States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?

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I. INTRODUCTION

Russian author Leo Tolstoy once remarked that "[w]ork is the inevitable condition of human life, the true source of human welfare." Indeed, these words have transcended time. Work remains a basic element of human existence and a necessity for continued subsistence. In fact, the importance of work has been recognized for centuries. Even the Bible observes that a man who will not work will not eat.\(^2\)

However, despite the ongoing significance of work, people living in the United States have the right to choose whether to work, as well as the right to decide whether to remain or depart from a particular work environment. Likewise, employers have the right to choose whether to retain or terminate an employee. Ideally, these choices are made available to employees and employers when jurisdictions abide by and enforce the at-will employment doctrine.\(^3\) This doctrine enables an employer or employee, in the absence of a contract to the contrary, to end the employment relationship at any time, with or without notice, for any or no particular reason.\(^4\)

Despite the traditional rule of at-will employment, more and more jurisdictions are beginning to erode this doctrine by carving out exceptions that restrict an employer's ability to freely terminate an employee without fear of liability.\(^5\) Particularly, and perhaps most restrictive of the employer's unbridled right to terminate, courts are recognizing an implied-in-fact contract exception to the at-will rule.\(^6\) Additionally, courts have allowed the pre-

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2. 2 Thessalonians 3:10.
3. For instance, the RESTATEMENT (SECOND) OF AGENCY § 442 (1958) classifies at-will employment as follows: "Unless otherwise agreed, mutual promises by principal and agent to employ and serve create obligations to employ and serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." RESTATEMENT (SECOND) OF AGENCY § 442 (1958).
4. Id.
6. See Kurt H. Decker, Pennsylvania's Whistleblower Law's Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will

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umption of at-will employment to be overcome by express agreement,\textsuperscript{7} public policy, and statutory exceptions.\textsuperscript{8}

Unlike other states, the Pennsylvania Supreme Court, at least for now, assures that Pennsylvania firmly adheres to the presumption of at-will employment.\textsuperscript{9} However, Pennsylvania courts have already taken measures to start the gradual erosion of the doctrine. As more and more jurisdictions depart from the at-will employment doctrine, whether Pennsylvania will completely follow suit is an open question.

This comment chronicles the development of the at-will employment doctrine, in both the United States and Pennsylvania, and details the various exceptions recognized by both Pennsylvania and her sister states. Additionally, it explains how other select jurisdictions have sounded the death-knell for the at-will rule, and it focuses on what Pennsylvania must do to avoid following suit.

II. HISTORY OF THE AT-WILL EMPLOYMENT DOCTRINE

A. United States

The at-will employment doctrine first materialized in the United States by means of an 1871 treatise authored by Horace Gray Wood.\textsuperscript{10} Although early American courts adopted the English common law approach that all hirings were presumed to last

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\textsuperscript{8} See Pennsylvania Whistleblower Law, 43 PA. STAT. ANN. § 1421 et seq. (1986); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980) (holding that an employee cannot be terminated by his employer for reporting public policy violations by the employer); and Phillips v. St. Mary Reg'l Medical Ctr., 96 Cal. App. 4th 218 (Cal. Ct. App. 2002) (holding that statutory exceptions include legislation such as Title VII of the Civil Rights Act of 1964, which specifically precludes termination at-will where such termination is based on protected status such as race or ethnicity).


for one year, Wood, without basis, argued that American courts should instead follow an at-will presumption. In fact, Wood cited four cases as authority for his position, but none supported his theory. Even though Wood offered no critical analysis for the at-will employment doctrine, by the late eighteen hundreds and early nineteen hundreds, most courts embraced Wood's formulation of the at-will presumption.

Many legal scholars have suggested the at-will employment doctrine was so widely accepted because it fit with the prevailing laissez-faire economic climate of the era. During the late nineteenth and early twentieth centuries, big business and industry ruled, laws were fashioned to promote industrial growth, and courts sided with powerful businessmen over employees. Thus, the at-will presumption flourished since it preserves managerial discretion in the work environment. Specifically, the at-will employment doctrine embraces freedom of contract principles, which played a key role in developing the free enterprise system.

However, in subsequent decades, courts around the nation began to acknowledge the vast disparity in power between employers and their employees, and reckoned that the at-will employment doctrine gave significant leverage to employers. Thus, in an effort to protect employees and level the playing field, courts, along with legislatures, created judicial and statutory exceptions for wrongful termination, such as implied covenants of good faith and fair dealing, public policy exceptions, and implied-in-fact contract exceptions.

Though these exceptions have eroded the at-will employment doctrine to varying degrees among the nation's jurisdictions, the doctrine still endures in the United States today. Only one state, 

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12. See Olsen, supra note 11, at 251. The four cases that Wood cited are as follows: Wilder's Case, 5 Ct.Cl. 462 (1869), rev'd on other grounds sub nom. United States v. Wilder, 80 U.S. 254 (1874); De Briar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); and Franklin Mining Co. v. Harris, 24 Mich. 115 (1871).
13. See Decker, supra note 6, at n.23.
14. Id. at 731.
17. Id.
18. See Decker, supra note 6, at 733.
19. Id. at 733-34.
through legislative measures, has completely eliminated the presumption of at-will employment.\textsuperscript{20}

B. Pennsylvania

In the late nineteenth century, the Pennsylvania Supreme Court first addressed the issue of at-will employment in \textit{Henry v. Pittsburgh & Lake Erie Railroad Company}.\textsuperscript{21} As the first judicial interpretation of the at-will doctrine in Pennsylvania, the court held that an employer could terminate an employee with or without cause, for good reason or no reason, unless the parties had agreed to a contract that stated otherwise.\textsuperscript{22}

\begin{enumerate}
\item \textbf{The Public Policy Exception}
\end{enumerate}

The at-will rule announced in \textit{Henry} remained untouched until 1974, when the Pennsylvania Supreme Court decided \textit{Geary v. United States Steel Corporation}.\textsuperscript{23} \textit{Geary} involved a discharge based on an employee's report to his superiors concerning the unsafe nature of the steel pipe manufactured and sold by the company.\textsuperscript{24} Although the court ultimately concluded that the employee did not set forth a cause of action, the court, in dicta, left open the possibility of a public policy exception to the doctrine of employment at-will.\textsuperscript{25} For instance, the court considered that in certain circumstances, an employee may have a claim for wrongful discharge when his termination would violate a "clear mandate of public policy."\textsuperscript{26} The \textit{Geary} court cautioned that the legislature is the most appropriate branch of government to create exceptions to the at-will rule.\textsuperscript{27} However, subsequent court decisions have interpreted \textit{Geary} as creating the first common law exception, the public policy exception, to the at-will doctrine.\textsuperscript{28}

\begin{notes}
\item Id. at 734 n.37 (citing MONT. CODE ANN. §§ 39-2-902 to 39-2-914 (1998)). Montana was the first state to deviate from the at-will presumption by creating a statute designed to protect at-will employees from wrongful termination. See Decker, \textit{supra} note 6, at 764.
\item 21. 21 A. 157 (Pa. 1891).
\item 23. 319 A.2d 174 (Pa. 1974).
\item 24. \textit{Geary}, 319 A.2d at 175.
\item 25. \textit{Id.} at 180.
\item 26. \textit{Id.}
\item 27. \textit{Id.}
\end{notes}
Approximately a decade and a half later, the Pennsylvania Supreme Court expanded its Geary decision in Clay v. Advanced Computer Applications, Inc. Justice Flaherty stated the following:

It should be noted that as a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship. Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.

Subsequently, in Paul v. Lankenau Hospital, the Pennsylvania Supreme Court announced that while Geary, as reinforced by Clay, acknowledged that some exceptions to the at-will employment rule exist, the judiciary, however, should not conclusively define the boundaries of such exceptions. Further, the Supreme Court also approved of Chief Justice Nix's concurrence in Clay, in which he stated that there was no common law cause of action for wrongful discharge. Overall, the court held that "in the absence of a legally cognizable cause of action, the trial court erred in submitting the issue to the jury." Although the Supreme Court in Paul and Clay determined that no cause of action for wrongful discharge had been stated, the Court left the door open for a public policy claim to be brought in Pennsylvania.

Since the Geary line of cases, lower Pennsylvania courts have experienced difficulty in determining what constitutes a valid public policy interest sufficient to overcome the presumption of at-will employment. Courts have utilized the public policy exception in instances where an employer: 1) terminated an employee for serving jury duty; 2) abstained from hiring a potential employee who did not disclose a pardoned conviction; 3) discharged an employee for reporting the employer's failure to comply with federal nuclear regulations; and 4) fired an employee in retaliation for filing a

30. Clay, 559 A.2d at 918 (citations omitted).
32. See Paul, 569 A.2d at 348 (quoting Geary, 319 A.2d at 180).
33. Id. (citing Clay, 559 A.2d at 923 (Nix, J., concurring)).
34. Id. at 348-49.
35. See Decker, supra note 6, at 736.
workers' compensation claim. In these cases, the courts have not specified what exactly constitutes "public policy," but they have noted in cases outside of the wrongful termination arena that "public policy is to be ascertained by reference to the laws and legal precedents and not from supposed public interest."

In general, the Pennsylvania Supreme Court stated that it decides what constitutes public policy in Pennsylvania by looking at Pennsylvania case law, the Pennsylvania Constitution, and legislative statutes. In fact, in all of the cases in which the courts have found public policy violations, they have grounded their decisions on statutory provisions or case law to justify the application of the public policy exception. Overall, Pennsylvania courts are very reluctant to employ the public policy exception, and thus, they reserve it for the very narrowest of circumstances.

2. Statutory Exceptions

Like many other jurisdictions, Pennsylvania courts allow employees to overcome the presumption of at-will employment by grounding their claims in federal statutory law. In fact, even if a state abides by the at-will doctrine, numerous federal statutes already prevent an employer from exercising his right to terminate at-will. Federal statutory exceptions include legislation such as the Civil Rights Act of 1964 and the National Labor Relations Act.

41. McLaughlin, 750 A.2d at 288.
42. See Decker, supra note 6, at 736-37.
43. Id. at 737.
44. See McLaughlin, 750 A.2d at 288.
46. 42 U.S.C. §§ 2000e-2, 2000e-3(a) (1964) (precludes termination at-will where such termination is based on protected status such as race or ethnicity).
47. 29 U.S.C. § 158(a)(1), (3), and (4) (1988) (prohibits discharge for engaging in union activity, protected concerted activity and for filing charges and testifying under the Act).
In addition to federal statutory exceptions, numerous states have also carved out their own statutory protections for employees. In 1986, the Pennsylvania Legislature enacted the Pennsylvania Whistleblower Law (hereinafter “the Whistleblower Law” or “the Law”). The purpose of the Whistleblower Law, as expressed in its Historical and Statutory Notes, is to provide a safe harbor for employees who report an actual or suspected violation of federal, state, or local law.

Specifically, the Whistleblower Law provides that an employer may not interfere with the “employee’s compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.” Additionally, the judiciary has great flexibility in calculating employee remedies under the Whistleblower Law because it can require the employer to reinstate the employee, or can order back-pay, restoration of seniority rights and fringe benefits, actual damages, or a combination of all of these awards, to make the employee whole. On the flip side, the court also can impose a variety of penalties on those who violate the Whistleblower Law. For instance, the court can order the violator to pay a civil fine of not more than five hundred dollars or suspend a person who works for the Commonwealth of Pennsylvania, or a political subdivision thereof, for a period of no more than six months.

The Whistleblower Law does not expressly state whether its coverage extends solely to public sector employees, or if it can also extend to private sector employees in certain situations. Before 1998, courts interpreted the Law to only apply to public employees who, acting in good faith, notified the appropriate authorities in instances where their employers engaged in improper conduct or

48. See Foley, 765 P.2d at 376 n.4.
50. Decker, supra note 6, at 743.
51. Id. at 744 (citing Whistleblower Law, 43 PA. STAT. ANN. §§ 1421-1428 (2003)).
52. Decker, supra note 6, at 749.
53. Id. at 750.
54. Id. However, a court’s ability to order suspension, as a penalty for violating the Whistleblower Law, does not extend to persons who hold public office. Id.
55. Decker, supra note 6, at 743.
committed waste.\textsuperscript{56} For example, in the 1993 case of \textit{Krajsa v. Keypunch, Inc.},\textsuperscript{57} the Pennsylvania Superior Court noted that the Whistleblower Law only extends to employees terminated from governmental entities or other bodies that were created by or received funding from the government.\textsuperscript{58} In fact, the court specifically rationalized that the legislature restricted the language of the Law to encompass only the public sector in order to avoid the millions of private sector employers and employees from drowning the courts in a flood of litigation.\textsuperscript{59}

However, five years later, in \textit{Riggio v. Burns},\textsuperscript{60} the Pennsylvania Superior Court, sitting \textit{en banc}, widened the scope of the Whistleblower Law to cover the private sector in situations where a private sector employee could demonstrate that he received public monies and acted as an agent to a public body.\textsuperscript{61} Since the Law defines “employee” as “[a] person who performs a service for wages or other remuneration under a contract of hire . . . for a public body,”\textsuperscript{62} the court observed that it must first decide whether a private sector employee fits into the definition of “public body.”\textsuperscript{63} The court determined that since the Law classifies any body “funded in any manner by or through Commonwealth . . . authority”\textsuperscript{64} as a public body, the employer fit the definition because it received state appropriations.\textsuperscript{65}

In the aftermath of \textit{Riggio}, subsequent Pennsylvania Superior Court decisions have reaffirmed the applicability of the Whistleblower Law to the private sector.\textsuperscript{66} In \textit{Denton v. Silver Stream

\textsuperscript{56}. \textit{Id.} at 750.
\textsuperscript{58}. \textit{Krajsa}, 622 A.2d at 360 (citing Cohen v. Salick Health Care, Inc., 772 F. Supp. 1521 (E.D. Pa. 1991)). In \textit{Krajsa}, the Court held that the Pennsylvania Whistleblower Law did not cover an at-will employee's termination from a company that performed government contracts. 622 A.2d at 360. Rather, the Law only protects employees discharged from governmental entities or other entities created or funded by government. \textit{Id.} at 360.
\textsuperscript{59}. \textit{Krajsa}, 622 A.2d at 360.
\textsuperscript{61}. Decker, \textit{supra} note 6, at 750 (discussing Riggio v. Burns, 711 A.2d 497 (Pa. Super. Ct. 1998)).
\textsuperscript{62}. Whistleblower Law, 43 PA. STAT. ANN. § 1422 (2003).
\textsuperscript{63}. Decker, \textit{supra} note 6, at 751.
\textsuperscript{64}. Whistleblower Law, 43 PA. STAT. ANN. § 1422 (2003).
\textsuperscript{65}. Decker, \textit{supra} note 6, at 752-53.
\textsuperscript{66}. \textit{Id.} at 753 (discussing \textit{Denton infra} notes 67-68 and accompanying text).
Nursing and Rehabilitation Center, the Superior Court clarified that the Whistleblower Law pertains to entities that receive both money provided for by the Commonwealth and public money that is siphoned through the Commonwealth by the federal government.

Overall, within the last half-decade, the Pennsylvania Superior Court has applied the Whistleblower Law to any private entity that fits the definition of a public body. Thus, hospitals, nursing and personal care homes, facilities for the mentally disabled, institutions for the mentally incompetent, and numerous health care providers all fall within the scope of the Law due to their receipt of governmental funding. Additionally, based on court decisions, the Law protects an employee who labors for any other private sector employer, contractor, or person who works with a public body, such as a contractor that does public works projects or an individual that makes sales to public bodies.

The Pennsylvania Superior Court's recent expansion of the persons covered by the Whistleblower Law has led critics to comment that the judiciary has broadened the Law to its fullest extent by statutorily abolishing a portion of the at-will employment doctrine. For instance, practically all private and public sector whistleblowers can resort to the Whistleblower Law to prevent their employers from terminating them at-will.

Although the Pennsylvania Supreme Court adamantly maintains that Pennsylvania adheres to the at-will rule, and though Pennsylvania courts only sparingly apply the public policy exceptions, the judiciary has greatly modified the at-will doctrine through statutory exceptions and must monitor this area more carefully in the future in order to prevent continual erosion.

3. The Implied-In-Fact Contract Exception

Many jurisdictions have deviated from the at-will employment doctrine by means of the implied-in-fact contract exception. Pennsylvania has remained very cautious about allowing employees to prevail under this exception, though Pennsylvania courts have

68. Decker, supra note 6, at 753.
69. Id.
70. Id. at 753-54.
71. Decker, supra note 6, at 754.
72. Id.
73. See McLaughlin, 750 A.2d at 287.
sometimes struggled in determining what factors or combination of factors are necessary to create an implied-in-fact contract.

As a general matter, Pennsylvania does recognize this exception. In *Veno v. Meredith, III*,74 the Pennsylvania Superior Court noted that though the simplest way for parties to rebut the at-will employment doctrine is by forming an express contract, the parties can also defeat the presumption through an implied contract.75 Specifically, all of the surrounding circumstances of the hiring may demonstrate that the parties wanted to enter into a for cause employment relationship.76 For example, in another much earlier case, *Lucacher v. Kerson*,77 the Pennsylvania Superior Court explained that when interpreting a contract to ascertain the intention of the parties, the judiciary may consider the totality of the circumstances, the situation of the parties, the objects they apparently had in mind, and the nature and subject matter of the agreement.78 However, the *Veno* court cautioned that in order to contract-away the at-will rule, the parties must express their intentions with extreme clarity.79

Given this standard, the employee in *Veno* could not overcome the presumption of at-will employment. Although he argued that upon his hiring, his employer told him that they would retire together, and though he turned down other job opportunities throughout the course of his employment, the court stated that despite the "aspirational quality" of the statements, "[t]he law does not attach binding significance to comments which merely evince an employer's hope that the employee will remain in his employ until retirement."80 Further, the court did not find merit in the employee's decision to forego other prospective employment opportunities, and reckoned that "[t]his forebearance [sic] was merely a manifestation of his preference to remain with the Free Press and in no way suggests he had the reasonable belief that he could never be fired except for just cause."81

In *Luteran v. Loral Fairchild Corp.*,82 a case similar to *Veno*, the Pennsylvania Superior Court acknowledged that an employee may

75. *Veno*, 515 A.2d at 577.
76. *Id.*
78. *Lucacher*, 45 A.2d at 247.
79. *Veno*, 515 A.2d at 578.
80. *Id.* at 579.
81. *Id.* at 579-80 (internal citations omitted).
rebut the at-will presumption by proving: "1) an agreement for a
definite duration; 2) an agreement specifying that the employee
will be discharged for just cause only; 3) sufficient additional con-
sideration; or 4) an applicable recognized public policy exception." The court went on to explain that when a litigant bases his claim
on an implied contract argument, he will only be able to have a
jury hear his case if he can clearly demonstrate that he and his
employer intended to create a contract. He attempted to prove that he
and his employer formed an implied-in-fact contract due to clear
and unequivocal language in an employee handbook that stated
that he could only be fired for just cause, but the court disagreed. To justify this decision, the court explained that a handbook is
only enforceable against an employer "if a reasonable person in
the employee's position would interpret its provisions as evidenc-
ing the employer's intent to supplant the at-will rule and be bound
legally by its representations in the handbook." The court went
on to emphasize that "[t]he handbook must contain a clear indica-
tion that the employer intended to overcome the at-will presump-
tion.

Determining whether the employer intended to create a for
cause relationship by means of an employee handbook is the re-
sponsibility of the court. Because the court must carefully focus
on the parties' clearly specified intentions, the court should not
simply assume that the employer wanted to create legal ramifica-
tions upon distributing an employee handbook or that the em-
ployee believed that the handbook legally bound his employer.

Given these guidelines, the Luteran court concluded that the
employer did not intend to form a for cause relationship with his
employee by distributing the handbook. The court based its deci-
sion on the fact that the handbook did nothing more than state
logical examples of actions that any reasonable employee would

83. Luteran, 688 A.2d at 214 (internal citation omitted).
84. Id.
85. Id. at 217.
86. Id. at 214.
87. Id.
88. Luteran, 688 A.2d at 214.
89. Id. at 214-15.
90. Id. at 215 (citation omitted).
91. Id.
understand as being grounds for termination.\textsuperscript{92} Further, the handbook expressly stated that the enumerated list of actions was illustrative only and was created solely for informational purposes.\textsuperscript{93} Additionally, by referring to its previous decision in \textit{Martin}, the court disagreed with the employee's argument that his employer intended a for cause relationship because the handbook expressly mentioned the term "discharge for just cause."\textsuperscript{94} In \textit{Martin}, the court specifically held that use of the term "just cause" does not automatically transform an employment handbook into a contract.\textsuperscript{95} In order to make a handbook a binding employment contract, the employer must clearly state that intention.\textsuperscript{96} The handbook did not contain express language indicating that it was to be a legally binding contract.\textsuperscript{97} Therefore, the \textit{Luteran} court held that the employer did not intend to limit the employment relationship to just cause terminations.\textsuperscript{98}

Similarly to \textit{Luteran}, the United States District Court, in \textit{Trefsgar v. Contributors to the Pennsylvania Hospital},\textsuperscript{99} held that the healthcare clinic employee did not present sufficient evidence to overcome the at-will presumption by means of an implied-in-fact contract.\textsuperscript{100} In this case, the defendant supervisor "repeatedly and emphatically" promised to retain employee Trefsgar, but shortly thereafter, the supervisor terminated her as part of a reduction in staff.\textsuperscript{101} Ms. Trefsgar claimed that because her employer provided continual assurances of job security, they entered into an implied contract of employment that the clinic breached by discharging her.\textsuperscript{102} Additionally, she argued that she provided "additional consideration" to her employer, sufficient to create an implied employment contract, by reassuring the clinic’s clients that she would continue working at the clinic during an ownership transition period.\textsuperscript{103}

The court responded to the arguments by first stating that an employee can overcome the at-will rule "by, \textit{inter alia}, establishing

\begin{itemize}
\item \textsuperscript{92} Id.
\item \textsuperscript{93} \textit{Luteran}, 688 A.2d at 215.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id. (citing Martin v. Capital Cities Media, Inc., 511 A.2d 830 (Pa. Super. Ct. 1986)).
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. at 216.
\item \textsuperscript{98} \textit{Luteran}, 688 A.2d at 216.
\item \textsuperscript{99} 1997 U.S. Dist. LEXIS 5486 (E.D. Pa. 1997).
\item \textsuperscript{100} \textit{Trefsgar}, 1997 U.S. Dist. LEXIS 5486, at *15.
\item \textsuperscript{101} Id. at *3.
\item \textsuperscript{102} Id. at *6.
\item \textsuperscript{103} Id.
\end{itemize}
that the parties either expressly or impliedly formed an employment contract for a definite duration, or by establishing that sufficient 'additional consideration' passed from the employee to the employer to form an implied contract."\textsuperscript{104} The court went on to explain that in order to form an implied contract, the employee must allege that her employer made her an intentional and definite offer of employment.\textsuperscript{105}

Applying these principles, the court ruled that although the employer "repeatedly and emphatically" told Ms. Trefsgar not to worry about losing her job, these assurances were too vague to form an implied contract.\textsuperscript{106} The United States District Court, relying on a Pennsylvania Supreme Court case, held that "[t]here must be an intended, definite, specific offer before any offer can be accepted or any enforceable contract created."\textsuperscript{107} The court reasoned that "[i]f assurances of 'lifetime' and 'permanent' employment are too vague, an assurance of 'secure' employment is also too vague, as it is no more definite in its terms."\textsuperscript{108}

Additionally, the court disagreed with Ms. Trefsgar's assertion that she gave her employer sufficient additional consideration to defeat the at-will rule.\textsuperscript{109} The court acknowledged that the parties may alter an at-will relationship if "an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform," but the court decided that Ms. Trefsgar could not overcome the at-will doctrine by means of the additional consideration theory.\textsuperscript{110} Specifically, the court held that her employer instructed her to reassure the clinic's clients that she would remain the medical administrator during the switch in ownership, and therefore, Ms. Trefsgar was merely carrying out her employment responsibilities by complying with what she was initially hired to do.\textsuperscript{111}

\textsuperscript{104} Id. at *7 (citations omitted).
\textsuperscript{105} Trefsgar, 1997 U.S. Dist. LEXIS 5486, at 7 (citations omitted).
\textsuperscript{106} Id. at *9-10.
\textsuperscript{107} Id. at *10 (citing Morosetti v. Louisiana Land & Exploration Co., 564 A.2d 151, 153 (Pa. 1989)).
\textsuperscript{108} Id. at *10.
\textsuperscript{109} Id. at *11.
\textsuperscript{110} Trefsgar, 1997 U.S. Dist. LEXIS 5486, at *11 (citing Stumpf, 658 A.2d at 335).
\textsuperscript{111} Id. at *12.
The implied-in-fact contract theory, formed on the basis of sufficient additional consideration, can markedly infringe on an employer's right to terminate. In fact, when an employee gives proper additional consideration, this should result in a finding that the "employee should not be subject to discharge without just cause for a reasonable time." A "reasonable time" has been interpreted as a period of time that is "commensurate with the hardship the employee has endured or the benefit he has bestowed." As a result of these standards, Pennsylvania courts only hold that an employee has provided sufficient additional consideration in very limited contexts.

As observed by the Pennsylvania Superior Court in *Scott v. Extracorporeal, Inc.*, sufficient additional consideration is present if "the employee bestows a legally sufficient benefit or incurs a sufficient detriment for the benefit of the employer beyond the services for which he was hired . . ." However, the *Scott* court cautioned that "[t]he at-will presumption is not overcome every time a worker sacrifices theoretical rights and privileges." For example, in *Shaffer v. BNP/Cooper Neff, Inc.*, the United States District Court, applying Pennsylvania law, held that the employee (Mr. Shaffer) did not transform his employment relationship from at-will to one that must be continued for a reasonable time.

In *Shaffer*, the U.S. District Court began its analysis by noting that the employee plaintiff bears the burden of proving by clear and convincing evidence that the parties intended to form a contract that would last for a definite term. In an effort to meet this burden, Mr. Shaffer argued that he provided his employer with additional consideration that extended beyond simple job performance by enduring the "self-evident hardship" of moving from Chicago to Singapore for his employer's benefit.

In considering Mr. Shaffer's claim, the court cited cases in which adequate consideration was found, and explained the vari-

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113. *Id.*
116. *Id.* at 339.
119. *Id.* at *12.
120. *Id.* at *17. Before even discussing compensation, benefits, or length of employment with his employer, Mr. Shaffer moved to Singapore on January 8, 1996, to lead a new practice group. *Id.* at *4. However, within 6 months, BNP/CN terminated Mr. Shaffer's employment, allegedly due to business reasons. *Id.* at *5-6.
ous factors that justified these pro-employee decisions. The court referenced that a very useful factor in determining adequate consideration is to question whether "a termination of the relation by one party will result in great hardship or loss to the other, as they must have known it would when they made the contract." Additionally, the court emphasized that the chief factor to consider is relocation, especially the relocation of a family. The court referenced Cashdollar v. Mercy Hospital, in which sufficient additional consideration was found because an employee, due to prodding by his employer, sold his home and moved from Virginia to Pennsylvania, along with his pregnant wife and young child. The court noted that relocation factors include the employee's sale of a house, especially if sold at a loss; the decision to accept a lower salary; and the rejection of other specific opportunities.

Despite the court's ease in readily identifying factors for judicial consideration, the court then provided a list of seemingly contradictory cases that illustrated the difficult application of these factors. For example, though the Pennsylvania Superior Court in Cashdollar held that an employee provided sufficient, adequate consideration when he sold his house and moved his wife and child to a different state at his employer's persistent requests; nearly five years earlier the same court held the exact the opposite in Veno v. Meredith, III, a case with very similar facts. As previously discussed, in Veno, the employee resigned from another job, relocated his family from Newark, New Jersey to Philadelphia, Pennsylvania, and rejected other employment offers in order to take a position with his employer. The only way to reconcile this apparent contradiction lies in the period of time that the employees worked at their new locations before being discharged by their employers. In Veno, the employee worked for eight years in the new location before facing termination, whereas, in Cashdollar,
the employee was fired after working only sixteen days. The Veno court explained that even if the original hardships undertaken by the employee had altered his employment status to that of a for cause employee, such a contract's reasonable duration would have "surely passed based on the consideration given" by the time the he reached his eighth year of employment. Given these two cases, Pennsylvania courts seemingly should add "length of employment" to their list of factors to consider when determining the presence of sufficient additional consideration because, under current Pennsylvania jurisprudence, the shorter the length of employment between relocation and termination, the more likely it is that the employee will be found to have provided sufficient additional consideration.

Pennsylvania courts, and/or the legislature, need to provide a concrete explanation of what exactly an employee must do, endure, or refrain from doing in order to provide sufficient additional consideration by means of suffering a substantial hardship. The U.S. District Court, in Martin v. Safeguard Scientifics, Inc., found that an employee who gave up goodwill and profit from his proprietary business in order to work for his employer's firm provided sufficient additional consideration. However, just three years earlier, the same court, in Duvall v. Polymer Corp., held that giving up other job opportunities with different employers was not enough of a hardship to justify a finding of sufficient additional consideration. Adding to the confusion in Pennsylvania case law, prior to the Martin and Duvall decisions, the Pennsylvania Supreme Court, in Greene v. Oliver Realty, Inc., determined that an employee provided sufficient additional consideration when he agreed to work at sub-union wages in exchange for lifetime employment. Given these three decisions, Pennsylvania employers are not given sufficient judicial rules regarding their conduct in order to avoid forming implied-in-fact contracts with their employees.

130. Veno, 515 A.2d at 580-81 n.4.
133. 526 A.2d 1192 (Pa. 1987).
134. In Greene, employee Greene formed an oral contract with his employer to work below the union pay rate so long as he was guaranteed employment for life. Greene, 526 A.2d at 1192.
In light of these inconsistent judicial decisions, the only clarification that the *Shaffer* court offered, in interpreting Pennsylvania law, was that courts "have given a narrow reading to 'additional consideration,' generally requiring a showing of some extraordinary detriment or extraordinary benefit before allowing the question to reach the jury."\(^{135}\) The court then held that Mr. Shaffer did not meet the burden of proving sufficient additional consideration because nothing in the record evidenced that his employer benefitted as a result of Mr. Shaffer's relocation: Mr. Shaffer himself first proposed the move as a means of obtaining a better job; Mr. Shaffer neither moved his family nor sold a home; and the employer actually provided notable additional benefits by giving Mr. Shaffer a housing stipend, travel benefits, moving expenses, and fringe benefits.\(^{136}\) The court concluded that Mr. Shaffer simply chose to vigorously pursue a professional and personal opportunity and did not prove the requisite consideration to overcome the at-will doctrine.\(^{137}\)

Although the determination in *Shaffer* clearly favored the employer, as Pennsylvania case law reveals, the facts and circumstances of other Pennsylvania cases are not always as clear-cut. Thus, Pennsylvania courts must identify more precise guidelines to use in determining what constitutes sufficient additional consideration so that Pennsylvania, like so many other jurisdictions, does not further erode the at-will employment presumption. Alternatively, due to judicial indecision, many judges have suggested that now is a key time for the legislature to become involved.

### III. Status of the At-Will Doctrine in Other Select Jurisdictions

#### A. California

On the books, California is an at-will state.\(^{138}\) However, in practice, California courts have progressively eroded the at-will employment doctrine by carving out exceptions that restrict an em-

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136. *Id.* at *21.
137. *Id.*
138. CAL. LAB. CODE § 2922 (West 1989 & Supp. 1996). Section 2922 of the California Labor Code states that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." *Id.* at § 2922.
ployer's ability to freely terminate an employee without fear of liability. Like Pennsylvania, California allows employees to overcome the presumption of at-will employment by express agreement,139 public policy exceptions,140 and statutory exceptions.141 These three exceptions, despite their ability to alter an at-will employment relationship into one for cause, are fairly routine, and do not create much turmoil for courts, employers, and employees. However, like Pennsylvania, California courts have also recognized the implied-in-fact contract exception, which has greatly impeded managerial discretion in the workplace, and has also created much confusion among California courts.142

When applying the implied-in-fact contract exception to employment cases, California courts consider the "totality of the circumstances" of the employment relationship in order to determine whether the parties did indeed form an implied-in-fact contract.143 In Foley, the California Supreme Court identified several factors that may prove the existence of an implied agreement that termination is allowable only for cause.144 Those factors include personnel policies, employer practices, industry practices, employee's length of service, and assurances by the employer of continued employment.145 In identifying these factors, the court rationalized that in employment cases, judiciaries need to determine the parties' actual intent, and in order to do so, can examine the parties' conduct.146

Following Foley, the California Supreme Court decided Scott v. Pacific Gas & Electric Co.,147 and significantly extended the implied-in-fact contract exception to cover wrongful demotions in addition to wrongful terminations.148 The Scott court suggested the modern trend in contract law is to reverse the presumption of reliance on the written agreement toward evidence of experience and practice.149 In finding an implied agreement of termination for

142. In the 1980s, California courts decided 2 landmark cases, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981) (overruled on other grounds), and Foley, 765 P.2d at 373, which applied the implied-in-fact contract exception to the employment arena.
143. See Pugh, 171 Cal. Rptr. at 927, and Foley, 765 P.2d at 388.
144. Foley, 765 P.2d at 387.
145. Id. (citations omitted).
146. Id. at 385.
147. 904 P.2d 834 (Cal. 1995).
148. 904 P.2d 834 (Cal. 1995).
149. Scott, 904 P.2d at 834.
cause, the Scott court reaffirmed the Foley court proposition that "implied contractual terms 'ordinarily stand on equal footing with express terms.'"\(^{150}\)

Although Pugh, Foley, and Scott, advocate a "totality of the circumstances" approach, and identify a seemingly straight-forward standard for determining the existence of an implied-in-fact contract, California courts have struggled to uniformly apply this guideline. In fact, California case law is inconsistent,\(^{151}\) and courts appear uncertain as to whether at-will disclaimers in employment manuals and handbooks, oral assurances of job security and continued employment, performance appraisals, promotions, salary increase, and a combination of some or all of these factors are enough to transform an at-will relationship into one for cause. In fact, these contradictory holdings have even led Judge Kozinski, of the Ninth Circuit Court of Appeals, to reflect that the once simple presumption of at-will employment has been replaced by burdensome trials and discovery, has created endless and insurmountable confusion among judges and juries, and has withered away to a "hollow legal fiction."\(^{152}\)

Much of the problem stems from the fact that despite the stated resolve to abide by traditional contract law, California courts are veering from this goal.\(^{153}\) For instance, although contract law mandates that parties manifest an intent to be bound by an

\(^{150}\) Id at 838-39 (quoting Foley, 765 P.2d at 385).

\(^{151}\) See Wayte v. Rollins Int'l, Inc., 215 Cal. Rptr. 59, 69 (Cal. Ct. App. 1985) (in wrongful discharge action, evidence of employer's repeated assurances over six years that employee's work was satisfactory was sufficient to raise inference that employee was wrongfully terminated in violation of an implied-in-fact promise that he would only be discharged for cause); Harlan v. Sohio Petroleum Company, 677 F. Supp. 1021, 1030 (N.D. Cal. 1988) (in plaintiff's action for breach of contract and wrongful discharge, court denied defendant employer's summary judgment motion because evidence that defendant made oral assurances about job security to plaintiff during recruitment raised genuine issue of material fact of whether employer's discharge of plaintiff was wrongful breach of an implied promise not to terminate except for good cause); Miller v. Pepsi-Cola Bottling Co., 259 Cal. Rptr. 56, 59 (Cal. Ct. App. 1989) (court affirmed trial court's grant of summary judgment for employer in wrongful discharge action and held that mere promotions and salary increases during eleven years of service were natural occurrences of employment relationships insufficient to raise the inference of an implied-in-fact contract); and Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550, 557 (Cal. Ct. App. 1990) (summary judgment for employer in wrongful discharge action was proper where employer and employee had express one-year agreement with no obligation for renewal, holding terms of written agreement cannot be changed through evidence of long service, prior contract renewals, and absence of poor performance evaluations).

\(^{152}\) See Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 783 (9th Cir. 1990) (Kozinski, J., dissenting).

agreement, courts are confused as to what factors demonstrate intent.\footnote{154} Certainly, deciphering what the parties intended is no easy task, especially since the \textit{Foley} court explained that contractual understanding need not be overt but can arise from the conduct of the parties.\footnote{155} However, a significant discrepancy results when some California courts find that parties expressed the requisite contractual intent solely due to employer praise and promotion in response to satisfactory employee performance, while others require these factors in addition to many more considerations.

Consequently, California employers do not know how to protect themselves from impliedly entering into for cause employment relationships. California courts insist on examining the “totality of the circumstances,” and as a result, at-will disclaimers in employment handbooks and manuals provide little protection.

However, in recent years, a few California cases significantly eliminated past confusion by enunciating what steps an employer can take to ensure that at-will remains the rule in the workplace. For instance, regardless of the fact that California courts insist on considering the “totality of the circumstances,” the California Supreme Court in \textit{Guz v. Bechtel National}, Inc.,\footnote{156} clarified the totality of the circumstances analysis as not implying “that every vague combination of \textit{Foley} factors, shaken together in a bag, necessarily allows a finding that the employee had a right to be discharged only for good cause, as determined in court.”\footnote{157} Additionally, the \textit{Guz} court pointed out that most cases applying California law, both pre- and post-\textit{Foley}, have held that “an at-will provision in an express written agreement signed by the employee, cannot be overcome by proof of an implied contrary understanding.”\footnote{158} The \textit{Guz} court observed, quite favorably for employers, that many of the post-\textit{Foley} cases have not allowed a finding of termination for cause based solely on evidence of duration of service, regular promotions, favorable performance reviews, praise from supervisors, and salary increases.\footnote{159} Rather, these events are merely “natural consequences” of a properly functioning work environment.\footnote{160} The \textit{Guz} court also noted that transforming at-will rela-
tionships into ones terminable only for cause, based solely on successful longevity, would hinder the retention and promotion of employees.\textsuperscript{161}

In order to create a for cause employment relationship, the employer must communicate that seniority and longevity create rights against termination at-will.\textsuperscript{162} Length of employment was a significant factor in \textit{Foley}, but the repeated assurances of job security were the prominent conduct that led the Court to find for the employee.\textsuperscript{163} California employers, based on \textit{Guz}, can protect themselves from inadvertently entering into implied contracts with their employees by minding their words and actions.

As an additional protection for employers, the United States District Court, in \textit{Salsgiver v. America Online Inc.},\textsuperscript{164} noted that "an implied-in-fact contract requiring cause for termination is fundamentally inconsistent with an express at-will contract, and the terms of the express contract cannot be rewritten by implications arising from later conduct."\textsuperscript{165} Thus, there cannot be both an express contract and implied contract when each requires different results. Express terms are controlling, even if not a part of an integrated employment contract.\textsuperscript{166}

Courts will examine the "totality of the circumstances" and termination for cause may be found in a particular case where the evidence of an implied contract outweighs the presumption of at-will employment. However, in accordance with the courts' much more careful application of the implied-in-fact contract exception, an express contract that articulates the at-will policy will not be trumped by evidence of an implied agreement.

The courts' recent assurance that California employers can preserve at-will relationships by forming express agreements with their employees may lead to questioning whether California truly is an at-will state because employers are required to take affirmative precautions to preserve the at-will rule. Additionally, employees may not enthusiastically agree to enter into express contracts that give their employers unbridled power to terminate them on a whim.

\textsuperscript{161} \textit{Id.} at 1104-05.
\textsuperscript{162} \textit{See Guz}, 8 P.3d at 1104-05.
\textsuperscript{163} \textit{See Foley}, 765 P.2d at 387-88.
\textsuperscript{164} 147 F. Supp. 2d 1022 (D.C. Cal. 2000).
\textsuperscript{165} \textit{Salsgiver}, 147 F. Supp. 2d at 1029.
The current trend in California case law, to apply the implied-in-fact contract exception to the employment context in only very limited circumstances, is much more favorable to employers than past judicial decisions. However, given the long history of confusion among California judges, a limited application of the implied-in-fact contract exception or continued erosion of the at-will doctrine are both equally possible in the future.

The fact that California case law has evolved to the point where employers must take extra steps to ensure that the at-will rule governs their workplaces exemplifies why the Pennsylvania legislature must establish clear guidelines for the application of the implied-in-fact contract exception. If action is not soon taken in Pennsylvania, Pennsylvania employers, similarly to California employers, might have to go to great lengths to reverse the damage done by a liberal application of the implied-in-fact contract exception.

**B. New Jersey**

Like both Pennsylvania and California, New Jersey also recognizes an implied-in-fact contract exception to the at-will rule. New Jersey especially merits discussion because it was one of the first jurisdictions to cause extreme damage to the at-will rule by means of the implied-in-fact contract exception.

In *Woolley v. Hoffmann-La Roche, Inc.*, the employer gave his employee an employment handbook, shortly after he began working for the employer, that spelled out the grounds for discharge and procedures for the employer to follow to discharge an employee. Subsequently, the employee argued that his employer breached an implied-in-fact contract because he veered from the grounds and procedures for termination that were codified in the handbook.

The New Jersey Supreme Court ruled in the employee's favor. The court held that the mere act of distributing a handbook was highly significant because the handbook discussed job security, a topic of great concern to employees. The court reasoned that

167. *See Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (modified, 499 A.2d 515 (N.J. 1985)).
169. *Id.* at 1271-73.
170. *Id.* at 1258.
171. *Id.* at 1271.
172. *Id.*
employees could understandably view the handbook as creating a legally binding obligation.\textsuperscript{173} Thus, the \textit{Woolley} court determined that by distributing an employment handbook, the employer makes an offer for a unilateral contract, which the employee accepts when he remains on the job.\textsuperscript{174} Further, the court concluded that the employee provides consideration for the unilateral contract by continuing to work despite no legal obligation to do so.\textsuperscript{175}

As one critic has observed, by formulating the unilateral contract analysis in \textit{Woolley}, the New Jersey Supreme Court fashioned a model for other jurisdictions that base their implied-in-fact contract exceptions on a traditional contract analysis.\textsuperscript{176} Further, by holding that an employer can alter his at-will relationship with his employee simply by distributing a handbook, New Jersey has markedly eroded the at-will doctrine because the \textit{Woolley} court did not evaluate the employer's intent or, like California courts, examine the "totality of the circumstances." Rather, the New Jersey Supreme Court ruled that the mere act of distribution alone creates legal consequences for the parties. Thus, Pennsylvania should view this sister state's decision as a warning to steer clear of this path in order to avoid completely obliterating the at-will doctrine.

C. \textit{Michigan}

Like New Jersey, Michigan has also eroded the at-will employment doctrine by means of the implied-in-fact contract exception.\textsuperscript{177} Of special significance, in \textit{Toussaint v. Blue Cross & Blue Shield},\textsuperscript{178} the Michigan Supreme Court ruled that the implied-in-fact contract exception is grounded in general notions of equity.\textsuperscript{179} In \textit{Toussaint}, the employer distributed a handbook to his employees, which explained various termination procedures and promised that the employer would discharge employees only for just cause.\textsuperscript{180} Subsequently, an employee who was discharged without

\textsuperscript{173} \textit{Woolley}, 491 A.2d at 1265-66.
\textsuperscript{174} \textit{Id.} at 1264-66.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{See} Shaughnessy, \textit{supra} note 5, at 1077.
\textsuperscript{177} \textit{See} Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980).
\textsuperscript{178} 292 N.W.2d 880 (Mich. 1980).
\textsuperscript{179} \textit{See} Shaughnessy, \textit{supra} note 5, at 1075.
\textsuperscript{180} \textit{Toussaint}, 292 N.W.2d at 893.
cause brought a claim against the employer for wrongful termination.  

The Michigan Supreme Court, in finding for the employee, established that the at-will doctrine was a rule of construction, rather than a rule of substantive law. Further, the court declared that contractual rights can arise from statements in employee handbooks. The Toussaint court held that contractual rights may arise although neither party signs the statement of policy; the employer can unilaterally amend the policy without notifying the employee; and the handbook makes no specific reference to a particular employee.

The court did not specifically explain these contractual rights found in handbooks, but concluded that by making promises of job security, the employer could gain an "orderly, cooperative and loyal work force." The court reasoned that because the employer ultimately benefits from this arrangement, the handbook should be interpreted in accordance with the employee's reasonable expectations.

These bold statements by the Michigan Supreme Court, similar to those of the New Jersey Supreme Court, signaled one of the first great assaults on the at-will doctrine by means of the implied-in-fact contract exception. Subsequently, other jurisdictions looked to the examples set by Michigan and New Jersey to develop a body of law that significantly protects non-union, private-sector employees from arbitrary or bad-faith discharge.

**IV. CONCLUSION**

By studying how other states have eroded the at-will doctrine, the Pennsylvania Legislature must realize that now is the time to act before Pennsylvania courts make the same mistakes as made in sister jurisdictions. Pennsylvania can learn great lessons from California, a state that applied the implied-in-fact contract exception much too liberally in recent decades and now must desper-

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181. Id. at 883.
182. Id. at 885.
183. Id.
184. Id. at 892.
185. Toussaint, 292 N.W.2d at 892.
186. Id. at 893.
188. See Shaughnessy, *supra* note 5, at 1077.
ately try to limit the breadth of the exception in order to eliminate contradiction in case law. Additionally, Pennsylvania can benefit by reviewing how both New Jersey and Michigan have severely limited employer discretion in the workplace by holding that mere distribution of an employee handbook can create legally binding consequences for the parties.

Thus, as the Pennsylvania judiciary has often suggested, the Pennsylvania legislature should set forth specific guidelines for applying the exceptions to the long-standing at-will employment doctrine, and should provide clear examples of what circumstances justify application of the exceptions. Uniform standards should be set forth that explain the circumstances under which an implied-in-fact contract can arise in the employment context, as well as what constitutes sufficient additional consideration. These guidelines are necessary in order to preserve managerial discretion in the workplace and to ensure that employers know how to conduct themselves in order to avoid inadvertently forming for-cause employment relationships with their employees. Until such policies are established, the only assurance that employers can rely on is the arguably hollow echo of the Pennsylvania Supreme Court’s repeated assertion that Pennsylvania is an at-will state.

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