants from falling, these safety measures are not designed to reduce, and, in fact, do not reduce, the anxiety.

28. Id.
29. Id.
30. Id.
31. After each exercise, the group facilitator discussed how the exercises went and what everyone learned in the process. Participants were encouraged to tie the lessons of the exercise to that group's workplace.
33. The Wilderness Lab, supra note 2, at 36.
34. Id.
36. See Rohnke, supra note 24, at 122-23. A "pamper pole" is a straight pole some thirty-five feet off the ground. Participants climb up a ladder and metal rungs on the side of the pole to a small platform at the top. Id.
37. Id.
38. Id.
39. Id.
40. The "pamper pole" exercise was part of the course that I observed. See supra note
B. Critique of Corporate Adventure Programs

Whatever virtues adventure programs may have when used in other settings, their use in the corporate setting is troublesome. Many jobs create some degree of stress and anxiety. But the stress and anxiety created by wilderness programs appear to bear little relationship to that which occurs in most workplaces. Nor is there much evidence that the learning that occurs during the adventure program experience is transferred to the workplace in ways that might justify the dangers these programs present. Most of the evidence is testimonial, gathered by the programs themselves, and presented in hyperbolic form in promotional literature. For example, promotional literature for SportsMind proclaims that AT&T's participation in SportsMind enhanced overall sales from 91% to over 160% of the goal, and that AT&T customer services improved to first in the country. Few other programs claim such far-reaching results, and most are content to rely on general assertions concerning the positive effect of their version of outdoor adventure.

While program brochures are likely to inflate results, it is more
disconcerting that much of the management and educational literature has not been more incisive. Educational specialists, particularly those enamored with experiential education, tend to be uncritical of the use of these programs in the corporate setting.\footnote{46} The few serious studies on corporate adventure programs do not demonstrate that they create any lasting impact on productivity.\footnote{47} Two studies are illustrative. One doctoral study focused on the short-term psychological effects on participants in the Colorado Outward Bound Program.\footnote{48} Participants filled out questionnaires before, during and after the adventure program.\footnote{49} While the author reports that participants claimed to experience an increase in self-perception and self-confidence, this improvement faded shortly after completion of the program.\footnote{50} The researcher did not study the effects of the program on productivity and efficiency,\footnote{51} and found little effect on teamwork.\footnote{52} In another study of managers from an aerospace company who completed a four-day wilderness training program, researchers reported "a boost in morale" and a higher retention rate for those who went through the program.\footnote{53} Yet, much of the evidence for this assertion was subjective, relying primarily on the perceptions of participants.\footnote{54} Moreover, the researchers were unable to document any increase in the company's


The more popular literature on adventure programs displays similar uncritical analysis. See, e.g., Galagan, Between Two Trapezes, TRAINING & DEV. J., Mar. 1987, at 40; Gall, supra note 14, at 54; Petini, supra note 2; Van Zwieten, supra note 35, at 27; The Wilderness Lab, supra note 2, at 30. One commentator stated that articles on outdoor programs are "always written by proponents, and as yet we lack a cool review of what outdoor development does and does not offer." Mumford, What's New in Management Development, PERSONNEL MGMT., May 1985, at 30, 32.


\footnote{48} Galpin, supra note 47, at xi.

\footnote{49} Id. at xii.

\footnote{50} Id.

\footnote{51} Id. at 69-70.

\footnote{52} Id. at 114, 121-22.

\footnote{53} King & Harmon, supra note 47, at 17-19.

\footnote{54} Id. at 4.
ADVENTURE TRAINING

overall performance.\textsuperscript{55}

Even if adventure programs were shown to improve corporate performance, other concerns counsel caution. The risk exercises, for example, deliberately induce anxiety in the participants. Reluctant or fearful participants run the added humiliation of failing in front of their colleagues. For example, one bank executive screamed and yelled during an exercise when he and eight others "were required to cross a river in one trip, using a canoe and an inner-tube."\textsuperscript{56} It later turned out that he was afraid of the water but could not admit it because of peer pressure.\textsuperscript{57}

Doubts about the propriety of trading on the emotional losses of employees for the financial gain of the corporation increase when the voluntariness of corporate adventure programs is considered. Some programs insist that they will train only employees who volunteer, and that they discourage employers from requiring employees to participate.\textsuperscript{58} However, few employees would feel free to refuse to participate, aware that if they do not go they might jeopardize their futures with the company. As one Federal Express regional director stated: "There was nothing voluntary about coming here. When your boss says he's organized a trip and would you like to come, then you go and pack your bags."\textsuperscript{59} The lack of choice makes the risk-taking exercises of wilderness programs far more problematic in the corporate setting than elsewhere.

While not frightening, the team-building exercises have other problems; in particular, the exercises require employees to interact

\begin{thebibliography}{99}
\item \textsuperscript{55} See id. at 17-19.
\item \textsuperscript{56} Black, supra note 2, at 67. In another program, the fear of heights caused one employee to wet his pants when he climbed down a cliff. Symmonds, A School of Hard Rocks, 130 Bus. Wk., Mar. 3, 1986, at 130.
\item \textsuperscript{57} Black, supra note 2, at 67. The potential of corporate adventure programs to produce severe emotional distress is particularly disturbing given the lack of standards for the content of the program or for the training of those who conduct them. It appears that almost anyone can establish an adventure program. No state has a certification or licensing requirement. Although many operators are trained by other adventure programs, few of them have backgrounds in psychology or counseling. Yet, they are operating programs which are designed to expose participants' deepest fears and anxieties.
\item \textsuperscript{58} Telephone interview with Bo Hughes, Director of Professional Development Programs, North Carolina Outward Bound (March 1, 1990); Telephone interview with Alison Stringer, Director of Rockpoint Reach, Burlington, Vt. (June 12, 1990).
\item \textsuperscript{59} Black, supra note 2, at 62. A Director of Planning and Administration for Federal Express has stated that "two people didn't make it. They have the right to say no, but when we get back, they'll be separated by not having shared the same experience." Id. See also Dingle, supra note 11, at 64 (noting that an employee was told that she would be going on the course).
\end{thebibliography}
with each other on a more intimate level than they might otherwise choose to on their own. For example, team exercises often require participants to engage in an extensive amount of touching and other physical contact, behavior usually reserved for intimate relationships.\(^6\) The offensiveness of unwanted intimacies may be increased when the program includes both male and female participants.\(^6\) As discussed later, the “forced intimacy” of adventure programs might constitute an unjustified invasion of participants’ privacy.\(^6\)

An additional concern about these programs is their assumption that lack of group cohesion and reluctance to take risks are owing to flaws or failures of individual employees rather than to the inadequacies of the corporate environment.\(^6\) After the “quick fix” of an adventure program, the corporation’s employees return to the same work environment.\(^6\) Yet, many of the problems attributed to employees are not of their own making but are the products of the rapid and dramatic changes of the last decade. Corporate employees, including middle managers and executives, have far less job security than in the past.\(^6\) A lack of security — the feeling that everyone’s job is on

\(^{60}\) See Black, supra note 2, at 66 (describing the “human wall”).

\(^{61}\) One particularly crude example of forced intimacy was evident in a rowing exercise during one of Outward Bound’s programs in Maine. In that exercise, the only woman executive on a Federal Express outing was made to feel like a “wimp” when she refused to follow the male example of urinating off the side of the boat. Black, supra note 2, at 66.

\(^{62}\) See infra notes 181-93 and accompanying text.

\(^{63}\) See infra notes 65-70.

\(^{64}\) See Black, supra note 2, at 68. As one CEO explained:

I think too many companies might see this as a quick way to build team spirit. They think it’s the American way to take a short-cut. The companies that see this as a cure-all remind me of the old saying: “Everybody wants to go to heaven, but nobody wants to die.”

\(^{65}\) See also Huszczo, Training for Team Building, TRAINING & DEV. J., Feb. 1990, at 37, 40; Conlin, supra note 1, at 32.

the line and all are competing for jobs — undoubtedly affects group cohesion and the willingness of managers to trust each other. Adventure programs assume that managers need to be taught mutual trust and teamwork. Yet, insecurity and lack of trust may be perfectly rational responses to a troubled work environment. What employees need is not a short, stress-filled wilderness program but a corporate environment that allows them to work with each other without undermining their own positions in the company.

Similarly, corporations legitimately need to encourage managers to take risks. But often, managers find that making risky business decisions, especially those that do not produce short-term results, jeopardizes their tenure with the company. The Japanese experience indicates that greater group cohesion and a long-term view come from creating a supportive environment over a long period of time, not


66. See Gordon, supra note 65, at 25. One article presents a graphic description of the effects of insecurity:
The firings, cutbacks, and forced retirements are sending an ominous message to managers . . . . Though most of them have no formal employment contract, they did perceive an implicit contract that practically guaranteed lifetime jobs in exchange for competence, honesty, loyalty, and hard work. This contract has been broken . . . . Even those who survive the shake-ups are affected, and this may bode ill for their employers. Some managers may become more cautious, lest they call attention to themselves. Anthony Carnevale, chief economist at the American Society for Training and Development, a professional association of human resource managers, says: "The people we expect to be the most creative and flexible now work in the most insecure environment and I don't think that's a good mix. Insecurity reduces productivity since it makes people more political, more afraid to take chances."

"Of course, turnover is increasing," says Robert Hecht, Chairman of Lee-Hecht & Associates, an "outplacement" firm. "Managers are jockeying for position and keeping an eye on the door — to see if they'll get pushed or should jump ship first."

Kessler, supra note 65, at 52.

67. Black, supra note 2, at 61.

68. Id. at 67

69. Id. at 63.
from facing risks in an artificial setting for a few days.70

Some corporate adventure programs also introduce arbitrary or irrelevant factors into the process of evaluating employees.71 Although directors of adventure programs disapprove of the practice, they readily admit that there is no way they can prevent the company from evaluating employees based on their performance in the program.72 Consequently, employees are not only subjected to unusual

70. In Japan, the core employees of large companies, approximately twenty to thirty percent of the work force, have lifetime employment security. See R. DORF, TAKING JAPAN SERIOUSLY: A CONFUCIAN PERSPECTIVE ON LENDING ECONOMIC ISSUES 28-32 (1987) [hereinafter TAKING JAPAN SERIOUSLY]; R. DORF, FLEXIBLE RIGIDITIES: INDUSTRIAL POLICY AND STRUCTURAL ADJUSTMENT IN THE JAPANESE ECONOMY 1970-80 72, 114-15 (1986) [hereinafter FLEXIBLE RIGIDITIES]; WEILER, supra note 12, at 70; Billesbach & Rives, LIFETIME EMPLOYMENT: FUTURE PROSPECTS FOR JAPAN AND THE U.S., ADVANCED MGMT. J., Autumn 1985, at 26-27 [hereinafter Billesbach & Rives]. During their work lives with a Japanese company, employees can expect to perform a variety of jobs and undergo extensive periods of training to learn these different jobs. See TAKING JAPAN SERIOUSLY, at 28. With this security, Japanese managers are better able to take a longer view or perspective and are not threatened by other managers in the firm. This kind of employment security encourages the kind of teamwork and commitment that American companies claim to want. See, e.g., id. at 29-31, 108-09, 141-42. Even so, employment security has not caught on in this country despite its popularity with many commentators. Only companies that are unionized provide any significant employment security. See, e.g., WEILER, supra note 12, at 68-71; W. OUCHI, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE 117-19 (1981); Billesbach & Rives, at 29-46; Hoerr & Zellner, supra note 65, at 86-87.

However, lifetime employment security in Japan exists only for male employees; women are expected to leave when they marry. Few women are even hired into professional or managerial positions. Many larger firms can provide security to their core employees by having a significant number of part-time or temporary workers, many of them women, who can be fired or laid off as business cycles dictate. The core employees are expected to retire early, usually at age 55. Unlike in American companies, job mobility is extremely limited in Japan. "Because losing or quitting a job is an admission of inadequacy, any job loss makes it difficult for an individual to find another job of comparable salary, rank and job security." Billesbach & Rives, at 27. See also TAKING JAPAN SERIOUSLY, at 29-32; FLEXIBLE RIGIDITIES, at 114-15; OUCHI, at 17-25; WEILER, supra note 12, at 68-71. If American companies are going to adopt employment security, they will have to rely on different cultural traditions than Japan. Dore attributes lifetime employment security to a Confucian tradition embodied in a community model of labor relations. TAKING JAPAN SERIOUSLY, at 85-107. Several American commentators have presented elaborate frameworks for how such a system could work in this country. See OUCHI, at 117-29; WEILER, supra note 12, at 68-71, 186-224; WORK IN AMERICA INSTITUTE, EMPLOYMENT SECURITY IN A FREE ECONOMY (1984).

71. See Black, supra note 2, at 62 (noting that continued success of corporate adventure programs may lead to employee evaluation based, in part, upon skills not employed during the normal course of employment).

72. Alison Stringer, Director of the Rockpoint Reach program in Burlington, Vermont explained that she would not keep a corporate client that evaluated employees on their performance in the outdoor program. Telephone interview with Alison Stringer, Director of the Rockpoint Reach Program, Burlington, Vt. (June 13, 1990). How Rockpoint Reach or any other adventure program would know if the corporation did evaluate employees based on
physical and psychological challenges, they may also find that their futures with the company have been injured by their performance on activities unrelated to their jobs. Employees have a right to expect that their job performance, not outdoor programs, will determine their prospects for retention and advancement.

Another objection to corporate adventure programs stems from their adoption of a quasi-military, and therefore predominantly male, model of individual and social organization that devalues and excludes other approaches. For example, SportsMind practices a war game called “Samurai” in which participants are organized into two teams that battle each other according to the code of the Samurai. Each team is told to develop their own “corporate cultures” with simple uniforms, chants and other rituals. Team members are required to protect their leader to the death if necessary. More generally,
adventure programs create group cohesion by subjecting participants to physical and psychological stresses in the belief that participants later will be bound to each other by having "survived" such experiences.\footnote{See Black, supra note 2, at 62.} This approach places a high premium on physical activities and risks, and devalues discussion — as if little is learned until participants are given a tangible physical demonstration of the principles of trust and the need for group cohesion.\footnote{See Galagan, supra note 46, at 40-41; Isenhart, supra note 11, at 123-24; \textit{The Wilderness Lab}, supra note 2, at 30-32; Kane, supra note 2, at 36-38. See also Gall, supra note 14, at 54-56.}

Much of the theory behind adventure programs betrays not only their military roots but also their use with young people in the schools.\footnote{In fact, Outward Bound and Project Adventure were developed to train young people of school age. Certainly, the trust fall described earlier, see \textit{supra} notes 23-24, has all the hallmarks of a child's game. This exercise is designed to teach participants that there are times when they "must learn" to trust others. Like children, participants cannot truly understand how to trust without such a concrete demonstration. See Galagan, supra note 46, at 43.} Participants are presumed to be unable to understand basic principles of social organization without concrete demonstrations.\footnote{For example, the Rockpoint Reach School is actually a physical education program used by a private elementary and secondary school in Burlington, Vermont. See ROHNKE, supra note 24 (noting that the same exercises used for children are also used in the corporate program).} Whatever value experiential outdoor education may have with children, using these programs with adults, particularly in the compulsory setting of a corporation, presents serious issues of abuse that the legal system will soon be called upon to confront.

Not only do the programs infantilize participants, but their emphasis on physical prowess, and deemphasis on other socializing skills, disadvantages women.\footnote{See generally West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988).} If called on to increase teamwork and trust, women, who tend to be more comfortable expressing emotions, might bring all employees involved together and discuss the obstacles to teamwork and trust that exist.\footnote{"[W]omen do not struggle toward connection with others, against what turn out to be"}{\textit{supra}} Adventure programs assume that the only way to generate effective discussions is to require participants to perform physical tasks.\footnote{See \textit{supra} notes 45-47 and accompanying text. As a result, they deemphasize the

\textit{JAPANESE LEARN TO WORK} (1989); S. COHEN & J. ZYSMAN, \textit{MANUFACTURING MATTERS} (1987); ROHLEN, supra note 1. In Great Britain, the London Action Development Company created a "war game" where executives work as a team to destroy the enemy. The idea is that the executives would be bound together in "the brotherhood of war." Conlin, \textit{supra} note 1, at 31.

\textit{76. See Black, supra note 2, at 62.}
\textit{77. See Galagan, supra note 46, at 40-41; Isenhart, supra note 11, at 123-24; \textit{The Wilderness Lab}, supra note 2, at 30-32; Kane, supra note 2, at 36-38. See also Gall, supra note 14, at 54-56.}
\textit{78. In fact, Outward Bound and Project Adventure were developed to train young people of school age. Certainly, the trust fall described earlier, see \textit{supra} notes 23-24, has all the hallmarks of a child's game. This exercise is designed to teach participants that there are times when they "must learn" to trust others. Like children, participants cannot truly understand how to trust without such a concrete demonstration. See Galagan, supra note 46, at 43.}
\textit{79. For example, the Rockpoint Reach School is actually a physical education program used by a private elementary and secondary school in Burlington, Vermont. See ROHNKE, supra note 24 (noting that the same exercises used for children are also used in the corporate program).}
\textit{80. See \textit{supra} notes 45-47 and accompanying text.}
\textit{81. See generally West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988).}
\textit{82. [W]omen do not struggle toward connection with others, against what turn out to be}
very social skills at which many women excel.\textsuperscript{83} Performance of male-dominated tasks, such as those called for by outdoor programs, may disadvantage female managers if this performance is used to evaluate whether the employee is "company material."\textsuperscript{84}

\section*{II. Tort and Contract Causes of Action Against Employers and Operators of Adventure Programs}

Employees might sue their employers and operators of adventure training programs in the event of injury suffered during the adventure program or in the event of discharge for refusal to take part in a course. The principal causes of action are intentional infliction of emotional distress,\textsuperscript{85} invasion of privacy\textsuperscript{86} and wrongful discharge.\textsuperscript{87} Corporate training programs are a new area for legal liability; as yet, there are no reported cases defining the liability of either employers or program operators. However, given the risks associated
with adventure programs discussed in section I of this article, it is only a matter of time before someone brings a suit. This section will explore whether existing law is adequate to provide redress for the kind of emotional injuries that stress training can cause.88

A. Intentional Infliction of Emotional Distress

Since one of the major purposes of outdoor training programs is to put employees deliberately into frightening or stressful situations,89 intentional infliction of emotional distress is the most obvious tort cause of action available to injured employees. Although this tort action was not developed for the employment setting, employees have frequently used it to seek redress for emotional distress caused by employer conduct.90 They have had some success, but only in extreme cases.91 This reluctance to find liability is due, in part, to

88. Outdoor training programs are not the only unorthodox training programs designed to increase efficiency and productivity that create risks of injury to employees. Other programs use techniques similar to brainwashing. Some of the “New Age” motivational training programs such as Transformational Technologies established by Werner Erhard and a similar program established by the Church of Scientology promise to increase productivity by “remodeling” employee attitudes in intense training sessions that subject employees to the kind of techniques normally associated with religious cults. Main, Trying to Bend Managers’ Minds, FORTUNE, Nov. 23, 1987, at 95-96. Pacific Bell used New Age techniques to “overhaul its corporate culture” after its divestiture from AT&T. Id. at 100. Investigation by the California Public Utilities Commission found that the training program was coercive, damaging to employees and enormously expensive. In addition, the program yielded few tangible benefits. Id. Reports on the Scientology training are even more disturbing. Employees reported that they were forced to participate in cult group activities that caused severe trauma. Employees unwilling to go to the sessions were fired or told they had little future with the company. Id. at 104. See also Conlin, supra note 1, at 32-36.

The adventure programs discussed in this article do not generally employ the kind of brainwashing techniques employed by the “New Age” programs but do try to change employee behavior in ways which raise some of the same issues. One adventure program, the Pecos Learning Center, employs more “New Age” techniques in the program. Participants are often required to make personal confessions, and engage in “games” designed to increase “personal intimacy” with other participants. Id. at 105-06. Most of the other programs concentrate more on physical exercises and have directed discussions about the lessons of the exercises with the group. Nonetheless, the emotional distress that these can create are just as disturbing.

89. See supra notes 32-40 and accompanying text.


91. See Austin, supra note 90.
the amorphous character of the tort, and the concern that a broad interpretation may create a flood of employment cases and undermine the employment-at-will doctrine.\textsuperscript{92} Courts might also be concerned that employment practices that cause some degree of emotional harm to employees are necessary to the efficient functioning of the workplace.\textsuperscript{93} According to the Restatement (Second) of Torts, to show intentional infliction of emotional distress,\textsuperscript{94} the plaintiff must establish: (1) that the defendant engaged in "extreme and outrageous conduct," (2) which "intentionally or recklessly" (3) caused (4) severe emotional distress.\textsuperscript{95} Of these elements, employees may encounter difficulty establishing that adventure training programs constitute extreme and outrageous conduct, and that employers intended to cause, or were reckless with regard to causing, emotional harm. Even if an injured employee can establish the elements of the tort, the employer may still prevail if it establishes that employees consented to participate.

1. Extreme or Outrageous Conduct

As one writer has indicated, the most important element of this tort is whether the defendant’s behavior constitutes extreme or outrageous conduct.\textsuperscript{96} In fact, if the plaintiff can establish this element, courts are prone to find that the elements of causation, intent and severe distress have been satisfied.\textsuperscript{97} Courts are more likely to find

\textsuperscript{92} See Austin, supra note 90, at 7-9; see also Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (noting that emotional distress claims should not undermine the at-will rule).

\textsuperscript{93} Austin, supra note 90, at 1-11.

\textsuperscript{94} RESTATMENT (SECOND) OF TORTS § 46 (1965). Intentional infliction of emotional distress is defined in relevant part as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Id. at § 46(1).

\textsuperscript{95} Id. See also Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 47-48 (1982).

\textsuperscript{96} Givelber, supra note 95, at 46-54.

\textsuperscript{97} Id. at 48-49. See also Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524, 534 (1984) (noting that discharging an employee for dating a former manager who was working for a rival company was outrageous, and therefore distressing to the plaintiff); Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 653 (1981) (conducting a strip search in front of a customer was obviously distressing to a young, shy employee).

However, some courts still require a significant showing of extreme distress. See, e.g., Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853 (Minn. Ct. App. 1985); Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985); Evard v. Jacobson, 117 Wis. 2d
the requisite degree of outrageousness when the defendant has power over the plaintiff derived from a contractual or status relationship — landlord-tenant, creditor-debtor, or employer-employee — and the defendant appears to be using this power to inflict emotional harm.\textsuperscript{96} Even then, however, the defendant's behavior must be fairly abusive.\textsuperscript{98} As a general matter, courts do not question the legitimacy of these relationships no matter how unequal they are,\textsuperscript{99} but rather impose liability for intentional infliction of emotional distress to regulate the relationship and to keep the more powerful party within civilized bounds.\textsuperscript{100} In the employment setting, courts accept that the employer will inflict distress on employees in the everyday operation of the workplace.\textsuperscript{101} A degree of brusqueness or even insensitivity is permissible when necessary to assure performance of essential tasks.\textsuperscript{102}

---

\textsuperscript{96} 69, 342 N.W.2d 788 (Ct. App. 1983); Harris v. Jones, 281 Md. App. 560, 380 A.2d 611 (1977); Givelber, \textit{supra} note 95, at 48-49 n.29; Austin, \textit{supra} note 90, at 16-17.

One commentator is critical of the requirement that the employee show extreme distress. This requirement denies recovery to workers who "displayed greater resourcefulness and adaptability" even if the employer's conduct was outrageous. Austin, \textit{supra} note 91, at 17. This requirement can create strange results as, for example, when courts have denied recovery to some plaintiffs while allowing others to recover in the same suit. In \textit{Moniodis}, all four employees established that requiring them to take an illegal polygraph test was outrageous but the appellate court reversed the jury award and allowed only one employee to recover. The court held that the rest were not adequately distressed. \textit{Moniodis}, 64 Md. App. at 15-16, 454 A.2d at 219. See Austin, \textit{supra} note 90, at 17. Employees should be able to recover if the employer's behavior is outrageous. He or she should not be penalized for failing to fall apart. Givelber suggests that sometimes courts require a greater showing of distress if they are not entirely convinced that the defendant's behavior is outrageous. Givelber, \textit{supra} note 95, at 48-49 n.29.

---


\textsuperscript{99} \textit{See RESTATEMENT (SECOND) OF TORTS} § 46 comment e. \textit{See also Givelber, \textit{supra} note 95, at 53.}

\textsuperscript{100} \textit{See Austin, \textit{supra} note 90.}

\textsuperscript{101} Givelber, \textit{supra} note 95, at 62, 74.

\textsuperscript{102} Austin, \textit{supra} note 90, at 5-12.

\textsuperscript{103} \textit{Id.}
Adventure programs, however, often include activities that have little, if any, relationship to the workplace responsibilities of the employee-participants. Moreover, adventure program activities are often designed to be stressful, whereas the stress of the workplace is normally incidental to an activity with immediate purposes other than the creation of stress. The tenuous connection between adventure programs and legitimate expectations of the workplace, and the deliberate emphasis on stressful activities, may make it easier for employees to establish that employer conduct exceeds acceptable limits. The caselaw suggests that the farther the conduct or activity is removed from the legitimate requirements of the job, the more likely that a court will find it to be outrageous and extreme. For example, in *Rulon-Miller v. IBM*, a supervisor fired the plaintiff for having a romantic relationship with a former employee who had left to work for a rival company. The discharge contravened a company policy which protected employees' private lives unless the company could show that the relationship threatened its legitimate business interests. Finding that the employee was penalized "for conduct unrelated to her work," the court concluded that under all the circumstances of the case the employer's behavior was outrageous.

*Rulon-Miller* suggests a number of features that ought to be expected in any determination of outrageous conduct. First, whether a tortfeasor's action rises to the level of outrageousness depends, in part, on the setting in which the conduct occurs. In the employment setting, employer practices that intrude into the personal lives of employees intrude on private behavior beyond the workplace, sometimes courts will find this interference to be outrageous. See Austin, *supra* note 90, at 8 n.26. However, when off-duty conduct affects legitimate employer concerns, courts do not find the employer liable. See, e.g., *Woodring v. Bd. of Grand Trustees*, 633 F. Supp. 583 (W.D. Va. 1986) (stating that an employer could discharge an employee after his wife died when his wife was crucial to success of the job); *Patton v. J.C. Penney Co.*, 301 Or. 117, 719 P.2d 854 (1986) (holding that termination for fraternization with an employee provided no cause of action).

104. See *supra* notes 41-55 and accompanying text.

105. See *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (noting that discharge because of an affair with a former employer was considered outrageous conduct). When employers intrude on private behavior beyond the workplace, sometimes courts will find this interference to be outrageous. See Austin, *supra* note 90, at 8 n.26. However, when off-duty conduct affects legitimate employer concerns, courts do not find the employer liable. See, e.g., *Woodring v. Bd. of Grand Trustees*, 633 F. Supp. 583 (W.D. Va. 1986) (stating that an employer could discharge an employee after his wife died when his wife was crucial to success of the job); *Patton v. J.C. Penney Co.*, 301 Or. 117, 719 P.2d 854 (1986) (holding that termination for fraternization with an employee provided no cause of action). See *infra* notes 160-206 (discussing invasion of privacy).

106. *Rulon-Miller* is also an important wrongful discharge case.

107. *Id.* at 244-46, 208 Cal. Rptr. at 527-29.

108. *Id.* at 246, 208 Cal. Rptr. at 530.

109. *Id.*

110. Other circumstances that the court considered relevant to its conclusion were that the supervisor at first gave plaintiff a choice about terminating her involvement, but then said the relationship had to end. When she complained, he terminated her. *Id.*
employees are more likely to be outrageous than those more directly related to the employee’s job responsibilities. Second, Rulon-Miller suggests that unless the connection to the workplace is self-evident, the employer has some burden of showing that its intrusion is job-related. The activities of adventure programs can intrude into deeply personal aspects of an employee’s life. They require employees to expose their most elemental and private fears to supervisors and co-workers. Whether these demands constitute outrageous conduct should depend, in part, on the extent and directness of their relationship to legitimate requirements of the workplace. As indicated earlier, this connection seems weak; at any rate, it has not been established in any reliable study.\(^{111}\) Employers resisting an allegation of outrageous conduct should have the burden of establishing that connection.

Even if the employer offers some proof that the adventure program activities improve managerial, and therefore corporate, performance, adventure activities may nevertheless constitute outrageous conduct. Courts in Oregon and in other states have held employers liable for outrageous and extreme conduct despite a clear connection to the needs of the workplace.\(^{112}\) In Bodewig v. K-Mart, Inc.,\(^ {113}\) an irate customer charged that the plaintiff, a cashier, took money that the customer had left on the counter.\(^ {114}\) After searching the employee’s jacket, in order to placate the customer, the manager had a female assistant manager take the employee into the women’s restroom to conduct a strip search of the employee in front of the customer;\(^ {115}\) no money was found.\(^ {116}\) The plaintiff quit her job the next day.\(^ {117}\) The Oregon court found that, while the manager was legitimately concerned with the possibility of theft, a jury could find that subjecting the employee to a humiliating strip search to placate an irate customer was outrageous conduct.\(^ {118}\)

Similarly, in Hall v. May Dep’t Stores Co.,\(^ {119}\) a supervisor accused the plaintiff of stealing money. The supervisor did not have convincing evidence of the employee’s guilt, but nevertheless threat-
ened her with “prosecution and imprisonment”\(^\text{120}\) in order to frighten her into confessing to the theft.\(^\text{121}\) After the interview, the plaintiff was forced to quit her job. The court recognized that the supervisor may have been pursuing the employer’s legitimate interest in detecting employee theft.\(^\text{122}\) It concluded, however, that intentionally subjecting the employee to a hostile confrontation constituted outrageous conduct in light of the “scanty evidence” of the employee’s guilt.\(^\text{123}\)

\textit{Bodewig} and \textit{Hall} establish that conduct may be outrageous even if it is related to the employer’s legitimate concerns; the fact that an employer sees a possible benefit to itself from abuse of an employee does not excuse that abuse. When an adventure program forces employees to expose and confront their fear of falling\(^\text{124}\) or drowning\(^\text{125}\) or suffer public humiliation,\(^\text{126}\) the distress produced seems no less outrageous than that suffered by an employee forced to confess to a crime. It thus seems likely that the more egregious forms of corporate exercises will result in liability. But it is not at all clear how far courts will go in imposing limits on the use of stress-inducing methods in pursuit of improved performance and profit.\(^\text{127}\)

2. Intent

Injured employees should have little difficulty satisfying the intent requirement because adventure programs deliberately create stressful conditions. Indeed, it is the overcoming of deliberately induced anxiety or fear that is thought to change the participants’ attitudes by forcing them to “face their personal dragons.”\(^\text{128}\) Employ-
ers might argue that while they intend to change attitudes they do not intend to cause severe distress. However, a showing of intent does not require that the employer intend severe harm; it is enough that the employer intended to “act . . . in a manner that can be considered outrageous.”29 If courts consider these programs to constitute outrageous conduct, then subjecting employees to the rigors of these programs is enough to show intent.13 Even if the employer argues that it did not intend to cause severe emotional harm, the Restatement formulation also allows a finding of liability if the defendant is reckless as regards the possibility that the outrageous conduct would cause severe distress.131 Given the risks, these programs are often, at the very least, reckless.132

This pressure to be “close” may cause severe discomfort to those involved. This is particularly true of outdoor programs, such as the Pecos River Project, that include therapy sessions or intense personal discussions as part of the program. Unlike corporate retreats, cocktail parties and company picnics, adventure programs demand far more contact and intimacy than is usual at conventional company gatherings. It is possible to have a working relationship with co-workers that does not involve deep friendship, and employees are entitled to make decisions about friendship on their own. See infra notes 181-93 and accompanying text (discussing forced intimacy as an invasion of privacy).

Employers and program operators show little concern about participants' psychological well-being, perhaps because they believe that these programs are not likely to produce psychological injuries. The case for intent is strengthened by the experimental nature of the programs. Employers encourage employees to take part even though they are unfamiliar with their emotional stability or background.

129. Givelber, supra note 95, at 46.

This view distinguishes between intention regarding the conduct and its likely victim, and intention regarding the consequences of the conduct. Plaintiff must show that the defendant intended to engage in conduct that is outrageous and that he or she intended or knew (or, perhaps, deliberately disregarded a high degree of probability) that the behavior would affect the plaintiff; once plaintiff has shown this, a reasonableness standard will be applied with respect to the issue of whether the defendant should have known that the conduct would cause emotional distress to the plaintiff . . . . Thus formulated, the test supports liability in cases where the defendant is so insensitive to the feelings of others that it is believable that the defendant had no idea that his or her outrageous behavior towards plaintiff would inflict severe emotional distress.

Id. at 46-47.

130. Id. at 46. See also Agis v. Howard Johnson Co., 371 Mass. 140, 140-45, 355 N.E.2d 315, 318 (1976); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145, 148 (1974) (noting that the intent or recklessness requirement was met when the defendant "had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result."). By contrast, the Restatement (Second) of Torts § 47 comment a, specifically requires that the defendant intended to cause severe distress. 131. Restatement (Second) of Torts § 46 (1965).

132. Restatement (Second) of Torts § 46 comment i defines recklessness as "deliberate disregard of a high degree of probability that the emotional distress will follow." Given
3. Defenses

As a defense, employers might argue that they do not require employees to participate in these programs and that, therefore, any employee who chooses to participate consents to do so. Although rarely raised in emotional distress cases, consent is a defense to this and all other claims based on the commission of an intentional tort. Consent usually means that the employees are able to make a choice as to whether to participate in the adventure program without jeopardizing their futures with the employer. But the coercion implicit in a corporate decision to enroll managers in an adventure

the risks that these programs pose and the extensive knowledge that employers have about them, sending employees on adventure programs should be regarded as deliberate disregard within the meaning of the Restatement. See supra notes 32-84 and accompanying text.

133. Most managerial employees are not told that they must participate. Instead, the employer tells them how important it is to the company and how the company strongly "advises" them to go. As the earlier discussion indicated, managers usually get the message. See supra notes 58-59 and accompanying text. If the employer requires managers to go, the coercion is more obvious.

134. See RESTATEMENT (SECOND) OF TORTS, § 892A; PROSSER & KEETON, supra note 98, § 18 (noting that consent is rarely raised as a defense in intentional infliction of emotional distress cases because this defense is neither relevant nor plausible in many situations). Plaintiffs rarely consent to the kind of treatment that they have received. In Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984), the plaintiff obviously did not consent to her termination under the circumstances of that case. See supra notes 105-10, and accompanying text. In Bodewig v. K-Mart, Inc., 54 Or. App. 480, 635 P.2d 657 (1981), and Hall v. May Dep't Stores Co., 292 Or. 131, 637 P.2d 126 (1981), the plaintiffs did not consent to being harassed, interrogated and searched in that way. See supra notes 113-23 and accompanying text. See also, Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (noting that the company took no action when its supervisor sexually harassed an employee for over a year); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (noting that an employee was discharged as part of the employer's plan to fire employees in alphabetical order until the employee who stole was uncovered); Milton v. Illinois Bell Tel. Co., 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981) (noting that an employee was fired when he refused to file false reports); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (involving an employee who was forced to endure racial harassment).

135. See, e.g., PROSSER & KEETON, supra note 98, § 18. But consent is regarded as present, also, when one manifests a willingness that the defendant engage in conduct and the defendant acts in response to such a manifestation . . . . [A] willingness to incur an invasion, or a willingness that the defendant should engage in conduct that brings about an invasion, may exist and be manifested only because the defendant has threatened consequences flowing from a refusal to submit. Under such circumstances the plaintiff's submission or manifestation of willingness may be coerced.

Id. See supra notes 133-34 and accompanying text. In Bodewig, for example, the employer claimed that the plaintiff was only asked, not told, to disrobe before the customer. The court quickly disposed of this argument by stating that she had no choice because she feared losing her job. 54 Or. App. at 485, 635 P.2d at 660.
program, and the limited information normally provided to employees about these programs, suggest that consent may not be an effective defense.\textsuperscript{136} Most employees are not likely to feel that they can refuse to participate in an adventure program even if given a choice, since doing so may jeopardize their futures with the company.\textsuperscript{137} Even if refusal does not jeopardize the relationship with supervisors, other employees who went through the program might resent their absence, thereby damaging their relationships with co-workers and impeding their future job performance.\textsuperscript{138} Many operators of adventure programs are aware of the problem of coercion and of the risks that employees might try exercises that they are unable to accomplish without experiencing serious emotional distress.\textsuperscript{139} Thus, some tell employers not to send unwilling employees to the program, warn employees that they need not try everything, and tell employers not to use performance as part of its evaluation system.\textsuperscript{140} But all that these operators can do is to offer these suggestions. They have no way to ensure that participation is truly voluntary; coercion is inherent in the command structure of a corporation.\textsuperscript{141}

Even if employers advise employees that participation in an adventure program is not required, the prospective participants may lack the information necessary to make an informed decision. There is little indication that participants know much about the exercises in the

\textsuperscript{136} The concept of “informed consent” has been applied primarily to medical procedures. Informed consent protects personal autonomy by requiring that patients know about and consent to any medical procedures performed on them. PROSSER & KEETON, supra note 98, § 18. A similar concern with personal autonomy exists with adventure programs that intensively probe participants’ most private fears and attitudes in ways not dissimilar to psychotherapy, although without the privacy and safeguards associated with therapy. While there are no reported cases involving adventure training and similar behavior-modification programs, courts should scrutinize them with the same care as other medical and psychotherapeutic procedures.

\textsuperscript{137} See Black, supra note 2.

\textsuperscript{138} A manager at Nike said as much about employees who did not go on the adventure program promoted by the company. MacNeil/Lehrer Newshour (WNET television broadcast, Sept. 4, 1989).

\textsuperscript{139} Telephone interview with Bo Hughes, Personnel Director, North Carolina Outward Bound (March 1, 1990); Telephone interview with Alison Stringer, Director of Rockpoint Reach School, Burlington, Vt. (June 10, 1990); Telephone interview with John Donovan, Donovan Associates, Norwich, Vt. (July 9, 1990).

\textsuperscript{140} Black, supra note 2, at 63.

\textsuperscript{141} Telephone interview with Alison Stringer, Director of the Rockpoint Reach School, Burlington, Vt., (June 10, 1990). Telephone interview with John Donovan, Donovan Associates, Norwich, Vt. (July 9, 1990). See also Black, supra note 2, at 62.
training course. The adventure training literature rarely explains the program in detail, and it is not even clear if participants see this literature because much of it is written for the corporate employer. In any case, the literature cannot convey to participants what these exercises are really like. Thus, the first opportunity for an employee to make an informed decision on participation in the program may be when the employee arrives at the training site. By this time, however, the pressure for participation has increased substantially and employees may feel unable to refuse to participate. Adventure programs are designed to have group members encourage other reluctant participants to become “team players,” and to take the risks. This pressure might well push participants to engage involuntarily in activities that they cannot manage, with devastating results.

Even if the employee can establish the elements of intentional infliction of emotional distress, some states do not allow employees to bring this tort action against the employer; rather, they must bring a claim for psychological injury under workers’ compensation schemes. However, injured employees can bring a separate action against the operators of the corporate adventure programs. Workers’ compensation would not be a bar to this suit. How well
would such a claim against the operator fare? Unlike the employer, the operator does not have power over participants. Employees participate because the employer told or "asked" them to do so. Even so, there may be no reason to treat the operator differently. The operators or consultants sell their programs to corporate leaders as ways to transform employees. The operator and the employer normally design the course together. The operator depends on the employer to deliver the participants. Although the authority operators have is derived from the employer, this authority is still imbued with the same potential for abuse as with the employer. Furthermore, the operator normally organizes and conducts the exercises. If operators of outdoor programs work in the corporate setting, they ought to bear the same risks and liability if a participant is emotionally harmed in the process.

many operators such as Outward Bound routinely include waiver of liability forms in the materials sent to participants.

Courts are generally hostile to waiver of liability or disclaimer forms when plaintiffs are personally injured, and where the plaintiffs do not understand the meaning of the disclaimer, or the risks involved. See, e.g., Gross v. Sweet, 49 N.Y.2d 103, 400 N.E.2d 306 (1979). But see Prosser & Keeton, supra note 98, § 68.

As indicated earlier, employees rarely know much about adventure training programs before they arrive. See supra notes 142-47, and accompanying text. In the program that I observed at the Rockpoint Reach School, employees did not know what to expect. Their supervisor did not tell them what to expect because he did not want to create any negative preconceptions.

In the Fasules case mentioned earlier, see supra note 7, the defendant also tried to introduce into evidence a release signed by the plaintiff. The federal district court refused to allow the release into evidence because the circumstances under which the release was given to participants on the rafting trip did not indicate that anyone understood the risks or dangers involved. In addition, the release itself was "too broad and ambiguous" to give the plaintiff any understanding of what the release meant or what dangers the river posed to novice rafters. In another suit brought by the widow of Robert Goldstein, another executive who died on the trip, the federal court also refused to admit this same release. Freeman, DDB Needham Faces Chiko Trial Next Year, ADVERTISING AGE, July 9, 1990, at 4; Hume, supra note 7, at 6; King & Hinge, supra note 7, at B4, col. 4-5. As in these cases, the court may also decline to enforce a release or disclaimer if the plaintiff did not understand the risks involved in the exercises or what the disclaimer meant.

151. See SportsMind brochure.

152. See Petrini, supra note 2, at 25; Wolman, Training Among the Trees, TRAINING NEWS, Dec. 1981, at 1, 3. The brochure from the Outward Bound School at Hurricane Island in Maine contains the following:

The Team Leadership program is a contact course which focuses on team building and leadership development. We would work closely with you to develop a result focused program designed specifically to meet your needs. Programs range from 1-7 days in length based on the goals and objectives established with you.

See also Gall, supra note 14, at 55.

153. In the Fasules case, see supra note 7, the plaintiff did not sue the the rafting
B. Invasion of Privacy

Warren and Brandeis are generally credited as the first to advocate a cause of action for invasion of privacy. In their landmark article of 1890, they argued that invasion of privacy should be treated as a cause of action independent of trespass and other intentional torts. Later, Prosser and the Restatement divided invasion of privacy into four distinct causes of action: (1) "unreasonable intrusion upon the seclusion of" individuals or their private affairs; appropriation of the name or likeness of another; public disclosure of private facts which "would be highly offensive to a reasonable person;" and (4) publicity that unreasonably places an individual "in a false light before the public." Because adventure programs may intrude into aspects of employees' lives unrelated to the requirements of the job, intrusion upon seclusion is the privacy cause of action most relevant to corporate adventure programs.

company that "ran the trip" because the rafting company was Canadian and because they were uninsured. Telephone interview with Bruce Crowe, attorney for plaintiff, Chicago, Illinois (Jan. 26, 1991). Many operators of adventure programs do have insurance, so they are not likely to avoid a lawsuit if an injury occurs.

A few companies operate their own outdoor training programs without the assistance of adventure program operators. See Gall, supra note 14, at 57. In that instance, an injured employee will not have an independent third party to sue.


158. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652D (1977); WORKPLACE PRIVACY, supra note 86, at 25-30; EMPLOYEE PRIVACY LAW, supra note 157, § 4.3; Decker, supra note 157, at 558-64, 570-73.

159. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652D (1977); WORKPLACE PRIVACY, supra note 86, at 25-30; EMPLOYEE PRIVACY LAW, supra note 157, § 4.3; Decker, supra note 157, at 570-73.

160. The employee might bring another cause of action for publication of private facts if the employer "publicizes" the performance of employees in these programs to a large number of people. See RESTATEMENT (SECOND) OF TORTS § 652D (1977). Public disclosure of private facts is in fact the most common privacy claim brought in the employment setting. See Decker, supra note 157, at 571. To be actionable, disclosure must be of private facts, must be made at least to a large number of people or to the public at large, and must be "highly offensive and objectionable to a reasonable person of ordinary sensibilities." PROSSER & KEETON, supra note 98, § 117. See infra notes 173-78 (discussing whether adventure
1. Intrusion Upon Seclusion

The Restatement (Second) of Torts defines intrusion upon seclusion as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his [or her] private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." There can be little doubt that the intrusions of corporate adventure programs are intentional. Establishing that the intrusions are highly offensive and that they invade a protected form of solitude or privacy concerns may be more problematic. Although the case law on privacy has not yet addressed corporate adventure programs, the latter provide a unique opportunity to clarify what privacy rights exist in the employment setting.

Apart from the phrase, "the right to be let alone," there is
little agreement about the meaning of privacy.¹⁶⁴ In the employment setting, most of the intrusion cases stem from information-gathering and evaluation activities undertaken by the employer.¹⁶⁵ Even for these more traditional intrusions, there is disagreement about how much latitude an employer should have in investigating and regulating employee behavior.¹⁶⁶

As one commentator explains, many employers engage in intrusive information-gathering practices in order to know the "whole employee," what he or she can or does do on and off the job.¹⁶⁷ In the privacy cases, employees have challenged the gathering of information on such matters as their financial affairs, off-duty recreational activities, personal relationships, or sexual activities.¹⁶⁸ In deciding

---


¹⁶⁷. EMPLOYEE PRIVACY LAW, supra note 157, at 11.

whether these information-gathering activities intrude upon protected private affairs, the courts have focused on whether the employer has delved into matters in which employees have a reasonable expectation of privacy. Employees have a reasonable expectation of privacy regarding their persons, beliefs, property, personal relationships and other off-work activities. Nonetheless, such expectations may have to yield to the legitimate requirements of the workplace. The determination of whether the intrusion on employees' reasonable expectations of privacy is "offensive" usually turns on the extent to which the intrusive activity is related to the legitimate concerns of the employer and on the means that the employer uses to accomplish these ends.

Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982) (holding that a questionnaire that asked about employee attitudes, weaknesses and finances was not an invasion of privacy).

169. PROSSER & KEETON, supra note 98, § 117. For example, in Cort v. Bristol-Myers Co., 385 Mass. at 306-10, 431 N.E.2d at 913-14, the plaintiffs, pharmaceutical salespersons, refused to fill out certain questions on a questionnaire that they believed to be highly personal and generally irrelevant to their job responsibilities. As a result, they were fired. The Massachusetts Supreme Court held that while requiring employees to supply unreasonably intrusive information could invade their privacy, most of these questions were "relevant to the plaintiffs' job qualifications." Id. at 310, 431 N.E.2d at 914.

The information that a high level or confidential employee should reasonably be expected to disclose is broader in scope and more personal in nature than that which should be expected from an employee who mows grass or empties waste baskets. A salesman responsible for the sale of drug products to hospitals, doctors, and pharmacists, falls in the middle of this range, but toward its upper side. The temperament and dedication of a salesman are important factors in his effectiveness, and questions bearing on these subjects are certainly reasonable and should be expected.

Id. at 309, 431 N.E.2d at 913. See also Bratt v. IBM, 392 Mass. 508, 467 N.E.2d. 126 (1984).

Cort also found that the company did not invade the plaintiffs' privacy because they had refused to answer the questions that they believed to be intrusive. If the employer was unable to secure the information, the "attempted invasion of privacy . . . failed." Id. at 304, 431 N.E.2d at 910.

Employer actions may also create a greater expectation of privacy in the workplace than might exist otherwise. For example, in Trott, the employer allowed employees to supply their own locks for store lockers without giving the employer the key or combination. 677 S.W.2d at 637-38. In so doing, the employer "recognized an expectation that the locker and its contents would be free from intrusion and interference." Id. at 637. The employer violated that expectation when it opened the locker and searched the employee's purse without her permission. Id. at 637-38. See also Rulon-Miller v. IBM, 162 Cal. App. 3d 498, 208 Cal. Rptr. 524 (1984) (noting that company policy protected the plaintiff's off-duty relationships from intrusion).


171. Id. at 397-98.

172. PROSSER & KEETON, supra note 98, § 117. WORKPLACE PRIVACY, supra note 86, at
The discussion of adventure programs in Section 1 suggests that such programs may intrude into employees' private affairs or concerns in two ways. First, corporate adventure programs may force employees to reveal deep-seated fears and anxieties that, in the usual work setting, are the personal and private concern of the employees. Second, the programs may force employees into forms of intimacy that are normally associated with private decisionmaking.

Are these invasions justified? The premise of these exercises is that participants will acquire new confidence to confront more conventional challenges by facing and overcoming these otherwise private fears and anxieties. The revelation of private feelings inherent in these exercises is compounded when employees who are too fearful to attempt the exercises, or who fail while attempting them, experience embarrassment and humiliation in front of co-workers. While there may be some employment situations in which it is unreasonable for employees to expect that their fears and anxieties concerning unusual physical challenges will remain private, those would not appear to include the typical management position. In most work settings, managers do not have to admit to or confront their personal fears about heights, water, boats or the outdoors. Moreover, forcing employees to expose these fears may cause the kind of embarrassment and trauma that almost anyone would want to keep private. Other co-workers and the employer might well interpret this behavior as a sign of "weakness" or incompetence. Attempting to transform the attitudes of employees this way makes these programs more like therapy sessions, an activity that ordinarily falls within a reasonable expectation of privacy.

30. See supra notes 41-62 and accompanying text.

173. This privacy concern falls within Alan Westin's definition of privacy as "the claim of individuals . . . to determine for themselves when, how and to what extent information about them is communicated to others." A. WESTIN, PRIVACY AND FREEDOM 7 (1967).

174. Although many cases concern physical intrusion, privacy protects an individual's psychological well-being as well. PROSSER & KEETON, supra note 98, § 117.

175. Black, supra note 2, at 67.

176. There are some employment contexts in which employees may not reasonably expect that certain phobias are their private concern alone — e.g., the airline pilot with a fear of heights or the ship captain with a fear of water. However, even in the airline company, the office manager should have a reasonable expectation that his or her fear of heights will remain a private concern.

177. Certainly, information given in the context of psychotherapeutic situations is considered "private" in the way that the term is usually meant. See, e.g., Bratt v. IBM, 392 Mass. 508, 467 N.E.2d 126 (1984) (noting that a doctor told the supervisor that an employee was
The employer may well see the program as a way to discover who will “break” under pressure or stress. But it does so by means that are so broad that courts should find them offensive intrusions. Fears of falling or drowning have little to do with the job requirements of managers. An individual who displays diffidence about rappelling down a steep cliff may nevertheless be an excellent administrator or executive.

Employers might maintain that adventure programs increase a manager’s ability and willingness to learn in new places and under less than ideal circumstances. After experiencing the adventure program, it might be argued, managers should be able to handle anything that the corporation needs for them to do in the fast-changing business world. Yet, like the other claims discussed above, this relationship between adventure programs and managerial duties has not been established. If employers choose to rely on these claims to justify intrusions into employee privacy, they must offer stronger evidence of the connection than the unsubstantiated assertions of program brochures. Absent such evidence, intruding on employees’ emotional privacy should be considered “offensive” within the meaning of the tort.

The second serious privacy concern with corporate adventure programs is that they put employees through risk-taking and team-building physical exercises, purportedly to “bond” them more closely together in order to increase corporate loyalty, efficiency and productivity. This “bonding” process is designed to go well beyond the polite working relationships accomplished in quality work circles or other kinds of workplace teams. Corporate adventure programs

179. See supra notes 13-40 and accompanying text.
180. In a limited category of employment contexts, a training program that exposes or helps to overcome certain phobias may be obviously and directly related to the employee’s job responsibilities. See supra note 177.
181. See supra notes 41-45 and accompanying text.
182. Quality work circles are small work teams composed of management and workers who meet to “formulate solutions to production or service problems that fall within the scope of the group’s work.” Ferguson & Gaal, Codetermination: A Fad or a Future in America?, 10 EMPLOYEE REL. L.J. 176, 181 (1985). The functions of such groups vary anywhere from merely discussing the “technical concerns of production,” id., to actually organizing and controlling part of the production process. Weiler, supra note 12, at 31-32. While Japanese companies did not invent these groups, larger companies use quality work circles extensively. See Ouchi, supra note 70, at 39-55; TAKING JAPAN SERIOUSLY, supra note 70, at 12-13, 18-19, 58-59, 87-89, 102-03, 119-20, 143-44; Kuper, Developments in the Quality of Working Life, 28 LAB. L.J. 752 (1977); The New Industrial Relations, Bus. Wk., May 11, 1981, at
seek to create deep bonds of friendship by putting employees into situations designed to foster vulnerability and deep camaraderie, the kind of intimate relationship employees would not necessarily choose to create on their own. At a minimum, this sort of "forced intimacy" violates the right of employees to choose their own relationships and friendships.

Although this argument has not been specifically made in the intrusion cases, some decisions provide authority for the proposition that employers cannot force employees into close relationships. For example, in Phillips v. Smalley Maintenance Services, Inc., the Eleventh Circuit found that the employer wrongfully intruded on the solitude of the plaintiff by sexually harassing her continually for several months. The employer locked the employee in his office, questioned her about her sex life with her husband, and finally dis-

---

84; Pascarella, 'QWL' Is Slowly Proving to Be a Winner, INDUS. WK., Sept. 21, 1981, at 17; Verma & McKersie, Employee Involvement: The Implications of Noninvolvement by Unions, 40 INDUS. & LAB. REL. REV. 556 (1987).


183. Of course, individual employees may become friends with other employees, but these friendships are made on their own, not at the employer’s initiation. While the workplace is a major place where social relationships are formed, these programs are designed to control employee decision-making in this regard.

184. See supra notes 59-62.

185. Many employees would find it difficult to stand aloof from the pressure to bond with the other participants because the intensity of the experience is likely to make him or her feel uncomfortable. In the program that I observed, most employees felt they had to do the exercises, especially the team-building exercises, even if they were uncomfortable with the intimacy and the physical contact involved. For one thing, the supervisor was there participating and watching what the others were doing. For another, the facilitators made it hard for any member of the group to stand aside. In any case, employers and co-workers might well regard such reticence as antisocial and would not consider the individual a “team player” or a good prospect for promotion.

186. 711 F.2d 1524 (11th Cir. 1983). The portion of the opinion dealing with invasion of privacy under Alabama law was written by the Alabama Supreme Court. The Eleventh Circuit certified the state law questions to the Alabama Supreme Court. Its answer comprised that part of the Eleventh Circuit opinion. 711 F.2d at 1533-37.

187. Id. at 1526-28.
missed her after she refused his sexual advances. In addition to finding a violation under Title VII of the Civil Rights Act, the Eleventh Circuit found that these activities invaded her privacy under state law even though the employer was not successful in getting his way. The mere use of the employer's power to corner and harass her with obscene suggestions and demands was enough for liability. Although adventure programs do not include sexual harassment of this type, Phillips suggests that an employer cannot force employees into relationships more intimate than a working relationship. Insisting that employees “bond” during an adventure program, while not as humiliating as sexual harassment, can be just as intrusive, and it would not be surprising for a court to find liability based on that behavior.

While the tort cases do not expressly address the matter, a zone of protected privacy is defined not only by the exclusion of those who would intrude, but also by an individual’s right to make decisions without interference. Most employment cases stress limits

---

188. Id.
190. The analysis in Phillips could be important if, for example, an employee refused to go on the outdoor program, or if the employee went but did not participate in the “offensive” exercises. In these instances, the employee could still bring a privacy action if the employer kept insisting that the employee participate. See Phillips, 711 F.2d at 1534.
191. In a related case, a New Jersey court found that an employer may be liable under the tort of intrusion when it had pressured employees to terminate intimate relationships with others of whom the employer disapproved. In Slohoda v. United Parcel Servs., Inc., 193 N.J. Super. 586, 475 A.2d 618 (1984), rev’d on other grounds, 207 N.J. Super. 145, 504 A.2d 53 (1986), the employer fired a married employee who was having an affair with a female employee who was not his wife. The employer stated that the primary reason for the discharge was that the plaintiff was having an adulterous affair. 193 N.J. Super. at 586, 588-92, 475 A.2d at 618, 619-20. In finding that the “discharge policy” may have violated the employer’s “right to privacy,” id. at 593, 475 A.2d at 622, Slohoda suggests that the employer cannot regulate the sexual or intimate activities of employees absent a legitimate business concern about how these relationships may affect the proper functioning of the workplace. Id. at 592-93, 475 A.2d at 621-22. The employer might be concerned about liability under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000-e to 2000-e.17 (1982), for sexual harassment if supervisors have relationships with employees. See Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (noting that the mere existence of a grievance procedure will not shield the employer from liability under Title VII where the employer’s agent made unwelcome sexual advances).
192. It is far more common to see discussions of the individual’s right to make such decisions in the constitutional privacy cases. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state may not intrude on the marital relationship by banning the use of contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that the constitutional
on employer conduct without mention of employees' affirmative right to make decisions about their private lives. Discussions about the importance of employee autonomy in or outside of the workplace are less common, perhaps because courts are more concerned with limiting or preserving the employer's control over the workplace. Yet employee autonomy should mean, at a minimum, that employees are able to prevent exposure of their deepest fears and anxieties to their employers if such fears have no direct relationship to their ability to perform their work. Similarly, employees should have the right to extend or withhold friendship or other intimate relationships with other employees as they choose. The common law right to privacy should protect the employee's right to make these decisions without undue interference by the employer.

2. Defenses

While courts recognize a right to privacy, they also recognize certain defenses that, if interpreted broadly, may defeat a privacy cause of action. As with intentional infliction, consent is a defense to invasion of privacy. The case law tends to interpret consent broadly. Some cases have found consent when the employer has announced that it was implementing the program as a policy. If the employee continues to work for the employer, he or she is thereafter deemed to have consented to the policy. Courts have used this approach to uphold such employment practices as drug or polygraph testing. Thus, all the employer would need to do to establish con-
sent is to tell prospective or existing employees that it expects all of its managers to undergo adventure training as part of its training and evaluation process. For all of the reasons given earlier, consent is not a real option for most job applicants or employees.\textsuperscript{197} Having to choose between taking or continuing in a job and going through an adventure program, and losing a job or a promotion for refusal to do so, is at best a hollow choice. Many of the privacy cases ignore this reality. Even if the employer does not say that participation in the program is required, most employees will feel that they cannot refuse.\textsuperscript{198} Consent in this context is a fiction.\textsuperscript{199}

One reason courts may interpret consent this broadly is because they believe that the employer's practice is necessary to further legiti-
mate business goals, even if this practice would be unacceptably intrusive in any other setting. For example, in the drug testing cases, courts generally find that the employer has a legitimate concern that employees not be intoxicated or impaired on the job. So long as the manner of conducting a drug test is not more intrusive than is required and so long as the employee is on notice that such a test is required, courts generally find that the employer has not invaded the employee’s privacy. While concern over intoxication has some connection to an employee’s job, adventure training has much less. In the absence of such a connection, the employer should not be able to defend these programs simply by alleging that adventure programs improve productivity and efficiency. Employers should have to demonstrate that these programs further legitimate goals. The kind of anecdotal information found in the literature should not suffice. In addition, employers should also have to prove that they could not achieve such goals with less intrusive means.

Much of what has been said about the liability of employers under the tort of intrusion should apply as well to operators of adventure programs. If, as I have urged, these programs invade employees’ privacy, operators should share this liability. In general, proponents of adventure programs show little, if any, sensitivity about the intrusiveness of the exercises that they devise and market. Because opera-

200. Furthering legitimate business goals is considered a defense or privilege to invasion of privacy. Like consent, this defense could significantly reduce any protection available to employees if interpreted too broadly. To some extent, this defense overlaps with the requirement that the plaintiff prove that the intrusion was “offensive to reasonable persons.” PROSSER & KEETON supra note 98, § 117; see also WORKPLACE PRIVACY, supra note 86, at 30. Presumably, if the intrusion furthered legitimate business goals, then it is not offensive to reasonable persons. When courts find that the employer’s practices furthered legitimate goals, they are also saying that the practice is not offensive.

201. See supra note 195.


203. See supra notes 40-55 and accompanying text.

204. For a discussion of what reasonable drug testing methods should be, see EMPLOYEE PRIVACY LAW, supra note 157, § 7.9.


205. In my discussions with directors and group facilitators, none saw any serious
tors do not have the same concern about productivity and efficiency that employers have, courts may be less inclined to protect the operators from invasion of privacy claims especially when operators are unable to demonstrate the effectiveness of the programs that they promote to employers.206

C. Wrongful Discharge

Employees may also have a cause of action if they are discharged or pressured to resign as a result of participating or refusing to participate in an adventure program.207 In recent years, many jurisdictions have modified the harsh employment-at-will doctrine, which precluded judicial intervention in most employment terminations.208 The classic statement of the employment-at-will doctrine problems with the risk-taking or team-building exercises. They viewed every problem as solvable by telling employers not to force employees to attend or by telling participants that they do not have to take part in exercises that bother them. These precautions ignore the realities of choice in the workplace and the realities of the very group process that these programs are designed to encourage. Few employees feel that they can refuse to come, and even fewer feel able to refuse to participate in exercises when other employees do.

206. See supra notes 40-55 and accompanying text.

207. Creating intolerable working conditions so that an employee is forced to resign is called constructive discharge. Constructive discharge has long been held actionable under Title VII and other federal labor statutes. See, e.g., Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982); Pittman v. Hattiesburg Mun. School Dist., 644 F.2d 1071 (5th Cir. 1981); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 1279 (8th Cir. 1980); Muller v. U.S. Steel Corp., 509 F.2d 923 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975); J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972); NLRB v. Tennessee Packers, Inc., 339 F.2d 203, 204 (6th Cir. 1964).


allowed the employer to terminate the employee for any or no reason.209 Only employees covered by collective bargaining agreements or other contracts for a specific term could demand that they be discharged for "just cause."210 In response to changing attitudes about the employment relationship and a growing body of statutory law limiting employer discretion, courts began to fashion various common law doctrines to limit discharge in a number of situa-


210. See supra note 209.
As with invasion of privacy, wrongful discharge actually comprises several causes of action sounding in both tort and contract. These include: (1) discharge in violation of public policy; (2) implied and express contracts; and (3) the implied covenant of good faith and fair dealing.

1. Public Policy

Most jurisdictions recognize a public policy exception to the employment-at-will doctrine, but its scope varies from state to state. Some jurisdictions interpret public policy narrowly; the discharge must violate or impinge on a statute, constitutional provision or judicially created rule in order to violate public policy. Other jurisdictions do not restrict public policy so stringently, but are unclear as to the boundaries of the concept. However, even in jurisdictions that interpret the concept broadly, the employer’s conduct must affect more than the employee’s interest or concerns for the discharge to violate public policy.

211. See WITHOUT JUST CAUSE, supra note 207, at 18-20.
212. See infra notes 215-72 and accompanying text.
213. See infra notes 270-358 and accompanying text.
214. See infra notes 273-328 and accompanying text.
215. See infra note 235; WITHOUT JUST CAUSE, supra note 207, at 27-63.

But what constitutes clearly mandated public policy? There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.

The Illinois Supreme Court then found that the discharge violated public policy when the employer fired the plaintiff, who had supplied information to, and cooperated with, local law enforcement officials. Id. at 879. Even though no statute or constitutional provision required what the employee did, nonetheless, the court found that a citizen's "exposure of crime" and cooperation with law enforcement was a matter of public policy. Law enforcement cannot function without citizen participation. Public policy is not limited to statutory and constitutional provisions. Id. at 880. See also Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Payne v. Rozendaal, 147 Vt. 488, 520 A.2d 586 (1986).

218. One commentator was very critical of court attempts to distinguish the "private" interests of employees from the interests of the public at large. See The Public Policy Exception, supra note 209, at 1947-50. See infra note 235 and accompanying text.

Most public policy cases fall into one of three categories: (1) refusal to engage in criminal activity. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to engage in price-fixing); (2) exercising a statutory or
The one public policy case most relevant to adventure programs, *Wagenseller v. Scottsdale Memorial Hospital*, was analyzed in terms of violation of the state's indecency statutes. In *Wagenseller*, the plaintiff, a nurse, went on an eight-day camping and rafting trip down the Colorado River with a group consisting largely of hospital co-workers and her immediate supervisor. During the trip, she became uncomfortable with group pressure to engage in public urination, bathing, heavy drinking, and other similar activities. She refused to participate in these activities and in a group parody of "Moon River," during which participants exposed themselves to others. Her supervisor and other members of the group did this skit twice, and each time the plaintiff refused to participate. As a result of her refusal, she was harassed by her supervisor until she was asked to resign. Before the trip, her job evaluations had been very good. Thereafter, her supervisor constantly criticized her work. When she refused to resign, she was fired.

The Arizona Supreme Court held that the discharge would be contrary to public policy if the employee was fired for refusing to participate in activities that would violate Arizona's indecent exposure statute. Although the Arizona Supreme Court did not limit the definition of public policy to violation of criminal or other statutes, it had little trouble finding that this discharge could have contravened constitutional right. See, e.g., Frampton v. Central Ind. Ins. Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (filing a worker's compensation claim); or (3) performing a public duty. See, e.g., Petrick v. Monarch Printing Corp., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (reporting suspicions of embezzlement to a superior); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (cooperating with law enforcement); Pierce v. Ortho Pharmaceutical Corp. 84 N.J. 58, 417 A.2d 505 (1980) (raising ethical objections to experimental human research).

Discharge as a result of corporate adventure programs does not fit easily into any of these categories. If courts are willing to recognize public policy in the violation of such independent torts as intentional infliction of emotional distress or invasion of privacy, then this kind of public policy is akin to exercising statutory rights. Employees are exercising their right to avoid an invasion of privacy or emotional distress.

220. Id. at 374, 710 P.2d at 1029.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
228. Id. at 379-80, 710 P.2d at 1035-36.
public policy where a criminal statute was involved.\textsuperscript{229}

Although most adventure programs do not violate criminal statutes as in \textit{Wagenseller}, they still use the coercion inherent in the employment relationship to pressure employees to engage in exercises that have the same potential to humiliate them.\textsuperscript{230} The supervisor in \textit{Wagenseller} saw the public participation in intimate activities as a way of bonding employees with each other.\textsuperscript{231} She also viewed the plaintiff's unwillingness to participate as an indication that she was not a team player and, therefore, not a good employee.\textsuperscript{232} While the employer — a hospital — did not organize the rafting trip, it failed to protect the employee from her supervisor when she returned to the workplace.\textsuperscript{233} Obviously, nothing she was asked to do on that trip had much relevance to her job as an emergency room nurse.

Even in the absence of a pertinent criminal statute, an employee discharged because of an adventure program could allege that the discharge violated public policy under two circumstances. First, the program might violate the common law tort of intentional infliction of emotional distress and/or invasion of privacy in a manner discussed earlier.\textsuperscript{234} Even jurisdictions that interpret public policy narrowly recognize judicial decisions as a source of public policy.\textsuperscript{235} Of course, the employee may not be able to make this argument if the employer has not committed an independent tort such as, for example,
when the employee is fired for refusing to go.\textsuperscript{236}

For example, in \textit{Slohoda v. United Parcel Service, Inc.},\textsuperscript{237} the employee alleged that he was dismissed because he had an extramarital affair with a co-worker.\textsuperscript{238} The New Jersey Superior Court held that if the employer's policy invaded the plaintiff's privacy, then the discharge would be in violation of public policy as embodied in the common law tort of invasion of privacy.\textsuperscript{239} If the employer fired the employee for reasons and under circumstances that create liability under this tort, then, in addition to liability under the tort of invasion of privacy, the discharge would also be in violation of public policy.\textsuperscript{240}

If the employer's conduct creates liability for invasion of privacy or intentional infliction of emotional distress, why does it matter if the employer is liable for a discharge in violation of public policy? Although the employee may not receive greater damages for a tortious discharge, nonetheless, liability sends an important message to employers in ways that other tort liability may not. Unlike invasion of privacy and intentional infliction of emotional distress, this tort is expressly directed at the employer. Wrongful discharge tells the employer that it cannot discharge employees for this reason even if it has the power to do so ordinarily.

In the absence of, or in addition to, an independent tort, the employee may be able to use state constitutional provisions that extend the right of privacy to private as well as public employees. Some states have expansive privacy provisions in their state constitutions.\textsuperscript{241} For example, the California Constitution contains such a

\begin{itemize}
\item \textsuperscript{236} Unless merely asking or requiring an employee to go is an invasion of his or her privacy. See e.g., Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524, 1534 (11th Cir. 1983) (noting that intrusion upon privacy does not require "that [the] information be acquired.").
\item \textsuperscript{238} Id. at 589, 475 A.2d at 619-20.
\item \textsuperscript{239} Id. at 590-91, 475 A.2d at 621-22.
\item \textsuperscript{240} Although many cases say decisional law can be the basis for public policy, few cases have actually found decisional law as a basis for public policy. See supra note 235. See also Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 906 (1982) (noting that an employer would contravene public policy if an employee were fired for refusing to answer questions that unreasonably invaded his or her privacy).
\item \textsuperscript{241} See e.g., ALASKA CONST. art. I, § 22; CALIF. CONST. art. I, § 1; ILL. CONST. art. 1, § 6; MONT. CONST. art. II, § 10. Thus far, only the California courts have interpreted the privacy provision to cover private employees. See White v. Davis, 13 Cal. 3d 757, 533 P.2d
provision. Although California courts are divided over the extent of this protection, they have interpreted this provision to cover some nongovernmental action. In Senmore v. Pool, the plaintiff was terminated after refusing to take a “pupillary reaction eye test” for drugs. The California Court of Appeal held that the California Constitution’s privacy provision covers private employers’ actions. As the court explained, the plaintiff’s right to refuse to take a drug test does not simply affect the employee alone.

While rights are won and lost by individual actions of people, the assertion of the right establishes it and benefits all Californians in the same way that an assertion of a free speech right benefits all of us . . . . The dispute here is more than a dispute between Mr. Semore and Kerr-McGee. It is a dispute over the role of drug testing in the workplace.

The court held that a constitutional claim to a right of privacy was sufficient to raise an issue about whether this discharge was in violation of public policy. The court remanded the case to the trial court to decide if Kerr-McGee’s drug-testing program invaded this employee’s privacy as protected by the California Constitution.

By contrast, in Luck v. Southern Pacific Transportation Co., another California Court of Appeal found that the right to privacy, even if protected by the California Constitution, could not provide the basis for a public policy exception to employment-at-will. Privacy, the court asserted, is a private, not a public, right.

---

222, 120 Cal. Rptr. 94 (1975). See Employee Privacy Law, supra note 157, §§ 3.9-3.11.
244. Id. at 1087, 266 Cal. Rptr. at 280.
245. Id. at 1091, 266 Cal. Rptr. at 282.
246. Id.
247. Id. at 1097, 266 Cal. Rptr. at 286.
248. Id. at 1097, 266 Cal. Rptr. at 285-86.
249. Id. at 1092, 266 Cal. Rptr. at 282.
250. Id. at 1097, 266 Cal. Rptr. at 286. Deciding if the drug test at issue violated the employee’s right to privacy requires a balancing test weighing such employer’s interest in keeping out drugs with the intrusiveness of the test.
252. Id. at 28, 267 Cal. Rptr. at 635.
253. Id.
the employer and employees can contractually agree that employees should take drug tests "without violating any public interest," an agreement between the plaintiff and defendant would not violate public policy. In any case, public policy exists only when "reasonable persons can have little disagreement." There is no consensus on whether drug testing violates state and federal privacy protections. In Foley v. Interactive Data Corp., the California Supreme Court also required that public policy be "firmly established at the time of termination." At the time the defendant introduced its drug testing program, no such rulings on drug testing existed. Although the court upheld the jury’s determination that the employer violated the employee’s right of privacy under the California Constitution, the court still refused to find that the employee’s termination violated public policy.

Thus, even if employees establish that a state constitutional pro-

---

254. Id.
255. Id. Much of this argument comes from Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211, (1988), where the California Supreme Court narrowed the wrongful discharge case law. On the public policy exception, the court held that reporting a supervisor’s imminent indictment on embezzlement charges did not constitute public policy because the information "serve[d] only the private interest of the employee," not the public at large. Id. at 671, 154 Cal. Rptr. at 218.
256. 218 Cal. App. 3d at 28, 267 Cal. Rptr. at 635.
257. Id. at 29, 267 Cal. Rptr. at 635.
260. Id. at 29, 267 Cal. Rptr. at 635.
261. What is odd about the court’s analysis is that it found that the employer acted in bad faith by requiring the plaintiff to take a drug test when the employer could not justify the program under the compelling interest test required by the California Constitution. The plaintiff, a computer operator, did not have a job where impairment would create safety hazards to the public or to other employees. That was the rationale the employer used to require a urine test, a very intrusive test. 218 Cal. App. 3d at 19-24, 267 Cal. Rptr. at 629-32. By terminating the plaintiff for her refusal to submit to urinalysis, the employer had acted in bad faith because the employee was “exercising her constitutional right to privacy.” Id. at 26, 267 Cal. Rptr. at 633. The employer’s “invasion . . . of privacy was unjustified.” Id. at 25, 267 Cal. Rptr. at 633.

If the plaintiff had a constitutional right to refuse to undergo urinalysis, it makes little sense to say that her discharge was not in violation of public policy. Perhaps the court was afraid that interpreting public policy broadly would substantially increase the number of cases. But see Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989), in which the Alaska Supreme Court refused to interpret the state constitutional provision as covering private action, but would allow this same constitutional provision to be the basis of a public policy challenge in the event of discharge. Id. at 1130, 1132-33.
vision covers the action of private employers, courts may not be willing to find that their discharge violates public policy. Senmore shows that courts will balance an employee's expectation of privacy with the employer's need to regulate employees' conduct. The results of such a balancing test regarding adventure programs depend on how much deference courts give to the employer's arguments that such training programs are necessary to its business operations. Senmore and Luck suggest that the examination of the employer's justification is more stringent under a state constitution than is employed under the tort of invasion of privacy. In particular, the court examines the intrusiveness of the employment practice and questions its importance to the business. For the reasons given earlier, adventure programs should not withstand this level of scrutiny. These programs have little to do with legitimate concerns over productivity and efficiency, and far less intrusive means exist to further these purposes. When constitutional provisions are at issue, courts are generally more willing to scrutinize employer action than they would normally be with common law torts.

If the state does not have a constitutional provision such as California's, or if its courts do not regard a violation of an independent tort as against public policy, employees will find it difficult to establish that their discharge because of an adventure program violated public policy. While there is disagreement over the meaning of public policy, all jurisdictions recognizing the public policy exception indicate that it does not extend so far as to protect an employee's interest in job security. As indicated earlier, the employer's action must affect the public at large in some appreciable way.

Although there is no precise line of demarcation dividing matters

262. 217 Cal. App. 3d at 1097, 266 Cal. Rptr. at 286.

263. Senmore, 217 Cal. App. 3d at 1096-98, 266 Cal. Rptr. at 285-86; Luck, 218 Cal. App. 3d at 17-24, 267 Cal. Rptr. at 627-32. In Luck, the court indicated that the analysis under the privacy provision of the California Constitution was even more stringent than under the Fourth Amendment of the United States Constitution. 217 Cal App. 3d at 20, 267 Cal. Rptr. at 632. The employer had to establish a compelling interest in order to require a drug test. While safety is a compelling reason, the plaintiff's job had nothing to do with safety. Id. at 20, 267 Cal. Rptr. at 632.

264. See supra notes 40-55 and accompanying text.

265. See supra notes 63-70 and accompanying text.

266. See supra notes 261, 263.


268. See supra note 235.
that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed.269

Following this reasoning, refusing a drug test or any other invasive process might not be seen as protecting other employees who might also be faced with a choice between keeping their jobs or acquiescing to the employer’s demands.270 Why should courts interpret public policy so narrowly? Some commentators express concern that interpreting public policy too broadly will unduly impinge on the employer’s discretion.271 This exception to the at-will rule would then swallow the rule. As other commentators believe, the at-will rule has lost whatever legitimacy or necessity it once had.272 Perhaps it is time to scrap a rule that was, after all, judicially created in the first instance. But in the absence of such a legal transformation, employees injured by adventure programs may find it difficult to establish the public policy exception.

2. Implied and Express Contracts

If employers have made written or oral assurances protecting employees’ status, the latter may be able to bring a contract action in the event that they are discharged because of an adventure pro-

270. But see Senmore, 217 Cal. App. 3d at 1097, 266 Cal. Rptr. at 286. For a criticism of this perspective, see The Public Policy Exception, supra note 209, at 1947-51.
271. See, e.g., WITHOUT JUST CAUSE, supra note 207, at 27-28; Krauskopf, supra note 209, at 247-51.

gram. Until recently, employees could not readily prove that their contractual relationships were other than at-will unless they were hired for a definite term or were covered by a collective bargaining agreement. Courts created a number of obstacles unique to employment contracts. Spurious doctrines such as mutuality of obligation and independent consideration placed almost insurmountable barriers in the way of employees attempting to establish that the employer promised more employment security. Courts strictly interpreted any oral or written language that allegedly provided for a just cause termination.

In recent years, courts have begun to view employment contracts

273. This sentence also is meant to cover the likely occurrence of constructive discharge. Instead of discharging the uncooperative employee, the employer forces the employee to quit by making the job unpalatable. There is a wide body of case law under Title VII and other antidiscrimination laws protecting an employee who is forced to quit. Most jurisdictions recognize constructive discharge as actionable. See supra note 207.

274. Limiting the Right to Terminate at Will, supra note 272, at 201.


276. Mutuality of obligation in the context of the employment relationship means that the employer's ability to fire cannot be limited if the employee can leave for any or no reason. Neither can be "bound" unless both are bound. This concept was discredited in contract law years ago. Summers, supra note 209, at 1098-99. Both parties do not have to have equivalent obligations in order to have an enforceable contract. Id.

As Weller has indicated, long term employees are reluctant to leave jobs where they have accumulated seniority and substantial benefits even if the law does not require them to stay. Employers have this leverage over these employees. See Weller, supra note 12, at 66. See also Glendon & Lev, Changes in the Bonding of the Employment Relationship: An Essay on the New Property, 20 B.C.L. REV. 457 (1979).

277. Like mutuality of obligation, the requirement of independent consideration means that an employee could not claim that he or she was something other than an at-will employee on the basis of performance. Even though performance is generally enough to satisfy the requirement of consideration, courts required more to enforce any limitations on the employer's right to discharge. One reason performance was not enough is that the employee was paid for his or her work. However, even contract law states that performance can be consideration for more than one promise. An equivalent exchange is not required. See Summers, supra note 209, at 1098-99.

278. See, e.g., Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967) (holding that neither giving up a farm to go to work for an employer, nor working for an employer, was enough consideration to establish anything other than an at-will relationship); Skagerberg v. Blanding Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) (giving up other job offers was not enough consideration); Summers, supra note 209, at 1098-99.

279. See, e.g., Gordon v Matthew Bender & Co., 562 F. Supp. 1286 (N.D. Ill. 1983) (holding that use of the words "acceptable sales performances" was inadequate to establish just cause); Summers, supra note 209, at 1098-99.
like ordinary ones. Employees have successfully challenged their discharges on the basis of employee handbooks, circulars, and even oral statements. In the setting of adventure programs, there are two general types of assurances that may give rise to a cause of action. First, the employer may make assurances that the employee will not be discharged except for something approximating good or just cause. Second, the employer might have made specific assurances that it will respect the employee's privacy.

If the employee can document specific language restricting the employer's ability to discharge, he or she may be able to use that language if fired for refusing to take part in an adventure program or for breaking down on one. One common source of such language can be found in employee handbooks usually written for dissemination among supervisors and employees. Such handbooks are usually designed to give the work force an understanding of the employer's rules, organization, and requirements. The handbooks often list reasons for discharge and also outline disciplinary procedures in the event of a rule's transgression. The rules and procedures in these manuals are also designed to persuade employees that they do not need a union for protection.

In Woolley v. Hoffmann-La Roche, Inc., the plaintiff, an engineering section head, alleged that he was fired in violation of contractual provisions in the employee manual that he read during his employment. The plaintiff argued that provisions in the manual

282. See infra notes 283-320 and accompanying text.
283. See infra notes 321-27 and accompanying text.
285. See generally, WEILER, supra note 12, at 11, 53-56.
287. Id. at 284, 491 A.2d at 1257.
288. Id. at 286, 491 A.2d at 1258. Some courts have allowed employees the protection
meant that he could be fired only for cause and then only after the employer followed procedures outlined in the manual.\(^{289}\) The New Jersey Supreme Court held that provisions in employee manuals can bind the employer.\(^{290}\) Employers issue manuals with job security provisions to encourage employers to stay and to discourage them from organizing a union.\(^{291}\) Therefore, the court held that the provisions in Hoffmann-La Roche’s policy manual were enforceable.\(^{292}\) Courts should construe employer manuals “in accordance with the reasonable expectations of employees” taking into account the entire context of their dissemination.\(^{293}\)

A policy manual that provides for job security grants an important, fundamental protection for workers . . . . If such a commitment is indeed made, obviously an employer should be required to honor it. When such a document, purporting to give job security, is distributed by the employer to a work force, substantial injustice may result if that promise is broken . . . . [U]nless the language contained in the manual were such that no one could reasonably have thought it was intended to create legally binding obligations, the termination provisions of the policy manual would have to be regarded as an obligation undertaken by the employee. It will not do now for the company to say it did not mean the things it said in its manual to be binding.\(^{294}\)

Unfortunately, Woolley left employers with a simple method of avoiding liability for statements made in the manual — simply include a disclaimer that nothing in the manual is to be construed as affecting the at-will status of any employee.\(^{295}\) Although a subsequent decision suggests that the disclaimer must be clear and conspicuous to be effective, few courts have treated employee manuals and

\(^{289}\) Woolley, 99 N.J. at 286-87, 491 A.2d at 1258.
\(^{290}\) Id. at 290-301, 491 A.2d at 1260-66.
\(^{291}\) Id. at 296 n.6, 491 A.2d at 1264 n.6.
\(^{292}\) Id. at 297, 491 A.2d at 1264.
\(^{293}\) Id. at 297-98, 491 A.2d at 1264-65.
\(^{294}\) Id. at 297-99, 491 A.2d at 1264-65.
\(^{295}\) Id. at 309, 491 A.2d at 1271.
circulars as they do consumer contracts and have refused to enforce disclaimers on the grounds of unconscionability despite the adhesive nature of these provisions and the imbalance of power between employers and employees.  

Apart from disclaimers, courts also apply liberal rules of contract modification seen earlier in the discussion of consent. The employer can simply destroy the manual after announcing this to employees or after making substantial modifications. Under a unilateral contract theory, the employee “accepts” these changes if he or she continues to work for the employer. Courts


Perhaps courts are reluctant to apply consumer doctrines like unconscionability because these would interfere too much with the employer’s ability to control the workplace. Disclaimers allow employers to change the employment relationship without too much judicial scrutiny. As long as disclaimers are clear and as long as the employer’s subsequent behavior and statements do not contradict the disclaimer, the employer can recreate an at-will relationship. WEILER, supra note 12, at 54-56; Without JUST CAUSE, supra note 207, at 91-95; Finkin, The Bureaucratization of Work: Employer Policies and Contract Law, 1986 Wis. L. Rev. 733, 748-53.

297. After this discussion, Hoffmann-La Roche followed the court’s suggestion and added this disclaimer:

This manual is a guide for all supervisors and employees. It provides up to date information on employee policies and procedures.

This Manual is Not an Employment Contract. No Contractual Obligation or Liability on the Part of the Company is Intended. No Promise of Any Kind is Made. The company retains the right, in its sole discretion, to change any policy, procedure, term or working condition at any time and in any manner, to the extent permitted by law.

See also Without JUST CAUSE, supra note 207, at 89-95.

298. The unilateral contract doctrine is used liberally to establish the enforceability of handbooks in the first instance. See Woolley, 99 N.J. at 301-04, 491 A.2d at 1266-68. The employer and the employee need not have actually bargained for the handbook or other provisions.

No pre-employment negotiations need take place and the parties’ minds need not meet on the subject, nor does it matter that the employee knows nothing of the particulars of the employer’s policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “instinct with an obligation.”
rarely consider that employees have few alternatives. Of course, employers could put a provision in the manual stating that employees will be expected to go through adventure training as a part of their job responsibilities. But this is unlikely because the programs are not used for all employees; furthermore, the employer may fear that applicants will be deterred because of the program.  

Apart from employee manuals or other written documents, the employer’s right to discharge may be limited by the employer’s assurances and other conduct over a period of time. In *Pugh v. See’s Candies, Inc.*, the plaintiff, a thirty-two year employee, alleged that he had been dismissed because he had protested the union’s position at the bargaining table and that the union had retaliated by inducing the employer to discharge him. The breach of contract claims were based on numerous oral assurances during his long tenure with the company that he would not be fired as long as he did a “good job.” During his employment at See’s Candies he rose from dishwasher to vice-president in charge of production and received no complaints or criticisms of his work. In fact, he was unaware of any problem until the day he was terminated. The California Supreme Court found that “an implied-in-fact promise for some form of continued employment” may be created by duration of the plaintiff’s employment, the promotions and good performance evaluations over his years of service, and the oral assurances given by senior management. In other words, the totality of the employer-
employee relationship may create an implied promise of continued employment. In the recent decision of Foley v. Interactive Data Corp., the California Supreme Court allowed a similar claim on behalf of an employee who, during six years of employment, received repeated oral assurances of job security together with superior evaluations, bonuses and promotions. The length of service, though shorter than in Pugh, was not dispositive. Even a short-term employee may have enforceable assurances if the "totality of the circumstances" indicates that the employer limited its own right to fire the employee.

Assuming an employee is able to establish that he or she is not an at-will employee, how would good or just cause protect employees from the consequences of adventure training programs? As with most contract terms, just cause is subject to a number of interpretations. If language defining the term is present, courts first try to define just cause in these terms. Otherwise, they look to other sources as a guide. Collective bargaining agreements routinely contain just cause provisions, and labor arbitration literature provides a general understanding of the concept. According to a leading authority:

A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist . . .

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? . . .

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business, and (b) the performance that the company might properly expect of the employee? . . .

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? . . .

actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Id. (footnotes omitted).

307. The court is examining the prospect of job security in terms familiar to any contract. The only thing unusual about the court's analysis is that modern contract analysis has not been applied to the employment setting. See Summers, supra note 209, at 1097-1108.


309. Id. at 681, 765 P.2d at 388, 254 Cal. Rptr. at 226.

310. Id. at 681, 765 P.2d at 387-88, 254 Cal. Rptr. at 226.

311. Id. at 680-81, 765 P.2d at 387-88, 254 Cal. Rptr. at 226-27.

4. Was the company's investigation conducted fairly and objectively? ...
5. At the investigation did the [manager] obtain substantial evidence or proof that the employee was guilty as charged? ...
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? ...
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the service record with the company?

This definition of just cause incorporates both substantive and procedural protections. Much of it concerns not just the reasons for discipline or discharge, but the procedures that management must use to investigate, to give notice to, and to punish the errant employee. This definition also reflects the blue collar setting of most labor arbitration proceedings. With managers, courts are generally inclined to give the employer more leeway in terminations because these employees occupy sensitive or confidential positions.

In regard to adventure programs, the central issues are whether such a program is required for the effective and efficient operation of the employer's business and whether it is appropriate to require managerial employees to go through arduous physical and psychological exercises. The answer depends on whether the court will accept the employer's assertion that these programs are essential to the legitimate requirements of the workplace and the employee's job description. Certainly the notice requirements of just cause are not met when employers fail to advise employees that this kind of training is part of their job responsibilities or when employers do not even tell

314. See Summers, supra note 272, at 499-508.
315. Pugh, 116 Cal. App. 3d at 330, 171 Cal. Rptr. at 928. See St. Antoine, supra note 272, at 72. For a criticism of treating high-level employees differently from other employees under Title VII see Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 947 (1982).
316. See supra notes 13-40 and accompanying text (discussing the theory behind adventure programs).
317. See supra notes 40-84 and accompanying text (discussing the lack of transference).
employees what to expect if they participate.318 Given the tenuous connection between the exercises and any workplace benefit, as well as the potential psychological harm that could result, courts may find that the employer lacked good or just cause to dismiss an employee who refuses to go or who performs below the employer's expectations.319 Even the extra latitude shown in cases of managerial employees must have its limits. It would be counterintuitive for a court to uphold the discharge of a manager when the activities might well create liability for intentional infliction of emotional distress or invasion of privacy.320

If employees are not fortunate enough to have the job security provided by just cause, they may still have contractual protection if the employer has promulgated a policy of protecting employees' privacy, as was the case in Rulon-Miller v IBM.321 As indicated earlier, Rulon-Miller sued IBM after she was discharged for having a relationship with a former IBM manager who worked for a rival computer company.322 In addition to bringing an emotional distress claim, the plaintiff also sued for wrongful discharge, relying on protections afforded to all IBM employees by the "Watson memo."323 The memo, written by IBM's chairperson, stated that an employee's private life was generally not the concern of management and that employees would not be dismissed for behavior outside the workplace unless these actions interfered with their work.324 The court found that the memo provided contractual protection for the plaintiff, whose relationship in no way compromised IBM or interfered with her work.325

While the Watson memo refers to employees' behavior off the job, the gist of the memorandum is that employees' actions that are

318. See supra notes 141-147 and accompanying text.
319. See supra notes 40-55 and accompanying text.
320. See supra notes 85-206 and accompanying text (discussing intentional infliction of emotional distress and invasion of privacy).
322. 162 Cal. App. 3d at 244-46, 208 Cal. Rptr. at 527-29. See supra notes 106-11 and accompanying text.
323. The actual claim was for breach of the implied covenant of good faith and fair dealing which, at the time of this decision, could sound in tort as well as in contract. Id. at 248-54, 208 Cal. Rptr. at 530-33. However, the good faith claim was based on the employer's failure to extend the contractual protection of the Watson memo to the plaintiff. The advantage of the implied covenant of good faith and fair dealing is that it allowed the plaintiff to recover tort damages. See infra notes 330-358 and accompanying text.
325. Id. at 250-51, 208 Cal. Rptr. at 530-32.
unrelated to the job should not be the basis of an employment decision, except when this behavior directly affects the employee’s job in some demonstrable manner. Although a company’s training program is not an off-duty activity, outdoor training programs require employees to participate in exercises that have little to do with the work that employees are hired to do. Programs force employees to expose aspects of their personalities and psychological make-up that they would ordinarily keep private. The Watson memo or other equivalent language protects employees’ private activities and private feelings whenever possible. Outdoor adventure programs intrude in serious ways on employees’ legitimate expectations of privacy. If the employer pledges to respect their privacy, then it should be held liable for failing to keep that promise.

As with all contractual claims, success depends on language and understandings between the employer and the employee. While recent cases have loosened the old restrictions on circumventing the at-will doctrine, the more liberal rules of contract formation and modification also make it easier for the employer to modify this contractual relationship with disclaimers and announcements of new policies. Unless courts begin to use protective doctrines associated with consumer contracts such as unconscionability, employees may not be able to bring contractual claims as employers grow more sophisticated in dealing with the case law. Employers will simply rewrite handbooks, application forms and any other communications with employees.

3. Implied Covenant of Good Faith and Fair Dealing
The implied covenant of good faith and fair dealing originated as a contract doctrine to protect the expectations of the parties. Good faith or “honesty in fact” is implied in every contract and requires parties to avoid behavior that is designed to undermine or evade the requirements of the contract. The *Restatement (Second)*

---

326. *Id.* at 248-50, 208 Cal. Rptr. at 530-31.
327. *See supra* notes 173-78 and accompanying text.
328. If courts want to protect employees fully from overreaching, then they will have to prohibit the enforcement of disclaimers under protective contract doctrines such as unconscionability. *See U.C.C.* § 2-302 (1977). As Llewellyn said long ago, “[c]overt tools are never reliable tools.” Llewellyn, *Book Reviews, 52 Harv. L. Rev.* 700, 703 (1939) (reviewing O. Praisnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937)).
of Contracts' section 205 comment a explains good faith this way:

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.331

Given the amorphous character of good faith and fair dealing, most jurisdictions refuse to recognize good faith and fair dealing as an exception to the at-will doctrine.332 Of those jurisdictions that do, most have restricted its application to situations similar to those that trigger it in other kinds of contracts.333 For example, courts apply the doctrine when the employer discharges an employee for the purpose of depriving the employee of commissions, bonuses or pensions that he or she has earned or is about to earn.334 Other jurisdictions,

331. See also RESTATEMENT (SECOND) OF CONTRACTS § 205 comment d (1979). Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance. Id. This description does little to clarify the meaning of good faith in the employment context. See WITHOUT JUST CAUSE, supra note 207, at 108-10.


334. This interpretation of good faith and fair dealing is similar to its use in contracts outside of the employment setting. See Mitford, 666 P.2d at 1000; Gram, 391 Mass. at 333, 461 N.E.2d at 769; Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

Even though New York does not recognize the implied covenant of good faith and
notably California, have interpreted good faith and fair dealing to be almost the equivalent of just cause, especially when long-term employees are discharged without a legitimate business reason.\textsuperscript{335} The good faith doctrine's potential to provide employees with the equivalent of just cause explains why many jurisdictions have rejected it.\textsuperscript{336} California also allowed an employee to recover tort damages for breach of the implied covenant of good faith and fair dealing.\textsuperscript{337}
Treat ing good faith and fair dealing as a tort is important because tort damages allow a far more generous recovery than contract damages; plaintiffs can collect mental distress and punitive damages.338

The potential of good faith and fair dealing to undermine the at-will doctrine is best illustrated by California cases such as Cleary v. American Airlines, Inc.339 In Cleary, an eighteen-year employee alleged that he was discharged for theft without a complete investigation.340 The California Court of Appeal found that the implied covenant of good faith and fair dealing required that a long-term employee be discharged only for good cause when the employer provided procedures to adjudicate employee disputes similar to the one concerning the plaintiff.341 The combination of longevity of service and the existence of grievance procedures meant that the employer must demonstrate just cause to sustain this discharge.342 A long-term employee expects that an employer will not treat him or her in an arbitrary fashion. Similarly, an employee also expects the employer to follow the disciplinary procedure that it established in the first instance.343 If the plaintiff is ultimately able to establish a lack of good cause at trial, then he or she can receive tort damages.344

After Cleary, subsequent California Court of Appeal decisions split as to how to apply the implied covenant of good faith and fair

---

338. Mental distress and punitive damages figure prominently in California employment cases. The desire to limit the employer’s liability and reduce the number of wrongful discharge cases is the rationale behind Foley v. Interactive Data Corp., 47 Cal. 3d at 654, 765 P.2d at 373, 254 Cal. Rptr. at 211. Many of these cases are brought on a contingent fee basis, and if tort damages are unavailable, fewer cases are likely to be brought. After Foley, only professional or managerial employees with significant contract damages will be able to bring an action. Jung & Harkness, Life After Foley: The Future of Wrongful Discharge Litigation, 41 Hastings L.J. 131, 144-52 (1989).

339. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The application of good faith and fair dealing to the employment setting in California came from a suggestion in the California Supreme Court decision of Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839 n.12 (1980), that the implied covenant of good faith and fair dealing might apply to employment contracts. California Courts of Appeal followed the suggestion and developed the doctrine to its fullest extent before the California Supreme Court in Foley, 47 Cal. 3d at 654, 765 P.2d at 373, 254 Cal. Rptr. at 211, effectively destroyed the doctrine.

341. Id. at 455, 168 Cal. Rptr. at 729.
342. Id. at 455-56, 168 Cal. Rptr. at 729.
343. Id. at 456, 168 Cal. Rptr. at 729.
344. Id.
dealing to employment cases. One line of cases required facts similar to those of *Cleary* — only employees with long seniority and with the protection of express policies governing the adjudication of employee disputes\(^{345}\) could prevail in this cause of action.\(^{346}\) The other line of cases did not limit the doctrine to facts like those in *Cleary*.\(^{347}\) Instead, employees had to show that they had some expectations grounded in contract and that employers attempted to deprive them of these contractual expectations by asserting "the existence of good cause for discharge . . . without probable cause and in bad faith."\(^{348}\) "[A]n employer acts in bad faith in discharging an employee if and only if [it] does not believe [it] has a legal right to discharge the employee."\(^{349}\) As a result, the employer may have had to show good cause for the discharge and pay tort damages under a wider variety of circumstances than under *Cleary*.\(^{350}\)

But this argument over the applicability of the doctrine became irrelevant after the California Supreme Court’s decision in *Foley v. Interactive Data Corp.*\(^{351}\) Under *Foley*, plaintiffs will not be able to recover tort damages under this theory at all.\(^{352}\) *Foley* questioned the basic rationale used in all of the earlier good faith and fair dealing cases, denying that the employment relationship is similar to insurance contracts, the context in which the doctrine originally developed.\(^{353}\) Furthermore, *Foley* limits good faith and fair dealing to enforcement of implied or express contract assurances of job security\(^{354}\) and also limits the remedy for a breach of these assurances to


\(^{348}\) Koehrer, 181 Cal. App. 3d at 1171, 226 Cal. Rptr. at 829.

\(^{349}\) Foley, 47 Cal. 3d. at 711, 765 P.2d at 409, 254 Cal. Rptr. at 247 (Broussard, J., dissenting).

\(^{350}\) Id. at 682-700, 765 P.2d at 373, 254 Cal. Rptr. at 211 (1988).

\(^{351}\) Id. at 682-700, 765 P.2d at 388-402, 254 Cal. Rptr. at 227-40.

\(^{352}\) Id. at 682-700, 765 P.2d at 388-402, 254 Cal. Rptr. at 230-39. See supra note 337.

\(^{353}\) Id.
contract damages regardless of the motivation for the breach.\textsuperscript{354} Employees discharged as a result of adventure programs are in a far stronger position when they establish that the employer can dismiss them only for good cause. As discussed previously, adventure programs should not withstand the careful scrutiny that good cause requires.\textsuperscript{355} If the few jurisdictions that recognize the implied covenant of good faith and fair dealing follow California’s lead, good faith will be important only if the employee can establish that he or she has the protection of oral or written assurances discussed in the last section.\textsuperscript{356} Even so, tort damages would be unavailable. Of course, if employees have the protection of handbooks or other assurances of job security, it is difficult to perceive what good faith and fair dealing adds to their protection.\textsuperscript{357} The possibility of tort damages makes this cause of action attractive.\textsuperscript{358}

### III. Abusive Corporate Adventure Programs: The Need for a Statute

Perhaps, as management expert Peter Drucker has said, corporations will stop sending employees on adventure programs when juries award multimillion dollar verdicts to injured employees.\textsuperscript{359} As indicated in the preceding section, there is the potential for such a verdict, but no guarantee under existing law.\textsuperscript{360} The most likely tort cause of action, intentional infliction of emotional distress, is too ill-defined to provide much guidance.\textsuperscript{361} Adventure programs may invade an employee’s privacy, but courts allow employers to avoid liability by merely announcing ahead of time that employees will be

\textsuperscript{354} Id. at 699-700, 765 P.2d at 308-402, 254 Cal. Rptr. at 238-39.

\textsuperscript{355} See supra notes 311-20 and accompanying text.

\textsuperscript{356} See supra notes 273-328 and accompanying text.

\textsuperscript{357} Good faith and fair dealing, even in this restrictive sense, may matter if an employee is discharged so that the employer can avoid paying bonuses or pensions that the employee has earned. See supra note 334. If the employee has no assurances of job security, good faith and fair dealing may be the only recourse. Even so, Foley indicates that the employee can recover only contract damages.

\textsuperscript{358} See Jung & Harkness, supra note 338, at 140-44. See also Weiler, supra note 12, at 82. Most surveys indicate that most wrongful discharge cases are brought by professional and managerial employees who can afford the costs of litigation and who face the prospect of larger awards. Id. The demise of good faith as a tort cause of action will only increase this trend.

\textsuperscript{359} Interview with Peter Drucker, Mac Neil/Lehrer NewsHour (Sept. 4, 1989).

\textsuperscript{360} See supra notes 96-358 and accompanying text.

\textsuperscript{361} See supra notes 96-153 and accompanying text.
expected to participate. If the employee continues to work, then he or she will be deemed to have consented to this invasion.62

Success under any of the wrongful discharge causes of action depends on circumstances that may not be present in all cases. Obviously, the employee must have been discharged or pressured to resign.63 To prevail on the tort theory of discharge against public policy, employees must have either established the commission of an independent tort or be fortunate enough to reside in a state whose constitution protects private employees’ privacy.64 If the employer has issued assurances protecting privacy or providing for discharge only in the event of just cause, then employees may prevail on contract theories.65 Contract causes of action, however, limit damages to economic loss — lost wages, salary, or benefits. Injured employees cannot recover for mental distress and, in most cases, they cannot recover punitive damages.66 Furthermore, even contract recoveries may be unavailable if employers publish disclaimers denying any contractual protection.67

Given the limitations of existing tort and contract causes of action, statutory protection may produce more just and consistent results in discouraging the use of corporate adventure programs. Numerous states have passed labor statutes regulating questionable employment practices in recent years. For example, many have enacted laws restricting drug and polygraph testing partly because existing law was inadequate to protect employees’ privacy.68 Even Congress has

62. See supra notes 154-206 and accompanying text.
63. See supra notes 207-14 and accompanying text.
64. See supra notes 215-72 and accompanying text.
65. See supra notes 273-328 and accompanying text.
66. See supra notes 330, 358 and accompanying text. See Mallor, supra note 332 (arguing in favor of allowing punitive damages in wrongful discharge cases).
67. See supra notes 295-98, 327-28 and accompanying text.
68. Forty-four states have enacted some form of polygraph regulation. These statutes regulate matters ranging from whether the polygraph can be used at all in the employment setting to who can administer tests. See ALA. CODE §§ 34-25-1 to -36 (1985); ALASKA STAT. § 23.10.037 (1990); ARIZ. REV. STAT. ANN. §§ 32-2701 to -2715 (1986); ARK. STAT. ANN. §§ 17-32-101 to -214 (1987); CAL. LAB. CODE § 432.2 (West 1989); CONN. GEN. STAT. § 31-51g (1987); DEL. CODE ANN. tit 19, § 704 (1985); FLA. STAT. ANN. §§ 493.561-579 (West 1981) (repealed 1990); GA. CODE ANN. §§ 43-36-1 to -22 (1988); HAW. REV. STAT. §§ 378-26 to -29 (1985); IDAHO CODE §§ 44-903 to -904 (1977); ILL. ANN. STAT. ch. 111, §§ 2401-32 (Smith-Hurd 1978); IND. CODE ANN. §§ 25-30-2-1 to -5 (West 1990); IOWA CODE ANN. § 730.4 (West 1990); KY. REV. STAT. ANN. §§ 329.010 to .990 (Michie 1990); LA. REV. STAT. ANN. §§ 2831-2854 (West 1988); ME. REV. STAT. ANN. tit. 32, §§ 7151-69 (1988); MD. ANN. CODE art. 100, § 95 (1985); MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1982); MICH. COMP. LAWS ANN. §§ 37.201-209 (West 1985); MINN. STAT. ANN.
passed a comprehensive law regulating the use of polygraphs.\textsuperscript{369} Passing a statute that bans the use of corporate adventure programs would be consistent with the recent legislative concern over protecting privacy.\textsuperscript{370}

\begin{footnotesize}
\begin{footnotes}{369}
\footnotesize
\end{footnotes}
\end{footnotesize}

\begin{footnotesize}
\begin{footnotes}{370}
\footnotesize
\textsuperscript{370} In fact, it might be easier to pass a statute like the one proposed in this article, which would ban only a specific employment practice, than it would be to press for a more encompassing statute that required just cause to sustain a discharge. For a similar argument in favor of a statute enumerating prohibited reasons for discharge instead of a just cause statute, see generally Perritt, \textit{Wrongful Dismissal Legislation}, 35 UCLA L. Rev. 65 (1987). As one commentator said:

\begin{quote}
Usually, statutes are not enacted because they incorporate good ideas or principles; rather they are enacted because organized interest groups lobby for their enactment. Employees who have not been organized by a labor union are exactly that: unorganized and therefore lacking in the unity of purpose and effort that produces a successful lobby. On the other hand, employers have associations that traditionally have lobbied against legislation conflicting with employer interests, and they may be counted upon to oppose legislation that would curtail the present power of employers to terminate employment without proof of cause.
\end{quote}

Peck, \textit{supra} note 272, at 3; \textit{see also} Perritt, \textit{supra} at 68-72, 81.

A number of commentators have advocated a just cause statute. \textit{See, e.g.,} Bellace, \textit{A Right to Fair Dismissal: Enforcing a Statutory Guarantee}, 16 U. Mich. J.L. Ref. 207 (1983); St. Antoine, \textit{supra} note 272, at 70-81; Stieber & Murray, \textit{Protection Against Unjust Discharge: The Need for a Federal Statute}, 16 U. Mich. J.L. Ref. 319 (1983); Summers, \textit{supra} note 272; Summers, \textit{Labor Law as the Century Turns: A Changing of the Guard}, 67 Neb. L. Rev. 7 (1988). Enactment of a just cause statute would help to provide the kind of employee security needed to create the kind of trust, teamwork and commitment that companies expect adventure training to establish. As indicated earlier, the insecurity associated with the at-will status makes it difficult for employees to make a long term commitment to their employers; they can be discharged at any time. \textit{See supra} notes 64-70 and accompanying text. Eliminating the risks of adventure training is easier than addressing the corporate malaise that prodded companies to start using these programs.

While most industrialized countries have some general protection against unjust discharge, \textit{see} Bellace, \textit{supra}; Summers, \textit{supra} note 272, at 483-84, 508-19, thus far only Montana has passed a general wrongful discharge statute designed to cover all nonunion employees. \textit{See Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987). While I favor a just cause statute, at the moment, there is little

\end{footnotes}
\end{footnotesize}
In addition to consistency, a properly drafted statute could prevent the uncertainty of case-by-case determinations. The legislature can hold hearings and determine the desirability of such programs. Once a statute bans such programs, injured employees would not have to establish that the programs are intrusive and damaging in every lawsuit. At the same time, judges would not have to decide if they are interfering with legitimate management decisions. The legislature will have made that determination for them; the employee would simply have to establish that the employer has violated the statute.371 A statute that bans these programs can also make it easier for the employer to know whether it can use particular programs or types of adventure training. At present, employers can only speculate as to what might happen if employees are psychologically injured as a result of participating in the programs; a statute can eliminate this uncertainty.372 Finally, if Congress passes a statute, then employers and employees will not confront the problem of inconsistent statutes or case law from one state to the next. Many large corporations have work sites and employees in a number of states; a federal statute could eliminate potential inconsistencies.373


372. Much of this depends on how the statute is drafted and how many exceptions it creates. See infra notes 373-77 and accompanying text. See also Perritt, supra note 370, at 69, 82-83.

373. Given the conservative administration in Washington, some states may prove to be more receptive to labor legislation. For example, Stieber & Murray, supra note 370, argue that states may be appropriate laboratories to experiment with just cause discharge statutes:

There are, of course, good reasons to focus on state legislatures as the primary arena for statutory reform. Enacting such legislation on a state-by-state basis would permit the variety and experimentation that is necessary to test new legislation before introducing it into the federal system. As a practical matter, it may also be
Assuming that a statute banning adventure programs is desirable, what should it provide and how can it define adventure programs with enough specificity to avoid including outdoor activities that do not present the same kind of threat to employees, such as ordinary retreats? The best definition would cover different kinds of adventure training programs. The statute should prohibit the use of training programs that place employees in severe "physically and/or mentally demanding" exercises designed to increase trust, teamwork and risk-taking. This definition includes not only the "outward bound" activities discussed throughout this article but also some of the mental exercises associated with the new-age training programs in vogue with a few employers in recent years. The objective would be to ban the use of such programs except where the job requires it, as for example in police work or fire fighting. The easier to persuade a few of the more progressive state legislatures to break new ground in this area than it would be to move such legislation through both houses of Congress and across a president's desk.

Id. at 336.

374. Certain kinds of corporate recreational activities do not have the same potential for psychological injury as adventure programs. For example, companies often have picnics, softball games or other kinds of recreational activities. While these activities are also designed to create social bonds among employees and between them and the employer, these generally do not pose the kind of psychological risks associated with adventure programs. See supra notes 13-40, and accompanying text (describing adventure training).

This statute does not hold operators of adventure programs liable. As indicated earlier, operators might well be held liable under common law tort such as intentional infliction of emotional distress or invasion of privacy. See supra notes 148-53, 204-06, and accompanying text. Because corporate adventure programs require the cooperation of employers to deliver employees as participants, a statute prohibiting employers from using such programs should provide an adequate deterrent. If an injured employee wants to sue the operators, he or she can sue under the tort theories discussed earlier. The statute would not preempt these causes of action.


376. Id. The term "place" rather than "require" is used to cover the situation in which an employer claims that participation is only "voluntary." As indicated earlier, such programs are not voluntary, regardless of how they are presented to employers. See supra notes 133-47, 194-99, and accompanying text.


378. Police and fire fighters have their own boot or training camps that are far more rigorous than adventure training, but that are attended for the same reasons. Police officers' and fire fighters' jobs require split-second timing and extensive esprit de corps. Few jobs require this level of physical cooperation or this kind of danger. Professional sports teams also have their own rigorous training programs. Even with these camps, the Minnesota Vikings decided to use an adventure training program, the Pecos River Program in New Mexico, last year. The high ropes exercises frightened most of the football players as much as other employees. There is no evidence, however, that the program improved their perfor-
advantage of banning, rather than simply regulating, is simplicity; employers are told that, with few exceptions, they cannot require employees to go through such programs.379

In the event that the employer does require or "strongly suggests" that employees participate in adventure programs, the statute should provide a private cause of action that allows injured employees to recover damages covering economic loss, mental distress, punitive damages and attorney's fees.380 Generous damage awards are far more likely to deter employers than allowing recovery only for lost wages or salaries.381 Also, employees would have less difficulty maintenance; their team record was no better than those of many teams who did not use such programs. See Werder, Vikings Get It Together, Nat'l Sports Daily, July 2, 1990, at 36, 37.

379. A ban is more appropriate because, as indicated earlier, there are few employment settings where this kind of training is appropriate. See supra notes 41-84 and accompanying text. Simply regulating adventure training programs assumes that these are appropriate under certain circumstances, a proposition that this article rejects. A ban is also more protective because injured employees would not have to show that their employers failed to have a legitimate reason for using this kind of training. Simply requiring or using such a program would violate the statute. In addition, the easier it is to establish a violation of the statute, the easier it will be for injured employees to prevail.

380. In addition to damages, the statute should also provide for reinstatement and other injunctive relief. In common law wrongful discharge actions, courts will not usually order reinstatement because reinstatement is a form of specific performance, and specific performance is not usually granted in personal service contracts. See 3 E.A. FARNSWORTH, CONTRACTS §§ 12.4-7 (2d ed. 1990); Summers, supra note 272, at 531. But most federal labor statutes authorize reinstatement. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 625(b),(c) (1988); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1988); Civil Rights Act of 1964 tit. VII, §§ 706(g), 42 U.S.C. § 2000e-5(g) (1988). The reinstatement remedy tends to work better in a unionized workplace because the union is better able to protect the employee from future retaliation. See Bellace, supra note 370, at 241; Getman, Labor Arbitration and Dispute Resolution, 88 YALE L.J. 916, 934-38 (1979); Stieber & Murray, supra note 370, at 339-40; WEILER, supra note 12, at 97. Even so, reinstatement ought to be available if the employee wants to return to the employer's workplace.

Furthermore, to protect employees from retaliation by the employer, this statute should also contain an anti-retaliation provision like those found in many labor statutes. See, e.g., A.D.E.A. § 4(d), 29 U.S.C. § 263(d) (1982); Civil Rights Act of 1964 tit. VII, § 704(a), 42 U.S.C. § 2000e-3(a) (1988); N.L.R.A. § 8(a)(3), 29 U.S.C. § 153(a)(3) (1988). If the employees are still working when they bring an action, the employer is likely to dismiss them. The anti-retaliation provision would provide additional protection from this abuse.

381. For example, Title VII has been criticized because the statute allows monetary recovery only for lost wages or salaries. See 42 U.S.C. § 2000e-5(g) (1982); Ralston, supra note 371, at 218. Because mitigation is required, the recovery is often reduced further. Therefore, the recovery allowed is too small to be an effective deterrent. For a similar criticism of § 8(a)(3) of the N.L.R.A., see WEILER, supra note 12, at 249. As a response to this and other difficulties created by the recent Supreme Court cases interpreting Title VII and other Civil Rights statutes, Congress passed the Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. The President vetoed the bill and this veto was sustained by only one vote. Holmes, President Vetoes Bill on Job Rights: Showdown is Set, N.Y. Times, Oct. 23, 1990,
finding lawyers to handle their claims. In addition to a private cause of action, the statute should also allow the attorney general or some other executive agency to bring suit against employers.\textsuperscript{382} Government action may be able to stop employers from using these programs in situations in which employees may not be able to bring suits on their own.\textsuperscript{383} However, if the experience of other labor law statutes is a guide, private parties are far more likely to bring lawsuits even when the government has the option to sue.\textsuperscript{384}

A federal law would have a number of advantages over state laws. First, the federal government has greater resources to enforce a law dealing with corporate adventure programs. The Labor Department has administrative structures in place to enforce this and other labor statutes.\textsuperscript{385} Second, as was mentioned, a federal statute provides uniformity; an employer does not have to worry about different regulations in different states. Employees will not have to worry that employers will send them to states where adventure programs are permitted, as could easily occur with these kinds of programs.\textsuperscript{386}

\textsuperscript{382} If Congress passes such a statute, the Labor Department would probably handle enforcement. If a state passes the statute, then the state attorney general will probably bring the action.

\textsuperscript{383} In addition, the government could bring an action against a number of employers at the same time, an option unavailable to employees.

\textsuperscript{384} The failure of governmental agencies to enforce labor laws can be due to a number of interrelated factors: (1) the pressure of a conservative political climate hostile to laws protecting employees; (2) the allocation of inadequate resources to enforce the law; and (3) the requirement of time-consuming and cumbersome processes to take any action. For a sobering analysis of the National Labor Relations Board’s inability and unwillingness to enforce the National Labor Relations Act, see WEILER, supra note 12, at 225-81. So disenchanted is Weiler with the Board’s ability to enforce labor laws that he proposes that employees dismissed for union activity in violation of N.L.R.A. § 8(a)(3), 29 U.S.C. § 58(A)(3) (1988), should be allowed to bring a private cause of action in state court for wrongful discharge. This change would involve removing the “preemptive effort of the N.L.R.A. on the state court’s authority to include the right to join a union among the categories of public policy.” At the present time, only the NLRB can handle this and other unfair labor practices under the Act. WEILER, supra note 12, at 249. Allowing a private tort cause of action with large damage awards would “put teeth in section 8(a)(3)” that do not exist now. \textit{Id.} At the present time, there are too many cases for the Board to handle quickly and the monetary recovery (back pay) allowed under the Act does not act as an adequate deterrent. \textit{Id.}


\textsuperscript{386} Many of the adventure programs are located in wilderness areas in a different state.
Finally, a federal statute makes a strong symbolic statement that protecting employee privacy and peace of mind is a national priority.\footnote{387} If Congress declines to act in this area, states should take the initiative. While the impact of state regulation is not as great, Congress may feel some pressure to pass such a bill if a number of states take the lead. Even employers may then prefer to have a single statute covering all the states. Inconsistent state laws may create an impetus to pass a federal statute.

\textbf{CONCLUSION}

Corporations are using outdoor adventure programs in an effort to create trusting, loyal and innovative employees in a short time without making the kind of structural changes that would promote and nurture such qualities in the workplace. This kind of quick fix, a short term approach to complex structural problems, is not only ineffective, but also harmful to the dignity and mental health of affected employees. In the process of remaking employees, adventure programs intrude on the most basic human fears and emotions, all in the name of efficiency and profit. Requiring employees to participate in these programs should create liability for employers and program operators under tort doctrines such as intentional infliction of emotional distress, invasion of privacy and possibly wrongful discharge. If employers have given oral or written assurances of job security, employees may also recover for breach of contract. However, only a statute banning the use of adventure programs in the corporate setting will adequately protect employees' privacy and dignity from this kind of intrusion. If employers wish to transform their employees, they must begin to transform the workplace.

\footnote{387}{This was part of the rationale for passing the federal law regulating polygraph testing. See Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (1988).}