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Labor Law—Employment at Will Doctrine—Good Cause Provision Allowed

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NOTES

LABOR LAW—EMPLOYMENT AT WILL DOCTRINE—GOOD CAUSE PROVISION ALLOWED. *Gladden v. Arkansas Children's Hospital*, 292 Ark. 130, 728 S.W.2d 501 (1987).

Arkansas Children's Hospital dismissed Gail Gladden after eighteen months of employment. She initially filed suit based upon the tort of outrage, but amended her complaint to allege that her employer breached hospital personnel regulations that were incorporated in her employment contract. Gladden asked the Arkansas Supreme Court to modify the employment at will doctrine[1] to enforce a written employment contract which limits the ability of the employer to discharge an employee,[2] even though the employment was for an indefinite term.

Saline County Memorial Hospital employed Loretta Samples as a nurse. The hospital provided its employees with a policy manual that dealt with administrative and personnel matters. The manual listed those specific acts that would subject employees to termination, although this list was not exclusive. The manual also required two written warnings and two suspensions without pay in order to discharge for absenteeism. A separate provision in the manual waived the guarantee of policy manual rights during any probationary period. The manual did not guarantee continued employment subject to termination for good cause only, nor did Samples' employment agreement define a definite length of employment. Samples' employer initially dismissed her for absenteeism. The hospital reinstated Samples, subject to her acceptance of ninety days of probation; it then terminated her employment because she refused to accept probation. Samples filed suit alleging that her dismissal was arbitrary and in bad faith, and that it breached her contract of employment with the hospi-

1. The employment at will doctrine states that where there exists no definite term of employment in the employment contract, the contract may be terminated by either the employer or the employee without liability for breach of contract. 1 F. MECHEM, A TREATISE ON THE LAW OF AGENCY 419-21 (2d ed. 1982).

2. Gladden's employee policy manual stated that employees would be discharged for misconduct. The handbook did not state that employment would be terminated only for good cause.

tal. The Arkansas Supreme Court consolidated Gladden's and Samples' cases for appeal.

The court dealt with three topics. First, the court expressly overruled *St. Louis, Iron Mountain & Southern Railway v. Matthews*,[3] which held that the employment at will rule[4] applied to an employment agreement which contained a provision against termination except for good cause unless the employment was for a definite term.[5] Second, the court affirmed prior decisions that refused to find an implied good cause provision in employment contracts. Third, the court announced that where an employee relies upon a personnel manual provision which forbids termination of employment without cause, the employment may not be terminated in violation of that provision.[6] *Gladden v. Arkansas Children's Hospital*, 292 Ark. 130, 728 S.W.2d 501 (1987).

Courts which follow the employment at will doctrine reason that mutuality is lacking if no definite period of employment is stated in the agreement.[7] The employment at will doctrine states that lack of mutuality in the employment agreement makes the contract unenforceable.[8] Under this doctrine, the employer has an unconditional right to terminate the employment relationship because the employee is free to quit when he pleases.[9] The most succinct summary of the employment at will doctrine may be that an employment at will relationship can be terminated "for a good reason, a bad reason, or no

3. 64 Ark. 398, 42 S.W. 902 (1897).

4. *See* 1 F. MECHEM, *supra* note 1, at 419-21.

5. 64 Ark. at 406, 42 S.W. at 904-05 (1897). *See also* Youngdahl, *The Erosion of the Employment-At-Will Doctrine in Arkansas*, 40 ARK. L. REV. 545 (1987) for a summary of previously recognized exceptions to the at will rule in Arkansas.

6. Neither plaintiff in *Gladden* benefitted by this newly created exception to the at will rule because neither of the employment contracts or employee policy manuals in these cases contained an express provision that termination could be only for cause. 292 Ark. 130, 135-36, 728 S.W.2d 501, 505 (1987).

7. Seven states continue to follow the employment at will doctrine: Delaware, Florida, Louisiana, Nebraska, Rhode Island, Utah, and Wyoming. Youngdahl, *supra* note 5, at 547 n.14. *See, e.g.*, Landry v. Farmer, 564 F. Supp. 598 (D. R.I. 1983); Avallone v. Wilmington Medical Center, 553 F. Supp. 931 (D. Del. 1982); Williams v. Delta Haven, Inc., 416 So. 2d 637 (La. App. 1982); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983); Rose v. Allied Dev. Co., 719 P.2d 83 (Utah 1986); Siebken v. Town of Wheatland, 700 P.2d 1236 (Wyo. 1985).

8. 64 Ark. at 408, 42 S.W. at 905.

9. Arkansas has required mutuality of obligations in those instances in which no other consideration for the contract exists other than a return promise. *See, e.g.*, Tinnon v. Missouri Pac. R.R., 282 F.2d 773, 776 (8th Cir. 1960); Crawford v. General Contract Corp., 174 F. Supp. 283, 297 (W.D. Ark. 1959); Johnson v. Johnson, 188 Ark. 992, 995, 68 S.W.2d 465, 466 (1934).

reason at all."[10]

Arkansas first followed the employment at will doctrine in 1897 in *St. Louis, Iron Mountain & Southern Railway v. Matthews.*[11] In that case, an employee was in control of a locomotive that was damaged when the boiler exploded. The company conducted an internal investigation and discharged the employee. In response to the employee's wrongful discharge claim the company alleged that the employee was grossly negligent in allowing the water in the boiler to reach an unsafe level.[12] The jury found for the employee. From the jury's instructions it is apparent that the jury found no negligence in the operation of the engine and that the employee's discharge violated his employment contract.[13] The trial court awarded damages for breach of a provision in the agreement which stated that "[n]o engineer shall be discharged or suspended without just and sufficient cause. . . ."[14] The Arkansas Supreme Court reversed the decision of the trial court and held this provision to be unenforceable absent an agreement by the employee to work a definite period.[15]

Again, in *Petty v. Missouri & Arkansas Railway*,[16] the Arkansas Supreme Court addressed a case in which a locomotive engineer was discharged from his employment. The employee alleged that his termination violated an agreement entered into by the railroad and its employees; the agreement provided for a pretermination hearing. The employee never received a hearing; and he contended that this omission amounted to a breach of his contract of employment.[17] The trial court ruled in favor of the employer. The Arkansas Supreme Court addressed the issue of whether the provisions regarding a fair hearing were enforceable for lack of mutuality of obligation. The majority opinion admitted that the provision assuring the employee's right to a hearing could not be enforced without overruling *Matthews*.[18]

The *Petty* court affirmed the decision of the trial court in favor of the employer because the three year statute of limitations barred the employee's claim.[19] However, both the concurring and dissenting justices criticized the majority's reasoning, stating that *Matthews* was un-

10. Loucks v. Star City Glass Co., 551 F.2d 745, 747 (7th Cir. 1977).
11. 64 Ark. 398, 406, 42 S.W. 902, 904-05 (1897).
12. *Id.* at 403, 42 S.W. at 903.
13. *Id.* at 404-05, 42 S.W. at 903-04.
14. *Id.* at 403, 42 S.W. at 903.
15. *Id.* at 406, 42 S.W. at 904-05.
16. 205 Ark. 990, 167 S.W.2d 895, *cert. denied*, 320 U.S. 738 (1943).
17. *Id.* at 991-92, 167 S.W.2d at 896.
18. *Id.* at 993-94, 167 S.W.2d at 897.
19. *Id.* at 997, 1001, 167 S.W. at 899, 901.

sound and advocating overruling the requirement of mutuality in employment contracts.[20] The concurring justice found that the crucial consideration is ascertaining the parties' intent in making the agreement.[21] He reasoned that it was improper to require any consideration other than what the parties had demanded, or to incorporate a doctrine into their contract that invalidated their agreement.

In 1982, in *Griffin v. Erickson*,[22] the Arkansas Supreme Court first indicated that it might consider enforcing a good cause provision[23] in an employment agreement even though the agreement did not require the employee to work for a definite period. In *Griffin*, the employee alleged that his employer discharged him in violation of a good cause provision in the employer's "Statement of Management Policy."[24] The trial court held that the discharge was not warranted and ordered reinstatement with backpay.[25] The Arkansas Supreme Court reversed[26] and restated the mutuality doctrine as found in *Matthews*.[27] The court stated that it would not consider whether *Matthews* controlled in the case before it because neither party made the holding from *Matthews* an issue at trial.[28]

The issue of abrogating the requirement of mutuality as it affects a good cause provision was again considered in *Jackson v. Kinark Corp.*[29] In *Jackson* the employee worked as a banquet server for a hotel. The employer discharged the employee when he refused to sub-

20. *Id.* at 997, 167 S.W.2d at 899 (Carter, J., concurring); *id.* at 1001, 167 S.W.2d at 901 (Robins, J., dissenting).

21. *Id.* at 999-1000, 167 S.W.2d at 900-01 (Carter, J., concurring). According to Justice Carter, the doctrine of mutuality was formed by courts of equity to be applied in those instances in which one party asked for specific performance of a contract. Specific performance would not be granted absent mutual obligations. The doctrine was later adopted by courts to determine whether a contract had been validly formed. This extension led to confusion and improper decisions such as *Matthews*. *Id.* at 998, 167 S.W.2d at 899.

22. 277 Ark. 433, 642 S.W.2d 308 (1982).

23. *Id.* at 438-39, 642 S.W.2d at 311. Erickson, the plaintiff, was a professional employee of the City of Little Rock, Arkansas. Employees of state and federal governments and those with collective bargaining agreements are typically protected from discharge except for good cause. Employees without express good cause provisions are protected in some jurisdictions by courts which hold that a good cause or good faith requirement is implied in every employment contract. These jurisdictions would thereby avoid the specific issue in *Gladden*. *See, e.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

24. 277 Ark. at 435-36, 642 S.W.2d at 309-10.

25. *Id.* at 435, 642 S.W.2d at 309.

26. *Id.* at 442, 642 S.W.2d at 313.

27. *Id.* at 437, 642 S.W.2d at 310 (citing St. Louis, Iron Mountain & So. Ry. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897)).

28. *Id.* at 438, 642 S.W.2d at 311.

29. 282 Ark. 548, 669 S.W.2d 898 (1984).

mit to a polygraph examination relating to the disappearance of a television set at the hotel.[30] The employee contended that his termination amounted to a breach of contract and alleged that his dismissal was wrongful and abusive, thereby creating liability in tort. The trial court granted summary judgment with regard to the contract claim because the employee was not employed for a definite term and could be terminated at his employer's will. The employee took a nonsuit as to the tort claim and sought review of the contract issue. The court of appeals transferred the case to the supreme court as "presenting an issue of significant public interest."[31] Again, the Arkansas Supreme Court was unwilling to decide the issue of whether an exception to the doctrine of mutuality should be made given the particular facts.[32]

Although Arkansas has been termed a "caveat-employee"[33] state, the Arkansas Supreme Court has implied in employment contracts a limited number of exceptions which favor the employee. In *Moline Lumber Co. v. Harrison*,[34] an Arkansas case decided in 1917, the court reviewed the authorities[35] regarding implied terms of duration. The Arkansas Supreme Court agreed with those authorities[36] which favor the rule that when salary was expressed in terms of a yearly, monthly, or weekly rate the hiring was for that period unless other circumstances indicated a different intent.[37]

The Arkansas Supreme Court reaffirmed this holding in 1955 in *Miller v. Missouri Pacific Transportation Co.*[38] In *Miller* the court held that employment at a specified rate per year, month, or week may tend to indicate that the employee was hired for that period, but where no definite term of employment was specified, the employee was subject to termination at the will of the employer.[39] The court has

30. *Id.* at 549, 669 S.W.2d at 899.

31. *Id.*

32. The court remanded the case for further findings of fact. *Id.* at 550, 669 S.W.2d at 899.

33. Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 497 (W.D. Ark. 1982).

34. 128 Ark. 260, 194 S.W. 25 (1917).

35. *Id.* at 263, 194 S.W. at 26.

36. *Id. See also* Pollock v. Art Institute of Boston, 97 Ill. App. 3d 958, 423 N.E.2d 1043 (1981); Floyd v. Lamar Farrell Chevrolet, Inc., 159 Ga. App. 756, 285 S.E.2d 681 (1981); McClure v. Leasco Computer, Inc., 134 Ga. App. 871, 216 S.E.2d 689 (1975). For a review of modern cases following the minority rule see, *e.g.*, Boatright v. Steinite Radio Corp., 46 F.2d 385, 390 (10th Cir. 1931); Lowenstein v. President and Fellows of Harvard College, 319 F. Supp. 1096, 1098 (D. Mass. 1970).

37. 128 Ark. at 263-64, 194 S.W. at 26. The court reasoned in favor of this holding because the use of a time period to describe compensation without other references to time creates an inference that the parties intended to contract for that period. *Id.*

38. 225 Ark. 475, 283 S.W.2d 158 (1955).

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

also ruled that evidence which indicates the employer typically hires persons of the same position for definite terms is relevant for consideration by the jury.[40]

Recent Arkansas cases presented the opportunity for the court to recognize an employee policy manual or handbook as being incorporated in the employment contract. In *Jackson v. Kinark Corp.*[41] the employee asserted that his employee handbook constituted a definite contract of employment because it provided that an employee who completed a three month probationary period could be terminated only for cause.[42] The Arkansas Supreme Court concluded that summary judgment for the employer was inappropriate because further findings of fact were required to determine whether the employee handbook was part of the employment contract.[43]

In *Bryant v. Southern Screw Machine Products Co.*,[44] the court addressed a case in which an employee policy manual arguably provided the employee some protection from the at will rule.[45] In *Bryant* the employer discharged the employee for accepting money from a vendor in return for an order for light bulbs.[46] The jury found for the employee on his allegation of wrongful discharge. The trial judge granted the employer's motion for judgment notwithstanding the verdict. The Arkansas Supreme Court affirmed the decision of the lower court.[47]

A court may imply terms in an employment contract to fulfill the mutuality of obligation requirement. This implication makes provisions in the contract, which favor the employee, enforceable. Arkansas cases recognize few exceptions to the mutuality requirement.[48] In *Scholtes v. Signal Delivery Services, Inc.*,[49] a federal court decision on Arkansas law, the court reasoned that since the Arkansas Supreme Court has recognized exceptions to the employment at will doctrine, it would recognize promissory estoppel as an exception to the mutual-

40. Arkadelphia Lumber v. Asman, 85 Ark. 568, 577, 107 S.W. 1171, 1173 (1907).

41. 282 Ark. 548, 669 S.W.2d 898 (1984).

42. *Id.* at 550, 669 S.W.2d at 899.

43. *Id.* at 550-51, 669 S.W.2d at 899.

44. 288 Ark. 602, 707 S.W.2d 321 (1986).

45. *Id.* at 603, 707 S.W.2d at 322.

46. *Id.* The employee handbook stated that employees would be eligible for all fringe benefits after a 60 day probationary period. The handbook also stated the company would not tolerate "dishonesty, cheating, willful negligence, theft, loafing during working time or insubordination." *Id.* at 603-04, 707 S.W.2d at 322. This clause did not provide the appropriate provisions the court desired in order to modify the at will rule.

47. *Id.* at 604, 707 S.W.2d at 322.

48. *See* Youngdahl, *supra* note 5.

49. 548 F. Supp. 487 (W.D. Ark. 1982).

ity requirement.[50] This decision recognized estoppel as a substitute for consideration to fulfill the requirement of mutuality of obligation. This opinion also found that an implied in fact term requiring good faith and fair dealing would be recognized in Arkansas if the parties intended to include such a term in the agreement.[51] The Arkansas Supreme Court has apparently not addressed the issue of whether promissory estoppel is sufficient to provide mutuality of obligation in an employment contract.

Other states also protect employees from the employment at will rule for reasons of public policy.[52] In the event of a discharge that violates a public policy goal, the employee will be allowed to recover on a theory of breach of contract or tort.[53] Only in the past few years has the Arkansas Supreme Court expressed a willingness to recognize public policy exceptions to the employment at will doctrine.[54] In *M.B.M. Co. v. Counce*[55] the court recognized that some matters of public policy might be considered to provide relief on a theory of breach of contract. The court stated that a public policy exception to the at will rule might be recognized if the employee was discharged in contravention of "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."[56]

In determining the liability of the employer in *Gladden v. Arkansas Children's Hospital* the Arkansas Supreme Court explained that neither of the employees, Gladden nor Samples, presented a case in which they had been discharged in violation of a matter of public policy for which liability could be imposed under *Counce*.[57] The court also found that these cases did not present the issues outlined in *Southern Screw Machine* as warranting review of the employment at will doctrine because neither Gladden nor Samples were protected by an express provision to terminate only for good cause.[58]

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50. *Id.* at 494.

51. *Id.* at 494.

52. What constitutes a matter of public policy may be decided by the courts or be defined by the legislature. Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984).

53. M.B.M. Co. v. Counce, 268 Ark. 269, 273, 596 S.W.2d 681, 684 (1980).

54. See Youngdahl, *Wrongful Discharge of Employees Terminable at Will-A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981) for a synopsis of public policy exceptions in Arkansas and other jurisdictions.

55. 268 Ark. 269, 596 S.W.2d 681 (1980).

56. 268 Ark. at 273, 596 S.W.2d at 683.

57. 292 Ark. 130, 135, 728 S.W.2d 501, 504 (1987) (citing M.B.M. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1981)).

58. *Id.* at 135, 728 S.W.2d at 505 (citing Bryant v. Southern Screw Machine Co., 288 Ark. 602, 707 S.W.2d 321 (1986)). *See, e.g.*, Note, *Protecting At Will Employees Against Wrongful*

Although the court did not recognize any implied terms in these employment agreements,[59] it did choose to modify the at will doctrine. The court called the rule from *Matthews* "outmoded and untenable."[60] The court reasoned that where the employment agreement states that the employee will not be discharged except for cause, the employee should not be terminated without cause simply because the employment was for an indefinite term.[61]

The court admitted that *Jackson*[62] may have suggested that a good cause provision might be implied by the courts into an employment agreement.[63] However, this inference was firmly rejected. The court was apparently concerned that allowing implied terms would lead lower courts to impose liability on the employer by adding terms to the agreement whenever an employee is discharged.[64]

In summary, the Arkansas Supreme Court reasoned in *Gladden* that the employment at will doctrine in Arkansas as applied to express good cause provisions was inequitable. The court lessened the harshness of the doctrine by allowing an employee who had a good cause provision in his contract to recover for breach of contract. An employee who has such a provision in his employee policy manual may now establish that he relied on that provision and recover for breach of contract. However, the court refused to go to the extreme of implying such a provision where none expressly exists.

Gladden is significant in three respects. First, the announcement that the court will enforce express good cause provisions in contracts gives effect to the intent of the parties in making their agreement. This was the position urged by the concurring justice in *Petty*[65] in 1943. This modification is equitable for both parties to the agreement. Before *Gladden*, an employer could promise an employee employment without termination except for valid reasons and subsequently terminate for no reason at all. It was deceptive for the employer to make such a promise and be protected by an archaic rule that the employee

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Discharge: The Duty to Terminate Only in Good Faith, 93 HARVARD L. REV. 1816 (1980) for arguments in favor of courts implying the contractual right of the employer only to terminate in good faith.

59. 292 Ark. at 136, 728 S.W.2d at 505.

60. *Id.* (citing St. Louis, Iron Mountain & So. Ry. v. Matthews, 64 Ark. 398, 42 S.W. 902 (1897)).

61. 292 Ark. at 136, 728 S.W.2d at 505.

62. 282 Ark. at 550, 669 S.W.2d at 899.

63. 292 Ark. at 136, 728 S.W.2d at 505.

64. *Id.*

65. Petty v. Mo. & Ark. Ry., 205 Ark. 990, 999, 167 S.W.2d 895, 900 (1943) (Carter, J., concurring).

could not have envisioned existed. It is interesting to note that the court chose to modify the doctrine even though neither employee in *Gladden* had a good cause provision in their contract. The court apparently felt that those considerations of fairness which were advocated in *Petty* are more important than the inequitable precedent of *Matthews*.

Second, the court reaffirmed its position against providing an implied good cause provision. This decision appropriately limits the obligations of the parties to the promises expressly contained in the written agreement. This position was advocated by the concurrence in *Petty* when it argued that courts should mold the law to facilitate the business affairs of the public.[66]

Third, the *Gladden* opinion does not merge the employment contract and employee handbooks or policy manuals into a single contract. The opinion states that an employee who "relies upon a personnel manual that contains *an express provision* against termination except for cause . . . may not be arbitrarily discharged in violation of such a provision."[67] An employee who does not have an express good cause provision in his employment contract must therefore establish some reliance upon the express terms of the policy manual. It is difficult to imagine how an employee could rely upon a good cause provision in his policy manual or handbook before he has been terminated. It seems that every employee who has been discharged would be capable of establishing the same reliance as any other employee who had been similarly discharged. The court will undoubtedly refine this statement in subsequent opinions.

The employer remains free to terminate at his discretion without breaching the contract of employment if the agreement has no definite period, the contract contains no express provision relating to termination only for good cause, the employee policy manual contains no requirement of termination only for good cause (or if it does the employee has not relied upon that provision), and the employer does not violate a public policy exception[68] to the employment at will rule. The Arkansas Supreme Court appears reluctant to abandon the employment at will doctrine although *Gladden* does create an exception to the general rule. An employee's advocate may find the legislature[69]

66. *Id.*

67. 292 Ark. at 136, 728 S.W.2d at 505.

68. Youngdahl, *supra* note 54, at 729.

69. *See generally* Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979) which advocates modification of the at will rule by the judicial and legislative branches of government.

more willing to provide greater protection for the employee than the judiciary.

As a practical matter this decision creates the potential for liability for breach of contract where express good cause provisions exist in employment contracts or employee handbooks or policy manuals. Because the court refused to merge the policy manual or handbook into the employment agreement, the employer should be capable of eliminating good cause terms in existing handbooks without the assent of the employee. However, a change in the terms of an existing contract requires the mutual assent of the parties before the elimination of such a term would be effective.

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