Master and Servant—Employer's Bad-Faith Termination of Employment Contract At Will Constitutes Breach of the Contract. *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

Mrs. Monge was hired by the Beebe Rubber Company under an oral employment contract terminable at the will of either party. She was told that she would be promoted to a better paying job if she performed her work satisfactorily. Mrs. Monge thereafter applied to fill a job opening at another position in the plant. Her foreman told her that she would have to be "nice"[1] if she wanted the job. After obtaining the job at an increased salary, the foreman asked Mrs. Monge for a date; she refused because she was married and had three children. Subsequently, Mrs. Monge's salary and overtime were decreased. Although Mrs. Monge's personnel manager admitted to her that he knew her foreman used his position to force his attentions on the female employees under his authority, he asked her "not to make trouble."[2] Mrs. Monge then became ill and was hospitalized. On the night that she returned to work she again became ill and was rehospitalized. She later was notified that because she had not reported to work for 3 consecutive days, she had been declared a "voluntary quit"[3] by the company and would not be allowed to return to work. Mrs. Monge sued Beebe Rubber Company for breach of her oral employment contract and sought actual and punitive damages. Mrs. Monge prevailed at trial and Beebe Rubber Company appealed. The New Hampshire Supreme Court held that Beebe Rubber Company's bad-faith termination of the employment contract constituted a breach of the contract.[4]

The court in *Monge v. Beebe Rubber Co.*[5] had to decide whether or not the traditional rule allowing an employee's termination at the will of his employer should be modified and a new cause of action for breach of a contract at will recognized for an employee terminated for bad-faith[6] or malicious[7] reasons. The court noted the

1. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).
2. *Id.* at 551.
3. *Id.*
4. *Id.*
5. 316 A.2d 549 (N.H. 1974).
6. NLRB v. Knoxville Publishing Co., 124 F.2d 875, 883 (6th Cir. 1942). Bad faith is a failure to respond to plain, well-understood contractual obligations or is conduct which amounts to a breach of a moral duty or obligation. *Id.*
7. Laughlin v. Bon Air Hotel, Inc., 85 Ga. App. 43, 68 S.E.2d 186 (1951). An act done maliciously has been defined as an act done with an intent to vex, harass, or annoy another. *Id.*

modern developments in the law of landlord and tenant and intimated that it would not hesitate to make similar changes in the law of master and servant. The court recognized, however, that certain competing interests had to be considered. The employee is concerned with steady employment and the employer wishes to have unfettered discretion in running his business as he sees fit. Society desires an equitable balance between these two interests. Allowing termination of a contract of employment at will for a bad-faith reason was not considered to be in the best interest of the economic system or public good.[8] The court rejected the traditional analysis of an employment contract at will which results in the employer having absolute discretion to terminate an employee. Instead, the court chose to view the contract of employment in the context of modern labor conditions and the present day employer-employee relationship.[9]

The court in *Monge* relied upon *Petermann v. Teamsters Local 396*[10] and *Frampton v. Central Indiana Gas Co.*[11] as authority for the proposition that an employee could recover from an employer who had terminated the employee in bad-faith. The court emphasized, however, that the employer's right to discharge for any other reason was to be preserved.[12]

Judge Grimes dissented and contended that the majority decision was not in accord with the prevailing law regarding contracts of employment at will. He emphasized that the cases concerning these contracts uniformly held that the employer has the power to terminate the employee for any reason.[13] The authority cited by the majority was criticized as not being apposite to the question of law before the court. *Petermann*[14] was based upon the California public policy against perjury and *Frampton*[15] was an action to recover actual and punitive damages in tort. The dissent concluded, therefore, that a cause of action for termination of an employment contract at will should not be allowed.[16]

The *Monge* case represents a departure from the general rule

8. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).
9. *Id.*
10. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).
11. 297 N.E.2d 425 (Ind. 1973).
12. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).
13. *Id.* at 552-53 (dissenting opinion).
14. Petermann v. Teamsters Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).
15. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).
16. Monge v. Beebe Rubber Co., 316 A.2d 549, 552-53 (N.H. 1974) (dissenting opinion).

that when the term of the employment is left to the discretion of either party,[17] when the contract is verbal,[18] or when there is an absence of contractual limitations,[19] the employer[20] or employee[21] has the right to terminate the contract at will.[22] Courts are reluctant to interfere with the employer's power to discharge an employee at will[23] and have held that management, as master of its own business affairs, has complete freedom to discharge an employee for good cause, bad cause, or no cause at all.[24] The employer owes no duty to the employee to continue the employement and, therefore, when no question of public health, safety, or welfare is involved and there are no statutory prohibitions being violated, no cause of action will lie against the employer for termination of the relationship.[25] Thus, in the absence of statutory or public policy considerations, the employer has an almost unfettered right to discharge an employee for any reason.

The employer's right to discharge is limited in those states which have statutes that provide criminal penalties for employers who terminate employees in retaliation against the employee's exercise of statutory rights. One Texas statute, for instance, provides that the employer shall not refuse the employee the privilege of attending political precinct conventions or subject the employee to a penalty for attending them.[26] Should the employee be discharged because of his attendance, the employer would be subject to a fine.[27] Similarly, the Missouri workmen's compensation statute provides a fine and possible imprisonment for an employer who discharges an employee for filing a compensation claim.[28] It should be noted, however, that a statute which subjects the employer to a criminal charge

17. East Line & R.R.R. v. Scott, 72 Tex. 70, 10 S.W. 99 (1888).

18. Scruggs v. George A. Hormel & Co., 464 S.W.2d 730 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

19. Mansell v. Texas & Pac. Ry., 137 S.W.2d 997 (Tex. Comm'n App. 1940, opinion adopted).

20. Scruggs v. George A. Hormel & Co., 464 S.W.2d 730 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.).

21. E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108 (8th Cir. 1969).

22. East Line R.R.R. v. Scott, 72 Tex. 70, 10 S.W. 99 (1888).

23. 9 S. WILLISTON, WILLISTON ON CONTRACTS § 1017, at 134 (3d ed. 1967).

24. Portable Elec. Tools, Inc. v. NLRB, 309 F.2d 423 (7th Cir. 1962).

25. Mitchell v. Stanolind Pipe Line Co., 184 F.2d 837 (10th Cir. 1950).

26. TEX. REV. CIV. STAT. ANN. art. 13.34a (1967).

27. *Id.*

28. *See* MO. REV. STAT. § 287.780 (1965), *as amended,* MO. REV. STAT. § 287.780 (Supp. 1974).

and provides a penalty for its violation generally will not be interpreted as creating a civil cause of action against the employer from which the employee may recover damages.[29] Thus, although the employee may be discharged in violation of a statute, he does not have a personal cause of action against the employer.[30]

Considerations of public policy may also limit the employer's right to terminate the employment contract at will. The court in *Petermann v. Teamsters Local 396*[31] allowed recovery to an employee who refused to perjure himself at legislative committee hearings, as requested by his employer, and was fired. The California court's rationale for allowing recovery was that the employer's right to discharge must be limited in order to effectuate the State's public policy against perjury.[32] In *Frampton v. Central Indiana Gas Co.*,[33] the Indiana Supreme Court recognized a cause of action for actual and punitive damages for retaliatory discharge of an employee terminated for filing a workmen's compensation claim. The court in *Frampton* was aware that its decision authorized a new cause of action in favor of an employee under a contract at will.[34] The public policy of financial protection for employees injured on the job would be defeated if the employer is allowed to terminate an employee who files a compensation claim.[35] Thus, it can be seen that the courts in certain instances have been willing to modify the employer's right to terminate an employee at will.

Courts which have recognized a cause of action for employees terminated under contracts at will have drawn analogies to developments in landlord and tenant law.[36] Landlord and tenant law has evolved in a manner that reflects the realities of urban living and the necessity for forceful social legislation. For example, in *Edwards v. Habib*,[37] a landlord was prohibited from evicting a tenant at will who had reported housing code violations to authorities. The court reasoned that the legislative intent to remedy inadequate housing

29. Christy v. Petrus, 295 S.W.2d 122 (Mo. 1956). *See also* Parker v. City School Superintendent, 451 S.W.2d 10 (Mo. 1970). The Missouri workmen's compensation statute was modified in 1973 and now allows the employee to recover civil damages against the employer. MO. REV. STAT. § 287.780 (Supp. 1974).

30. Bell v. Faulkner, 75 S.W. 612, 614 (Mo. App. 1934).

31. 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).

32. *Id.*

33. 297 N.E.2d 425 (Ind. 1973).

34. *Id.*

35. *Id.*

36. *Id.*

37. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

would be defeated if a landlord were permitted to retaliatorily evict a tenant who reported his substandard housing to the authorities. The court recognized the inequitable bargaining position of the tenant and the conditions which inspired the codes. Factors which prompted the housing codes were a shortage of housing which precluded tenants from moving to better and more adequate housing, and the economic burden of moving placed on the tenant with limited financial means.[38] Also, the landlord enjoyed the benefit of a superior bargaining position[39] which made it difficult for tenants to elicit covenants from the landlord to keep the premises in good repair. Thus, the social and economic importance of minimum housing standards made the codes desirable.[40] The law of landlord and tenant has adapted to reflect the modern relationship between the landlord and tenant. Modification in the law of master and servant may be warranted because of the increasing percentage of employees depending upon wages or a salary as a means of livelihood.[41]

Employees face problems similar to those encountered by modern day tenants at will. Employees with little bargaining power find themselves pitted against employers with strong bargaining positions which enable them to make and enforce their demands, whether just or unjust.[42] The rationale that both parties to the employment contract have the option to sever the relationship[43] breaks down in today's job-oriented[44] society with its abundance of ready, willing, and unemployed laborers.[45] Because the employee cannot afford to run the risk of not immediately obtaining other employment, he is reluctant to relinguish his job. Thus, there are economic barriers prohibiting the employee from terminating his employ-

38. *Id.* at 701. *See also* Kline v. Burns, 276 A.2d 248, 251 (N.H. 1971).

39. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Kline v. Burns, 276 A.2d 248 (N.H. 1971).

40. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

41. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1044 (1967).

42. Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1017-18 (1970).

43. St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 171 S.W. 703 (1914).

44. Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1016-18 (1970).

45. The Wall Street Journal, Oct. 7, 1974, at 3, col. 2. "In September [1974] joblessness rose 438,000 to an adjusted 5.3 million persons, the largest number of unemployed since the department began adjusting its report for seasonal factors in 1948." *Id.*

ment.[46] Dismissal means that the employee not only loses his means of livelihood, but also past salary advances, and any interest he may have acquired in pension plans and other fringe benefits.[47] Also, as an employee gets older he faces increased difficulty in obtaining new employment, because employers usually prefer younger employees with long-range employment potential.[48] If an employee engages in frequent job changes, he will be viewed as an unstable risk by prospective employers[49] and, therefore, will find it more difficult to obtain new employment. The psychological importance of employment, which directly affects the employee's self esteem, also serves to make the employee hesitant to seek other employment.[50] If left unprotected by the courts, employees will usually suffer an employer's coercive and abusive policies rather than risk dismissal.[51] Employees with contracts at will need legal protection similar to that received by tenants at will. Repressive and changed social conditions have resulted in changes in landlord-tenant law. Similar conditions exist in the relation between master and servant and justify changes in the law regarding contracts of employment at will.

Lack of legislation, however, may delay judicial recognition of a cause of action in favor of an employee at will terminated by his employer in bad-faith. The court in *Monge,* unlike the court in *Edwards,* had no statute upon which the court could rely as an indication of legislative intent to remedy the evil before the court.[52] Typical state legislation concerns itself with physical working conditions and hours[53] and is silent as to the employer's permissible motives for terminating an employee. Even when the employee is terminated for reporting violations of labor legislation, some courts hold that the employee does not have a cause of action against the employer.[54] Therefore, without specific legislation recognizing a

46. Comment, *Employment at Will and the Law of Contracts,* 23 BUFFALO L. REV. 211 (1973).

47. Note, *California's Controls on Employer Abuse of Employee Political Rights,* 22 STAN. L. REV. 1015, 1017-18 (1970).

48. *Id.*

49. *Id.*

50. Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 338 (1974).

51. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1044, 1045 (1967).

52. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969). Housing codes evinced legislative intent to remedy inadequate housing.

53. *E.g.,* TEX. REV. Civ. Stat. Ann. arts. 5173-5178, 5165-5165a (1971).

54. Bell v. Faulkner, 75 S.W. 612 (Mo. App. 1934); *see* MO. REV. STAT. § 287.780 (Supp. 1974).

cause of action in favor of an employee discharged for bad-faith or malicious reasons, many courts may be reluctant to follow the lead of the *Monge* court.

Courts also may refuse to allow the remedy provided by the court in *Monge*, because a contractual remedy does not adequately protect an employee at will from being discharged in bad-faith. Punitive damages and damages for mental suffering generally are not recoverable in a contract action, because theoretically, they were not foreseen by the parties.[55] Also, the employer is entitled to have the recovery reduced by the amount which the employee could have earned by the exercise of ordinary care in mitigating damages.[56] Thus, under the contractual remedy, the employee's recovery may be substantially reduced. Because the object of the cause of action for an employee discharged in bad-faith is to protect the employee from overreaching domination by the employer,[57] some courts may choose a remedy which will allow an award of actual and punitive damages, such as an action in tort.[58] The possibility of increased damages certainly would have a deterrent effect on the employer and thus discourage bad-faith discharge of employees under contracts at will.

Recognition of a cause of action for an employee discharged maliciously is in accord with public policy and considerations of fairness in the master and servant relationship. The rule adopted by the court in *Monge* affords the employee a certain stability in his employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably. Although the employee can not expect to be completely free to do as he pleases and must face the prospect of discharge for failing to abide by his employer's directions, he should not have to fear dismissal for a bad-faith reason.[59] There is parallel development in other areas of the law, such as landlord and tenant, which tends to support recognition of the cause of action. In whatever form the remedy is adopted,

55. Otto v. Imperial Cas. & Indem. Co., 277 F.2d 889 (8th Cir. 1960); Johnson v. Waisman Bros., 36 A.2d 634 (N.H. 1944).

56. Mr. Eddie, Inc. v. Ginsberg, 430 S.W.2d 5 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.).

57. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1044 (1967).

58. Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974).

59. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1044, 1046 (1967).

contract or tort, it is duly needed in an industrial society in which people so depend upon employment by others for their livelihood.

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