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Wrongful Discharge—Sexual Harassment Equated with Prostitution to Find Public Policy Exception

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WRONGFUL DISCHARGE—SEXUAL HARASSMENT EQUATED WITH PROSTITUTION TO FIND PUBLIC POLICY EXCEPTION, *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984).

Beverly Lucas, an employee of Brown & Root, Inc., was discharged on January 15, 1981.[1] Lucas subsequently filed suit against Brown & Root in the United States District Court for the Eastern District of Arkansas.[2] She contended the discharge was the direct result of her refusal to sleep with her foreman. On April 7, 1983, the district court dismissed the claims brought pursuant to 42 U.S.C. sections 1983[3] and 1985[4] and granted the plaintiff leave to amend the complaint to include claims under Title VII of the Civil Rights Act of 1964.[5] Plaintiff's second amended complaint contained, *inter alia*, an explana-

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1. Beverly Lucas was employed at the Brown & Root, Inc. construction site in Newark, Arkansas.

2. Lucas v. Brown & Root, Inc., No. 83-1923 (E.D. Ark. final order filed May 11, 1983).

3. 42 U.S.C. § 1983 (1979 and Supp. 1984). Section 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities . . . shall be liable to the party injured . . . .

4. 42 U.S.C. § 1985 (1979 and Supp. 1984) provides in part: [I]f one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation . . . .

5. 42 U.S.C. § 2000e (1976). Section 703(a) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e - 2(a). Section 701 of Title VII sets out applicable definitions to the Act at 42 U.S.C. § 2000e. Brown & Root objected to the proposed amendment on the ground that Lucas failed to file a timely Title VII action. Title VII requires that suit be filed within ninety days of receipt of the right-to-sue notice. *See* 42 U.S.C. § 2000e - 5(f) which states:

> If a charge filed with the [Equal Employment Opportunity] Commission pursuant to subsection (b) of this section is dismissed by the Commission or if within one hundred and eighty days from the filing of such charge . . . the Commission, has not filed a civil action . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . .

See also Harper v. Burgess, 701 F.2d 29 (4th Cir. 1983). Specifically, defendant asserted that Beverly Lucas had personally acknowledged receiving a right-to-sue notice from the Equal Employment Opportunity Commission ninety-one days prior to the filing of the initial complaint. It is interesting to note that Lucas' first attempt to bring an action under Title VII occurred nearly five months beyond the statutory time limitations.

tion for the untimely filing of the Title VII action.[6] In addition, plaintiff asserted claims for wrongful discharge and for intentional infliction of emotional distress under Arkansas law.[7] The district court dismissed all claims.[8] An appeal to the United States Court of Appeals for the Eighth Circuit ensued.[9]

The court of appeals agreed with the lower court that the plaintiff's Title VII claim was time barred.[10] However, the court reversed and remanded with respect to the state law claims,[11] finding that a public policy exception to the employment-at-will doctrine was recognized in Arkansas.[12] The decision to remand was based on the findings that the

> [c]omplaint alleging that plaintiff was fired because she would not sleep with her foreman stated both a contract and a tort claim under Arkansas law; and . . . [the] complaint alleging that sexual advances were made placing plaintiff's job on the line and that her employer made misrepresentations with respect to plaintiff's unemployment compensation stated [a] cause of action for intentional infliction of emotional distress under Arkansas law.[13]

Lucas v. Brown & Root, 736 F.2d 1202 (8th Cir. 1984).

At common law, an employment relationship could be terminated at the will of either the employer or the employee when there was no contractual provision that either required continued employment or set forth a covered duration of employment.[14] Even though this rule sometimes operated harshly, few legal principles have been as well-settled as the broad rule that employment for an indefinite term is regarded as employment-at-will.[15] The employment-at-will rule provided that employment for an indefinite period could be terminated at any time by either party for any reason or for no reason at all.[16]

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6. *Lucas*, No. 83-1923 (E.D. Ark. 1984).
7. *Id.*
8. *Id.*
9. Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984).
10. *Id.* at 1203.
11. *Id.*
12. *Id.* at 1204.
13. *Id.* at 1203.
14. Murg and Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 334-335 (1982).
15. No federal or state statute had been enacted as of 1982 which would override the employment-at-will doctrine. Experts estimate that between seventy and seventy-five million American workers are unprotected from the harshness of the rule. 111 LAB. REL. REP. (BNA) No. 23, at 7 (Nov. 22, 1982).
16. *Id.*

Employment-at-will evolved from the presumption adhered to by English courts that a hiring would be for one year if no time limit was expressed or implied by custom.[17] English courts imposed liability upon employers who discharged employees without good cause at any time during the year.[18] Early American cases appear to support the view that the English rule was adopted by the colonies.[19] These cases reflect that American courts had no difficulty fixing a term of employment where proof of custom,[20] trade usage,[21] or an understanding between the parties[22] was present. However, decisional conflicts resulted where such factors were not present.[23]

These conflicts were the by-product of changing economic times which required new and better rules to govern the employment relationship. First, the industrial revolution brought about a more impersonal employment relationship.[24] Employers began to abandon paternalistic feelings toward employees nurtured by the feudal master-servant filiation.[25] Second, a contract theory developed by the courts during this period conditioned the employer's duty to not terminate at-will upon a firm promise clearly expressing an intent to be held to the terms of the agreement.[26] Finally, in an effort to resolve conflicting court decisions and to meet the changing needs of an industrialized society, American courts began to presume that a hiring for an indefinite period was terminable at-will.[27]

This presumption became known as the employment-at-will rule, often referred to as the "Wood Rule" for the attorney who first stated the doctrine.[28] In an exhaustive study of the law of the master-servant relationship, H.G. Wood professed that "a general or indefinite hiring

17. Murg and Scharman, *supra* note 14, at 332.

18. *Id.*

19. *See, e.g.*, Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891) (presumption that continuance after expiration of one year contract is general hiring for one year); Douglas v. Merchants' Ins. Co., 118 N.Y. 484, 23 N.E. 806 (1890) (presumption that employee's continuance of employment after end of specified annual contract is with same terms); Bascon v. Shillito, 37 Ohio 431 (1882) (English presumption for one year to be inferred from general hiring).

20. Hobbs v. Davis, 30 Ga. 423 (1858).

21. Roddy v. McGetrick, 49 Ala. 159 (1873).

22. Smith v. Theobald, 86 Ky. 141, 5 S.W. 394 (1887).

23. *Compare* Davis v. Gorton, 16 N.Y. 255 (1857) (indefinite hiring is hiring for one year) *with* Kirk v. Hartmant Co., 63 Pa. 97 (1869) (law does not imply a hiring for one year).

24. Murg and Scharman, *supra* note 14, at 334.

25. *Id.*

26. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980).

27. *Id.*

28. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1st ed. 1877).

is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."[29] Despite the contention that the cases cited by Wood failed to support his proposition, the courts quickly adopted his formulation of the rule.[30] Many of the early decisions cited Wood alone as authority, and one cited no authority at all, finding that the cases adhering to the rule were too numerous to justify citation.[31]

The American rule "permitted an employer to discharge an employee for good cause, no cause or even for bad cause."[32] An employee could only be protected by a contract providing for a definite term of employment. Thus, in a broad sense, the rule relied upon formalistic contract theories. Under this approach, manifestations of intent must be evidenced by definite, express terms if promises are to be enforceable.[33] Therefore, if the parties intended the employment relationship to last for one year, the employment contract would have to expressly provide for this to make the provision enforceable at law.

The case most frequently cited in support of the employment-at-will rule is *Payne v. Western & Atl. R.R.*[34] This case, like many of the early decisions, refused to interfere in the nature of the employment contract, thus creating a presumption in favor of allowing termination at any time.[35] The American rule, as developed through case law, placed the burden of proof on the employee to establish that the parties intended to create employment for a definite term.[36] Under the English rule the employer had borne the heavier burden of proving an intent between the parties to create an employment term of less than one

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29. *Id.* at 272.

30. For a discussion of those cases, see Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); *see also* Annot., 11 A.L.R. 469, 476-77 (1921).

31. Harrod v. Wineman, 146 Iowa 718, 125 N.W. 812 (1910).

32. Murg and Scharman, *supra* note 14, at 335.

33. RESTATEMENT (SECOND) OF AGENCY § 442 (1958); *see also* 9 S. WILLISTON, CONTRACTS § 1017 (3d Ed. 1967).

34. 82 Tenn. 507 (1884). In *Payne* the court stated:

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

Id. at 518-19, *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). *See also* Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 554, 112 P. 886, 888 (1910).

35. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, note 23, at 129 (1976).

36. *Id.*

year.[37]

For nearly a century, the employment-at-will doctrine has remained virtually unchanged. Absent a federal statute or a collective bargaining agreement containing provisions to the contrary, most states apply the rule in its original form; termination is the sole prerogative of the employer.[38] Courts in some states, however, have permitted exceptions to the application of the rule.

Generally, exceptions are permitted in two situations: 1) where "public policy" is violated by the discharge and 2) where implied contracts are violated by the discharge.[39] The public policy exception is best exemplified by a 1959 California case, *Petermann v. International Brotherhood of Teamsters, Local 396*.[40] The *Petermann* decision held that an employer did not have the right to discharge an employee who refused the employer's order to commit perjury. The California court, after finding perjury to be against the state's declared public policy, proclaimed "the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury."[41]

Another area in which attempts are made to erode the common law rule is that of "implied contracts". Courts applying this exception generally hold as a matter of law that employment contracts include an implied right of good faith and fair dealing.[42] Thus, where a discharge of an employee is found to have been motivated by bad faith, a cause of action for breach of contract is allowed.[43]

Arkansas, declining to recognize either of these exceptions, has always followed the employment-at-will rule in its original formulation.

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37. Note, *supra* note 26, at 1825-26.

38. *Id.*

39. 111 LAB. REL. REP. (BNA) No. 23, at 7 (Nov. 22, 1982).

40. 174 Cal. App.2d 184, 344 P.2d 25 (1959).

41. *Id.*, 344 P.2d at 31.

42. *See* Rees v. Bank Bldg. and Equip. Corp., 332 F.2d 548, 551-52 (7th Cir. 1964), *cert. denied*, 379 U.S. 932 (1964); Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 101, 364 N.E.2d 1251, 1255-56 (1977).

43. The rationale behind this theory is the protection of earned employee benefits. *See* Coleman v. Graybar Electric Co., 195 F.2d 374 (5th Cir. 1952) (The court recognized an employer's obligation to not deprive an at-will employee of his previously earned commissions by discharging the employee without good cause); Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (Court held that a termination not made in good faith would constitute a breach of contract. The jury was instructed to determine the employer's real motive in terminating the employee and if the reason for discharge was to avoid payment of a bonus then the termination was in bad faith).

In *Miller v. Missouri Pacific Transportation Co.*,[44] the Arkansas Supreme Court clearly stated its position: "where no definite term of employment is specified the employment may be terminated at the will of either party in the absence of other circumstances controlling the duration of employment."[45] The Arkansas courts have consistently applied the employment-at-will rule for nearly a century.[46] The Supreme Court of Arkansas recently reaffirmed its adherence to the employment-at-will doctrine stating "[i]t is quite clear, therefore, that in the absence of some alteration of the basic employment relationship, an employee for an indefinite term is subject to dismissal at any time without cause."[47]

In 1980, the Arkansas Supreme Court departed from its firm stance and indicated that in the proper circumstances an action for wrongful discharge would be allowed under the public policy exception to employment-at-will.[48] But the court failed to find an action for wrongful discharge in subsequent decisions.[49]

Despite the indecision of the Arkansas Supreme Court, *Lucas v. Brown & Root, Inc.*[50] held that in Arkansas the public policy exception to the employment-at-will rule *may* give rise to a cause of action for wrongful discharge.[51] The Eighth Circuit refrained from making a specific finding of wrongful discharge but reversed and remanded to the district court for further consideration in light of the court's opinion.[52]

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44. 225 Ark. 475, 283 S.W.2d 158 (1955).

45. *Id.* at 481, 283 S.W.2d at 161.

46. *See, e.g.*, Halsell v. Kimberly-Clark Corp., 518 F. Supp. 694 (D.C. Ark. 1981), *aff'd*, 683 F.2d 285 (1982); Gilbreath v. East Arkansas Planning and Development Dist., Inc., 471 F. Supp. 912 (E.D. Ark. 1979); French v. Dillard Dept. Stores, 285 Ark. 332, 686 S.W.2d 435 (1985); Gaulden v. Emerson Electric Co., 284 Ark. 149, 680 S.W.2d 92 (1984); St. Louis I.M. and S.R. Co. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897).

47. Griffen v. Erickson, 277 Ark. 433, 642 S.W.2d 308 (1982). Justice Hays, writing for the court went on to state: "We cite these cases to illustrate how firmly ingrained in our case law is the rule that *either party* may terminate a contract of employment where no specific duration is agreed on even when the contract requires cause." *Id.* at 311.

48. M.B.M. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (court rejected implied just cause standard for termination, but indicated a public policy exception to the employment-at-will rule might be appropriate in the proper circumstances). *But cf.* Newton v. Brown & Root, Inc., 280 Ark. 337, 658 S.W.2d 370 (1983) (court contends that it was unable to decide in *Counce* if it would recognize a public policy exception to the employment-at-will rule).

49. French v. Dillard Dept. Stores, 285 Ark. 332, 686 S.W.2d 435 (1985); Gaulden v. Emerson Electric Co., 284 Ark. 149, 680 S.W.2d 92 (1984); Newton v. Brown & Root, Inc., 280 Ark. 337, 658 S.W.2d 370 (1983).

50. 736 F.2d 1202 (8th Cir. 1984).

51. *Id.* at 1204.

52. *Id.* at 1207. The plaintiff, Beverly Lucas, took a nonsuit on November 5, 1984.

Judge Arnold, speaking for the three member panel,[53] summarily dismissed the plaintiff's Title VII claim as time barred. The remainder of the court's opinion was divided into two issues: 1) wrongful discharge and 2) intentional infliction of emotional distress.

Addressing the wrongful discharge claim first, the court briefly outlined the development of the employment-at-will doctrine. Citing several law review articles[54] as authority, Judge Arnold noted that a steady trend was developing toward allowing a public policy exception to the rule. Even though no Arkansas case has held a discharge to be in violation of public policy, the Eighth Circuit observed that the Arkansas Supreme Court had indicated a willingness to recognize a public policy exception to at-will employment.[55] Specifically, the court relied upon *M.B.M. Co. v. Counce*,[56] in which the plaintiff's claim of wrongful discharge was denied. The Arkansas Supreme Court stated in dicta in that case: "We might well agree with Ms. Counce if there was any indication that she was discharged for exercising a statutory right, or for performing a duty required of her by law, or that the reason for the discharge was in violation of some other well established public policy."[57] The court concluded that two propositions had been established by Arkansas Supreme Court decisions:

> 1) that employees whose contracts are not for a fixed term may ordinarily be discharged, just as they may quit, for any reason or for no reason; and 2) that there are exceptions to this rule, coming into play when the reason alleged to be the basis for a discharge is so repugnant to the general good as to deserve the label 'against public policy'.[58]

The court defined "against public policy" as something forbidden by either the legislature or the courts.[59] The use of "public policy" by the Arkansas Supreme Court was characterized as falling in the latter category.[60] After examining the public policy of Arkansas both retrospectively and prospectively, Judge Arnold found that the shared moral

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53. The two remaining members of the panel hearing the case were Judge Gibson and Judge Bowman.

54. *Lucas*, 736 F.2d at 1204. *See generally* Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980)

55. *Lucas*, 736 F.2d at 1204.

56. 268 Ark. 269, 596 S.W.2d 681 (1980).

57. *Id.* at 273, 596 S.W.2d at 683.

58. *Lucas*, 736 F.2d at 1204-05.

59. 736 F.2d at 1205.

60. *Id.*

values of the people reflected that the plaintiff's claim for wrongful discharge should state a cause of action.[61] Analogizing the facts at hand to prostitution he declared "[i]t is at once apparent that the shoe fits. A woman invited to trade herself for a job is in effect being asked to become a prostitute."[62] Indeed it is clear that prostitution, made illegal by statute,[63] is against public policy.

Although it could be argued that a job is not a "fee" within the meaning of the statute, the court refuted the merits of this argument by pointing out that in a civil proceeding, such as the one at hand, the statute need not be strictly construed.[64]

Judge Arnold expressed concern that an individual should not be punished for refusing to commit a crime, and thus a cause of action is well founded where this is proven.[65] A cause of action for wrongful discharge according to this theory is based upon breach of contract,[66] "[f]or it is an implied term of every contract of employment that neither party be required to do what the law forbids."[67] Thus, an employer who discharges an employee for refusing to do what is clearly prohibited is in violation of a duty imposed by law upon all employers to implement the public policy of the state.

The second issue dealt with by the court was plaintiff's claim for intentional infliction of emotional distress. Judge Arnold articulated plaintiff's burden of proof as follows: "To avoid summary dismissal facts must be pleaded which support the prima facie elements . . . . Appellants' allegations, accepted as true, must show (1) extreme and outrageous conduct, (2) willfully or wantonly performed, (3) which caused severe emotional distress."[68] Extreme and outrageous conduct was defined by the court as "conduct that is so extreme in degree, as to go beyond all possible bounds of decency . . . ."[69] The Eighth Circuit

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61. *Id.*

62. *Id.*

63. ARK. STAT. ANN. § 41-3002(1) (Supp. 1983) provides: A person commits prostitution if in return for or in expectation of a fee he engages in or agrees or offers to engage in sexual activity with any other person.

64. *Lucas*, 736 F.2d at 1205.

65. *Id.* In addition to proving that she was discharged for refusing to commit a crime, Lucas must also prove that Brown & Root was responsible for it. "If, for example, Brown & Root took steps to correct the allegedly offending foreman within a reasonable time, it would not be responsible for his conduct." 736 F.2d at 1205 n.3.

66. *Lucas*, 736 F.2d at 1205.

67. *Id.*

68. *Lucas*, 736 F.2d at 1206 (citing Orlando v. Alamo, 646 F.2d 1288, 1290 (8th Cir. 1981).

69. Lucas v. Brown & Root, Inc., 736 F.2d at 1206 (citing M.B.M. Co. v. Counce, 268 Ark. at 280, 596 S.W.2d at 687).

placed emphasis not on just the acts done by the employer, but even more importantly upon the employer's abuse of the relationship with an employee which gives him the power to damage the employee's interest.[70] Thus, Judge Arnold referred specifically to the defendant's power over the employment relationship as enough to justify the claim.[71] Lucas' allegations of sexual advances and misrepresentations made by the employer with respect to her unemployment compensation were held to state a cause of action.[72] However, no mention of plaintiff's chances for success on the merits was made. Accordingly, the burden of proof required by the courts to make out a prima facie case must be met before the plaintiff can recover.

Lucas v. Brown & Root, Inc.[73] is significant for several reasons. First, the opinion reaches well beyond the bounds of any Arkansas case decided prior to *Lucas*. A careful analysis of recent case law leads to the conclusions that Arkansas has yet to recognize a public policy exception to at-will employment.[74] Second, Judge Arnold relies entirely on non-Arkansas precedent for the proposition that an implied convenant of good faith and fair dealing is inherent in every employment contract.[75] Finally, the court gave limited consideration to Arkansas'

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70. *Lucas*, 736 F.2d at 1206 (citing M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980).

71. *Lucas*, 736 F.2d at 1206.

72. *Id.*

73. 736 F.2d 1202 (8th Cir. 1984).

74. *See* Scholtes v. Signal Delivery Service, Inc., 548 F.Supp. 487 (W.D. Ark. 1982) (district court refused to recognize public policy exception stating "it is a wave which has yet to reach Arkansas." *Id.* at 494); Jackson v. Kinark Corp., 282 Ark. 548, 669 S.W.2d 898 (1984) (Arkansas Supreme Court refused to recognize public policy exception on a demurrer to the complaint for lack of sufficient facts); Newton v. Brown & Root, Inc., 280 Ark. 337, 658 S.W.2d 370 (1983) (Arkansas Supreme Court refused to recognize public policy exception where employee contributed to unsafe working conditions); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) (Arkansas Supreme Court refused to recognize public policy exception on the facts presented).

75. *Lucas*, 736 F.2d at 1204. Judge Arnold relied on case law from California, Massachusetts, New Hampshire and New Jersey to support the trend toward recognizing a public policy exception to the doctrine of employment-at-will. *See* Petermann v. Int'l Bhd. of Teamsters, Local 396, 174 Cal. App.2d 184, 344 P.2d 25 (1959) (against public policy to terminate an employee for refusing to commit perjury despite the existence of the employment-at-will rule); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (every employment contract contains an implied covenant of good faith and fair dealing; thus, a discharge in bad faith constitutes breach of contract); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (a bad faith termination constitutes breach of contract); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (a termination which violates clear mandate of public policy constitutes an action for wrongful discharge). In addition, the court of appeals relied on California law alone to uphold its conclusion that every employment contract contains an implied term forbidding either party from being required to commit an act forbidden by law. *Lucas*, 736 at 1205; *see* Tameny v. Atlantic Richfield Co., 27 Cal.2d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

strong adherence to the doctrine of employment-at-will. Judge Arnold bypassed the decisions of the Arkansas courts which state a strong position in favor of the viability of the employment-at-will rule in the state.[76]

The Arkansas Supreme Court reaffirmed its position on the at-will rule in *Griffin v. Erickson*[77] wherein the court stated: "It is quite clear, therefore, that in the absence of some alteration of the basic employment relationship, an employee for an indefinite term is subject to dismissal at any time without cause."[78] Arguably, the *Griffin* decision did not involve a cause of action based on the public policy exception, however, other Arkansas cases decided both before and after *Griffin* have faced the public policy exception and rejected it.[79] The United States District Court for the Western District of Arkansas dealt with the issue by holding, "[t]hus, while reversing the 'at-will' presumption may be the wave of the future, it is a wave which has yet to reach Arkansas."[80]

Arkansas seems to recognize this "inevitable" trend but has been careful not to leap into the fray without due consideration of its past stand on the issue. The Supreme Court of Arkansas, for instance, after stating in dicta in *Counce*[81] that it might recognize an action for wrongful discharge in the appropriate circumstances, backtracked from that broad proposition in *Newton v. Brown & Root, Inc.*[82] Chief Justice Adkisson, writing for the court, refused to find that *Counce* was the definitive authority for Arkansas adopting the public policy exception.[83] Instead, the Chief Justice stated, "[t]here [in *Counce*] we were unable to decide if we would recognize such an exception . . . ."[84] Indeed, *Counce* is not the definitive authority sanctioning the public policy exception. Just two days before the decision in *Lucas* was handed down, the Arkansas Supreme Court again rejected an opportunity to adopt the exception.[85]

Thus, while the courts of Arkansas are aware of the trend toward eroding the doctrine of employment-at-will, they have avoided every

76. *Griffin*, 277 Ark. 433, 642 S.W.2d 308 (1982).
77. *Id.*
78. *Id.* at 437, 642 S.W.2d at 310.
79. *Supra*, note 74.
80. Scholtes v. Signal Delivery Service, Inc., 548 F.Supp. 487, 494 (W.D. Ark. 1982).
81. 268 Ark. 269, 596 S.W.2d 681 (1980).
82. 280 Ark. 337, 658 S.W.2d 370 (1983).
83. *Id.* at 339, 658 S.W.2d at 373.
84. *Id.*
85. Jackson v. Kinark Corp., 282 Ark. 548, 669 S.W.2d 898 (1984) (The Arkansas Supreme Court stated in regard to the public policy exception that it was unwilling to dispose of such an important issue on what amounted to a demurrer to a complaint).

opportunity to adopt an exception to the rule. It is clear that a public policy exception is necessary in a growing, changing economic society.[86] However, it is not clear that a federal court of appeals sitting in diversity jurisdiction may impose common law upon a state, regardless of the social need for it.

Under *Erie R.R. Co. v. Thompkins*,[87] a federal court must follow state substantive law in a diversity case. It is not the obligation or duty of a federal court to predict the future of Arkansas laws. This limitation on federal courts was recognized by the Seventh Circuit Court of Appeals in *Loucks v. Star City Glass Co.*[88] The Seventh Circuit refused to impose its perceptions of the law on the state of Illinois stating, "We sit as a court, not as a legislature; it is not our province as a federal appellate court to fashion for Illinois what we are certain many would say was a wise and progressive social policy."[89]

In stark contrast, the Eighth Circuit has taken the position that it sits as a super legislature dictating what "we think [the law] will be declared by that Court [the Supreme Court of Arkansas] in the future."[90] The panel clearly formulated new state law for Arkansas supporting its position by relying upon dicta. Dicta is both insufficient and improper to use to predict future state legal developments. As one appellate court noted in deciding the controlling law: "Dicta alone, while entitled to consideration, is not of itself an authoritative expression of the law of the state."[91] The Eighth Circuit has staunchly adopted this doctrine stating, "[T]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it."[92] The *Lucas* panel has gone beyond simply ascertaining state law and has formulated common law for Arkansas. This bit of judicial activism has left the law of Arkansas unsettled with few guidelines for litigating a wrongful discharge claim.

If Arkansas courts rely on *Lucas* as authority for adopting the

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86. Comment, *Wrongful Discharge of Employees Terminable at Will — A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729, 744 (1981) (quoting Blades, *supra* note 54, at 1404).

87. 304 U.S. 54 (1938).

88. 551 F.2d 745 (7th Cir. 1977). Loucks specifically claimed he was discharged for expressing his intention to file a Workmen's Compensation claim. The Illinois Worker's Compensation Act at the time of the action was silent on the question of a retaliatory discharge. Moreover, no Illinois appellate court had specifically addressed this question. Plaintiff referred the court to a lower state court decision which found a cause of action for retaliatory discharge. After reviewing the plaintiff's contentions, the district court dismissed Louck's complaint. *Id.*

89. *Id.* at 746

90. *Lucas*, 736 F.2d at 1205.

91. Estate of Goldstein v. Comm'r of Internal Revenue, 479 F.2d 813, 816 (10th Cir. 1973).

92. Yoder v. Nu-Enamel Corp., 117 F.2d 488, 489 (8th Cir. 1941).

public policy exception, there is still difficulty in defining "public policy." The panel stretched the rationale used in other states that have developed the exception. Generally, other jurisdictions have applied the exception where a state statute reflecting the public policy of the area directly related to the alleged public policy violation. In contrast, the authors of the *Lucas* opinion, without any argument of this nature having ever been raised by plaintiff's counsel, equated the plaintiff's claim of discharge for refusal to engage in sexual relations to prostitution. Is it not more realistic that the legislature in passing the prostitution law, intended to prohibit commercial sex?[93] Thus, the public policy, as evidenced by the statute, is not directly related to the facts before the court.

In conclusion, it must be noted that the Eighth Circuit's decision to "jump the gun" and determine the law for the State of Arkansas is not a decision that will open a Pandora's box of evils. However, it is reasonable to presume that Arkansas' firm adherence to the doctrine of employment-at-will has yet to be conclusively abrogated.

Kim Vance

93. In the Commentary following the Prostitution Statute (ARK. STAT. ANN. § 41-3002(1) (Supp. 1983)) it is noted that "[T]he 'fee' requirement assures that only commercialized sex will be penalized."