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Vi. Employment And Labor Law

opinion in *$29,000* also serves as an excellent guide for courts faced with the argument that a warrantless search of an automobile, motor home,[109] boat,[110] or aircraft[111] is valid under the fourth amendment warrant requirement.

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VI. EMPLOYMENT AND LABOR LAW

A. *Erosion of the Employment-at-Will Doctrine: Recognition of an Employee's Right to Job Security*

The employment-at-will doctrine is a common law rule that holds that any indefiniteness in the duration of an employment contract creates the presumption that the employment arrangement is terminable at will.[1] The employment-at-will doctrine permits an employer to dismiss an employee for good cause, for no cause, and even for bad cause, free of liability for the dismissal.[2] Courts have adhered to the employment-at-will doctrine in the

109. *See Carney,* 105 S. Ct. at 2069 (applying automobile exception to motor home).

110. *See* United States v. Hensel, 699 F.2d 18, 24-26 (1st Cir. 1982) (applying automobile exception to boat), *cert. denied,* 461 U.S. 958 (1983); United States v. Weinrich, 586 F.2d 481, 492 (5th Cir.) (same), *cert. denied,* 440 U.S. 982 (1978).

111. *See* United States v. Rollins, 699 F.2d 530, 534 (11th Cir.) (applying automobile exception to airplane), *cert. denied,* 464 U.S. 933 (1983); United States v. Gooch, 603 F.2d 122, 123-26 (10th Cir. 1979) (same); United States v. Worthington, 544 F.2d 1275, 1280 (5th Cir.) (same), *cert. denied,* 434 U.S. 817 (1977).

1. Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816, 1816-18 (1980) [hereinafter cited as Note, *Protecting At-Will Employees].* The employment-at-will doctrine relies upon the theory that promises must be in written terms to be enforceable. *Id.* at 1825. The formal contract theory underlies the argument that if the parties to a contract had intended that employment last for a specific duration or that employment was terminable only for cause, the parties would have set forth express provisions in the employment contract. *Id.; see* Note, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort,* 93 HARV. L. REV. 1510, 1529-37 (1980) (explaining evolution of formal contract interpretation in instances of tortious interference with contractual relationship); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 343-45 (1974) (discussing early applications of employment-at-will doctrine) [hereinafter cited as Note, *Rights to Job Security].*

2. *See generally,* Murg and Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?,* 23 B.C.L. REV. 329 (1982). The employment-at-will doctrine emerged in 1877 in a treatise by H.G. Wood on the law of master and servant. *Id.* at 334-35. Prior to the employment-at-will doctrine a presumption existed that employment contracts not specifying a term of duration lasted for one year. *Id.* at 334. Nevertheless, courts readily adopted the employment-at-will doctrine. *See, e.g.,* Granger v. American Brewing Co., 25 Misc. 701, 703,

belief that implying terms of duration in an employment contract ultimately would destroy an employer's ability to regulate the size of the employer's labor force to meet changing market requirements.[3] In recent years, commentators have argued that the employment-at-will doctrine gives employers too much discretion to dismiss employees, and that the doctrine strips employees of any sense of job security.[4] In response to these criticisms, courts have begun to protect at-will employees by creating exceptions to the employment-at-will doctrine.[5] This article will trace the history of the employment-at-will doctrine and the justifications for the doctrine, focusing on the exceptions to the doctrine that have evolved. Furthermore, this article will explain the current status of the employment-at-will doctrine among the states within the jurisdiction of the United States Court of Appeals for the Fourth Circuit and will suggest the most desirable direction to follow in applying the employment-at-will doctrine to labor relationships in the future.

In 1877, H. G. Wood published *A Treatise on the Law of Master and*

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55 N.Y.S. 695, 697 (Sup. Ct. 1899) (hiring of corporate supervisor for indefinite term at yearly salary was terminable at election of either party); Copp v. Colorado Coal & Iron Co., 20 Misc. 702, 705, 46 N.Y.S. 542, 543 (N.Y. City Ct. 1897) (hiring of attorney at yearly rate for indefinite term was terminable at will); Martin v. New York Life Ins. Co., 148 N.Y. 117, 118, 42 N.E. 416, 417 (1895) (absent term of duration, contract for services at yearly rate was contract to pay only for services rendered and was terminable at will of either party). The effect of the adoption of the employment-at-will doctrine has been to minimize an employee's job security. DeGiuseppe, *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits,* 10 FORDHAM URB. L.J. 1, 8-9 (1981).

3. *See, e.g,* Page v. Carolina Coach Co., 667 F.2d 1156, 1158 (4th Cir. 1982) (holding that employer could discharge employee despite employer's promise of permanent employment); Hope v. National Airlines, Inc., 99 So.2d 244, 247 (Fla. Dist. Ct. App. 1957) (holding that contract for permanent employment was unenforceable because of lack of mutuality of obligation between parties), *cert. denied,* 102 So.2d 728 (Fla. 1958); Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 69, 139 So. 760, 761 (1932) (holding that because employment contract did not bind employee, employment contract did not bind employer).

4. *See generally* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employment Power,* 67 COLUM. L. REV. 1404 (1967) (noting inadequacy of present limitations on employer's right to dismiss and suggesting private right of action for wrongfully discharged employees); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue in the 80's,* 40 BUS. LAW 1 (1984) (reviewing more recent court decisions that have created exceptions to employment-at-will rule and discussing importance of implied contract and public policy theories of recovery); Peck, *Unjust Discharge from Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1 (1979) (arguing that employment-at-will doctrine violates employee's constitutional guarantees of due process and equal protection of law); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976) (explaining that statutory encroachments undercut employment-at-will rule and made rule anachronistic); Note, *Protecting At-Will Employees, supra* note 1 (stating that courts should create good faith test to replace employment-at-will doctrine to provide employees job security).

5. *See* Note, *Protecting At-Will Employees, supra* note 1, at 1818-24 (discussing causes of action under contract and tort theories of law available to discharged at-will employee); *infra* notes 44-56 and accompanying text (explaining three general exceptions to employment-at-will doctrine).

Servant[6] setting forth the rule that came to be known as the employment-at-will doctrine.[7] Wood asserted that hiring a servant for an indefinite period was prima facie hiring at will.[8] Under Wood's rule, the absence of a specific term of employment indicated a mutual desire to retain the freedom to end the employment relationship at any time.[9] Wood provided no analysis justifying the rule of law that he asserted.[10] Wood simply cited four American cases, one of which supported the employment-at-will doctrine.[11]

The employment-at-will doctrine represented a clear departure from the paternalism that previously characterized the employment relationship. Prior to Wood's development of the employment-at-will doctrine, a customary presumption dictated that an indefinite hiring was a hiring for one year.[12] The presumption of annual employment reflected the traditional notion that an employer was responsible for an employee's health and well-being.[13] When an employer dismissed an employee before the employee had finished one year's service, the employer was liable for breach of the employment contract even if the employment contract was silent on the duration of employment.[14]

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

7. *Id.*

8. *See* H.G. WOOD, *supra* note 6, at 272. Wood contended that a servant had the burden of establishing that his hiring was not a hiring at will. *Id.*

9. *See id.* (proposing principle that emerged later as employment-at-will doctrine); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895) (relying upon Wood's rule in holding that hiring of employee was hiring at will and that employer was at liberty to discharge at any time).

10. Feinman, *The Development of the Employment At Will Rule,* 20 AM. J. LEGAL. HIST. 113, 126 (1976).

11. *See* Wilder v. United States, 5 Ct. Cl. 462, 468 (1869) (outdated contract between Army and private entrepreneurs did not prevent entrepreneurs from making price increase for transporting Army goods), *rev'd on other grounds,* 80 U.S. 254 (1871); Franklin Mining Co. v. Harris, 24 Mich. 115, 116 (1871) (granting recovery to mining captain dismissed after only eight months work despite assurances of job security); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 58 (1870) (holding that trial court did not err in permitting jury to determine nature of employment contract from all circumstances surrounding employment relationship); DeBriar v. Minturn, 1 Cal. 450, 451 (1851) (discussing right of dismissed bartender to occupy room at tavern after receiving notification to vacate by end of month); Toussaint v. Blue Cross and Blue Shield of Mich., 408 Mich. 579, 601-03, 292 N.W.2d 880, 886-87 (1980) (explaining that cases which Wood cited did not support finding of undetermined term employment). *See generally* Note, *Right to Job Security, supra* note 1, at 341 n.54 (explaining how four cases cited by Wood were insufficient to uphold Wood's rule).

12. Note, *Protecting At-Will Employees, supra* note 1, at 1825 n.51, *citing* C. SMITH, TREATISE ON THE LAW OF MASTER AND SERVANT, 53-57 (1852); *see* Franklin Mining Co. v. Harris, 24 Mich. 115, 117 (1871) (holding that although miner's employment was uncertain and was for indefinite term, jury could find that hiring was for at least one year); Davis v. Gorton, 16 N.Y. 255, 257 (1857) (holding that presumption of one-year employment applied to employees managing farm). The presumption of a one-year employment contract applied to all employment relationships in the absence of proof that the parties intended otherwise. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE, 129 (1969).

13. *See* 2 J. KENT, COMMENTARIES ON AMERICAN LAW, 253-66 (rev. ed. 1896) (employer had duty to furnish employee with security, food, and shelter).

14. *See* Adams v. Fitzpatrick, 125 N.Y. 124, 128, 26 N.E. 143, 145 (1891) (holding that

Even when economic setbacks had forced an employer to lay off an employee, the courts held the employer liable for payment of the remainder of the employee's annual salary.[15]

Despite the inconsistency of the employment-at-will doctrine with traditional concepts regarding employment contracts, changes in economic realities and in contract law during the late nineteenth century permitted a nearly universal adoption of the employment-at-will doctrine.[16] The United States saw a period of great industrialization during the late nineteenth century.[17] The economy began to place a premium on an employer's flexibility in responding to fluctuating market demands, which included power to regulate the size of an employer's labor force to meet changing production needs.[18] Traditional notions of paternalism, however, interfered with an employer's autonomy by forcing an employer to retain an employee for a one year period despite a reduced demand for the employee's labor.[19] In contrast, under the employment-at-will doctrine, an employer readily could reduce the size of the employer's labor force if necessary to meet reduced market demands.[20] The employment-at-will doctrine permitted employers greater flexibility in dealing with labor and, therefore, provided economic advantages to employers.[21]

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when employer hired employee without mentioning time and frequency of payment, duration of employment was one year); Huntingdon v. Claffin, 38 N.Y. 182, 182 (1868) (holding that when employee continued employment after term of original contract had expired, employment relationship was enforceable for additional year); New Hampshire Iron Factory Co. v. Gonas Richardson, 5 N.H. 294, 296 (1830) (same); *see also* Feinman, *supra* note 10, at 119-20 (noting that employer could not discharge employee except for good cause).

15. *See* Murg & Scharman, *supra* note 2, at 332 (noting that courts usually did not consider employer's lack of business to be good cause for employee's discharge); Feinman, *supra* note 10, at 119-20 (same).

16. *See infra* notes 17-21 and accompanying text (describing influence of industrialization on employment relationship during late nineteenth century); *infra* notes 23-24 and accompanying text (explaining development of formal contract doctrine in context of employment relationship).

17. *See* N. WARE, THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895, 65-72 (1929) (tracing changes in labor practices in United States during development of industrial economy in late nineteenth century). One population census indicates that between 1880 and 1890 the number of Americans living in cities grew by 56 1/2 percent. EASTERLIN, POPULATION, LABOR FORCE, AND LONG SWINGS IN ECONOMIC GROWTH, 192 (1968). The employment relationship during the early nineteenth century was typically a single employer-employee arrangement. *Id.* at 334 n.22. Servants often learned trade skills in the master's home. *Id.* With the advent of the industrialization of the nineteenth century, close interpersonal relationships between masters and servants began to erode as employers employed an increasing number of workers at jobs requiring fewer skills. *Id. See generally* Feinman, *supra* note 10, at 118-23 (discussing change that industrialization of economy brought to employment relationship); Note, *Protecting At-Will Employees, supra* note 1, at 1824-25 (same).

18. *See* Murg & Scharman, *supra* note 2, at 335-36 (explaining economic advantage to employer who could discharge unneeded labor when necessary).

19. *See supra* note 12 (citing cases holding in favor of presumption of one year employment).

20. *See* G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 227-316 (7th ed. 1973) (under employment-at-will doctrine, employer could hire and fire as he saw fit without fear of lawsuits).

21. *See, e.g.*, Page v. Carolina Coach Co., 667 F.2d 1156, 1158 (1982) (holding that employer

The application of formal contract principles to the employment relationship also influenced the adoption of the employment-at-will doctrine. In response to the need for greater flexibility in regulating labor, courts began to enforce only contracts that the employer expressly made, ruling that mere labor for pay was not sufficient consideration to uphold an employment contract.[22] Additionally, under the concept of mutuality of obligation, courts held that when an employee made no promise to work for a fixed term, courts would not enforce an employer's promise to retain an employee for a specified term.[23]

A series of cases in New York were also instrumental in the general adoption of the employment-at-will doctrine.[24] For example, in *Martin v.*

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could discharge employee despite employer's promise to employee of permanent employment); Title Insurance Co. of Richmond v. Howell, 158 Va. 713, 717-18, 164 S.E. 387, 389 (1932) (holding that employer had no duty to retain employee for remainder of month simply because employee received salary on monthly basis); Washington, B. & A.R.R. Co. v. Moss, 127 Md. 12,____, 96 A. 273, 276 (1915) (holding that while employer obtained valuable benefit from employee after promising employee permanent employment, court would not obligate employer to retain employee); *see* Comment, *Employment at Will and the Law of Contracts,* 23 BUFFALO L. REV. 211, 212-16 (1973) (explaining employer's absolute power to discharge under employment-at-will doctrine) [hereinafter cited as *Employment at Will and the Law of Contracts*]; Comment, McKinney v. National Dairy Council: *The Employee At Will Relationship in Massachusetts,* 16 NEW ENG. L. REV. 285, 286-88 (1980-81) (same); Vernon and Gray, *Termination at Will—The Employer's Right to Fire,* 6 EMP. REL. L.J. 25, 26-27 (1980) (same).

22. *See* Lynas v. Maxwell Farms, 279 Mich. 684, 689, 273 N.W. 315, 317 (1937) (holding that contract for permanent employment, without some consideration in addition to employee's obligation to work and employer's obligation to pay wages, is terminable at pleasure of either party); *see also* Note, *Protecting At-Will Employees, supra* note 1, at 1825-26 (explaining how emerging theory of formal contract doctrine effected drastic minimization of employer's responsibilities to employee). During the late nineteenth century, courts adopted a one sided approach to the consideration doctrine. Note, *Protecting At-Will Employees, supra* note 1, at 1819. Courts ruled that an employee's labor ensured an employee only of a wage. *Id.* Without judicially recognized or otherwise identifiable additional considerations, such as foregoing personal injury claims or contributing financially to an employer's business, an employee was unable to enforce an employer's promises of job security. Note, *Rights to Job Security, supra* note 1, at 351-56. *But see* A. CORBIN, CONTRACTS § 684, at 229 (rev. ed. 1960) (explaining that employees should not have to furnish additional consideration to enforce promise of job security); RESTATEMENT (SECOND) OF CONTRACTS § 81 (Tent. Draft. No. 2, 1965) (explaining that while parties must satisfy requirement of consideration, no rule requires that promises exchanged be equivalent in value).

23. *See* Murg & Scharman, *supra* note 2, at 336-37. Mutuality of obligation requires that every party to a contract have a duty to perform some promise under the contract. *Id.* Courts refuse to force an employee to keep his promise to work for a specific length of time because forcing an employee to remain at his job would violate the thirteenth amendment's prohibition against involuntary servitude. *Id.; cf.* Note, *Protecting At-Will Employees, supra* note 1, at 1819 (under mutuality doctrine, absent employee's promise to work, employer may terminate at will).

24. *See* Clarke v. Atlantic Stevedoring Co., 163 F. 423, 425 (E.D.N.Y. 1908) (holding that employment contract, which was indefinite respecting term and which had no term fixed by statute or custom, was terminable at will); Sumners Phenix Ins. Co., 50 Misc. 181, 182, 98 N.Y.S. 226, 228 (Sup. Ct. 1906) (employment with yearly salary, absent express term of duration, was indefinite hiring and was terminable at any time by either party). Granger v. American Brewing Co., 25 Misc. 701, 703, 55 N.Y.S. 695, 697 (Sup. Ct. 1899) (hiring of

New York Life Insurance Co.,[25] the New York Court of Appeals held that an annual salary term in an employment contract would no longer result automatically in a presumption that the period of employment was for a full year.[26] The *Martin* court declared that measuring compensation by the day, month, or year did not prevent an employer from terminating an employment relationship when no explicit provision specified the duration of employment.[27] The *Martin* court reasoned simply that Wood's rule reflected the present condition of the legal effect of a general hiring and, thus, would be controlling in the case.[28] Following the example of the *Martin* court, the United States Supreme Court in *Adair v. United States*[29] and in *Coppage v. Kansas*[30] declared that courts could not compel any individual to accept or retain the personal services of another when the parties had not bargained for a specific term of employment.[31] In both *Adair* and *Coppage* the Court reasoned that any

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corporate supervisor at yearly salary, absent express term of duration, was terminable at election of either party); Copp v. Colorado Coal & Iron Co., 20 Misc. 702, 705, 46 N.Y.S. 542, 543 (N.Y. City Ct. 1897) (hiring of attorney at yearly rate was no more than indefinite hiring and was terminable at will of employer); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895) (contract for services at yearly rate, absent express term of duration, was contract to pay only for rendered services and was terminable at will of either party).

25. 148 N.Y. 117, 42 N.E. 416 (1895).

26. *See id.* at 121, 42 N.E. at 417. The employee in *Martin v. New York Life Ins. Co.* managed the employer's real estate department at an annual salary of $10,000. *Id.* The employee alleged that the $10,000 annual salary constituted an employment contract on a yearly basis. *Id.* The employee contended that because the employer in *Martin* discharged the employee prior to the end of the alleged contractual term, the employer was liable to the employee for the remainder of the employee's yearly salary. *Id.*

27. *Id.*

28. *See id.* The first courts to adopt the employment-at-will doctrine merely cited the Wood rule or cases that cited the Wood rule; *see, e.g.*, Clarke v. Atlantic Stevedoring Co., 163 F.423, 425-26 (E.D.N.Y. 1908) (using employment-at-will rule to support denial of recovery to discharged employee); Harrod v. Wineman, 146 Iowa 718, 125 N.W. 812, 813 (1910) (same); Geer v. Arlington Mills Mfg. Co., 17 Del. 581,____, 43 A. 609, 610-13 (Super Ct. 1899) (same); *see also supra* notes 6 & 8 and accompanying text (discussing assertion of employment-at-will rule). *See generally,* Note, *Rights to Job Security, supra* note 1, at 342-43 (discussing lack of analysis in early court decisions that adopted employment-at-will doctrine).

29. 208 U.S. 161 (1908). In *Adair v. United States,* the employer discharged an employee because the employee was a member of a labor organization. *Id.* at 170. The employee contended that the discharge violated a federal statute, known as the Erdman Act, which barred a common carrier from discharging an employee due to the employee's union membership. *Id.* The United States Supreme Court denied recovery to the employee, and the Court struck down the Erdman Act, ruling that the Act restricted parties' freedom to contract. *Id.* at 180, citing Erdman Act of June 1, 1898, ch. 370, § 10, 30 Stat. 424, 428.

30. 236 U.S. 1 (1915). In *Coppage v. Kansas,* the employer discharged an employee for refusing to sign a document that stated that the employee agreed to withdraw from a labor union. *Id.* at 7. The employee contended that Kansas statutory law forbade the use of contracts that required as a condition of employment that employees not join a labor organization. *Id.* at 6. The United States Supreme Court held that the employee had no cause of action and struck down the statute in question as unconstitutional. *Id.* at 26-27.

31. *See* Adair v. United States, 208 U.S. at 174 (supporting principles favoring employer's freedom to contract); *Coppage,* 236 U.S. at 10-11 (citing provisions of *Adair* supporting argument against arbitrary interference with employer's liberty to contract).

regulation of an employment relationship interfered with the parties' freedom to contract.[32]

The validity of the policies supporting the employment-at-will doctrine remained unchallenged until the 1930's when federal and state courts and legislatures began to limit the employment-at-will doctrine.[33] In *NLRB v. Jones & Laughlin Steel Corp.*,[34] the United States Supreme Court held that an employer could not discharge an employee merely because the employee belonged to a labor organization.[35] The Court recognized that, due to the dramatic differences in bargaining leverage between employers and employees, an employee's freedom to contract did not provide enough protection from wrongful discharge.[36] The Court reasoned that since employees could not obtain fair treatment from employers, the Court had a duty to aid employees by placing restrictions on an employer's right to discharge.[37]

In addition to judicial erosion of the employment-at-will doctrine, federal and state legislatures also expressed a willingness to limit the application of the employment-at-will doctrine. During the 1930's, legislators enacted public regulations designed primarily to prevent unjust terminations.[38] Federal regulation of the employment relationship began with the inception of the National Labor Relations Act,[39] which formed the theoretical framework for the more recent Fair Labor Standards Act,[40] the Occupational Safety and Health Act of 1970,[41] and various other statutes protecting employees from

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32. *See Adair*, 208 U.S. at 174 (arguing that employer and employee have complete freedom of contract); *Coppage*, 236 U.S. at 10-11 (same).

33. *See* Note, *Protecting At-Will Employees*, *supra* note 1, at 1826-28 (discussing judicial and legislative repudiation and modification of concepts supporting employment-at-will doctrine); *supra* notes 39-48 (same).

34. 301 U.S. 1 (1937).

35. *See id.* at 33-34 (explaining that coercion and discrimination that interferes with employees' exercise of right to unionize is subject to condemnation by legislation). In *NLRB v. Jones & Laughlin Steel Corp.*, an employer dismissed employees due to the employees' union activity. *Id.* at 29. The United States Supreme Court stated that the National Labor Relations Act prohibited employers form interfering with an employee's rights to self-organization and representation. *Id.* at 45-46, citing National Labor Relations (Wagner) Act of 1935, 29 U.S.C, §§ 151-166 (1985). The Court concluded that the employer violated the National Labor Relations Act by discharging the employees, and ordered the employer to reinstate the discharged employees and compensate them for lost wages. *Id.* at 48.

36. *See id.* at 33 (explaining that overbundance of employees resulted in unequal bargaining power between employers and employees).

37. *Id.* at 43-44.

38. *See* DeGiuseppe, *supra* note 2, at 16. The various statutory limitations placed on the employment-at-will rule have destroyed the belief that freedom of contract principles justify an employer's absolute right to discharge an at-will employee with or without cause at any time. *Id.*

39. *See* National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-166 (1982) (promoting unionization as countervailing measure against employer control and power over labor).

40. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982) (preventing employer from discharging employee who has filed claims or has initiated proceedings under Fair Labor Standards Act).

41. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590

unjust terminations.[42] The goal of federal labor regulation has been to provide employees with at least some measure of job security by limiting an employer's discretion to discharge employees.[43]

The judicial and legislative activity regarding the employment relationship led to the creation of three general exceptions to the employment-at-will doctrine.[44] The most widely recognized of these exceptions establishes a tort action for wrongful discharge.[45] The tort of wrongful discharge provides a remedy to an employee discharged for engaging in activities protected by public policy.[46] The public policy exception to the employment-at-will doc-

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(codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.) (1982) (preventing discrimination against employee who has exercised rights provided under Occupational Safety and Health Act).

42. *See, e.g.*, Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141-187 (1982) (promoting unionization as countervailing measure against employer control and power over labor); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to 2000e-17 (1982) (prohibiting discriminatory discharge based upon race, religion, color, sex, or national origin); Age and Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982) (prohibiting discriminatory discharge of older workers); Vietnam Era Veterans Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (codified in scattered sections of 38 U.S.C. and in 50 U.S.C. § 459) (restoring returning veterans to former employment and prohibiting employers from dismissing veterans for one year).

While many state statutes contain provisions similar to the above statutes, some states have expanded their protections to prohibit discharge for a variety of other protected activities. *See* D.C. CODE ANN. § 36-803 (1981) (prohibiting termination for failure to take lie detector test); MICH. COMP. LAWS § 418.125 (1985) (prohibiting discharge for filing claims for workmen's compensation).

43. *See Protecting At-Will Employees, supra* note 1, at 1827 (discussing multiple aims of public regulation of employment relationship).

44. *See infra* notes 45-56 and accompanying text (setting forth common exceptions to employment-at-will doctrine). Today, courts in three-fifth's of the states have created some type of action for wrongful discharge. Lopatka, *supra* note 4, at 1. While courts have begun to grant exceptions to the employment-at-will rule, courts have refused to grant an exception to the employment-at-will rule when express statutory remedies provide an alternative measure of protection to a wrongfully discharged at-will employee. *See* Murg & Scharman, *supra* note 2, at 352-54. Courts believe that granting exceptions to the employment-at-will rule when no express statutory remedies are available to the employee would circumvent legislative policy. Murg & Scharman, *supra* note 2, at 354; *see* Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 912 (E.D. Mich. 1977) (court refusing to grant recovery to employee under public policy exception to employment-at-will rule when statutory remedies already protect employee from discharge on basis of age or sex), *modified*, 456 F. Supp. 650 (E.D. Mich. 1978); *see also* Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055 (E.D. Pa. 1977) (court holding that when private cause of action would conflict with express statutory enforcement provisions, court would not grant independent remedy to employee alleging wrongful discharge), *aff'd*, 619 F.2d 276 (3d Cir. 1979).

45. *See* Abramson & Silvestri, *Recognition of a Cause of Action for Abusive Discharge in Maryland*, 10 U. BALT. L. REV. 257, 263 (1981) (explaining that tort cause of action for wrongful discharge is most limited intrusion upon scope of employment-at-will rule).

46. *See* Note, *Protecting At Will Employees, supra* note 1, at 1822-24. The public policy exception exists to prevent employers from discharging employees in violation of the public policy of the state. *Id.* Under the public policy exception to the employment-at-will rule, the key to an employee's claim in wrongful discharge cases is the appropriate definition of public policy that an employer allegedly has violated. *See infra* notes 47-49 and accompanying text

trine began as a narrow rule allowing an employee to sue an employer when a statute expressly prohibited the employee's dismissal.[47] The public policy exception then expanded to provide a cause of action when a dismissal was inconsistent with a statutory expression of public policy.[48] Today, courts occasionally permit recovery under the public policy exception even when a statute does not embody the contravened public policy.[49]

The second general exception to the employment-at-will doctrine permits an employee to rebut the presumption that an indefinite hiring is terminable at will by showing reliance on an implied-in-fact promise that limits the employer's right of discharge.[50] Under the implied-in-fact promise exception,

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(describing how scope of public policy exception to employment-at-will rule differs among jurisdictions).

47. *See* Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App.2d 322, 323, 202 P.2d 1059, 1061 (1949) (permitting wrongful discharge suit when statute prohibited employer from discharging employee who served as election officer); Geary v. United States Steel Corp., 456 Pa. 171, 175, 319 A.2d 174, 178-79 (1974) (in absence of statute prohibiting employee's discharge, court denied relief when employer discharged employee for reporting to superiors potential product defects in employer's product).

48. *See* Petermann v. Teamsters Local 396, 174 Cal. App.2d 184, 188-89, 344 P.2d 25, 27 (1959). In *Petermann v. Teamsters Local 396,* the employer directed the plaintiff employee to give false testimony during a legislative hearing. *Id.* The employee refused to give false testimony, which resulted in the employee's dismissal. *Id.* While no statute prohibited the employee's discharge, the California Court of Appeals permitted the employee's claim against the employer for wrongful discharge. *Id.*

Some courts have refused to permit even a narrow public policy exception to the employment-at-will rule despite cases with pronounced public overtones. *See, e.g,* Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976) (in absence of statute prohibiting discharge, court denied recovery when employer allegedly discharged employee for disagreeing with misrepresentation that employer made to federal government). Tameny v. Atlantic Richfield Co., 88 Cal. App.3d 646, 646, 152 Cal. Rptr., 54-55 (1979) (court denying relief when employer allegedly discharged employee for refusing to engage in price-fixing scheme, because no statute prohibited employee's discharge); Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1132 (Ala. 1977) (court denying recovery when employer allegedly discharged employee for refusing to falsify medical records because no statute prevented employee's discharge).

49. *See* Nees v. Hocks, 272 Or. 210,____, 536 P.2d 512, 516-17 (1975) (despite absence of statute prohibiting discharge, cause of action available when employee's dismissal results from being away from work to serve on jury). One court has held an employer liable for discharging an employee who refused to have a romantic relationship with the employee's foreman. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). In *Monge v. Beebe Rubber Co.,* the Supreme Court of New Hampshire held that a discharge motivated by bad faith or malice or based on retaliation is not in the public's best interest. *Id.*

50. *See* Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (1979). In *Rowe v. Noren Pattern & Foundry Co.,* the employer induced the employee to give up former employment and lifetime pension opportunities, assuring the employee that the employee would become a union member and that the employer would not fire the employee except for good cause. *Id.* at 262, 283 N.W.2d at 717. Despite the oral assurance of job security that the employer extended to the employee, the employer subsequently discharged the employee without cause. *Id.* at 263, 283 N.W.2d at 717-18. The Michigan Court of Appeals stated that an exception to the employment-at-will rule exists when an employee relinquishes employment under assurances of a permanent position at a new job. *Id.* at 259, 283 N.W.2d at 716; *see also* O'Neill v. ARA Servs., Inc., 457 F. Supp. 182, 186 (E.D. Pa. 1978) (allowing cause of action

courts consider the circumstances surrounding an employment relationship to determine whether an employer has made implied promises concerning job security or procedures for discharge.[51] Courts usually have declined to find that employer assurances of job security constitute enforceable promises, even when detrimental reliance occurs and when employee handbooks or manuals extend the employer's assurances.[52]

The third general exception to the employment-at-will doctrine, which courts rarely apply, limits an employer's discretion in dismissing an employee by implying in the employment contract a covenant of good faith and fair dealing.[53] Under the good faith exception, discharge without good cause

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to discharged employee who had begun employment in reliance upon promises of promotion); Chinn v. China Nat'l Aviation Corp., 138 Cal. App.2d 98,____, 291 P.2d 91, 94 (1955) (employee's reliance upon employer's inducements to remain at job constituted sufficient consideration to render employment contract enforceable).

51. *See* Grauer v. Valve & Primer Corp., 47 Ill. App.3d 152, 154-55, 361 N.E.2d 863, 865-66 (1977) (court holding that letter to employee from employer furnished implied promise of annual employment).

52. *See* Note, *Protecting At-Will Employees, supra* note 1, at 1820-21 (explaining customary inclination to disregard personnel handbooks and manuals as creating enforceable promises); Neth v. General Elec. Co., 65 Wash.2d 652,____, 399 P.2d 314, 319 (1965) (court declined to enforce promises that employer made during union election campaign, finding that employer's representations were no more than opinions); Cederstrand v. Lutheran Brotherhood, 263 Minn. 520,____, 117 N.W.2d 213, 222-23 (1962) (court refused to hold that written policy of corporation to dismiss only for good cause constituted offer of continued employment).

Although courts traditionally have refused to enforce promises of continued employment contained in personnel policy manuals, some courts recently have decided to enforce these promises. In *Toussaint v. Blue Cross & Blue Shield of Mich.*, for example, the employer made oral promises to the employee during the employment interview that the employer would not discharge the employee unless the employee failed to perform employment duties. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 614-15, 292 N.W.2d 880, 892 (1980). The employer's company manual also implied that the employer would not discharge employees without good cause. *Id.* at 597-98, 292 N.W.2d at 884. The Michigan Supreme Court held that the oral and written statements of the employer created an enforceable contractual provision necessitating good cause for dismissal. *Id.* at 614-15, 292 N.W.2d at 892. The court reasoned that the promises, both written and oral, were inducements to employment. *Id.* The court found that the employer's promises constituted part of the employment that the employee accepted. *Id.; see* Murg & Scharman, *supra* note 2, at 367-72 (minority of courts beginning to adopt view that courts can enforce promises of continued employment appearing in employee manuals and handbooks).

53. *See* Pstragowski v. Metropolitan Life Ins. Co, 553 F.2d 1, 2-3 (1st Cir. 1977) (holding that employer's discharge of employee was malicious and, therefore, constituted breach of employment contract under New Hampshire law); Zimmer v. Wells Management Corp., 348 F. Supp. 540, 541 (S.D.N.Y. 1972) (employer had obligation to act in good faith with employee in reaching decision whether to continue employment contract). Much litigation has arisen concerning whether an employer had the good cause necessary to discharge an employee under the good faith exception. *See* Comment, *Employment at Will And The Law of Contracts, supra* note 21, at 229. Whether an employer has good cause to discharge an employee is a question of fact for a jury. Ward v. Consolidated Foods Corp., 480 S.W.2d 483, 486 (Tex. Civ. App. 1972). One court has determined that an employer has good cause to discharge when an employee fails to perform employment duties in the same manner as would a person of ordinary reason under the same or similar circumstances. Ingram v. Dallas County Water Control &

breaches a covenant of good faith and, thus, is wrongful.[54] Courts have given a great deal of consideration to whether a duty to terminate for good cause applies only to at-will employment and generally have declined to imply that duty when no provisions express a specific term of employment.[55] Courts have explained that implying a duty to terminate only in good faith would unduly infringe upon an employer's discretion to discharge employees.[56]

While numerous exceptions to the employment-at-will doctrine have emerged, until recently the courts in Virginia have been reluctant to declare any significant exceptions to the employment-at-will rule.[57] Virginia adopted the employment-at-will rule during the early twentieth century.[58] *Title Insur-*

Improvement Dist. No. 7, 425 S.W.2d 366, 367 (Tex. Civ. App. 1968). Inefficiency and dishonesty of the employee, as well as the employee's failure to perform any of his customary duties, constitutes good cause for the employee's dismissal. *See* Comment, *Employment At Will And the Law of Contracts, supra* note 21, at 229.

54. *See* DeGiuseppe, *supra* note 2, at 24. The New Hampshire Supreme Court was the first court to impose the good faith exception to the employment-at-will rule. Monge v. Beebe Rubber Co., 114 N.H. 130,____, 316 A.2d 549, 551 (1974). In *Monge,* the New Hampshire Supreme Court stated that a good faith requirement for dismissal was necessary because an unrestricted right to dismiss employees interfered with the policy of fostering improved labor relations. *Id.* Other jurisdictions, such as California and Massachusetts, also have recognized a covenant of good faith and fair dealing in employment contracts. *See* Pugh v. See's Candies, Inc., 116 Cal. App.3d 311, 313, 171 Cal. Rptr. 917, 919-20 (1981). In *Pugh v. See's Candies, Inc.,* the employer allegedly discharged the employee because the employee opposed negotiation of a sweetheart contract between the employer's company and a labor organization. *Id.* at 313, 171 Cal. Rptr. at 919-20. The California Appellate Court in *Pugh* found that the employee had stated a cause of action, looking at the totality of circumstances of the employment relationship. *Id.* at 329, 171 Cal. Rptr. at 927. The *Pugh* court declared that the fact that the employee had worked for thirty-two years, the absence of any criticism of the employee's work, and the assurances of job security which the employee received from the employer gave rise to an implied covenant that the employer would discharge employees only in good faith. *Id.* Thus, the *Pugh* court held that the employer had the burden of proving good cause to discharge the employee. *Id.; see also* Fortune v. National Cash Register Co., 373 Mass. 96, 104, 364 N.E.2d 1251, 1256 (1977) (court held that employment contract imposed upon employer duty to discharge in good faith). *See generally* DeGiuseppe, *supra* note 2, at 24-30 (explaining adoption and development of good faith exception to employment-at-will rule).

55. *See* Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 226-27, 685 P.2d 1081, 1086 (1984) (no good faith limitation on discharge); Parner v. Americana Hotels, 65 Hawaii 370, 372, 652 P.2d 625, 629 (1982) (same); Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699, 703 (1980) (same).

56. *See Daniel,* 127 Ariz. at____, 620 P.2d at 703 (1980) (stating that courts should not interfere with employee dismissals to extent that courts become arbiters of any discharge that has tinge of bad faith); *Parner,* 65 Hawaii at 377, 652 P.2d at 629 (1982) (stating that protection of employee does not include intrusion on employer's right to discharge that would result from implying duty to terminate only in good faith).

57. *See infra* notes 72-101 (discussing status of employment-at-will doctrine in Virginia).

58. *See* Conrad v. Ellison-Harvey Co., 120 Va. 458, 466, 91 S.E. 763, 766 (1917) (holding that indefinite employment was employment-at-will and was terminable at will of either party); Stonega Coke & Coal Co. v. Louisville & N.R. Co., 106 Va. 223, 226, 55 S.E. 551, 552 (1906) (same); *see also* Warden v. Hines, 163 F. 201, 203 (1908) (same); The Pokanoket, 156 F. 241, 243 (1907) (same).

ance Co. of Richmond v. Howell was typical of the Virginia Supreme Court's early treatment of the doctrine.[59] In *Howell,* the employer allegedly discharged the employee in breach of a monthly employment contract.[60] The Virginia Supreme Court found that an employment contract was terminable at will if the contract simply provided for a monthly rate of pay and did not mention the duration of employment.[61] The court noted that when a breach of an employment contract occurs, the language of the contract alone determines the rights of the parties under the contract.[62] The court held that when no contractual language furnished the means of determining the duration of a contract, the court would not add terms which the parties did not incorporate into the employment contract.[63]

The law of employment-at-will in Virginia has changed very little since the doctrine's early adoption by the Virginia Supreme Court.[64] In Virginia, when an employment contract does not specify that the employment is terminable only for cause or that the employment will endure for a specific duration, courts apply a rebuttable presumption of at-will employment.[65] In determining whether an employee has rebutted the presumption of at-will

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59. 158 Va. 713, 164 S.E. 387 (1932).

60. *See id.* at 716, 164 S.E. at 388-89. In *Title Insurance Co. of Richmond v. Howell,* the employer agreed in a written contract to pay the employee at a rate of $708.34 per month for the employee's services as an expert title examiner. *Id.* The employee contended that an additional oral understanding between the parties specified that the employer would pay the employee on a monthly basis and that the employer would give the employee thirty days notice prior to termination of the employment contract. *Id.* at 717, 164 S.E. at 389. The employee argued that the oral understanding between the parties constituted a contract for monthly employment. *Id.*

61. *See id.* at 717-18, 164 S.E. at 389. The Virginia Supreme Court of Appeals in *Howell* stated that the employee had made no claim that would create an enforceable contract for monthly employment. *Id.* at 718, 164 S.E. at 389.

62. *Id.* at 718, 164 S.E. at 389.

63. *Id.*

64. *See* Plaskitt v. Black Diamond Trailer Co., 209 Va. 460, 468, 164 S.E.2d 645, 651 (1968) (court citing *Stonega,* a 1906 Virginia case, in support of refusal to grant exception to employment-at-will doctrine); Stonega Coke & Coal Co. v. Louisville & N.R. Co., 106 Va. 223, 226, 55 S.E. 551, 552 (1906) (holding that indefinite employment was terminable at will of either party); *see also* Wards Co. v. Lewis & Dobrow, Inc., 210 Va. 751, 756, 173 S.E.2d 861, 865 (1970) (court refusing to grant recovery to discharged at-will employee); Hoffman Speciality Co. v. Pelouze, 158 Va. 586, 594, 164 S.E. 397, 399 (1932) (court refusing to controvert settled doctrine that when no specific term determines duration of employment, presumption attaches that employment was terminable at-will); Title Insurance Co. v. Howell, 158 Va. 713, 718, 164 S.E. 387, 389 (1932) (court declaring that in United States, contract of employment for indefinite period was terminable at will of either party).

65. *See* Boyette, *Terminating Employees in Virginia: A Roadmap for the Employer, Employee, and their Counsel,* 17 U. RICH. L. REV. 747, 749-54 (1983). The employee can rebut the presumption of at-will employment by showing by a preponderance of the evidence that the employment is terminable only for cause. *Id.* at 755-56. When an employee violates the terms of his employment contract or the employer's reasonable rules, regulations, or policies, the employer may have adequate grounds to discharge the employee. *Id.* at 750-51. Incapacity or disability or failure to perform in a reasonably skillful manner also may constitute cause for discharge. *Id.* at 751-53.

employment, Virginia courts have considered the intent of the parties, judging from the parties' written and oral agreements, the usual practices of an employer's business, and the nature of the employment.[66] Employees in Virginia sometimes have succeeded at rebutting the presumption of at-will employment. For example, the Virginia Supreme Court has held that an employer's offer of severance pay to procure an employee's resignation negates the presumption of at-will employment.[67] The court has explained simply that offering severance pay upon discharge of an employee is an act that is inconsistent with rights of parties under contracts for employment of indefinite duration.[68] While a good faith requirement has emerged to offer increased protection to at-will employees, Virginia has not yet recognized this requirement.[69]

Despite Virginia's reluctance to limit the employment-at-will doctrine using modern contract theory, the Virginia Supreme Court has limited the doctrine by recognizing that a cause of action in tort exists when a termination is in violation of public policy.[70]

In *Bowman v. State Bank of Keysville,*[71] two discharged employees brought an action against their employer, alleging improper discharge and tortious interference with the employees' respective employment contracts.[72] The employer had warned the two employees, who were shareholders of the employer's corporation, that the employees would lose their jobs if the employees did not vote in favor of a proposed merger.[73] The employees voted in favor of the merger, but subsequently informed the employer that the employees' votes were void.[74] Shortly thereafter, the employer fired the

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66. *See infra* note 67 and accompanying text (discussing example of employee attempt to rebut presumption of at-will employment).

67. *See* Hoffman v. Pelouze, 158 Va. 586, 594-95, 164 S.E. 397, 400 (1932). In *Hoffman v. Pelouze,* the discharged employee alleged that he had had a one-year contract that was renewable from year to year. *Id.* at 588-89, 164 S.E. at 397. Because the parties had executed no contract that specified the duration of employment, the Virginia Supreme Court initially applied a presumption of at-will employment. *Id.* The court, however, found that the employer's offer of severance pay together with the employer's letter referring to the employee's annual pay negated the presumption of at-will employment. *Id.* at 594-95, 164 S.E. at 400. Thus, the Virginia Supreme Court upheld the jury verdict that no at-will employment contract existed. *Id.*

68. *Id.*

69. Boyette, *supra* note 65, at 760; *see* Fisher v. Southern Oxygen & Supply Co., Civil Action No. 82-0912-R (E.D.·Va. Sept. 26, 1983). In *Fisher v. Southern Oxygen & Supply Co.,* the United States District Court for the Eastern District of Virginia ruled that Virginia had not yet recognized an implied duty to discharge for good cause only. *See Fisher,* Civil Action No. 82-0912-R at 2 (E.D. Va. Sept. 26, 1983). The *Fisher* court indicated that Virginia would not recognize such an implied duty because Virginia has regarded contracts of indefinite duration as contracts of hazard. *Id.*

70. *See infra* note 80 and accompanying text (noting Virginia's recently recognized public policy exception to employment-at-will rule).

71. 229 Va.____, 331 S.E.2d 797 (1985).

72. *Id.* at____, 331 S.E.2d at 800.

73. *Id.* at____, 331 S.E.2d at 799.

74. *Id.* The employees in *Bowman* executed proxy cards in favor of the merger for fear

two employees.[75] The Virginia Supreme Court found that section 13.1-32 of the Virginia Code,[76] which entitles a shareholder the right to vote, conferred upon the employees the right to vote their shares free of duress and without fear of reprisal from corporate management.[77] The *Bowman* court stated that the Virginia General Assembly intended section 13.1-32 of the Virginia Code to further the public policy of free exercise of corporate voting rights.[78] The court ruled that the employer could not lawfully threaten discharge in response to the employees' exercise of their voting rights, for such a threat would violate the public policy of ensuring a shareholder's unfettered discretion to vote his shares freely.[79]

While *Bowman* signals Virginia's recognition of a cause of action when dismissal violates a specific public policy, the scope of a cause of action based on a public policy may be rather narrow.[80] The *Bowman* court indicated that the employer's threat and subsequent discharge of the employees were unlawful only because the employer's acts violated the established policy of section 13.1-32 of the Virginia Code.[81] The *Bowman* court's holding, therefore, implies that the Virginia courts will recognize a wrongful discharge action only when the discharge violates the public policy underlying an existing statute.[82]

Although the public policy exception imposed upon the employment-at-will doctrine in *Bowman* is rather narrow, the exception is not unlike limitations placed upon the doctrine by the Virginia legislature.[83] The Virginia legislature has provided that a discharged employee may sue his employer when the discharge results from the employee's exercise of rights under the safety and health laws[84] or the Workman's Compensation Act,[85] or when the discharge

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that the employer would discharge the employees. *Id.* The merger proposal passed as a result of the two employees voting in favor of the merger. *Id.* After the employees informed the employer that the employees' votes were void, the employer aborted the plans for a merger. *Id.*

75. *Id.*

76. VA. CODE ANN. § 13.1-32 (1984 & Supp. 1985) (stating that each share of stock entitled holder to one vote on every matter that meeting of stockholders considers).

77. *Bowman*, 229 Va. at ___, 331 S.E.2d at 801.

78. *Id.*

79. *Id.*

80. *See id.* at___, 331 S.E.2d at 801. The Virginia Supreme Court stated that it was applying a narrow exception to the employment-at-will rule. *Id.* The *Bowman* court indicated that, while the court was not altering the traditional rule of employment-at-will, the court recognized that the employment-at-will rule was not absolute. *Id.* The court stated that the unique facts of the case required the court to apply the public policy exception to the employment-at-will doctrine. *Id.*

81. *Id.* at___, 331 S.E.2d at 801.

82. *See supra* text accompanying note 81 (explaining narrow basis upon which *Bowman* court created public policy exception). Having created a very narrow exception to the employment-at-will rule, the Virginia Supreme Court's decision in *Bowman* will not remedy violations of judicially defined policies.

83. *See infra* notes 84-86 and accompanying text (citing statutory restrictions that Virginia legislature has placed upon employer's power to discharge employee).

84. *See* VA. CODE ANN. § 40.1-52.2:1 (1981) (providing that no person shall dismiss or discriminate against employees exercising rights under Virginia safety and health laws).

85. *See id.* § 65.1-40.1 (1980 & Supp. 1985) (providing that no person shall dismiss

violates certain other statutes.[86] Furthermore, the *Bowman* decision finds support among numerous jurisdictions that have adopted a similar public policy exception to the employment-at-will doctrine.[87]

In Maryland, courts long have adhered to the rule that an employment contract of indefinite duration is terminable at the pleasure of either party at any time.[88] Since the adoption of the employment-at-will rule in Maryland, courts have carved out few exceptions to the rule.[89] Courts applying Maryland law have recognized a limited exception to the employment-at-will rule when employees provide consideration in addition to their services.[90] For example, the Maryland courts have granted an exception to the employment-at-will rule when an employee relinquishes a personal injury claim in exchange for an employer's promise of a lifetime job.[91] Maryland, however, has recognized a cause of action for breach of contract when an employer discharges an

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employee solely because employee has filed or intends to file a claim for workmen's compensation, or because employee has testified or intends to testify in proceedings under Virginia Worker's Compensation Act).

86. *See id.* § 40.1-28.7 (1981 & Supp. 1985) (providing that no person shall discriminate against physically handicapped employee whose handicap does not interfere with employee's job performance); *id.* § 34-29(f) (1984) (providing that no person shall discharge employee where court has subjected employee's wages to garnishment for employee's indebtedness).

87. *See supra* notes 45-49 and accompanying text (discussing widespread acceptance of public policy exception to employment-at-will doctrine).

88. *See* Washington, B. & A.R.R. Co. v. Moss, 127 Md. 12,____, 96 A. 273, 276 (1915). In *Moss,* the employer induced an employee to close the employee's business and lease the employee's business premises to the employer under the oral promise of employment with the employer. *Id.* at____, 96 A. at 273-74. The employee performed his obligations under the agreement but the employer refused to provide employment for the employee. *Id.* The Maryland Court of Appeals held that no action would lie for breach of the employment contract, stating that the employment was terminable at the pleasure of either party in spite of the employee's detrimental reliance. *Id.* The *Moss* court explained that the court's function was to uphold, unimpaired, the established laws, and that the court simply could not create contracts between parties to avoid injustice. *Id.; see also* State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc., 278 Md. 120, 126, 360 A.2d 1, 5 (1976) (stating that common law rule of employment-at-will permitted employer or employee to terminate employment at pleasure); Vincent v. Palmer, 179 Md. 365,____, 19 A.2d 183, 187 (1941) (same).

89. *See infra* notes 90-92 and accompanying text (discussing Maryland's exception to employment-at-will based on added consideration of employee) and notes 96-101 and accompanying text (discussing Maryland's public policy exception to employment-at-will rule).

90. *See* Page v. Carolina Coach Co., 667 F.2d 1156, 1158 (4th Cir. 1982) (Fourth Circuit affirming ruling of Maryland District Court). In *Page v. Carolina Coach Co.*, the employee asserted that his discharge breached an oral contract of lifetime employment. *Id.* at 1156. The employee alleged that he had relinquished other employment, assuming a new position with the employer under a promise of lifetime employment. *Id.* at 1157-58. The United States Court of Appeals for the Fourth Circuit stated that, under Maryland law, a contract for lifetime employment was enforceable if an employee had given valuable consideration in addition to the employee's regular employment duties. *Id.* at 1158. The Fourth Circuit, however, held that mere relinquishment of a job was insufficient as a matter of law to constitute consideration for a lifelong employment contract. *Id.; see also* Adler v. American Standard Corp., 538 F. Supp. 572, 581 (D. Md. 1982) (court holding that relinquishment of alternative employment was insufficient consideration to modify contract for at-will employment); Chesapeake & Potomac Tel. Co. v. Murray, 198 Md. 526,____, 84 A.2d 870, 873 (1951) (same).

91. *See* Pullman Co. v. Ray, 201 Md. 268,____, 94 A.2d 266, 270 (1953) (holding that

employee in violation of a personnel policy that the employer has communicated to the employee.[92]

Maryland has been more willing to allow claims of wrongful discharge based upon theories of tort law than claims based upon theories of contract law.[93] In the case of *Adler v. American Standard Corp.*,[94] the Maryland Court of Appeals held than an employee could maintain a wrongful discharge claim when the employee's discharge violated a clear mandate of public policy.[95] In *Adler*, an employer dismissed an employee who had reported to superiors many potentially illegal practices and methods of operation ongoing within the employer's business.[96] On certification from the Untied States District Court of Maryland, the Maryland Court of Appeals found that the employee's claims were insufficient to state a cause of action in tort against the employer because the employee had failed to cite specific statutes that the employer had violated.[97] On remand, the United States District Court of

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employee's relinquishment of personal injury claim against employer in exchange for promise of lifetime employment was sufficient to modify at-will employment contract to contract for lifetime employment).

92. *See* Staggs v. Blue Cross of Md., 61 Md. App. 381, 392, 486 A.2d 798, 803-04 (1985). In *Staggs v. Blue Cross of Md.*, employees alleged that their discharge violated the employer's personnel policy statements. *Id.* at 387, 486 A.2d at 800. The employees had begun employment without any contract regarding the duration of employment. *Id.* at 384, 486 A.2d at 799. The employer, however, later distributed a memorandum among the employees explaining that the employer would dismiss an employee only when cause for dismissal existed and, in most circumstances, only after the employee previously had received two formal counseling sessions regarding complaints about the employee's job performance. *Id.* at 384-85, 486 A.2d at 799-800. The employees stated that the employer discharged them without following the personnel policy. *Id.* at 387, 486 A.2d at 800. The Court of Special Appeals of Maryland held that provisions in an employer's policy statements that limit an employer's discretion in terminating at-will employment or that prescribe required procedures for termination of at-will employment may, when properly communicated to the employee, become contractual obligations of the employer which are enforceable by an employee. *Id.* at 392, 486 A.2d at 803-04. Thus, the Maryland Court of Special Appeals declared that the lower court's earlier grant of summary judgment for the employer was inappropriate and remanded the case to the Baltimore County Circuit Court for trial. *Id.* at 393, 486 A.2d at 804; *see also* Dahl v. Brunswick Corp., 277 Md. 471, 476, 356 A.2d 221, 231 (1976) (discussing proposition that certain employer policy directives pertaining to employment relationship became contractual obligations when, with knowledge of existence of directives, employee starts or continues working for employer).

93. *See infra* notes 94-101 and accompanying text (discussing Maryland's public policy exception to employment-at-will rule).

94. 291 Md. 31, 432 A.2d 464 (1981).

95. *Id.* at 45, 432 A.2d at 473.

96. *See id.* at 34, 432 A.2d at 466. In *Adler*, the employee's duties were to conduct a thorough analysis of the operational and management structure of the employer's business and to recommend changes that would enhance efficiency within the business. *Id.* at 33, 432 A.2d at 466. The employee discovered many possibly illegal practices, including payment of commercial bribes and falsification of corporate financial records and statistics. *Id.* Shortly before a meeting with the corporation's headquarters personnel, the employee's immediate superiors discharged the employee on the grounds of unsatisfactory performance. *Id.* at 34, 432 A.2d at 466. The employee alleged that his superiors discharged him to prevent headquarters personnel from learning of the discovered activities. *Id.*

97. *See id.* at 47, 432 A.2d at 472-73. The *Adler* court declared that the employee's allegations did not furnish a sufficient factual predicate for the court to decide whether the

Maryland granted recovery to the employee after the employee had amended the complaint to include specific violations of statutory law.[98] The Maryland Appellate Court's holding in *Adler* indicates that an employee in Maryland may maintain a cause of action for wrongful discharge when the termination has violated the public policy of a statute enacted by the Maryland legislature.[99] *Adler* implies that the scope of Maryland's public policy exception to the employment-at-will doctrine is very similar to the public policy exception that Virginia recently has adopted.[100] In both Maryland and Virginia courts have granted public policy exceptions only when an employee's dismissal has contravened the public policy of a preexisting statute.[101]

While the Maryland courts have been reluctant to recognize causes of action under contract law and have recognized only a limited tort cause of action for discharge of at-will employees, an abundance of statutes in Maryland restrict the right to discharge at-will employees.[102] The Maryland Code provides that an employer may not discharge an employee due to race, color, sex, religion, age, national origin, marital status, or physical or mental handicap unrelated in nature to the performance of employment.[103] Other statutes prescribed by the Maryland legislature prevent an employer from discharging an employee for filing a workman's compensation claim,[104] for refusing to take a polygraph test,[105] for serving on a jury,[106] and for active involvement in proceedings related to the Maryland Occupational Safety and Health Act.[107] Maryland labor regulations purport to foster the public policy

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employer violated a declared public policy. *Id.* at 46, 432 A.2d at 472. The Maryland Court of Appeals, however, stated that the court did no confine itself simply to legislative enactments, previous judicial decisions, or administrative regulations in determining Maryland's public policy. *Id.* at 45, 432 A.2d at 472. The decision of the Maryland Court of Appeals, therefore, has given rise to speculation that the court might allow a suit based upon public policy even though not evinced by a statute. *See* Abramson & Silvestri, *supra* note 45, at 270.

98. *See Adler,* 538 F. Supp. 572, 578 (D. Md. 1982). The district court of Maryland noted that the employee's second amended complaint was identical to the employee's previous complaint except that the employee had enumerated in the second amended complaint several federal and state statutes that the employer's agents allegedly had violated. *Id.* at 575. Finding that the employee's second amended complaint recited the specific statutes that the employer violated, the United States District Court for the District of Maryland granted recovery to the employee. *Id.* at 578.

99. *See id.* Maryland's public policy exception to the employment-at-will rule, however, applies only when no statute provides an alternative remedy to an alleged wrongful discharge. Chekey v. BTR Realty, Inc., 575 F. Supp. 715, 716-17 (D. Md. 1983).

100. *See supra* notes 80-82 and accompanying text (discussing scope of Virginia's public policy exception to employment-at-will rule).

101. *See id.* (discussing Virginia's public policy exception to employment-at-will rule); *supra* notes 94-100 and accompanying text (discussing Maryland's public policy exception to employment-at-will rule).

102. *See* Abramson & Silvestri, *supra* note 45, at 262 (discussing statutory restrictions in Maryland limiting application of employment-at-will doctrine).

103. MD. ANN. CODE art. 49B § 16(a)(1) (1979).

104. MD. ANN. CODE art. 101 § 39A (1985).

105. MD. ANN. CODE art. 100 § 95 (1985).

106. MD. CTS. & JUD. PROC. CODE ANN. §§ 8-105, -401 (1984).

107. MD. ANN. CODE art. 89 § 43 (1985).

underlying the activities that these statutes protect.[108] The Maryland legislature's regulations regarding employment relationships are necessary only because the employment-at-will doctrine enables employers to freely terminate employment contracts for an unspecified term.[109] The Maryland labor regulations that restrict employers' discretion in terminating at-will employees demonstrate the Maryland legislature's awareness of the continued vitality of the employment-at-will doctrine.[110]

Like Virginia and Maryland, the North Carolina courts in the past have adhered strictly to the rule that an employment contract for an indefinite period of time is terminable at the will of either party without notice and for any reason.[111] The North Carolina courts generally have refused to allow contract causes of action involving discharge of an at-will employee.[112] Only when an employee has given valuable consideration in addition to the employee's services have the North Carolina courts considered the contract to be enforceable.[113] In *Dotson v. Royster Guano Co.*,[114] the Supreme Court of North Carolina held that when an employer had induced an employee to

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108. *See* Abramson & Silvestri, *supra* note 45, at 262 (discussing statutory restrictions in Maryland limiting application of employment-at-will doctrine).

109. *See supra* notes 12-15 and accompanying text (discussing labor relations prior to adoption of employment-at-will rule).

110. Abramson & Silvestri, *supra* note 45, at 262.

111. *See* Tuttle v. Kernersville Lumber Co., 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964) (permanent employment, in absence of provisions setting forth duration of service, is generally employment terminable at will); *infra* notes 112-18 and accompanying text (discussing North Carolina law on employment-at-will doctrine).

112. *See* Burkhimer v. Gealth, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682 (1979), *cert. denied*, 297 N.C. 298, 254 S.E.2d 918. In *Burkhimer v. Gealth*, the employer discharged the employee despite a lifetime employment contract that the employer allegedly had made with the employee. *Id.* at 452, 250 S.E.2d at 680. The North Carolina Court of Appeals found that the employment contract between the parties was for an indefinite period and was terminable at the pleasure of either party. *Id.* at 454, 250 S.E.2d at 682. The *Burkhimer* court explained that the employee had failed to produce evidence that he had given sufficient consideration to make the employment contract enforceable. *Id.; see also* Williams v. Biscuitville, Inc., 40 N.C. App. 405, 408, 253 S.E.2d 18, 20 (1979) (holding that policies from operations manual regarding discharge procedures were not basis for establishing breach of contract), *cert. denied*, 297 N.C. 457, 256 S.E.2d 810; Tuttle v. Kernersville Lumber Co., 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964) (holding that employee had no grounds for breach of employment contract although employee's services had been satisfactory prior to discharge); Malever v. Jewelry Co., 223 N.C. 148, 149, 25 S.E.2d 436, 437 (1943) (denying recovery when employer discharged employee after having induced employee to relinquish former position under promise of employment on permanent and regular basis with employer).

113. *See* Jones v. Carolina Power & Light Co., 206 N.C. 862, 864, 175 S.E. 167, 167 (1934) (holding that employer could not discharge employee without cause after employee had moved to different state in reliance upon promise of permanent employment); Dotson v. Royster Guano Co., 207 N.C. 635, 636, 178 S.E. 100, 101 (1935) (allowing recovery for breach of contract when employee released personal injury claim against employer in return for promise of permanent employment); Fisher v. Roper Lumber Co., 183 N.C. 485, 489, 111 S.E. 857, 860 (1922) (same).

114. 207 N.C. 635, 178 S.E. 100 (1935).

forego a personal injury claim under promises of permanent employment, the employer then could not dismiss the employee without cause.[115] The *Dotson* court indicated that by foregoing an injury claim, the employee had given sufficient consideration for the employment contract to be binding between the parties.[116] The *Dotson* court, therefore, granted recovery to the discharged employee for the employer's breach of the parties' employment contract.[117]

North Carolina has refused until recently to recognize that a cause of action in tort exists for wrongful discharge when no statute provides a right to recovery.[118] The Appellate Court of North Carolina in *Sides v. Duke Hospital,*[119] however, recognized a public policy exception to the employment-at-will rule.[120] In *Sides,* the employer, Duke Hospital, discharged an employee who refused to testify falsely on behalf of a fellow employee involved in a medical malpractice trial.[121] The *Sides* court held that the employer's efforts to persuade the employee to testify falsely or incompletely at trial constituted an offense once punishable under North Carolina common law, and now

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115. *See id.* at 636, 178 S.E. at 101. In *Dotson v. Royster Guano Co.,* the employee, while laboring for the employer, suffered an injury that led to amputation of the employee's leg. *Id.* at 635, 178 S.E. at 101. In return for the release of the employee's claim for damages arising from the injury, the employer agreed to give the employee employment for life. *Id.* Despite the agreement between the parties, the employer dismissed the employee approximately 18 years after the employee had sustained his leg injury. *Id.*

116. *Id.* at 636, 178 S.E. at 101.

117. *Id.*

118. *See* Dockery v. Lampart Table Co., 36 N.C. App. 293, 297-98, 244 S.E.2d 272, 275-76, *petition for discretionary review denied,* 295 N.C. 465, 246 S.E.2d 215 (1978). In *Dockery v. Lampart Table Co.,* the employee sustained numerous injuries during the course of employment. *Id.* at 294, 244 S.E.2d at 274. The employee filed a claim under the North Carolina Workman's Compensation Act to recover for the damages resulting from the injury. *Id.; see also* N.C. GEN. STAT. § 97 (1985) (North Carolina's Workman's Compensation Act). Three months after the employee filed the workman's compensation claim, the employer dismissed the employee. *Id.* at 298, 244 S.E.2d at 274. The discharged employee argued that the North Carolina courts should grant recovery to an employee when discharge was in retaliation for the employee's pursuit of a statutory or constitutional right. *Id.* The North Carolina Court of Appeals rejected the employee's argument, stating that the North Carolina legislature, rather than the North Carolina courts, was responsible for providing remedies for employees claiming wrongful discharge. *Id.*

119. 74 N.C. App. 331, 328 S.E.2d 818 (1985).

120. *See Sides,* 74 N.C. App. at 343, 328 S.E.2d at 826-27 (holding that employer could not dismiss at-will employee for unlawful reason that contravened public policy); *infra* notes 121-24 (discussing facts and legal analysis of *Sides).*

121. *See Sides,* 74 N.C. App. at 334, 328 S.E.2d 821-22. In *Sides v. Duke Hospital,* the employee, a nurse at Duke Hospital, had watched a hospital physician negligently administer anesthesia to a patient, which resulted in permanent brain damage to the patient. *Id.* at 333, 328 S.E.2d 821. Physicians and attorneys of Duke Hospital attempted to persuade the employee to testify falsely at the ensuing malpractice trial regarding the employee's knowledge of the physician's administration of anesthesia. *Id.* The employee testified truthfully at the trial, which resulted in a verdict against the hospital. *Id.* Three months later, the employee's supervisor discharged the employee. *Id.* at 334, 328 S.E.2d at 821-22.

punishable under the General Statutes of North Carolina.[122] The Appellate Court of North Carolina stated further that the employer's conduct offended the integrity of the judicial system, interfering with the court's duty to administer justice fairly.[123] The court declared than an employer could not discharge an at-will employee for any unlawful purpose or reason which contravened public policy.[124] As a result of *Sides,* employers now may incur liability when an employee's discharge is inconsistent with policy considerations underlying federal and state law.[125] Compared to the public policy exceptions of Virginia and Maryland, North Carolina's exception appears to provide greater protection to the employee.[126] Unlike Maryland and Virginia, North Carolina has not specified that only a statutory violation of law will invoke the public policy exception to the employment-at-will doctrine.[127]

West Virginia, like the other states within the jurisdiction of the Fourth Circuit, has carved out few exceptions to the employment-at-will doctrine.[128] The West Virginia Supreme Court of Appeals has determined that an at-will employee ordinarily has no cause of action against the employee's former employer based upon theories of contract law.[129] The court has stated simply

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122. *See id.* at 337-38, 328 S.E.2d at 823. The *Sides* court noted that perjury and subornation of perjury were once felonies at common law and were presently punishable under North Carolina statutory law. *Id.* The *Sides* court stated further that intimidation of witnesses was an offense at common law and was punishable in North Carolina as a misdemeanor. *Id.* at 338, 328 S.E.2d at 823.

123. *Id.* at 338, 328 S.E.2d at 823-24.

124. *See id.* at 342, 328 S.E.2d at 826. The *Sides* court reached its decision by reasoning that interpreting the law otherwise would encourage lawlessness. *Id.*

125. *Id.*

126. *See supra* notes 70-82 and accompanying text (discussing Virginia's public policy exception to employment-at-will doctrine); *supra* notes 94-101 (discussing Maryland's public policy exception to employment-at-will doctrine).

127. *See Sides,* 74 N.C. at 342, 328 S.E.2d at 826-27. The North Carolina Court of Appeals in *Sides* did not stipulate whether the public policy exception would extend to situations in which discharge was in contravention of public policy principles of North Carolina common law. *See id.* Thus, some uncertainty exists regarding the precise scope of North Carolina's public policy exception.

128. *See infra* notes 129-38 and accompanying text (discussing status of employment-at-will doctrine in West Virginia).

129. Wright v. Standard Ultramarine and Color Co.; 141 W. Va. 368, 380, 90 S.E.2d 459, 468 (1955). In *Wright v. Standard Ultramarine and Color Co.,* the employer allegedly discharged the employee to avoid paying premiums under the employee's annuity retirement plan and to prevent the employee from receiving benefits under the plan. *Id.* at 372, 90 S.E.2d at 463. The employee asserted that the employer's conduct amounted to a breach of an employment contract between the parties. *Id.* The employee contended that the employer's promises of retirement income had induced the employee to continue working for the employer. *Id.* Furthermore, the employee asserted that the employer had agreed to retain the employee for so long as the employee properly performed employment duties. *Id.* The West Virginia Supreme Court of Appeals found that the employee had given no consideration that would create an enforceable employment contract between the parties. *Id.* at 381, 90 S.E.2d at 467. Consequently, the *Wright* court determined that the employment relationship was terminable at-will and that either party could terminate such an employment arrangement without liability for breach of contract.

that an employee may not recovery for breach of an employment contract of indefinite duration in the absence of extra consideration on the part of the employee, because the employment-at-will doctrine permits either party to terminate the relationship with or without cause.[130] In West Virginia, therefore, an employer is never liable for breach of contract when discharging an at-will employee.[131]

Until recently, West Virginia permitted no cause of action in tort for wrongful discharge of an at-will employee.[132] In *Harless v. First National Bank in Fairmont,*[133] the West Virginia Supreme Court of Appeals held that an employer is liable in tort when the employer dismisses an employee to contravene some substantial public policy principle.[134] The *Harless* court indicated that the employee's dismissal resulted from the employee's attempts to curtail the employer's intentional violations of the West Virginia Consumer and Protection Act.[135] The court determined that the legislature had intended to establish a clear and unequivocal public policy that consumers of credit have protection from lending institutions seeking to violate provisions of the Act.[136] Because the employee in *Harless* had attempted to uphold the policy of the Act, the court held the employer liable in tort for the employee's

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Id. at 382, 90 S.E.2d at 468; *see also* Bell v. South Penn Natural Gas Co., 135 W. Va. 25, 32, 62 S.E.2d 285, 288-89 (1950) (discussing proposition that employment of indefinite duration is terminable by employer or employee at any time); Adkins v. Aetna Life Ins. Co., 130 W. Va. 362, 371, 43 S.E.2d 372, 377 (1947) (same); Resener v. Watts, Ritter & Co., 73 W. Va. 342, 344-45, 80 S.E. 839, 840 (1914) (same).

130. Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 182 (W. Va. 1980).

131. *See* Harless v. First Nat'l Bank in Fairmont, 162 W. Va. 116, 124, 246 S.E.2d 270, 275 (1978) (noting that discharging employee at-will is wrongful only when discharge violates significant West Virginia public policy principle).

132. *See id.* (discussing prior absence of public policy exception to employment-at-will rule in West Virginia).

133. 162 W. Va. 116, 246 S.E.2d 270 (1978).

134. *Id.* at 124, 246 S.E.2d at 275.

135. *See id.* at 118-20, 246 S.E.2d at 272-73. In *Harless,* the employee discovered that the employer, First National Bank in Fairmont, intentionally had overcharged bank customers on prepayment of customers' installment loans. *Id.* at 119, 246 S.E.2d at 272. The employee reported the illegal activities to his supervisors. *Id.* After a series of investigations revealing several illegal banking practices, the employers discharged the employee. *Id.* at 119, 246 S.E.2d at 273. The *Harless* court stated that the employee's complaint, which referred to the employer's intentional overcharging of installment loan customers, alleged willful violations of West Virginia Code section 46A-1-101, known as the West Virginia Consumer Credit and Protection Act. *Id.* at 125, 246 S.E.2d at 275-76; W. VA. CODE § 46A-1-101 (1985).

136. *Harless,* 116 W. Va. at 125, 246 S.E.2d at 276. The *Harless* court noted that the West Virginia legislature imposed criminal sanctions for certain willful violations of the West Virginia Consumer Credit and Protection Act. *Id.* at 125, 246 S.E.2d at 275-76. West Virginia Code section 46-5-103 explains that any person violating provisions of the Consumer Credit and Protection Act shall be guilty of a misdemeanor and shall receive a fine of not more than $1000 or imprisonment for not more than one year, or shall receive both a fine and imprisonment. W. VA. CODE § 46A-5-103 (1980). *See generally* Cardi, *The West Virginia Consumer Credit and Protection Act,* 77 W. VA. L. REV. 401 401-519 (providing full account of history and scope of West Virginia Consumer Credit and Protection Act).

termination.[137] The *Harless* court explained West Virginia's view of the employment-at-will doctrine, stating that discharging an at-will employee was not wrong unless carrying out such a discharge contravened some statutory expression of public policy.[138]

Similar to the other states within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, South Carolina has continued to adhere to the employment-at-will rule, declaring repeatedly that indefinite term employment is terminable at any time by either party for any reason or for no reason at all.[139] An examination of the employment-at-will cases in South Carolina indicates that the courts within South Carolina have been reluctant to allow contract or tort theories of recovery that would temper the harshness of the employment-at-will doctrine.[140] The courts in South Carolina have continued to propound the rule that when a contract of permanent employment has no consideration other than the employee's obligation to perform work and the employer's obligation to pay wages, the contract is terminable at will.[141] Acknowledging on several occasions that other states have recognized a public policy exception to the employment-at-will doctrine, the Supreme Court of South Carolina consistently has declined to adopt such an exception to the rule.[142] Even the South Carolina legislature has made little attempt to provide statutory provisions that would provide an employee with any recourse for wrongful discharge.[143] Clearly, in South Carolina, an employer may discharge an employee under almost any circumstances without incurring liability as a result.

In spite of continued adherence to the employment-at-will doctrine, public policy considerations have prompted the majority of the states within the jurisdiction of the Fourth Circuit to recognize a tort action for wrongful discharge.[144] Adoption of the public policy exception to the employment-at-

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137. *Harless,* 116 W. Va. at 125, 246 S.E.2d at 276.

138. *Id.*

139. *See* Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 289-90, 278 S.E.2d 607, 609-10 (1981) (holding that indefinite term employment is terminable by either party at any time and for any reason); Hudson v. Zenith Engraving Co., Inc., 273 S.C. 766, 769, 259 S.E.2d 812, 812-13 (1979) (same); Ross v. Life Ins. Co. of Va., 273 S.C. 764, 765, 259 S.E.2d 814, 815 (1979)(same).

140. *See supra* note 139 and accompanying text (providing cases noting South Carolina's strict adherence to employment-at-will doctrine).

141. *See* Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 155, 321 S.E.2d 618, 620-21 (1984) (holding that employee had no cause of action although discharge resulted from employee's testimony in hearing).

142. *See supra* note 139 (citing South Carolina Supreme Court cases refusing to adopt exceptions to employment-at-will rule).

143. *See, e.g.*, S.C. GEN. STAT. § 16-17-560 (1976) (preventing employer from lawfully discharging employee for employee's political opinion or employee's exercise of civil rights); *id.* § 41-15-510 (1976) (preventing employer from discharging employee for participating in proceedings under Occupational Health and Safety Act); *id.* § 41-15-520 (1976) (providing remedy to employee when employer has discharged employee in violation of Occupation Health and Safety Act).

144. *See supra* notes 70-82 and accompanying text (discussing Virginia's public policy

will rule benefits employees because the public policy exception prohibits discharges that result from an exercise of employee rights.[145] States correctly apply the public policy exception only to discharges that contravene interests recognized by federal and state law.[146] Adopting a public policy exception by making ad hoc determinations of what constitutes important public policies is inadvisable, because the ad hoc determinations create uncertainty regarding the scope of protection that the tort action for wrongful discharge provides.

The states within the Fourth Circuit likewise would be correct to permit an exception to the employment-at-will rule when an employee can prove reliance on implied-in-fact promises that limit the employer's discretion to discharge.[147] When an employee can show that he has furnished consideration to the employer in addition to the obligation to work for wages, promises of the employer regarding job security and duration of employment become enforceable provisions of the employment contract.[148] When an employer wishes to foreclose the possibility that an employee will develop legitimate expectations concerning the employer's promises, the employer simply can refrain from making promises.[149]

While the states within the Fourth Circuit have adopted some measures that limit an employer's discretion to discharge,[150] the states within the Fourth Circuit have declined to imply a duty to terminate an employment contract in good faith. Although a good faith exception to the employment-at-will rule may act as a deterrent to wrongful discharge, a refusal to recognize the exception is perhaps appropriate. A great deal of litigation has

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exception); *supra* notes 94-101 and accompanying text (discussing Maryland's public policy exception); *supra* notes 118-27 and accompanying text (discussing North Carolina's public policy exception); *supra* notes 132-38 and accompanying text (discussing West Virginia's public policy exception).

145. *See supra* notes 46-49 (explaining that protection afforded employees through public policy exception differs according to state's definition of public policy).

146. *See supra* note 47 (discussing cases in which court granted public policy exception in response to discharge jeopardizing statutory policy of encouraging full and honest testimony).

147. *See supra* notes 50-51 and accompanying text (explaining how courts determine whether exception regarding implied-in-fact contractual provisions is applicable in suit for wrongful discharge).

148. *See id.*

149. *See Boyette, supra* note 65, at 763-68. By controlling communications with an employee, an employer can minimize chances that a discharged at-will employee will bring a suit against the employer for breach of the employment contract. *Id.* at 764. In the employment application, an employer should make explicit the provisions regarding job duration and the employer's ability to terminate the employment. *Id.* In the hiring interview, recruitment personnel should then emphasize to job applicants that the employment is terminable with or without cause at any time, avoiding any sweeping statements about duration of employment or assurances of job security. *Id.* at 765. In the portions of personnel manuals that address termination procedures, the employer should disclaim explicitly any intent to form a binding employment contract between the parties. *Id.* at 766.

150. *See supra* notes 57-143 and accompanying text (discussing adoption of limited exceptions to employment-at-will rule by states within Fourth Circuit).

arisen over what constitues good cause to discharge an employee.[151] Thus, when employers have to show good cause to dismiss employees, fears of litigation might force a company to retain employees despite the employees' possible shortcomings. Retaining unsatisfactory workers merely out of fear of litigation would undermine efficiency in the market place.

H. TUCKER DEWEY

B. *Determining the Free Speech Rights of Public Employees*

The first amendment guarantee of free speech[1] is a qualified right.[2] The right to free speech is a qualified right because in some circumstances the government's interest in restraining speech will prevail over citizens' free speech interests.[3] In guaranteeing the right to free speech, the first amendment stringently guards a citizen's right to engage in uninhibited debate on matters of public concern.[4] Not all citizens, however, enjoy the same degree of first

151. Comment, *Employment At Will and the Law of Contracts, supra* note 54, at 229.

1. *See* U.S. CONST. amend. I. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." *Id.* Decisions from the Supreme Court illustrate that the Framers of the first amendment intended primarily for the first amendment to protect free discussion of public affairs. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 296-97 (1964) (emphasizing first amendment right to free expression on public questions). For example, the Supreme Court's decision in *New York Times v. Sullivan* recognizes a profound national commitment to uninhibited debate on public questions. *Id.* at 270. In addition, free discussion is essential to the vitality of governmental institutions. Terminiello v. Chicago, 337 U.S. 1, 4 (1948). Through free political discussion, government remains responsive to the will of the people. DeJong v. Oregon, 299 U.S. 353, 365 (1937). The unfettered interchange of ideas brings about changes the people desire. Roth v. United States, 354 U.S. 476, 484 (1957). The first amendment protects even those ideas involving the slightest social importance, including controversial ideas, unorthodox ideas, and ideas that differ from the prevailing point of view to the extent that such ideas are not excludable as encroaching on more important interests. *Id.*

2. Breard v. Alexandria, 341 U.S. 622, 642 (1951). The guarantee of freedom of speech does not give one the right to speak in any manner, at any time or at any place. *Id.; see* Roth v. United States, 354 U.S. at 482 (1957) (guarantee of freedom of speech gives no absolute protection). For example, obscene, profane, and libelous speech does not warrant first amendment protection. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (defining classes of speech that first amendment does not protect).

3. *See generally* M. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE FIRST AMENDMENT §§ 2.01-2.02 (1984) (discussing restrictions on first amendment free speech). The government restricts speech in the interest of maintaining public order. *See* American Communications Association v. Douds, 339 U.S. 382, 399 (1950) (discussing conflict between interest in public order and interest in free speech). Similarly, the government has an interest in restraining free speech to foster national security. *See* Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) (discussing conflict between interest in national security and interest in free speech).

4. *See supra* note 1 (emphasizing that first amendment protection extends primarily to free discussion of matters of public interest).

amendment protection.[5] For example, because the state has an interest in regulating the speech of public employees to facilitate efficiency in the services that public employees provide to the state,[6] the state restricts the free speech rights of public employees more than the state limits the free speech rights of citizens in general.[7] Although the state may limit the scope of the free speech rights of public employees, the state cannot condition public employment on the relinquishment of the first amendment right to comment on matters of public concern.[8] In determining the extent to which

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5. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (state's interest in regulating speech of public employees differs significantly from state's interest in regulating speech of citizens generally; Vicksburg Firefighters, Etc. v. City of Vicksburg, Miss., 761 F.2d 1036, 1039 (5th Cir. 1985) (same); *see also infra* notes 6-7 and accompanying text (discussing state's interest in regulating speech of public employees).

6. *See Pickering,* 391 U.S. at 568 (discussing state's interest in regulating speech of public employees). Since government employees provide indispensable services, the public interest demands an effective, disciplined administration of government agencies. *See* Note, *Nonpartisan Speech in the Police Department: The Aftermath of Pickering,* 7 HASTINGS CONST. L.Q. 1001, 1002 (1980) (discussing inefficiency and disharmony resulting from unrestrained speech by public employees). Uninhibited speech by public employees often results in inefficiency in the governmental office. *Id.; see generally Developments in the Law—Public Employment,* 97 HARV. L. REV. 1611, 1738-80 (1984) (overview of evolution of Supreme Court's approach to first amendment protection of public employee's free speech rights).

7. *See* McMullen v. Carson, 754 F.2d 936, 938 (11th Cir. 1985) (state subjects members of law enforcement agency to more restricted form of first amendment protection than most other citizens); *see also supra* note 6 (discussing state's interest in regulating speech of public employees). The degree of first amendment protection afforded a public employee varies according to the character of the public employment. *See* Hughes v. Whitmer, 714 F.2d 1407, 1419 (1983) (law enforcement agency has greater interest than typical government employer in regulating speech of public employees), *cert. denied sub nom.* Hughes v. Hoffman, 465 U.S. 1023 (1984); *see also* Note, *supra* note 6 at 1013 (discussing difference in first amendment rights of public school teachers and police officers). For example, employment as a school teacher differs in nature and character from employment as a police officer. *See* Brukiewa v. Police Comm'r of Baltimore, 257 Md. 36, 74-75, 263 A.2d 210, 229 (1970) (Barnes, J., dissenting). The dissent in *Brukiewa* explains that, unlike a school teacher, the state charges a police officer with the preservation of public safety and security. *Id.* The carrying out of the duties that the law assigns to the police requires discipline, *esprit de corps,* and uniformity. Kelley v. Johnson, 425 U.S. 238, 246 (1975). Due to the organized structure and disciplined rank and file, police are a paramilitary force. *See* Gasparinetti v. Kerr, 568 F.2d 311, 321 (3d Cir. 1977) (Rosenn, J., concurring in part, dissenting in part), *cert. denied,* 436 U.S. 903 (1978). Since police are a paramilitary force the dissent in *Gasparinetti* asserted that the government has a greater need to regulate the speech of policemen. *Id.* Consequently, because of the unique characteristics of police employment, a police officer's right to comment on matters involving his employment is limited. *See* Muller v. Conlisk, 429 F.2d 901, 904 (7th Cir. 1970) (discussing first amendment rights of police). In contrast, maximum first amendment protection facilitates the public school teacher's interest in encouraging students to consider and discuss ideas concerning public issues. *Brukiewa,* 263 A.2d at 229 (Barnes, J., dissenting). Therefore, by virtue of the nature and character of teaching, the public school teacher enjoys maximum free speech protection. *Id.*

8. *See Pickering,* 391 U.S. at 568. In *Pickering,* the United States Supreme Court held that a state cannot compel a public school teacher to relinquish the first amendment right to comment on a matter of public concern involving the operation of the school. *Id.* In so holding, the *Pickering* court relied on the Supreme Court's decision in *Keyishan v. Board of Regents. Id.; Keyishan,* 385 U.S. 589, 605-06 (1967). The *Keyishan* Court rejected the theory that the state can subject the attainment of public employment to conditions. *Keyishan,* 385 U.S. at

the state can limit the right of a public employee to comment on matters of public concern, courts must balance the interest of the public employee, as a citizen, to speak on matters of public concern, with the state's interest as an employer, to provide efficient services through public employees.[9]

The issue of the free speech rights of public employees frequently arises when a public employee speaks critically about the government agency for which he works and the employer retaliates by demoting or discharging the employee.[10] A public employee claiming wrongful demotion or discharge in reprisal for exercising free speech rights first must demonstrate that the speech or conduct qualifies for first amendment protection.[11] To determine

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605-06; *see also* Wentz v. Klecker, 721 F.2d 244, 246 (8th Cir. 1983) (state cannot compel public employees to relinquish first amendment right to speak on matters of public concern).

The threat of employment reprisal inhibits the speech of public employees. *See Pickering,* 391 U.S. at 574 (recognizing threat of dismissal as potent means of inhibiting speech). Retaliatory action by an employer can trigger first amendment rights. *See* McGill v. Board of Educ. of Pekin Elementary School, 602 F.2d 774, 779-80 (7th Cir. 1979). The Seventh Circuit in *McGill v. Board of Education of Pekin Elementary School* held that the test to determine whether retaliatory action by an employer triggers first amendment rights is whether the retaliatory action is likely to chill the employee's exercise of speech protected by the first amendment. *Id.; cf.* Note, *supra* note 3, at 1003 (discussing chilling effect on public employee speech resulting from restrictions on first amendment rights).

9. *See Pickering,* 391 U.S. at 568. In *Pickering,* the Supreme Court considered the first amendment rights of Pickering, a public school teacher. *Id.* at 569-74. The defendant school board dismissed Pickering after Pickering wrote a letter to a local newspaper that criticized the board's allocation of school funds between educational and athletic programs. *Id.* at 566. The *Pickering* Court established a balancing test to determine whether the first amendment protected Pickering's conduct in writing the letter to the newspaper. *Id.* at 568. The *Pickering* Court concluded that the court must balance the teacher's interest, as a citizen, in speaking freely on matters of public concern, against the state's interest, as an employer, in promoting efficiency. *Id.* In arriving at a balance between the competing interests of the employee and the state, *Pickering* requires the courts to consider the nature of the employment relationships within the government agency. *Id.* at 569-70. The *Pickering* court reasoned that the closer the working relationships, in terms of day to day contact among co-workers, the greater the state's need to maintain internal harmony by regulating the speech and conduct of employees. *See id.* (explaining the necessity of maintaining personal loyalty and confidence in situations involving close working relationships). The Supreme Court in *Pickering,* however, declined to lay down a general standard for arriving at a balance between the competing interests of the employee and the state. *Id.* at 569. Rather, courts must look to the facts of each case when weighing the employee's interests against the state's interests. *See id.* (explaining that variety of factual situations involving critical statements by public employees renders general standard inappropriate).

10. *See* Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees,* 89 YALE L.J. 376, 379-80 (1979) (discussing first amendment rights of public employee who criticizes government agency for which employee works). Employment reprisals against public employees who criticize operations within the agency can take a variety of forms. *See, e.g.,* MacFarlane v. Grasso, 696 F.2d 217, 223 (2d Cir. 1982) (refusal to hire); Watters v. Chaffin, 684 F.2d 833, 836-37 n.9 (11th Cir. 1982) (demotion and transfer); Bickel v. Burkhart, 632 F.2d 1251, 1255-56 (5th Cir. 1980) (refusal to promote); Porter v. Califano, 592 F.2d 770, 771-72 (5th Cir. 1979) (suspension).

11. *See* Mount Healthy School Board of Education v. Doyle, 429 U.S. 274, 287 (1977) (explaining that initial burden is on public employee to show that public employee's speech or

whether a public employee's speech warrants first amendment protection, courts apply a balancing test promulgated by the United States Supreme Court in *Pickering v. Board of Education.*[12] *Pickering* requires courts to balance the state's interest in promoting efficiency with the public employee's interest in commenting on matters of public concern.[13] In addition to the requirement that the public employee demonstrate that the speech or conduct is constitutionally protected, the Supreme Court's decision in *Mount Healthy School Board of Education v. Doyle*[14] requires the public employee to show that the constitutionally protected speech or conduct was the motivating factor, or "but for" cause, of the demotion or discharge.[15] Finally, the

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conduct qualifies for first amendment protection); *see also infra* note 15 and accompanying text (discussing *Mount Healthy).*

12. *See Pickering,* 391 U.S. at 568 (courts must balance interests of state and employee); *see also supra* note 8 and accompanying text (explaining *Pickering* balancing test).

13. *See Pickering,* 391 U.S. at 568 (courts must balance interests of state and employee); *see also supra* note 8 and accompanying text (explaining *Pickering* balancing test).

14. 429 U.S. 274 (1977).

15. *See Mount Healthy,* 429 U.S. at 287. In *Mount Healthy,* a public school teacher brought an action against the Mount Healthy School Board, claiming that the Board had violated the first amendment by deciding not to rehire the teacher after the teacher had provided a local radio station with information concerning the school district's teacher dress code. *Id.* at 282. The *Mount Healthy* Court held that the district court properly had placed the burden on the teacher to demonstrate that providing the radio statio with information on the teacher dress code was constitutionally protected conduct, and that providing the radio station with the information was a motivating factor in the Board's decision not to rehire the teacher. *Id.* at 287. The *Mount Healthy* Court stated that if the teacher demonstrated that the constitutionally protected conduct was a motivating factor in the Board's decision not to rehire the teacher, the burden would shift then to the Board to demonstrate that the Board would not have rehired the teacher even if the teacher had not engaged in the constitutionally protected conduct. *Id.*

Although *Mount Healthy* required a public employee's speech or conduct to constitute the motivating factor in the employee's demotion or discharge, the Supreme Court later refined *Mount Healthy's* "motivating factor" requirement into a "but for" standard. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416-17 (1979). Specifically, the Supreme Court's decision in *Givhan v. Western Line Consol. School Dist.* requires courts to find that the public employer would not have demoted or discharged the public employee "but for" the employees engaging in constitutionally protected conduct. *See id.* (illustrating application of "but for" requirement). Thus, under the "but for" standard, an employee must show that his speech or conduct was constitutionally protected, and that the constitutionally protected speech was a motivating factor in the employee's demotion or discharge. *See* Brasslett v. Cota, 761 F.2d 827, 839 (1st Cir. 1985) (explaining requirements of *Mount Healthy).* If the employee can establish that his speech or conduct qualified for constitutional protection and that the constitutionally protected speech was a motivating factor in the employee's demotion or discharge, then the burden shifts to the employer to show by a preponderance of the evidence that the employer would have demoted or discharged the employee even if the employee had not engaged in the constitutionally protected activity. *Id.; see also* Henderson v. Huecker, 744 F.2d 640, 643 (8th Cir. 1984) (explaining requirements of *Mount Healthy);* Berry v. Bailey, 726 F.2d 670, 674 (11th Cir. 1984) (same), *cert. denied,* 105 S.Ct. 2326 (1985). Thus, under *Mount Healthy,* as refined by *Givhan,* an employee can succeed in a first amendment claim only if the court finds that the employer would not have demoted or discharged the employee "but for" the employee's engaging in constitutionally protected conduct. *See* Note, *supra* note 10, at 383-84 (1979) (criticizing *Mount Healthy* "but for" standard).

Supreme Court's recent decision in *Connick v. Myers*[16] narrows the scope of *Pickering* by requiring that a public employee's speech constitute a matter of public concern in order to qualify for first amendment protection.[17] Under *Connick,* courts do not reach the *Pickering* balancing test unless the public employee first establishes that the employee's speech or conduct involved a matter of public concern.[18] The threshold inquiry, therefore, in determining whether a public employee's speech or conduct qualifies for first amendment protection is whether the public employee's speech or conduct constitutes a matter of public concern.[19] Thus, if the public employee satisfies the test enunciated by the Supreme Court in *Pickering, Mount Healthy,* and *Connick,* the public employee successfully has demonstrated wrongful demotion or discharge in violation of the first amendment.[20] In *Jurgensen v. Fairfax*

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16. 461 U.S. 138 (1983).

17. *See id.* at 147. In *Connick,* the Supreme Court considered whether the discharge of an assistant district attorney for circulating a questionnaire within the district attorney's office violated the assistant district attorney's first amendment rights. *Id.* at 146-54. In *Connick,* a district attorney had transferred Myers, an assistant district attorney, to a different section of the criminal court. *Id.* at 140. Strongly opposed to the transfer, Myers circulated a questionnaire among the other assistant district attorneys involving office transfer policy, office morale, the desirability of a grievance committee, the degree of confidence in supervisors, and whether employees felt pressured to work in office supported political campaigns. *Id.* at 141. The *Connick* Court held that only the question concerning whether the employees felt pressured to work in office supported political campaigns involved a matter of public concern. *Id.* at 149. The *Connick* Court, therefore, applying *Pickering,* concluded that the questionnarie, as a whole, warranted only limited first amendment protection. *Id.* at 154. In denying first amendment protection to the questionnaire, the Supreme Court in *Connick* stated that although the first amendment requires public officials to be open to criticism by public employees, the first amendment does not demand public officials to operate public agencies as a roundtable for employee dissatisfaction with internal office policy. *Id.* at 149. The *Connick* Court emphasized that when expression by a public employee does not involve any social or political matter of concern to the community, public employers should enjoy wide deference in the management of government offices. *Id.* at 146. The Supreme Court in *Connick,* therefore held that speech involving matters of only personal interest do not warrant first amendment protection. *Id.* at 147. *See generally* Note, *Connick v. Myers: Narrowing the Free Speech Rights of Public Employers,* 33 CATH. U.L. REV. 429, 456 (1984) (Connick's restrictive definition of public concern narrows first amendment protection of public employees). The *Connick* Court added that in determining whether a public employee's speech includes a matter of public concern, courts must consider the content, form, and context of the employee's statement. *Connick,* 461 at 147-48. Additionally, the manner, time, and place of the employee's speech or conduct are relevant considerations in determining whether a public employee's speech or conduct qualifies for first amendment protection. *Id.* at 152.

18. *See* Wilson v. City of Littleton, Colorado, 732 F.2d 765, 769 (10th Cir. 1984) (interpreting *Connick); Connick,* 461 U.S. at 146 (first amendment protects only matters of public concern); *see also supra* note 17 and accompanying text (discussing *Connick).*

19. *See Connick,* 461 U.S. at 146 (first amendment protects only matters of public concern); *see also supra* note 18 and accompanying text (explaining that courts do not proceed to balancing test unless public employee's speech or conduct involves public concern).

20. *Pickering,* 361 U.S. at 568; *Mount Healthy,* 429 U.S. at 287, *Connick,* 461 U.S. at 147. *See supra* notes 11-18 and accompanying text (discussing proof required to establish violation of first amendment based on wrongful demotion or discharge).

County,[21] the United States Court of Appeals for the Fourth Circuit considered whether Fairfax county wrongfully had demoted a public employee in retaliation for the employee's exercise of the employee's first amendment free speech rights.[22]

In *Jurgensen*, the Fairfax County Police Department (Department) had employed the plaintiff, Robert E. Jurgensen, since 1974 as an Assistant Squad Supervisor in the Emergency Operations Center (EOC).[23] The three major functions of the EOC were telephone answering, radio dispatching, and computer transactions.[24] In 1980, the Department commissioned an internal review of the operation of the EOC.[25] Two Fairfax County police officers conducted the review and prepared an inspection report.[26] The inspection report was a normal internal administrative review that enumerated several recommendations for improvement of the EOC.[27] The recommendations included an increase in staff, modification of new personnel training, an increase in telephone lines, equipment replacements, and computer program changes.[28] The inspection report found no illegal action, no abuse of authority, no corruption or waste, and no discrimination against employees.[29] After the officers conducting the review submitted the inspection report to the EOC, the Department created a special group to review and implement the changes recommended in the inspection report.[30] The group periodically submitted status reports to Department supervisors, listing steps that the Department had taken in response to the inspection report's recommendations.[31]

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21. 745 F.2d 868 (4th Cir. 1984).

22. *See id.* at 880-87.

23. *Id.* at 871.

24. *Id.* at 871. At the time in question in *Jurgensen*, the Emergency Operations Center (EOC) had approximately sixty employees. *Id.* The EOC divided the employees into squads working on the 4-10 schedule. *Id.* The 4-10 schedule results in a compressed work week. *Id.* at 872 n.2. The compressed work week provides an alternative work schedule by increasing the number of hours worked per day while reducing the number of days worked per week so that the employee works the standard number of weekly hours in less than five days. *Id.* The Department's change to the 4-10 schedule constituted a primary cause of Jurgensen's dissatisfaction. *Id.* at 874 n.4. Because all police, fire, and rescue communications for Fairfax County are located at the EOC, the EOC must operate twenty-four hours a day. *Id.* at 871.

25. *Id.* at 871.

26. *Id.*

27. *Id.*

28. *Id.* at 872. The *Jurgensen* court described the inspection report's recommendations as "housekeeping" recommendations. *Id.* The report stated that the understaffing and 4-10 scheduled had created a stressful work environment. *Id.* at 871. The inspection report also recommended modifications in the training of new personnel to alleviate the current delay in the institution of a new employee's formal training. *Id.* at 872. Additionally, the inspection report recommended an auxiliary power system to enable the EOC to cope with a power failure. *Id.*

29. *Id.* at 871.

30. *Id.* at 872.

31. *Id.* at 873. In *Jurgensen*, the Fourth Circuit noted the steps that the EOC had taken

In April or May 1981, a *Washington Post* reporter telephoned the EOC and talked with the plaintiff, Jurgensen, about general conditions within the Department.[32] During the telephone conversation, Jurgensen agreed to a private meeting with a *Washington Post* reporter.[33] At a private meeting, Jurgensen referred to the inspection report while describing to a *Washington Post* reporter the problems in the EOC.[34] Subsequently, the *Washington Post* reporter arrived at the police department headquarters to interview Chief Carroll D. Buracker concerning problems in the EOC.[35] The *Washington Post* reporter also requested permission to read the inspection report, but Chief Buracker refused to release the inspection report to the reporter, explaining that the inspection report was a confidential internal review.[36] Chief Buracker, however, did permit the reporter to inspect EOC operations and to speak freely with employees.[37] Unsatisfied with the information collected during his inspection of the EOC and during conversations with EOC employees, the *Washington Post* reporter requested that Jurgensen provide him with a copy of the inspection report.[38] The reporter was persistent in his requests.[39] Without authorization and in knowing violation of depart-

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to implement the recommendation of the inspection report. *Id.* The steps taken by the EOC included instructions to the Director of Communications to explore the procedure for acquiring additional frequencies for EOC use, a requisition for a new conveyor belt, a supplemental appropriation of $60,000 to replace the Mobile Center in the EOC, formation of a Training Task Force to provide EOC improved training services, a request for five additional EOC positions for the next fiscal year, plans for an emergency generator and plans for termination of the 4-10 schedule. *Id.* Subsequent status reports in 1981 noted the successful implementation of the new training program and the addition of six EOC positions. *Id.* In June 1981, the Fairfax County Executive provided the Board of Supervisors of Fairfax County with a full report detailing each recommendation noted in the inspection report. *Id.* at 874. The report to the Board of Supervisors also described the steps taken by the EOC to comply with the inspection report's recommendations. *Id.* at 874. Based on these reports, the *Jurgensen* court found that the Department had undertaken an aggressive program to deal with the problems indicated in the inspection report. *Id.*

32. *Id.* at 874. In *Jurgensen,* the conversation between the reporter and the plaintiff centered on an article that appeared in the *Washington Post* concerning comparative per capita expenditures for police departments and addressed the low per capita expenditures for the Fairfax County Police. *Id.*

33. *Id.* at 874.

34. *Id.* In *Jurgensen,* Jurgensen expressed concern that EOC employees were overworked and underpaid. *Id.* at n.5.

35. *Id.* at 874. The *Jurgensen* court noted that subsequent to the filing of the inspection report, the Department promoted Buracker from deputy chief of police to chief of police. *Id.* at 877 n.10.

36. *Id.* at 874.

37. *Id.* In *Jurgensen,* the Fourth Circuit noted that the *Washington Post* reporter investigating the EOC encountered no difficulty in talking to employees concerning the working conditions in the EOC. *Id.* The *Jurgensen* court further noted that the EOC did not discourage or criticize EOC employees for expressing opinions on EOC operations, even though some employees' opinions were critical. *Id.*

38. *Id.* at 875.

39. *Id.* at 875. In *Jurgensen,* the Washington Post reporter explained that he needed the inspection report, not because he needed more information for his story, but to verify the

mental regulations,[40] Jurgensen took a copy of the inspection report from Department files and gave the report to the *Washington Post* reporter.[41]

Quoting from the inspection report as well as certain internal departmental memoranda, on June 26, 1981, the *Washington Post* published an article on the internal operations of the EOC.[42] The *Washington Post* article reported that the EOC was understaffed, that EOC employees were overworked, and that employee morale in the Department was low.[43] The *Washington Post* article reported no corruption, illegality or inattention to the problems of the EOC on the part of the Department.[44] Subsequently, the Department began an inquiry to determine which employee had released the inspection report.[45] During the departmental inquiry, Jurgensen admitted supplying the inspection report to the *Washington Post* reporter.[46] The following day, on his own initiative, Jurgensen inquired as to what disciplinary recommendation Major Kelly Coffelt, commander of the Department's Technical Services Bureau, expected to make with regard to Jurgensen's violation of the departmental regulations.[47] Major Coffelt informed Jurgensen that his tentative recommendation would be either a demotion to communications assistant and a transfer, or at most, termination.[48] Upon Jurgensen's request, Jurgensen and Major Coffelt met with Chief Buracker to discuss further the disciplinary action that the Department intended to take against Jurgensen.[49] At the meeting with Chief Buracker, Jurgensen agreed in writing to accept a voluntary demotion if the Department would drop the disciplinary charges against him.[50] Several days after Chief Buracker

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correctness of quotations from the report. *Id.* at n.6. The need for verification stemmed from an incident in which the *Washington Post* had published a story totally fabricated by the reporter. *Id.* Consequently, the *Washington Post* told Jurgensen that the *Washington Post* would run a story on the EOC only if the reporter could obtain a copy of the inspection report. *Id.* Jurgensen was reluctant to release the inspection report to the *Washington Post* reporter because he knew departmental regulations governed requests for the release of documents. *Id.* at 875.

40. *Id.* at 883. In *Jurgensen,* the Department charged Jurgensen with the violation of General Order No. 401 and section 204.4 of the employee regulations of the Fairfax County Police Department. *Id.* General Order No. 401 prohibits an employee from releasing any official information to the news media without specific prior authorization from an information releasing authority. *Id.* General Order No. 401 limits the authority to release official information to the Chief of Police, Deputy Chief of Police, Commander of the Staff Services Division and the Public Information Officer. *Id.* Additionally, section 204.4 of the regulations provides that employees cannot reveal police information unless the police manual so provides. *Id.*

41. *Id.* at 875.

42. *Id.*

43. *Id.* at 875-76.

44. *Id.* at 876.

45. *Id.*

46. *Id.*

47. *Id.* In *Jurgensen,* Major Coffelt headed the group assigned to implement the recommendations made in the inspection report. *Id.* at 872.

48. *Id.*

49. *Id.* at 876-77.

50. *Id.* at 877. The Fourth Circuit in *Jurgensen* stated that conflicting testimony existed

and Jurgensen entered into the agreement, Jurgensen requested rescission of the voluntary demotion.[51] Chief Buracker, however, denied Jurgensen's request for rescission and the Fairfax County Police Department demoted Jurgensen to a lower rank and assigned him to a different police station.[52]

Eleven months after his demotion, Jurgensen filed a civil rights action under 42 U.S.C. § 1983[53] in the United States District Court for the Eastern District of Virginia.[54] Jurgensen brought the civil rights action against Fairfax County, Virginia, the Fairfax County Police Department, and two of the Department's ranking officers, challenging the validity of the demotion.[55] Jurgensen claimed that the demotion was a reprisal for providing the *Washington Post* with a copy of a report on the internal inspection of the EOC and that the demotion violated Jurgensen's first amendment right to free speech.[56] In *Jurgensen,* the defendants claimed that Jurgensen's demotion

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as to whether Jurgensen or Chief Buracker first suggested Jurgensen's demotion as punishment for releasing the inspection report to the *Washington Post* reporter. *Id.* Jurgensen testified that Chief Buracker asked whether Jurgensen would take a voluntary demotion. *Id.* In contrast, Chief Buracker testified that Chief Buracker told Jurgensen that he was not prepared to hear Jurgensen's case, and that Jurgensen responded by requesting that Chief Buracker not hear the case, but that Chief Buracker instead consider a voluntary demotion. *Id.*

51. *Id.* at 877. In *Jurgensen,* Jurgensen wrote a letter to Chief Buracker requesting rescission of the demotion and asked that the Department institute ordinary disciplinary proceedings against him. *Id.* Jurgensen based his request for rescission on the claim that he was under duress when he agreed to the voluntary demotion. *Id.* Jurgensen could seek recourse through the Civil Service and judiciary if the department dismissed him. *Id.*

52. *Id.* at 877.

53. 42 U.S.C. § 1983 (1982). 42 U.S.C. § 1983 provides for a private right of action to persons deprived of rights secured by the Constitution and laws of the United States. *See* 42 U.S.C. § 1983 (1982). Specifically, 42 U.S.C. 1983 provides that every person who, under the color of state law, causes any person within the jurisdiction of the United States to be deprived of any right secured by the Constitution and laws, will be subject to an action at law, a suit in equity, or other proceeding for redress. *Id.* Congress originally enacted 42 U.S.C. § 1983 as part of the Ku Klux Klan Act of 1871. *See* Ku Klux Klan Act of 1871, 17 Stat. 13 (1871) (enacted to enforce provisions of fourteenth amendment and for other purposes) (current version at 42 U.S.C. § 1983); *see also* H.R. REP. No. 548, 96th Cong., 1st Sess. 1 (1979) (explaining that § 1983 created federal right of action against government officials who deprive citizens of constitutional rights), *reprinted in* 1979 U.S. CODE CONG. & AD NEWS 2609, 2609. In 1979, Congress amended § 1983 to allow a civil action against any person acting under the laws of the District of Columbia who deprives a person of any statutory or constitutional rights. *See* H.R. REP. No. 548, 96th Cong., 1st Sess. 1 (1979) (explaining purpose of amendment to Section 1983), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2609, 2609.

54. *Jurgensen,* 745 F.2d at 868. Jurgensen sought injunctive and declaratory relief, damages, and restoration of his position. *Id.* at 870.

55. *Id.* at 870.

56. *Id.* In *Jurgensen,* Jurgensen, in his complaint, characterized the removal and release of the inspection report as "whistleblowing." *Id.* at 870. Whistleblowers are federal government employees who disclose illegality or improper activity within government. *See* S. REP. No. 969, 95th Cong., 2d Sess. 8 (defining whistleblowers and discussing protection given to federal whistleblowers), *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 2723, 2730 [hereinafter cited as SENATE REPORT]. 5 U.S.C. § 2301(b)(9) is known as the whistleblower statute. 5 U.S.C. § 2301(b)(9) (1982); *see* Comment, *The First Amendment and the Law Enforcement Agency: Protecting the Employee Who Blows the Whistle,* 18 LAND AND WATER L. REV. 789, 791 (1982)

did not violate the first amendment and asserted that Jurgensen's acceptance of the demotion rendered the controversy moot.[57] The district court jury returned a verdict for Jurgensen,[58] finding that the release of the inspection report, in violation of contrary departmental regulations, had caused the disciplinary action against Jurgensen.[59]

On appeal, the Fourth Circuit considered whether the defendants had

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(discussing § 2301(b)(9)). Enacted as part of the Civil Service Reform Act, § 2301(b)(9) protects federal government employees who disclose information involving mismanagement, waste, abuse of authority, or a threat to public health or safety. 5 U.S.C. § 2301(b)(9) (1982); *see* Comment, *supra*, at 791 (discussing § 2301(b)(9)). Similarly, § 2302(b)(8) of title 5 of the United States Code prohibits the taking or failure to take a personnel action with regard to an employee or applicant for employment in reprisal for disclosing information involving mismanagement, waste, abuse of authority, or a threat to public health or safety. 5 U.S.C. § 2302(b)(8) (1982). Congress intended § 2301(b)(9) and § 2302(b)(8) to protect federal employees who disclose illegality, waste, and corruption within government. *See* SENATE REPORT, *supra*, at 2730 (explaining purpose of whistleblower statute). 5 U.S.C. § 2301(b)(9); 5 U.S.C. § 2302(b)(8). The purpose of § 2301(b)(9) and § 2302(b)(8), however, is not to protect employees who disclose classified information or information prohibited from disclosure by statute. *See* SENATE REPORT, *supra*, at 2730 (explaining purpose of whistleblower statute). Congress also did not intend for sections 2301(b)(9) and 2302(b)(8) to protect employees who claim to be whistleblowers from adverse action because of the employee's inadequate performance. *Id.* at 2730-31.

Congress vested the authority to enforce § 2301(b)(9) and § 2302(b)(8) in the Merit Systems Protection Board (MSPB) and Special Counsel. *See* 5 U.S.C. §§ 1201-1204 (1982) (discussing appointment and removal of MSPB and Special Counsel); 5 U.S.C. § 1205 (1982) (enumerating powers and functions of MSPB and Special Counsel); 5 U.S.C. § 1206 (1982) (explaining authority and responsibilities of Special Counsel). The President nominates the Special Counsel subject to approval by the Senate. *See* SENATE REPORT, *supra*, at 2728 (explaining functions of MSPB and Special Counsel). The Special Counsel receives and investigates allegations of violations of the merit system and brings violators before the MSPB. *Id.* at 2728-29. The President, subject to Senate confirmation, nominates the three member bipartisan MSPB. *Id.* at 2728. The MSPB adjudicates alleged violations of the merit system brought to the MSPB by the Special Counsel and determines the appropriate remedial action. *Id.* at 2728-29. Unlike the federal legislature, very few states have enacted statutes offering protection to whistleblowers at the state level who do not enjoy the protection of the federal whistleblower statute. *See* Comment, *supra* at 791. Michigan, Alaska, and California are among the few states that have enacted statutes protecting whistleblowers at the state level. *See* MICH. COMP. LAWS § 15.361-.369 (1981) (Whistleblowers' Protection Act). Section 15.362 of the Michigan Whistleblowers' Protection Act prohibits employers in both the public and private sectors from discharging or otherwise discriminating against an employee because the employee has reported an unlawful activity to a public body. *Id.* at § 15.263; *see* Comment, *supra*, at 791 (discussing Michigan's Whistleblowers' Protection Act). Similarly, § 14.20.095 of the Alaska Code prohibits the enactment of any bylaw or regulation restricting or modifying a school teacher's right to comment and criticize school personnel outside school hours. ALASKA STAT. § 14.20.905 (1982). Similarly, CAL. GOV'T CODE §§ 10540.-10547 address public employee reporting of improper government activities. CAL. GOV'T CODE §§ 10540-10546 (1980). Section 10543 of the California Code prohibits the use of a threat of reprisal to interfere with the right of the employee to disclose information. *Id.* at § 10543. Most states, including Virginia, however, have not enacted statutes to protect the whistleblower. *See Jurgensen*, 745 F.2d at 871 n.1.

57. *Id.* at 870-71.

58. *Id.* at 871.

59. *Id.* at 881.

violated Jurgensen's free speech rights and applied the test promulgated by the Supreme Court in *Pickering, Mount Healthy,* and *Connick.*[60] The Fourth Circuit first applied *Mount Healthy* to determine whether an exercise of Jurgensen's first amendment rights was the "but for" cause of Jurgensen's demotion.[61] Under *Mount Healthy,* Jurgensen's speech had to qualify for constitutional protection, and had to constitute the "but for" cause for Jurgensen's demotion.[62] The Fourth Circuit found that Jurgensen's removal and release of the inspection report in knowing violation[63] of valid departmental regulations constituted insubordination.[64] The Fourth Circuit, therefore, concluded that insubordination, and not an exercise of Jurgensen's first amendment rights, constituted the "but for" cause of Jurgensen's demotion.[65] The Fourth Circuit further held that insubordination justified Jurgensen's demotion regardless of whether the inspection report included matters of public interest.[66]

In concluding that insubordination justified Jurgensen's demotion even if the inspection report involved matters of public concern, the Fourth Circuit relied on the Supreme Court's decision in *Connick v. Myers.*[67] In *Connick,* the plaintiff, an Assistant District Attorney, had prepared and circulated among her co-workers a questionnaire concerning various matters within the District Attorney's office, including the office transfer policy and office morale.[68] The Supreme Court considered whether the plaintiff's subsequent discharge violated her first amendment free speech rights.[69] In determining whether the discharge infringed on the plaintiff's free speech rights, the Supreme Court noted that the employer in *Connick* considered the questionnaire an act of insubordination that disrupted working relationships within the office.[70]

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60. *Id.* at 871-89; *see supra* notes 11-19 and accompanying text (discussing test established by Supreme Court in *Pickering, Mount Healthy* and *Connick).*

61. *Jurgensen,* 745 F.2d at 880-88.

62. *Mount Healthy,* 429 U.S. at 287 (discussing test that public employee must satisfy in order to state valid cause of action for violation of first amendment rights); *see Jurgensen,* 745 F.2d at 880-81 (illustrating Fourth Circuit's application of *Mount Healthy); see also supra note* 15 (explaining "but for" requirement of Mount Healthy).

63. *Jurgensen,* 745 F.2d at 883. The *Jurgensen* court concluded that Jurgensen not only violated departmental regulations, but that Jurgensen knowingly violated the regulations. *Id.*; *see supra* note 40 (discussing departmental regulations). The Fourth Circuit reasoned that the Department presumed Jurgensen's familiarity with departmental regulations. *Jurgensen,* 745 F.2d at 883. In addition, in his own testimony, Jurgensen revealed that he knew that only certain department employees had the authority to release department documents. *Id.* Furthermore, the Fourth Circuit recognized that the *Washington Post* reporter had alerted Jurgensen that the Department viewed the inspection report as confidential. *Id.*

64. *Id.* at 883.

65. *Id.* at 887.

66. *Id.* at 882.

67. *Id.; see Connick,* 461 U.S. at 141, 151 (discussing insubordination); *see supra* note 17 (discussing Supreme Court's decision in *Connick).*

68. *Connick,* 461 U.S. at 141.

69. *Id.* at 146-54.

70. *Id.* at 141.

The *Connick* Court reasoned that since the employee's questionnaire involved matters of public concern in only a limited sense, the first amendment did not require the employer to tolerate conduct that the employer reasonably believed would cause discord within the office.[71] The Supreme Court concluded, therefore, that the plaintiff's discharge did not violate the first amendment.[72] The Fourth Circuit relied on *Connick* as a decision sustaining the employee's discharge on the basis of insubordination, even though the employee's questionnaire involved, in part, a matter of public concern.[73] In fact, the Fourth Circuit found that Jurgensen's conduct in removing and releasing the inspection report was similar to the employee's conduct of preparing and distributing the questionnaire in *Connick,* and concluded that the evidence of insubordination in *Jurgensen* was more compelling than the evidence of insubordination in *Connick.*[74] The Fourth Circuit considered *Connick* clear authority for justifying Jurgensen's demotion on the basis of insubordination.[75] The Fourth Circuit, therefore, concluded that because Jurgensen's removal and release of the inspection report

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71. *Id.* at 152. *Cf.* McKinley v. City of Eloy, 705 F.2d 1110, 1115 (9th Cir. 1983) (requiring actual, not imagined, disruption of close working relationships to justify employee's dismissal for speaking on matters involving public concern).

72. *Connick,* 461 U.S. at 147.

73. *See Jurgensen,* 745 F.2d at 882 n.21 (concluding that Supreme Court in *Connick* upheld discharge of employee on basis of insubordination); *Connick,* 461 U.S. at 141 (discussing distribution of questionnaire as insubordination).

74. *Id.* at 883-84. In concluding that *Jurgensen* presented a stronger case of insubordination than *Connick,* the Fourth Circuit pointed out that *Connick,* unlike *Jurgensen* did not involve an express regulation proscribing the employee's conduct. *Id.* The *Connick* Court did not find any showing that the employee in *Connick* knew that her conduct violated a departmental regulation. *Id.* Furthermore, the Fourth Circuit compared the fact that while the employee in *Connick* could claim the questionnaire as her property, the inspection report in *Jurgensen* constituted departmental property. *Id.* at 888.

75. *Id.* at 888; *see Connick* 461 U.S. at 141, 151 (discussing insubordination). In addition to *Connick,* the Fourth Circuit relied on the Merit Systems Protection Board's (MSPB) decision in *Special Counsel v. Department of State* to uphold Jurgensen's demotion as disciplinary action based on insubordination. *Id.* at 882; Special Counsel v. Department of State, 9 M.S.P.B. 14, 14-16 (1982); *see also supra* note 54 (discussing role and function of MSPB). In *Special Counsel,* the MSPB considered the statutory free speech rights of a federal employee charged with insubordination. *See Special Counsel,* 9 M.S.P.B. at 14-16. The employee in *Special Counsel* had removed government files from the New York Passport Office (NYPA) in an attempt to disclose corruption within the NYPA. *Id.* at 15. The NYPA suspended and transferred the employee based on charges of removal of government files and insubordination. *Id.* The employee sought unsuccessfully protection under 5 U.S.C. § 2302(b)(8). *Id.* at 15-16; see 5 U.S.C. § 2302(b)(8) (1982) (federal statute protecting whistleblowers); *see also supra* note 56 (discussing 5 U.S.C. § 2302(b)(8)). Applying *Mount Healthy* the MSPB concluded that the employee's attempt to disclose corruption through the removal of files constituted whistleblowing which warranted protection under § 2302(b)(8). *Id.* at 16. The MSPB concluded, however, that although the employee's whistleblowing may have influenced the NYPA's decision to suspend and transfer the employee, insubordination was the motivating factor in the employee's suspension and transfer. *Id.* at 16. The MSPB, therefore, upheld the suspension and transfer on the basis of insubordination. *Id.* Thus, the Fourth Circuit found support for Jurgensen's demotion in *Jurgensen* by reasoning that Jurgensen's act of insubordination equated exactly with the employee's act of insubordination in *Special Counsel. Jurgensen,* 745 F.2d at 882.

constituted insubordination and that because insubordination justified Jurgensen's demotion, the demotion did not violate Jurgensen's first amendment right to free speech.[76]

In upholding Jurgensen's demotion on the basis of insubordination, the Fourth Circuit emphasized the validity of the Department regulations that Jurgensen had violated.[77] The *Jurgensen* court stated that General Order 401 which Jurgensen violated when he released the inspection report without authorization provided a procedure for the orderly processing of document requests.[78] Recognizing a law enforcement agency's special need for an established procedure governing the release and disclosure of reports and documents, the Fourth Circuit held that General Order 401 was a valid regulation.[79] In upholding the validity of General Order 401 the Fourth Circuit emphasized that the regulation, as applied in *Jurgensen,* did not violate Jurgensen's free speech rights because the Department did not attempt, through application of the regulation, to deny Jurgensen the right to speak freely on his views concerning conditions within the EOC.[80] The Fourth Circuit further reasoned that to disregard Jurgensen's knowing violation of departmental regulations would encourage other employees to violate regulations and, consequently, would disrupt discipline within the EOC.[81] The Fourth Circuit acknowledged that the *Jurgensen* holding would establish important precedent on the issue of insubordination, and expressed concern that a holding providing first amendment protection to Jurgensen's disregard of departmental regulations would encourage disgruntled public employees to purloin and publish any type of public records under the claim that the documents involved matters of public interest.[82] The Fourth Circuit concluded that because Jurgensen's demotion was the result of a knowing violation of a valid regulation, a violation of Jurgensen's free speech right was not the "but for" cause of Jurgensen's demotion.[83] The Fourth Circuit, therefore, held that Jurgensen's failure to satisfy the "but for" standard of *Mount Healthy* required the district court to dismiss Jurgensen's case.[84]

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76. *Jurgensen,* 745 F.2d at 887.

77. *Id.* at 881. The *Jurgensen* court emphasized that the validity of the regulation, not the contents of the inspection report, posed the first issue for the Fourth Circuit to resolve. *Id.*

78. *Id.* at 887 n.30; *see supra* note 40 (discussing General Order No. 401).

79. *Id.* at 884.

80. *Id.* at 884 n.27.

81. *Id.*

82. *Id.*

83. *Id.* at 887.

84. *Id.* at 880-81; *see Mount Healthy,* 429 U.S. at 287 (discussing "but for" requirement); *see also supra* note 15 (same). The *Jurgensen* court noted that the district court had submitted resolution of the *Pickering* balancing test to the jury. *Jurgensen,* 745 F.2d at 880-81, 881 n.20; *see Pickering* 391 U.S. at 568 (discussing balancing test). The Fourth Circuit stated, however, that under *Connick* the question of whether speech qualifies for first amendment protection is a question of law, not fact. *Jurgensen,* 745 F.2d at 880-81, 881 n.20; *see Connick,* 461 U.S. at 148 n.7 (protected speech status is a question of law). Since the Fourth Circuit felt that the court could decide *Jurgensen* under the "but for" standard of *Mount Healthy,* the Fourth

Although the Fourth Circuit found that the *Mount Healthy* "but for" standard was dispositive of Jurgensen's first amendment claim, the Fourth Circuit analyzed the facts of Jurgensen's demotion under the *Pickering* balancing test to determine whether Jurgensen's conduct qualified for first amendment protection.[85] Assuming that the publication of the inspection report constituted an exercise of free speech rights, the *Jurgensen* court reasoned that because the report dealt with internal office policy and did not reveal any potential wrongdoing, the report involved matters of only limited public concern.[86] The Fourth Circuit, therefore, concluded that because the Department's interest in preventing disruption within the Department outweighed Jurgensen's free speech rights, Jurgensen's conduct did not warrant first amendment protection.[87]

In contrast to the majority's opinion, the dissent in *Jurgensen* concluded that the inspection report addressed a matter of public concern.[88] The dissent reasoned that Jurgensen's interest, as a citizen, in releasing the report to the press outweighed the interest of the county, as an employer, in promoting the efficiency of the EOC.[89] With regard to the general order restricting the release of information to the press, the dissent reasoned that the county incorrectly equated whistleblowing with insubordination.[90] The dissent, therefore, disagreed with the majority's holding that the violation of the departmental regulation established conclusively that Jurgensen's conduct did not come under the protection of the first amendment.[91]

The Fourth Circuit in *Jurgensen* properly concluded that Jurgensen's failure to satisfy the "but for" standard of *Mount Healthy* required the district court to dismiss Jurgensen's claim that his demotion by the Fairfax County Police Department officials violated his first amendment right to free speech.[92] The Fourth Circuit correctly found that Jurgensen's removal

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Circuit declined to remand the case to the district court to apply the *Pickering* balancing test. *Jurgensen* at 881, 881 n.20.

85. *Id.* at 888-89; *see supra* note 9 (discussing *Pickering* balancing test).

86. *Jurgensen,* 745 F.2d at 88.

87. *Id.* at 888-89.

88. *Id.* at 893 (Butzner, J., dissenting). The dissent in *Jurgensen* reasoned that in addition to corruption, which is clearly a matter of public concern, deficiencies in personnel, training, equipment, and adequate financing which were addressed in the inspection report, also involve matters of public concern. *Id.* at 895.

89. *Id.* at 894.

90. *Id.*

91. *Id.* The dissent in *Jurgensen* reasoned that while Jurgensen's violation of the regulation could not establish decisively that the first amendment did not protect Jurgensen's conduct, Jurgensen's conduct weighs in as a factor in the court's application of the *Pickering* balancing test. *Id.* Furthermore, the dissent in *Jurgensen* argued that Jurgensen's disclosure of the inspection report did not disrupt the efficient operation of the EOC. *Id.*

92. *See id.* at 887. In *Jurgensen,* the Fourth Circuit correctly interpreted *Mount Healthy* to establish a two-part test, both parts of which a plaintiff-employee must satisfy in order to establish a valid cause of action under the first amendment. *Jurgensen,* 745 F.2d at 887; *see Mount Healthy,* 429 U.S. at 287 (requiring employee to show that speech or conduct qualified for first amendment protection, and that constitutionally protected speech or conduct was

and release of the inspection report constituted insubordination,[93] and that insubordination, not an exercise of Jurgensen's first amendment free speech rights, constituted the "but for" cause of Jurgensen's demotion.[94] The Supreme Court's decision in *Connick* supports the Fourth Circuit's conclusion that the Department's interest in preventing disruption within the Department permitted the demotion of Jurgensen for insubordination.[95] Additionally, decisions from the Merit Systems Protection Board (MSPB)[96] support the *Jurgensen* court's holding that a finding of insubordination justified Jurgensen's demotion regardless of whether the inspection report involved matters of public concern.[97] The United States Circuit Courts of Appeals disagree, however, whether a finding of insubordination automatically excludes a public employee from first amendment protection.[98] Some

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motivating factor in employer's decision not to rehire employee); *see also Givhan,* 439 U.S. at 417 (refining *Mount Healthy* motivating factor requirement to a "but for" standard); *supra* note 15 (discussing *Mount Healthy* and *Givhan*).

93. *See Jurgensen,* 745 F.2d at 883 (recognizing that Jurgensen's conduct constituted insubordination). Insubordination is the refusal by an employee to obey the lawful instruction of his employer. BLACK'S LAW DICTIONARY 120 (5th ed. 1979); *see Jurgensen,* 745 F.2d at 883. In *Jurgensen,* the Fourth Circuit classifies accurately Jurgensen's conduct of removing and releasing the inspection report as insubordination by recognizing Jurgensen's conduct as a knowing violation of a valid regulation imposed on Jurgensen as a condition of his employment. *Id; see supra* notes 40, 63 (discussing Jurgensen's violation of the departmental regulations).

94. *See Jurgensen,* 745 F.2d at 881 (concluding that insubordination constituted the "but for" cause of Jurgensen's demotion). In *Jurgensen,* the Fourth Circuit recognized that all parties in the district court, including Jurgensen, conceded that Jurgensen's removal and release of the inspection report caused his demotion. *Id.* The district judge in *Jurgensen* gave the plaintiff's counsel an opportunity to introduce other factors, other than the removal and release of the inspection report to explain why the Department took disciplinary action against Jurgensen. *Id.* The failure of the plaintiff's counsel to recall the witness or to argue any other reason for the demotion supports the Fourth Circuit's conclusion that the unauthorized removal and release of the inspection report, not an exercise of Jurgensen's first amendment rights, constituted the "but for" cause of Jurgensen's demotion). *Id.*

95. *Jurgensen,* 745 F.2d at 882; *see Connick,* 461 U.S. at 152. In *Connick,* the Supreme Court held that a public employer does not have to wait until an employee's speech or conduct actually disrupts the office before dismissing the employee. *Connick,* 461 U.S. at 152. Thus, the Department's fear that tolerance of Jurgensen's violation of regulations would create a real likelihood that all department employees' respect for regulations would diminish significantly, justified the Department's disciplinary action against Jurgensen on the basis of insubordination. *See Jurgensen,* 745 F.2d at 885 (Fourth Circuit's application of *Connick* justifying Jurgensen's demotion); *see also supra* note 17 and text accompanying notes 67-72 (discussing *Connick).*

96. *See supra* note 56 (discussing MSPB).

97. *Jurgensen,* 745 F.2d at 882; *see* Special Counsel v. Department of State, 9 M.S.P.B. at 16 (dismissal of public employee upheld since employee's act of insubordination formed basis for dismissal); *supra* note 75 (discussing *Special Counsel)*

98. *See* Berry v. Bailey, 726 F.2d 670, 674 (11th Cir. 1984) (employee fired for insubordination warrants no first amendment protection), *cert. denied,* 105 S. Ct. 2326 (1985); *infra* notes 101-08 and accompanying text (discussing *Berry). But see* Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1259 (7th Cir. 1985) (insubordination is only one factor to consider in determining whether employee warrants first amendment protection); *see infra* notes 113-22 and accompanying text (discussing *Patkus).*

circuits are unwilling to permit a finding of insubordination to automatically remove an employee's speech or conduct from first amendment protection.[99]

Consistent with the Fourth Circuit's holding in *Jurgensen,* the United States Court of Appeals for the Eleventh Circuit concluded in *Berry v. Bailey*[100] that a finding of insubordination automatically excludes a public employee's speech or conduct from first amendment protection, even if the speech or conduct involves a matter of public concern.[101] In *Berry,* the Eleventh Circuit considered whether a sheriff had violated the first amendment rights of a deputy sheriff by terminating the deputy's employment after the deputy refused to obey orders from the sheriff.[102] The deputy brought a civil rights action against the sheriff claiming that the deputy's discharge violated his first amendment rights.[103] The Eleventh Circuit acknowledged that the deputy's motivation in refusing to obey the sheriff's orders stemmed from his desire to expose corruption within the sheriff's department.[104] The Eleventh Circuit reasoned, however, that although corruption within the sheriff's office is a matter of public concern, if the sheriff fired the deputy for insubordination, the deputy warranted no first amendment protection.[105] The Eleventh Circuit concluded that the deputy's refusal to obey the sheriff's orders constituted insubordination.[106] Because the deputy's discharge resulted from insubordination and not from an exercise of free speech rights, the *Berry* court held that the deputy's discharge did not violate the deputy's first

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99. *See* Berry v. Bailey, 726 F.2d 670, 674 (11th Cir. 1984) (employee fired for insubordination warrants no first amendment protection); *infra* notes 101-08 (discussing *Berry).*

100. 726 F.2d 670 (11th Cir. 1984).

101. *See Berry,* 726 F.2d at 674 (deputy Sheriff's dismissal upheld because based on insubordination).

102. *Id.* at 673-76. In *Berry,* Berry performed well as a deputy, but Berry's involvement in FBI undercover operations and refusal to favor the sheriff's political supporters led to Berry's discharge. *Id.* at 671-72. The event which ultimately resulted in Berry's discharge involved the arrest of members of a wedding party at a restaurant following a wedding rehearsal dinner. *Id.* at 672. When Berry and other deputies arrived at the restaurant, a fight broke out and the deputies made several arrests. *Id.* Among those arrested was the daughter of Judge Smith. *Id.* Judge Smith was a political supporter of the sheriff. *Id.* After a visit from Judge Smith regarding his daughter's arrest, the sheriff instructed Berry to drop the charges against Judge Smith's daughter and the other women arrested to avoid a showing of favoritism toward Judge Smith's daughter. *Id.* After Berry refused to heed the sheriff's order to drop the charges against the political supporter's daughter and others, the sheriff fired Berry. *Id.* The sheriff explained that his political supporters had informed him that the sheriff would lose the next election if Berry remained on the payroll. *Id.*

103. *Id.* at 673. In *Berry,* Berry claimed that the speech and action between Berry and the sheriff regarding the events surrounding the arrest of Judge Smith's daughter constituted constitutionally protected speech, and that the sheriff fired Berry for exercising his first amendment speech rights. *Id.* at 674. The Eleventh Circuit, however, concluded that under *Pickering,* Berry failed to demonstrate that his speech qualified for first amendment protection. *Id.* at 674-75.

104. *Id.* at 676.

105. *Id.* at 674.

106. *Id.* at 676.

amendment rights.[107] Thus, the Eleventh Circuit's conclusion in *Berry* supports the Fourth Circuit's holding in *Jurgensen* that a finding of insubordination automatically excludes a public employee's speech or conduct from first amendment protection, even if the speech or conduct constitutes a matter of public concern.[108]

Unlike the Fourth and Eleventh Circuits, the United States Court of Appeals for the Seventh Circuit does not allow a finding of insubordination to automatically exclude an employee's speech or conduct from first amendment protection.[109] Rather than focusing on the employee's act of insubordination, the Seventh Circuit considers the disruption that results from the employee's act of insubordination in determining whether the employee's speech or conduct involving a matter of public concern warrants first amendment protection.[110] The disruptive effect of the employee's speech or conduct becomes a factor in the *Pickering* balancing equation.[111] For example, in *Patkus v. Sangamon-Cass Consortium,*[112] the Seventh Circuit considered whether the disruptive impact of a public employee's speech excluded the employee's speech from first amendment protection even though the speech involved matters of significant public concern.[113] In *Patkus,* Patkus, was the administrator of the Sangamon-Cass Consortium, an agency responsible for the administration of the Comprehensive Employment and Training Act (CETA) program for two counties in Illinois.[114] Concerned that an investigation within the agency was not proceeding in compliance with federal regulations,[115] Patkus and several other staff members sent a telegram to the United States Department of Labor (DOL) listing specific charges against

107. *Id.* at 674. The *Berry* court emphasized that although the court did not condone the manner in which the sheriff operated the sheriff's department, or the sheriff's firing of Berry, Berry's refusal to obey the sheriff's order did not fall within the protection of by the first amendment. *Id.* at 675. The Eleventh Circuit in *Berry* reasoned that courts cannot encourage employees to disregard orders every time the employee feels the employer is not managing the office properly. *Id.* at 676.

108. *See supra* text accompanying notes 105-06 (insubordination justified deputy's dismissal notwithstanding fact that deputy's conduct involved matter of public concern).

109. *See* Patkus v. Sangaman-Cass Consortium, 769 F.2d 1251, 1259-60 (7th Cir. 1985) (insubordination is only one factor in determining first amendment rights of public employee); *infra* notes 113-21 (discussing Patkus).

110. *See Patkus,* 769 F.2d at 1258-59 (7th Cir. 1985) (disruption caused by insubordination becomes factor determining whether employee warrants first amendment protection); *see infra* text accompanying notes 111-19 (illustrating how courts balance disruption caused by insubordination when employee speaks on matter of public concern). *See Pickering,* 391 U.S. at 568 (explaining balancing test).

111. *See Pickering,* 391 U.S. at 568 (explaining balancing test); *see also infra* text accompanying notes 112-19 (illustrating how disruption caused by insubordination becomes factor in *Pickering* balancing equation).

112. 769 F.2d 1251 (7th Cir. 1985).

113. *Id.* at 1257.

114. *Id.* at 1254. In *Patkus,* Patkus' duties as administrator of the Consortium included managing and supervising the regular business of the Consortium and maintaining contact with other state and federal CETA offices. *Id.*

115. *Id.* In *Patkus* the investigation involved a complaint filed with the United States Department of Labor (DOL) filed against Patkus by a Consortium employee. *Id.* The DOL

the employee conducting the investigation.[116] Classifying Patkus' conduct as insubordination, the state discharged Patkus.[117] Patkus claimed that the discharge violated her free speech rights because the telegram came under the protection of the first amendment.[118] The Seventh Circuit acknowledged that Patkus' conduct involved an important matter of public concern and applied *Pickering* to the employee's claim by balancing the disruptive effect of the employee's insubordinate conduct with the employee's first amendment right to comment on a matter of public concern.[119] The Seventh Circuit reasoned, however, that even though Patkus' conduct involved an important matter of public concern, under the *Pickering* balancing test, Patkus' conduct was so disruptive of the county agency that the county's interests in avoiding internal disruption outweighed Patkus' interest in speaking freely.[120] Thus, *Patkus* demonstrates that the balancing approach represents the proper application of the test established by the Supreme Court's decisions in *Pickering, Mount Healthy,* and *Connick* to determine whether a public employer has violated the first amendment rights of a public employee.[121] Additionally, *Patkus* illustrates that in the application of the *Pickering* balancing test, disruption resulting from insubordination likely will outweigh the employee's interest in speaking freely.[122]

Although when weighed as a factor in the *Pickering* equation, the disruptive impact of an employee's speech or conduct involving matters of public concern frequently excludes the speech or conduct from first amendment protection, the Seventh Circuit's decision in *O'Brien v. Town of Caledonia*[123] illustrates that the government's interest in preventing disruption of internal discipline cannot outweigh in every instance a public employee's first amendment right to speak freely.[124] In *O'Brien,* the plaintiff, a police

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regarded the complaint against Patkus as a personnel matter and recommended that the Consortium designate a hearing officer to investigate the employee's complaint against Patkus. *Id.* Upon the DOL's request, the state agency appointed a hearing officer to investigate the complaint according to federal regulations governing internal agency investigations. *Id.* at 1254-55.

116. *Id.* In *Patkus*, the telegram to the DOL expressed the Consortium staff's concerns about the political involvement of the hearing officer investigating the complaint against Patkus. *Id.*

117. *Id.* at 1255-56.

118. *Id.* at 1256.

119. *Id.* at 1257-59.

120. *Id.* at 1259. The *Patkus* court emphasized that even though Patkus spoke about a matter of public concern, Patkus' conduct in sending the telegram constituted highly disruptive, conflict-creating behavior. *Id.*

121. *See id.* at 1258-59 (illustrating Seventh Circuit's application of *Pickering* balancing test); *Pickering*, 361 U.S. at 568; *Mount Healthy*, 429 U.S. at 287; *Connick*, 461 U.S. at 147.

122. *See Patkus*, 769 F.2d at 1258-59 (under *Pickering*, disruptive impact of Patkus' conduct outweighed Patkus' free speech rights); *see also* Derrickson v. Board of Educ. of City of St. Louis, 738 F.2d 351, 353 (8th Cir. 1984) (disruptive manner of employee's criticism outweighed employee's right to criticize even assuming criticism involved matter of public concern).

123. 748 F.2d 403 (7th Cir. 1984)

124. *See id.* at 407 (government cannot insulate itself from public scrutiny through

officer, claimed that the Caledonia Police Department unlawfully had dismissed him in retaliation for discussing graft and corruption within the police department with his attorney, the local district attorney, the county circuit court judge, the FBI and the media.[125] The Caledonia Police Department defended the disciplinary actions taken against O'Brien, arguing that O'Brien had violated section X-4 of the caledonia Police Department manual governing confidentiality of information.[126] O'Brien argued that the Department's application of section X-4 violated his first amendment right to discuss graft and corruption within the Department and requested a preliminary injunction against the implementation of disciplinary proceedings against him for violating section X-4.[127] Reasoning that O'Brien had a substantial likelihood of success on the merits of his claim regarding the application of section X-4, the Seventh Circuit ordered entry of the preliminary injunction.[128] Applying the *Pickering* balancing test, the *O'Brien* court concluded that O'Brien's interest in exposing graft and corruption outweighed the Department's interest in maintaining discipline through the enforcement of section X-4.[129] The Seventh Circuit, therefore, concluded that the Department's application of the departmental regulation to O'Brien infringed upon O'Brien's first amendment free speech right.[130] Rather than viewing O'Brien's violation of departmental regulations as insubordination that automatically excluded O'Brien's conduct from consideration under the *Pickering* balancing test, as the Fourth Circuit did in *Jurgensen,* the Seventh Circuit in *O'Brien* considered O'Brien's violation of the departmental regulation as well as the Department's application of the departmental regulation to O'Brien as factors to weigh in the *Pickering* equation.[131] Thus, notwithstanding the fact that

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regulations declaring all official business confidential); *infra* notes 125-36 and accompanying text (discussing *O'Brien).*

125. *Id.* at 405. In *O'Brien,* O'Brien sought a preliminary injunction against the continuation of disciplinary proceedings against him for violating section X-4 of the Calendonia Police Department Manual. *Id.* at 403.

126. *Id.* at 405. In *O'Brien,* Section X-4 of the Calendonia Police Department Manual required department employees to treat the official business of the department as confidential. *Id.* The major focus of the Department's internal investigation of O'Brien's conduct was whether O'Brien's communications with his attorney, the local district attorney, the county circuit judge, the FBI, and the media had violated section X-4. *Id.* A prior investigation conducted by the FBI had revealed no criminal conduct. *Id.* In addition to section X-4, the Seventh Circuit in *O'Brien* found sections V-A-1 and 5 of the Calendonia Police Department Manual unconstitutional because sections V-A-1 and 5 prohibited all criticism of the Department regardless of the context or public interest involved. *Id.* at 406.

127. *Id.* at 404. The Department retaliated against O'Brien through incommunicado interrogations, disciplinary proceedings, and other forms of harassment.

128. *Id.* at 409.

129. *Id.* at 407. The *O'Brien* court held that O'Brien's perception of graft and corruption within the Department deserved vigilant first amendment protection. *Id; see Pickering,* 391 U.S. at 568 (explaining balancing test). Additionally, the Seventh Circuit in *O'Brien* asserted that the public has a substantial interest in serious governmental misconduct. *O'Brien,* 748 F.2d at 407.

130. *Id.* at 407.

131. *Id; Jurgensen,* 745 F.2d at 887; *see Pickering,* 391 U.S. at 568 (describing balancing test).

O'Brien had violated a departmental regulation, through the application of the *Pickering* balancing test, the Seventh Circuit determined that O'Brien's speech involving a matter of public concern warranted first amendment protection.[132]

The result of the Seventh Circuit's balancing of interests in *O'Brien* illustrates that the application of the *Pickering* balancing test protects more effectively the first amendment rights of a public employee who comments on a matter of public concern, than does the Fourth Circuit's approach of automatically excluding speech or conduct from consideration under *Pickering* upon a finding of insubordination, even if the speech or conduct involves a matter of public concern.[133] For example, under the *Jurgensen* analysis, a claim by the Caledonia Police Department in *O'Brien* that O'Brien's violation of a valid departmental regulation constituted insubordination automatically would exclude O'Brien's speech or conduct from first amendment protection, even though the departmental regulation infringed upon O'Brien's first amendment free speech rights.[134] As *O'Brien* illustrates, however, insubordination may not always constitute the "but for" cause of disciplinary action against a public employee.[135] Rather, a public employer may attempt to use the label of insubordination as a pretext for suppression of a public employee's right to comment on matters of public concern.[136] Because insubordination may not always constitute the "but for" cause of an employee's demotion or discharge in situations involving speech or conduct of public concern, courts should apply the *Pickering* balancing test in order to protect adequately the public employee's first amendment rights.[137] Through balancing, courts can protect the public employee in situations in which insubordination does not constitute the "but for" cause of the employee's demotion or discharge by allowing the public employee's first amendment right to comment on matters of public concern to outweigh the effect of the employee's act of insubordination.[138] Thus, when a public employee's speech or conduct involves a matter of public concern, the balancing of interests under *Pickering* is a better approach to protecting the

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132. *See O'Brien*, 748 F.2d at 407 (Seventh Circuit's application of Pickering balancing test); *Pickering*, 391 U.S. at 568 (explaining balancing test).

133. *See O'Brien*, 748 F.2d at 407 (Seventh Circuit's application of *Pickering* balancing test); *Pickering*, 391 U.S. at 568 (explaining balancing test); *see also infra* notes 134-39 and accompanying text (explaining that balancing approach extends more effective protection to a public employee whose speech or conduct involves public concern).

134. *See Jurgensen*, 745 F.2d at 882 (insubordination justified demotion even if inspection report involved matter of public concern); *see also O'Brien* 748 F.2d at 407 (Seventh Circuit's discussion of disruption caused by O'Brien's violation of regulation).

135. *See O'Brien*, 748 F.2d at 409 (application of regulation to O'Brien infringed on O'Brien's free speech rights).

136. *Id.*

137. *See Pickering*, 391 U.S. at 568 (explaining balancing test); *see also infra* text accompanying note 136 (illustrating how court could infringe on first amendment rights simply by labeling employee's conduct as insubordination).

138. *See Pickering*, 391 U.S. at 568 (explaining balancing test).

free speech rights of public employees than automatically excluding a free speech claim on the basis of insubordination.[139]

The need for the balancing approach as applied by the Seventh Circuit in *O'Brien* does not denigrate, however, the Fourth Circuit's decision in *Jurgensen.*[140] Unlike O'Brien's speech in *O'Brien,* the inspection report in *Jurgensen* did not involve a matter of substantial public concern.[141] Additionally, unlike the Caledonia Police Department in *O'Brien,* the Fairfax County Police Department in *Jurgensen* did not suppress Jurgensen's first amendment rights through the application of the departmental regulation governing the release of departmental documents.[142] Since *Jurgensen* did not involve suppression of Jurgensen's free speech rights,[143] the Fourth Circuit properly concluded that Jurgensen's act of insubordination constituted the "but for" cause of Jurgensen's demotion, and precluded the need for application of the *Pickering* balancing test.[144]

Although the Fourth Circuit found that the *Mount Healthy* "but for" standard was dispositive of Jurgensen's claim, the Fourth Circuit, relying on *Connick,* properly concluded that the inspection report constituted, at most,

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139. *Id.*

140. *See Jurgensen,* 745 F.2d at 888 (*Jurgensen* does not involve exercise of free speech rights); *id.* at 887 n.30 (departmental regulation did not violate Jurgensen's free speech rights). In *Jurgensen,* assuming that *Jurgensen* had involved the exercise of Jurgensen's first amendment rights and Jurgensen's conduct had involved a matter of substantial public concern, the application of the Seventh Circuit's balancing approach to the facts of *Jurgensen* yields the same result as the Fourth Circuit's "but for" analysis. *See* O'Brien, 748 F.2d at 407. Specifically, although the Fourth Circuit in *Juregensen* spoke in terms of insubordination, the *Jurgensen* court focused primarily on the disruptive impact of Jurgensen's insubordination on discipline within the EOC. *See Jurgensen,* 745 F.2d at 884 n.27 (discussing potential for disruption caused by violations of departmental regulations). Consequently, under *Pickering* the Fourth Circuit could protect the Department's interest in discipline by allowing the disruption of discipline caused by Jurgensen's insubordination to outweigh any first amendment rights arising from Jurgensen's release of the inspection report. *See supra* note 122 and accompanying text (illustrating how disruption caused by employees speech or conduct outweighs employees right to engage in speech or conduct). In addition to the Department's concern with disruption, the Department's fear that tolerance of Jurgensen's violation of the regulations would create a real likelihood that all department employees' respect for regulations would diminish significantly, justified the Department's disciplinary action against Jurgensen on the basis of insubordination. *Jurgensen,* 745 F.2d at 888. Moreover, the special character of a police department, in terms of the government's interest in promoting public confidence in the efficiency of services provided by law enforcement agencies, also supported Jurgensen's demotion. *See Jurgensen,* 745 F.2d at 880 (emphasizing particular need of law enforcement agencies to maintain discipline and uniformity); *supra* note 7 (same). The Fourth Circuit concluded correctly that the Department's need to maintain discipline and efficiency required a decision from the court to serve as a precedent to deter acts of insubordination by other department employees. *See Jurgensen,* 745 F.2d at 886 n.29 (emphasizing need for precedent).

141. *See Jurgensen,* 745 F.2d at 888 (inspection report did not involve substantial public concern). *But see O'Brien,* 748 F.2d at 408 (public's interest in governmental misconduct is very great).

142. *See Jurgensen,* 745 F.2d at 887 n.30 (departmental regulation did not violate Jurgensen's free speech rights).

143. *Id.* at 888.

144. *Id.* at 887; *see Pickering,* 391 U.S. at 568 (explaining balancing test).

a matter of limited public concern.[145] Since the inspection report dealt with internal office policy and not with internal misconduct, the inspection report did not involve issues of substantial public interest.[146] Furthermore, the *Jurgensen* court noted that the inspection report did not constitute a matter of substantial public concern because the inspection report revealed no illegal action, no abuse of authority, no corruption or waste and no discrimination against employees.[147] Thus, the Fourth Circuit implied that if the inspection report had revealed governmental illegality and corruption, the inspection report would have constituted a matter of substantial public concern and would, presumably, warrant greater first amendment protection.[148] Other circuits agree with the Fourth Circuit in *Jurgensen* that illegality, corruption, and wrongdoing within a government agency are matters of substantial public concern.[149]

Because misconduct within a government agency is a matter of substantial public interest, some circuits unlike the Fourth Circuit, discuss explicitly the issue of the public employee who discloses governmental corruption and attempt to provide greater first amendment protection to a public employee who discloses such governmental corruption.[150] A public employee who reports corruption, illegality, or wrongdoing within the government agency for which he works is a "whistleblower,"[151] and as a whistleblower, absent statutory protection, the employee must depend on the first amendment for protection against reprisal by his employer.[152] Consequently, in *Brockell v. Norton,*[153] the United States Court of Appeals for the Eighth Circuit took the position that a public employee's first amendment interest is greater when a public employee acts as a whistleblower exposing governmental corruption.[154] In *Brockell,* the Eighth Circuit considered whether the city officials of Marvell, Arkansas violated a Marvell Police Department employ-

145. *Id.* at 888. The *Jurgensen* court correctly noted that under *Connick,* the inspection report dealt mainly with internal office policy, and therefore did not constitute a matter of public concern sufficient to warrant first amendment protection. *Id.; see Connick,* 461 U.S. at 138, 146-55. The *Connick* Court characterized the employee's questionnaire in *Connick* as a grievance from an employee concerning internal office policy that warranted only limited first amendment protection. *Id.* at 154; *see supra* note 17 (discussing Connick).

146. *Jurgensen,* 745 F.2d at 888.

147. *See Jurgensen,* 745 F.2d at 871 (report was simply internal administrative review); *id.* at 872 (noting complete absence of critical comment in report); *see also supra* text accompanying notes 27-29 (describing contents of internal inspection report).

148. *Jurgensen,* 745 F.2d at 871.

149. *See* Berry v. Bailey, 726 F.2d 670, 676 (11th Cir. 1984) (corruption of sheriff's office is matter of public concern); Rookard v. Health and Hosps., Corp., 710 F.2d 41, 46 (2d Cir. 1983) (court protects reports of corruption and waste).

150. *See* Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984) (public employees first amendment interest is greater when public employee acts as whistleblower); *see infra* notes 154-59 and accompanying text (discussing *Brockell).*

151. *See supra* note 56 (discussing whistleblowers).

152. *See* Comment, *supra* note 56 at 791 (discussing protection for whistleblowers).

153. 732 F.2d 664 (8th Cir. 1984).

154. *Id.* at 668.

ee's free speech rights by dismissing the employee because he had reported misconduct of a Marvell police officer to a person outside of the Department's chain of command.[155] Emphasizing the public importance of the employee's report of governmental misconduct, the *Brockell* court characterized the employee's conduct as whistleblowing.[156] The Eighth Circuit then applied *Pickering* by balancing the internal disruption caused by the employee's disclosure of corruption with the employee's right to disclose the corruption.[157] Recognizing that a finding of disruption cannot control the *Pickering* balancing test when that disruption resulted from the disclosure of corruption, the *Brockell* court concluded that the employee's conduct warranted first amendment protection.[158] As *Brockell* illustrates, the Eighth Circuit attempts to extend greater protection to the public employee who acts as a whistleblower because of the significant public interest in governmental corruption.[159]

In addition to the agreement among the circuits that governmental corruption is a matter of significant public concern,[160] most circuits agree that speech or conduct involving matters of only personal interest to the individual employee do not constitute a matter of public concern.[161] For

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155. *Id.* at 665-69. In *Brockell,* Brockell reported his belief that a fellow officer possessed a copy of a certification test given by the Arkansas State Law Enforcement Standards Commission. *Id.* at 665.

156. *Id.* at 668.

157. *Id.* at 667-68.

158. *Id.* at 668.

159. *Id.; see also* Hughes v. Whitmer, 714 F.2d 1407, 1423 (8th Cir. 1983) (recognizing that disruption cannot control *Pickering* balancing test when such disruption results from public employee acting as whistleblower exposing corruption), *cert. denied,* 465 U.S. 1023 (1984). In addition to the Eighth Circuit, the United States Court of Appeals for the District of Columbia Circuit in *Murray v. Gardner* attempted to provide greater protection for the whistleblower by distinguishing between speech that merely expresses a public employee's dissatisfaction with internal management policy and speech that allows society to form an opinion regarding the internal operations of governmental agencies. Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), *cert. denied,* 105 S.Ct. 1748 (1985). In *Murray,* the D.C. Circuit considered the first amendment rights of an FBI agent who claimed that the FBI violated his free speech rights by disciplining him for criticizing the FBI's employee layoff procedure. *Id.* at 437-39. The D.C. Circuit reasoned that the agent's criticism of the agency's layoff procedure amounted to no more than the typical employee complaint that management acted incompetently. *Id.* at 438. The D.C. Circuit, therefore, held that the agent's remarks did not constitute a matter of public concern. *Id.* The D.C. Circuit concluded that although the role of the whistleblower warrants protection, the discontented employee's expressions of personal dissatisfaction do not. *Id.*

160. *See supra* note 149 (illustrating that circuits agree that corruption is matter of public concern).

161. *See e.g.,* Day v. South Park Indep. School Dist., 768 F.2d 696, 700-01 (5th Cir. 1985) (teachers complaint about principal's evaluation of her did not warrant first amendment protection because complaint concerned private matter); Alinovi v. Worcester School Comm., 766 F.2d 660, 671 (1st Cir. 1985) (resolution of personnel problem between teacher and her employer is not matter of public concern); Renfroe v. Kirkpatrick, 722 F.2d 714, 715 (11th Cir. 1984) (teacher's grievance concerning school board's decision not to rehire her did not constitute matter of public concern), *cert. denied,* 105 S.Ct. 98 (1984); *see infra* notes 163-68 and accompanying text (discussing *Day* and *Alinovi).*

example, in *Day v. South Park Independent School District,*[162] the United States Court of Appeals for the Fifth Circuit considered whether a school district violated an untenured school teacher's first amendment rights by not renewing the teacher's contract after she challenged the principal's unfavorable evaluation of her teaching performance.[163] The Fifth Circuit reasoned that the teacher's complaint regarding the school district's decision not to renew her contract constituted a purely private matter and did not involve a matter of public concern.[164] The *Day* court, therefore, concluded that the teacher's complaint about the principal's evaluation of her teaching performance did not constitute protected speech under the first amendment.[165] Similarly, in *Alinovi v. Worcester School Committee*[166] the United States Court of Appeals for the First Circuit held that the resolution of a personnel problem between a school teacher and her employer is not a matter of public concern.[167] Thus, *Day* and *Alinovi* illustrate that the circuits generally refuse to classify employee grievances that affect only the employee's own employment as matters of public concern.[168]

Although the circuits agree that speech or conduct of a purely personal nature do not constitute matters of public concern, and that speech or conduct concerning governmental corruption do constitute matters of substantial public concern, factual situations arise in which a public employee's speech or conduct involves more than a personal grievance but does not reveal governmental corruption.[169] Public employee speech that does not constitute either a personal grievance or a report of governmental corruption illustrates the existence of a grey area in which no clear guidelines exist for determining whether the employee's speech or conduct constitutes a matter

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162. 768 F.2d 696 (5th Cir. 1985).

163. *Id.* at 697-701.

164. *Id.* at 700-01.

165. *Id.*

166. 766 F.2d 660 (1st Cir. 1985).

167. *Id.* at 671. In *Alinovi,* the United States Court of Appeals for the First Circuit considered whether a teacher's posting of letters she received from the school administration on Parents' Night constituted a matter of public concern warranting first amendment protection. *Id.* at 670-71. In *Alinovi,* a school teacher refused to give the school principal a copy of a paper the teacher had written about a student in the teacher's class. *Id.* at 662. On Parents' Night, the teacher posted letters to her from the school administration regarding the teacher's refusal to give a copy of the term paper to the principal. *Id.* School officials disciplined the teacher for posting the letters on Parents' Night. *Id.* The teacher claimed that the disciplinary action taken against her by the school officials violated her first amendment free speech right. *Id.* Relying on *Connick,* the First Circuit reasoned that the teacher's desire to resolve her own disciplinary problem motivated her to post the letters. *Id.* at 671. The *Alinovi* court characterized the teacher's conduct as the resolution of a personnel problem that did not constitute a matter of public concern and, therefore, denied the teacher's claim to first amendment protection. *Id.*

168. *See Day,* 768 F.2d at 700-01 (personal matters do not warrant first amendment protection); *Alinovi,* 766 F.2d at 671 (same); *see also supra* 163-68 and accompanying text (discussing *Day* and *Alinovi*).

169. *See infra* notes 170-80 and accompanying text (illustrating speech or conduct that involves more than individual employee dissatisfaction but does not involve governmental corruption).

of public concern.[170] For example, the inspection report in *Jurgensen* falls into this grey area.[171] Although the inspection report recommended increases in staffing, equipment, and funds for the EOC, the Fourth Circuit classified the report's recommendations as primarily dealings with internal office policy.[172] The Fourth Circuit concluded, that since the inspection report involved internal office policy and not internal governmental corruption, the inspection report did not constitute a matter of substantial public concern.[173] As the dissent in *Jurgensen* correctly noted, however, although deficiencies in equipment, staffing, and financing are less culpable than corruption, such deficiencies also hamper public services.[174]

The United States Court of Appeals for the Ninth Circuit's decision in *Anderson v. Central Point School District No. 6*[175] demonstrates the lower courts' difficulty in distinguishing clearly between matters of general interest and matters of public concern.[176] In *Anderson,* the Ninth Circuit considered whether a school district violated a teacher-coach's first amendment rights by suspending him for writing a letter to the school board regarding the athletic policies of the school district.[177] The court in *Anderson* acknowledged that the athletic program was at that time a matter of public debate.[178] Applying *Connick,* the Ninth Circuit reasoned that although the letter contained some details not involving matters of public interest, the athletic program itself constituted the subject matter of the letter.[179] The *Anderson* court concluded, therefore, that the letter constituted a matter of public concern.[180]

Anderson and *Jurgensen* illustrate the lack of clear guidelines for determining whether a public employee's speech or conduct constitutes a matter of public concern.[181] Although the Supreme Court's decision in *Connick*

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170. *See Connick,* 461 U.S. at 146. Although the Supreme Court's decision in *Connick* requires courts to deny first amendment protection to speech that does not involve matters of political or social interest or concern to the community, the *Connick* decision offers little guidance to the lower courts in determining what speech falls into the category of community interest. *Id.; see supra* note 17 (discussing *Connick).*

171. *See Jurgensen,* 745 F.2d at 871 (describing inspection report); *see also supra* notes 27-29 and accompanying text (discussing inspection report).

172. *See Jurgensen,* 745 F.2d at 888 (determining that inspection report did not constitute matter of substantial public concern).

173. *Id.*

174. *See id.* at 895 (Butzner, J., dissenting) (deficiencies in equipment, staffing, and financing are matters of public concern).

175. 746 F.2d 505 (9th Cir. 1984).

176. *See id.* at 506-07 (Ninth Circuit's consideration of whether teacher-coach's letter to school board involved matter of public concern).

177. *Id.*

178. *Id.* at 507.

179. *Id.; see Connick,* 461 U.S. at 147 (first amendment protects only matters of public concern); *see also supra* notes 17-19 and accompanying text (discussing *Connick).*

180. *Id.; see also* McGee v. South Pemiscot School Dist. R-V, 712 F.2d 339 (8th Cir. 1983) (subject matter of track coach's letter to newspaper had become public issue).

181. *See Anderson,* 746 F.2d at 507 (teacher's letter to newspaper involved matter of public

requires courts to determine whether a public employee's speech or conduct constitutes a matter of public concern on a case by case basis,[182] the myriad of factual situations that arise involving the free speech rights of public employees results in confusion and inconsistency as to the extent a public employer can limit the first amendment rights of public employees.[183] Thus, through repeated references to the absence of allegations of governmental corruption in the inspection report, the Fourth Circuit's decision in *Jurgensen* implies that public employee speech involving governmental corruption is a matter of public concern.[184] The *Jurgensen* opinion, however, offers little guidance to the lower courts in determining whether public employee speech not involving corruption constitutes a matter of public concern.[185]

In *Jurgensen,* the Fourth Circuit upheld Jurgensen's demotion on the basis of insubordination.[186] The Fourth Circuit's conclusion that because insubordination constituted the "but for" cause of Jurgensen's demotion, the demotion did not violate Jurgensen's first amendment free speech rights is consistent with the Supreme Court's decision in *Mount Healthy.*[187] However, the Fourth Circuit's conclusion that Jurgensen's act of insubordination justified Jurgensen's demotion irrespective of whether his conduct involved a matter of public concern is dangerous in terms of possible future ramifications within the Fourth Circuit.[188] Allowing insubordination to automatically exclude from first amendment protection a public employee's speech or conduct involving a matter of public concern permits a public employer to violate the first amendment rights of public employees under the guise of

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concern); *Jurgensen,* 745 F.2d at 888 (inspection report did not involve matter of public concern); *see also supra* notes 171-80 and accompanying text (discussing *Anderson* and *Jurgensen).*

182. *See Connick,* 461 U.S. at 154 (*Connick* Court's refusal to establish general standard for judging all statements by public employees).

183. *See e.g.,* Brasslett v. Cota, 761 F.2d 827, 844 (1st Cir. 1985) (former fire chief's comments concerning town's fire fighting capabilities constitutionally protected); Knapp v. Whitaker, 757 F.2d 827, 843 (7th Cir. 1985) (teacher's speech concerning inequitable mileage allowance for coaches and extent of liability coverage for coaches and parents who transported student athletes constituted matter of public concern), *cert. denied,* 106 S.Ct. 36 (1985); McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983) (probationary police officer's public criticism of decision not to raise police officers' salary is matter of public concern).

184. *See Jurgensen,* 745 F.2d at 871 (inspection report found no illegal action, no abuse of authority and no evidence of corruption); *id.* at 872 (noting complete absence of critical comment in inspection report); *see also supra* notes 27-29 and accompanying text (discussing inspection report).

185. *See Jurgensen,* 745 F.2d at 888 (Fourth Circuit concluding that under *Connick,* inspection report did not qualify for first amendment protection because inspection report dealt primarily with internal office policy).

186. *See supra* notes 61-65 and accompanying text (discussing Fourth Circuit's application of "but for" standard established by Supreme Court in *Mount Healthy*).

187. *See supra* note 15 and accompanying text (explaining "but for" standard of *Mount Healthy*).

188. *See supra* notes 99-139 and accompanying text (explaining why balancing disruption caused by insubordination is better than allowing insubordination to automatically exclude speech or conduct involving public concern from constitutional protection).

insubordination.[189] Nevertheless, the Fourth Circuit's decision in *Jurgensen* clearly signals that an employee of a law enforcement agency cannot commit an act of insubordination, that the agency has a valid reason to proscribe, and then bring an action seeking protection for the act of insubordination in the name of the free speech clause of the first amendment.[190] Furthermore, while the Fourth Circuit's conclusion that Jurgensen's conduct did not involve a matter of substantial public interest is consistent with *Connick,* the *Jurgensen* opinion offers little guidance to the lower courts in identifying public employee speech that does constitute a matter of public concern.[191]

SARAH BETH PATE

C. Ross v. Communications Satellite Corp.: *Collateral Estoppel Effect of a Non-Fair-Employment-Practice Agency Decision in a Subsequent Title VII Action*

Title VII of the Civil Rights Act of 1964[1] protects employees from discriminatory employment practices based on race, color, sex, religion, or national origin.[2] Title VII vests central administrative authority in the Equal

189. *See supra* notes 124-36 and accompanying text (illustrating danger that insubordination may not always be the "but for" cause of employee demotion or discharge).

190. *See supra* note 140 and accompanying text (discussing *Jurgensen* and terms of precedent on issue of insubordination).

191. *See Connick* at 146-154 (only matters of public concern warrant first amendment protection); *supra* note 170 (discussing lack of clear guidelines in *Connick* for determining what public employee speech or conduct constitutes matter of public concern); *see also supra* notes 181-85 and accompanying text (illustrating difficulty of lower courts in determining whether public employee speech or conduct constitutes matter of public concern).

1. The Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975(a-d), 2000a-2000a-6, 2000b-2000b-3, 200c-2000c-9, 2000d-2000d-4, 2000e-2000e-6 (1976). The purpose of the Civil rights Act of 1964 was to achieve a peaceful and voluntary settlement of the persistent problems of racial and religious discrimination and segregation by prohibiting, among other problems, discriminatory obstacles to the exercise of the right to vote, discriminatory denials of access to public facilities and discriminatory employment practices. 1964 U.S. CODE CONG. & AD. NEWS 2355, 2393-94 (1964). Title VII of the Civil Rights Act of 1964 established the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-4 (1976). The purpose of the EEOC is to address and resolve claims of discriminatory employment practices that allegedly violate Title VII. 42 U.S.C. § 2000e-5(a) (1976). Congress, however, did not intend the EEOC to supplant state or local authorities empowered to address and resolve discriminatory employment practices but instead intended to screen from the EEOC and the federal courts those civil rights problems that state authorities could settle to the satisfaction of the grievant in a voluntary and localized manner. Oscar Mayer & Co. v. Evans, Iowa, 441 U.S. 750, 760 (1979).

2. 42 U.S.C. § 2000e-2(a) (1976). Congress intended section 2000e-2(a) to prohibit, with some exceptions, distinctions or differences in employment treatment or favor based on race,

Employment Opportunity Commission (EEOC)[3] and entrusts to the federal courts the ultimate responsibility of enforcing the anti-discriminatory provisions.[4] Persons aggrieved by allegedly discriminatory employment practices may file their claims with the EEOC, which will then investigate the claim and attempt to resolve the dispute through conference, conciliation, and persuasion.[5] If the EEOC finds a claim to be meritless, the EEOC will dismiss the complaint and inform the claimant of his or her right to institute a personal action in federal court.[6] Alternatively, if the EEOC finds the claim to be meritorious and the EEOC's efforts at conciliation fail, the EEOC may not take further action but must refer the case to the United States Attorney General who may bring a civil action in federal district court to enforce the provisions of Title VII.[7] Title VII requires the EEOC and the federal courts to defer to state or local agencies that have legally conferred authority to grant or seek relief from such employment discrimination.[8]

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color, religion, sex, or national origin. 110 CONG. REC. 7213 (April 8, 1964) (interpretative memorandum of Title VII submitted by Sens. Clark and Case).

3. 42 U.S.C. § 2000e-4 (1976). Congress intended the EEOC to have the power to use and cooperate with state and local authorities, as well as individuals. 110 CONG. REC. 7213 (April 8, 1964) (interpretative memorandum of Title VII submitted by Sens. Clark and Case). Congress also intended for the EEOC to furnish conciliation services between employers and employees. *Id.* Following the 1972 amendments to Title VII, Congress empowered the EEOC to file suit on behalf of claimants. 42 U.S.C. §§ 2003e-5(b) & (f) (1976); *see* Equal Employment Opportunity Act of 1972—Congress Report, 118 CONG. REC. 7167 (March 6, 1972). In the 1972 amendments, Congress authorized the EEOC to process a charge of adverse employment activity through the investigative and conciliation stages. *Id.; see infra* note 4 (EEOC procedure of claims, conciliation, and resolution). When the respondent employer is a government, a governmental agency, or a political subdivision, the EEOC may file a civil action against the respondent in federal district court if the EEOC has been unsuccessful in eliminating the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. 118 CONG. REC. 7167 (1972).

4. 42 U.S.C. § 2000e-5(f)(3) & (g) (1976) (United States district courts have jurisdiction over and power to enforce actions accruing under Title VII). An enforcement proceeding under Title VII begins with the aggrieved employee, or another person on the employee's behalf, filing a written charge with the EEOC. *Id.* at § 2000e-5(b); *see infra* note 8 (provisions of "deferral clause"). When the investigation is complete, the EEOC makes a preliminary determination as to whether probable cause exists to believe that an unlawful employment practice has occurred; and, if the EEOC finds cause to believe the claim has merit, the EEOC will attempt to remedy the situation through conference, conciliation, and persuasion. 42 U.S.C. § 2000e-5(b). If the EEOC finds no reasonable cause to believe the charge is true, the EEOC will dismiss the charge and notify the claimant and the respondent of the EEOC's action. *Id.* If the EEOC dismisses the charge, the EEOC issues to the claimant a "right to sue" letter and the claimant may pursue a private civil action. *Id.* at § 2000e-5(f)(1). The "right to sue" letter is a statutory prerequisite to a private civil action based on a charge of employment discrimination. *Id.*

5. *See supra* note 4 (discussing EEOC procedure of investigation, conference and conciliation).

6. *See id.* (statutory requirement of right-to-sue letter before claimant may pursue private civil action for employment discrimination).

7. *See id.* (EEOC procedure followed when EEOC determines employee has valid unfair employment practice claim).

8. 42 U.S.C. § 2000e-5(c) (1976) (the "deferral" clause). If a state or local government has an agency dealing with employment discrimination, the EEOC may not actively process a

Pursuant to the deferral provisions of Title VII, if a state agency has addressed a charge of unfair employment practices, the EEOC also may investigate the truth of the charge,[9] but the EEOC is required to give "substantial weight" to the findings and orders of state administrative agencies.[10] The EEOC is not bound by state administrative findings.[11] If, however, a state court has reviewed a decision of a state administrative agency, or conducted a trial de novo, or the state administrative agency has functioned as a judicial forum in a fair employment case, the federal district court must grant the same preclusive effect[12] to issues resolved in the state hearing as the state's own courts would grant.[13] In *Ross v. Communications Satellite Corp.*,[14] the United States Court of Appeals for the Fourth Circuit considered whether a Maryland state court's determination in an unemployment compensation proceeding was entitled to receive preclusive effect, based on the doctrine of collateral estoppel, in a subsequent federal Title VII employment discrimination action.[15]

In *Ross,* Communications Satellite Corporation (COMSAT) employed Thomas J. Ross (Ross), a single white male, in its Research and Development Laboratories between June 8, 1980 and August 24, 1981, when COMSAT

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charge of discrimination until the state or local agency has begun its remedial process and 60 days have passed. *Id.* The state or local agency has exclusive jurisdiction for 60 days. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES, 84-85 (1980). If the state or local agency has not resolved the charge within 60 days, the charging party then may file a charge with the EEOC. *Id.*

9. *See supra* note 4 (EEOC procedure of investigation, conciliation, or dismissal).

10. 42 U.S.C. § 2000e-5(b) (1976).

11. *Id.; see* Alexander v. Gardner-Denver Co., 412 U.S. 36, 48 n.8 (1974). The *Alexander* Court held that the EEOC must accord substantial weight to the final findings and orders that state or local authorities make but that the EEOC was not bound by such findings. *Id.*

12. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 n.6 (1982). The *Kremer* Court emphasized the importance of the related doctrines of collateral estoppel and res judicata in fulfilling the purpose of the civil courts, the conclusive resolution of disputes within their jurisdiction. *Id.* The principle of res judicata provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that those parties raised or could have raised. Allen v. McCurry, 449 U.S. 90, 94 (1980). The principle of collateral estoppel provides that once a court decides an issue of fact or issue of law necessary to the court's judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties. Parklane Hosiery v. Shore, 439 U.S. 322, 326 n.5 (1979). The application by the federal courts of the principles of res judicata and collateral estoppel to state court judgments promotes not only judicial efficiency but comity between the state and federal courts. Allen v. McCurry, 449 U.S. 90, 96 (1980).

13. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1983). The Supreme Court in *Kremer* noted that any civil action subsequent to consideration of an employment discrimination charge by federal or state *agencies* is to be a trial de novo. *Id.* at 469; *see* Alexander v. Gardner-Denver Co., 415 U.S. at 38 (trial de novo not foreclosed by prior submission of claim to arbitration); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973) (court actions under Title VII are de novo proceedings).

14. 759 F.2d 355 (4th Cir. 1985).

15. *Id.* at 357.

discharged Ross.[16] Ross alleged that in late January 1981, he rejected a sexual advance made by another employee, Mary L. Penrose (Penrose), a technician employed in COMSAT's Semiconductor Technology Division.[17] On February 2, 1981, Ross filed with Leonard R. Sparrow, his supervisor, an in-house sexual harassment and professional misconduct complaint against Penrose.[18] After Ross filed the complaint, COMSAT reorganized Ross' work schedule so that Ross would not come into direct contact with Penrose,[19] but Ross found the arrangement unacceptable.[20] On March 31, Ross filed with the EEOC a charge against COMSAT alleging sexual harrassment and sexual discrimination.[21] Ross filed a second charge with the EEOC on July 8, 1981, alleging that COMSAT had committed several acts to retaliate against Ross for filing the initial EEOC charge.[22]

On or about August 18, 1981, Ross and at least one other employee were discussing Ross' EEOC charge against COMSAT.[23] When an employee asked Ross what Ross would do if he lost his EEOC claim, Ross responded that he might "blow the place up."[24] Employees reported Ross' statement to Ross' supervisor.[25] Subsequently, on August 24, 1981, COMSAT terminated Ross' employment.[26] Following Ross' termination, Ross amended his second EEOC charge to include a claim of retaliatory discharge.[27] The day after his termination, Ross filed a claim for unemployment compensation with the Maryland Employment Security Administration (ESA).[28] Ross alleged in his ESA charges, along with allegations of harrassment and sexual discrimination, that COMSAT discharged him in retaliation for filing a

16. Ross v. Communication Satellite Corp., 34 FAIR EMPL. PRAC. CAS. (BNA) 260, 261-62 (D. Md. 1984). In *Ross,* Ross held the position of Materials Engineer in COMSAT's Materials and Process Department. *Id.*

17. *Id.* In *Ross,* Ross, Penrose, and a third COMSAT employee car-pooled to a tennis tournament in late January, 1981 and after the tournament, Penrose, the driver, dropped the third employee at his apartment and returned Ross to his vehicle. Brief for Appellant at 6, Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985); Brief for Appellee at 4, Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985). Ross and Penrose spoke briefly, following which Penrose said to Ross, "Tom, I think you and I should get to know each other better." Brief for Appellant at 6; Brief for Appellee at 4.

18. Brief for Appellee, *supra* note 17, at 4.

19. *Id.* at 6.

20. Brief for Appellant, *supra* note 17, at 7.

21. *Ross,* 34 FAIR EMPL. PRAC. CAS. at 261.

22. *Id.* at 263. In *Ross,* Ross alleged that COMSAT had retaliated against him for filing a charge with the EEOC by printing the details of his EEOC charge in the company newsletter, by reducing his professional responsibility, by giving him unfavorable performance reviews, and by informing prospective employers that Ross had filed charges with the EEOC. *Id.* at 265.

23. Brief for Appellee, *supra* note 17, at 11; Brief for Appellant, *supra* note 17, at 11-12.

24. Brief for Appellee, *supra* note 17, at 11; Brief for Appellant, *supra* note 17, at 11-12.

25. Brief for Appellee, *supra* note 17, at 11; Brief for Appellant, *supra* note 17, at 11-12.

26. *Ross,* 34 FAIR EMP. PRAC. CAS. at 261.

27. *Id.*

28. *Id.* at 262.

charge of discrimination with the EEOC.[29] Following an investigation, an ESA Claims Examiner denied Ross' claim for unemployment compensation, finding that COMSAT had discharged Ross for employee misconduct.[30] Ross appealed the decision of the Claims Examiner and on May 19, 1982 the ESA Appeals Referee held a de novo hearing.[31] On May 27, the Appeals Referee presented his findings and ruled that COMSAT had discharged Ross for misconduct.[32] Ross appealed the Referee's decision to the ESA Board of Appeals.[33] The ESA Board of Appeals denied Ross' petition.[34] Ross then filed a timely appeal of the ESA Board's decision to deny review in the Circuit Court for Baltimore City.[35] Following a hearing on September 20, 1983, the Circuit Court of Baltimore City affirmed the decision of the Board of Appeals[36] without issuing an opinion or making any findings of fact.[37] Ross did not appeal the decision of the Circuit Court of Baltimore.[38]

While Ross' case with the Maryland ESA progressed on appeal, the EEOC conducted an investigation of Ross's charges and, without making any findings, issued a right-to-sue letter on January 5, 1982.[39] On March 3, 1982, between the time that the ESA Claims Examiner issued his decision and the ESA Appeals Referee held the de novo hearing on Ross' unemployment claim, Ross filed his Title VII action in the United States District Court for the District of Maryland.[40] The district court found that the decision of the ESA Board of Appeals, as affirmed by the Circuit Court for Baltimore City, that Ross had been discharged for misconduct, precluded the district court from finding that COMSAT discharged Ross in retaliation for Ross filing charges with the EEOC.[41] The district court held that since the ESA proceedings afforded Ross an opportunity to present evidence in support of his complaint and to rebut the evidence presented by COMSAT,[42] the ESA

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29. *Id.* In *Ross,* COMSAT defended its termination of Ross. Id. COMSAT claimed that Ross' work performance had deteriorated and that Ross had intimidated and harassed other employees. *Id.*

30. *Id.*

31. *Id.* According to the District Court in *Ross,* at the May 19, 1982 hearing before the Maryland Employment Security Administration (ESA) Appeals Referee, counsel represented both Ross and COMSAT, and both parties had an opportunity to examine and cross-examine witnesses. *Id.*

32. *Id.* The Maryland Appeals Referee in the *Ross* ESA proceedings stated that the evidence did not substantiate Ross' charges of sexual discrimination, but the Referee refused to comment on the effect the finding would have on Ross' Title VII claim. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Ross,* 34 FAIR EMPL. PRAC. CAS. at 263.

37. Brief for Appellant, *supra* note 17, at 13.

38. *Ross,* 34 FAIR EMPL. PRAC. CAS. at 263.

39. *Id.; see supra* note 4 and accompanying text (EEOC procedure in processing claim of alleged employment discrimination).

40. *Ross,* 34 FAIR EMP. PRAC. CAS. at 264.

41. *Id.*

42. 8 MD. CODE ANN. art. 95A, § 7(g) (1985) (ESA Board of Appeals must conduct hearing in such manner as to ascertain substantial rights of parties).

proceedings satisfied the Due Process Clause and the doctrine of collateral estoppel entitled the ESA's findings to preclusive effect in Ross' Title VII claim.[43] The district court granted summary judgment for COMSAT.[44]

On appeal, the Fourth Circuit in *Ross v. Communications Satellite Corp.* reversed the district court's decision that collateral estoppel precluded Ross' litigation of the issues relating to his discharge.[45] Accordingly, the *Ross* court remanded the case to the district court to reexamine whether the district court should grant summary judgment based on applicable Title VII standards.[46] Unlike the district court, the Fourth Circuit held that the ESA proceedings did not preclude the relitigation in federal court of Ross' claims of retaliatory discharge.[47] The Fourth Circuit reached this decision after an analysis, not only of the degree of similarity of the issue presented before the Maryland ESA and the district court, but also of the statutes under which the ESA and the district court considered the issue.[48] According to the *Ross* court, the Maryland ESA, in deciding the reason for Ross' discharge, determined whether COMSAT discharged Ross for work-related misconduct[49] pursuant to the provisions of the Maryland Unemployment Insurance Law.[50] The district court, however, following the provisions of Title VII, addressed the issue of whether COMSAT had discharged Ross because Ross filed charges with the EEOC.[51] Since the Maryland Unemployment Insurance Law[52] directs the factfinder's attention to an employee's forbidden conduct and Title VII[53] directs the factfinder's attention to an

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43. *Ross*, 34 FAIR EMPL. PRAC. CAS. at 264.

44. *Id.* at 266.

45. *Ross*, 759 F.2d at 357. When Ross appealed to the Fourth Circuit, Ross dropped his claims of sexual discrimination and focused only COMSAT's alleged retaliatory harassment. *Id.* at 359.

46. *Id.* at 363.

47. *Id.* at 360.

48. *Id.* at 360-62.

49. *Id.* at 362.

50. *Id.* at 362. *See* MD. CODE ANN. art. 95A, § 6(c) (1985). Section 6(c) of the Maryland Unemployment Insurance Law provides that the Maryland Secretary of Employment and Training (Secretary) shall disqualify a claimant seeking unemployment benefits for the week in which the employer has discharged the claimant employee if the Secretary finds that the discharge is the result of misconduct connected with the employee's work. *Id.* Section 6(c) also provides that the employee's disqualification shall continue for a period of four to nine additional weeks, depending upon the severity of the employee's misconduct. *Id.* The ESA Board of Appeals defines "misconduct" for section 6(c) as an employee's violation of his employer's policies or rules or a breach of a duty the employee owes his employer. Rogers v. Radio Shack, 271 Md. 126, 132, 314 A.2d 113, 117 (1974).

51. *Ross*, 759 F.2d at 362; *see* 42 U.S.C. § 2000e-3(a) (1976). As the *Ross* court stated, Title VII prohibits an employer from discriminating against any employee because an employee has engaged in any activity protected by Title VII, such as Ross' filing charges with the EEOC. *Id.*

52. MD. CODE ANN. art. 95A § 6(c). *See supra* note 50 (Maryland Unemployment Insurance Law provides that employee shall not receive unemployment benefits for up to ten weeks if employer discharges employee for misconduct).

53. 42 U.S.C. § 2000e-3(a). *See supra* note 51 (Title VII prohibits employer discrimination for protected conduct).

employer's forbidden motive, the Fourth Circuit held that although a court might phrase the reason for Ross' discharge as an issue facially the same in both the ESA and Title VII hearings, the dissimilarities in the ESA and Title VII statutes destroyed the identity of the issue.[54] The *Ross* court, therefore, held that the dissimilarity in the ESA and Title VII statutes rendered inapplicable the doctrine of collateral estoppel.[55]

Because the *Ross* court found that the doctrine of collateral estoppel was inapplicable in Ross' Title VII action, the Fourth Circuit in *Ross* held that the district court committed reversible error when the district court granted summary judgment based on the ESA findings.[56] The Fourth Circuit then remanded the case to the district court for reconsideration of the propriety of summary judgment and for new trial, if necessary.[57] In denying preclusive effect to the ESA hearings, however, the *Ross* court did not hold that the findings of the ESA were irrelevant.[58] The Fourth Circuit in *Ross* recommended that the district court consider the ESA findings as evidence in Ross' Title VII case.[59] In remanding *Ross,* the Fourth Circuit directed the district court's attention to the elements of a Title VII retaliatory firing charge that tend to complicate a decision of whether to grant summary judgment.[60] The *Ross* court noted that when, as in Title VII claims of

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54. *Ross,* 759 F.2d at 362. In addition to distinguishing the foci of the fact-finder's attention, the *Ross* court drew other distinctions between the Maryland Unemployment Insurance Law and Title VII such as the two laws' enforcement procedures and purposes. *Compare* 42 U.S.C. § 2000e-5 (1976) (Title VII enforced by federal courts) *with* MD. CODE ANN. art 95A § 7 (1985) (Maryland Unemployment Insurance Law enforced by Maryland ESA) *compare* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (purpose of Title VII is to achieve equality of employment opportunities) *with* MD. CODE ANN. art. 95A § 2 (1985) (purpose of Maryland Unemployment Insurance Law is to benefit persons unemployed through no fault of their own).

55. *Ross,* 759 F.2d at 362.

56. *Id.* at 363. The *Ross* court recognized its ability to uphold the district court's summary judgment if alternative grounds supporting summary judgment existed. *Id.* The Fourth Circuit stated, however, that the number and complexity of the issues in *Ross* made affirmance of the summary judgment improper. *Id.; see* Charbonnages de France v. Smith, 597 F.2d 406, 416 (4th Cir. 1979) (appellate court not bound on review to consider specific grounds upon which district court based grant of summary judgment).

57. *Ross,* 759 F.2d at 364; *see infra* note 59 (directions of Fourth Circuit in *Ross* to district court on propriety of summary judgment).

58. *Ross,* 759 F.2d at 363.

59. *Id.*

60. *Ross,* 759 F.2d at 363-365. The *Ross* court stated that in determining whether to grant summary judgment, the district court first must examine whether any genuine issues of fact exist, and second, whether such issues of fact are material. *Id.* at 364; *see* FED. R. CIV. PROC. 56(c) (1985) (summary judgment rendered forthwith if documents before court show no genuine issue of material fact and that moving party is entitled to judgment). If a district court finds that the moving party has met its burden of proof by showing the absence of any genuine issue of material fact, the court must grant summary judgment. *Ross,* 759 F.2d at 364; FED. R. CIV. PROC. 56(c) (1985) (summary judgment proper in absence of genuine issue of material fact). The *Ross* court stated that COMSAT, as the moving party, bore the burden of proving that no genuine issue of fact existed. *Ross,* 759 F.2d at 364; *see* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970) (moving party has burden of proving absence of genuine issue of material

retaliatory discharge, the state of mind or intent of either of the parties is a decisive element of the claim or defense, a court must act cautiously in granting summary judgment because of the strong probability that a jury should resolve questions of intent.[61] The Fourth Circuit also noted that although motive often is the critical issue in a Title VII claim of retaliation, an employee may not defeat an employer's motion for summary judgment merely by alleging that the employer's motive violated Title VII.[62] The court stated that, as in any consideration of summary judgment, the party wishing to defeat the motion—in this case the employee—must present sufficient evidence of violative motive to support allegations of discriminatory or retaliatory treatment and to create a genuine issue of material fact.[63]

In addition to demonstrating the existence of a genuine issue of fact concerning whether COMSAT's motive in discharging Ross violated Title VII, Ross, according to the Fourth Circuit, also had to show that the issue went to a material fact.[64] The Fourth Circuit then stated that Ross had to show that "but for" Ross filing charges with the EEOC COMSAT would not have harassed or discharged Ross.[65] The *Ross* court chose the "but for"

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fact). The Fourth Circuit also stated that the district court must view the facts, and the inferences drawn from the facts, in a light most favorable to Ross, the nonmoving party. *Ross,* 759 F.2d at 364; *see* United States v. Diebold, 369 U.S. 654, 655 (1962) (nonmoving party in summary judgment is entitled to benefit of doubt). The *Ross* court noted that the district court should grant summary judgment only if the *Ross* case presented no issues for the court's consideration and that, even if the district court properly could grant a directed verdict after hearing the evidence, the district court should not try the case in advance by granting summary judgment. *Ross,* 759 F.2d at 364; *see* Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.) (summary judgment proper only when no facts are in dispute), *cert. denied,* 342 U.S. 887 (1951). The *Ross* court noted, however, that although COMSAT bore the burden of showing the absence of genuine issues of material fact, and that the district court must view the evidence in a light most favorable to Ross, Ross also was bound to present specific facts indicating the presence of a genuine issue and could not rely solely on the speculative assertions of the pleadings. *Ross,* 759 F.2d at 364; *see* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968) (party cannot rest on allegations of claim when opposing party has moved for summary judgment).

61. *Ross,* 759 F.2d at 634; *Charbonnages de France,* 597 F.2d at 414 (summary judgment is seldom appropriate in cases in which particular states of mind are decisive as elements of claim or defense). In *Ross,* the Fourth Circuit stated that questions of intent, such as employer motivation in Title VII cases of retaliatory discharge, often require a court to examine the demeanor of live witnesses and that a summary judgment easily could eliminate such a crucial determination of an employer's motivation. *Ross,* 759 F.2d at 364; *see* Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) (determination of intent often depends on witnesses' demeanor and credibility).

62. *Ross,* 759 F.2d at 364; *see supra* note 60 (discharged employee cannot rely solely on speculative allegations in pleadings to raise genuine issue of material fact).

63. *Ross,* 759 F.2d at 364; *see* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968) (party wishing to show existence of issue must present evidence substantial enough to persuade trier of fact of necessity of factual determination).

64. *Ross,* 759 F.2d at 364; *see supra* note 60 (court may not grant summary judgment unless no genuine issue of material fact exists).

65. *Ross,* 759 F.2d at 364; *see infra* note 103 and accompanying text (*Ross* court's adoption of "but for" standard of employer motivation in Title VII retaliatory discharge case).

test of employer motivation over an "in part" test, rejecting the view that an employer violates Title VII if retaliation for protected activity is merely a partial reason for an employee's discharge.[66] The *Ross* court stated that it chose the "but for" test because the "but for" test focuses the factfinder's inquiry on the dominant reason for the employee's discharge,[67] the "but for" test opens employees to normal sanctions for misconduct while protecting employees' Title VII rights,[68] and provisions of Title VII other than those proscribing retaliatory employer motivation also resolve violations by the "but for" standard.[69]

Since the *Ross* courts' choice of the "but for" standard was likely to affect the district court's disposal of the retaliation issue on the summary judgment motion, or alternatively, the district court's resolution of the retaliation issue at trial,[70] the Fourth Circuit also presented the sequence of burdens of persuasion and production applicable to Title VII cases of retaliation.[71] The court stated that in Title VII retaliation cases, the employee first must establish a prima facie case of retaliation by a preponderance of the evidence.[72] The employee's prima facie case consists of three elements.[73]

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66. *Ross,* 759 F.2d at 364; *see infra* text accompanying notes 102-104 (*Ross* court's rejection of "in part" test of employer motivation in Title VII retaliatory discharge case).

67. *Ross,* 759 F.2d at 366.

68. *Id.*

69. *Id.* at 365.

70. *Id.* at 364; *see* United States v. Adamson, 665 F.2d 649, 656 n.19 (5th Cir. 1982), *cert. denied,* 464 U.S. 833 (1983). In *United States v. Adamson,* the Fifth Circuit held that when an appellate court considers and decides an issue that parties have litigated and which likely will arise on retrial, the appellate court's decision constitutes a holding, not dicta, even though the appellate court may not need the decision to reverse the decision of the court below. *Adamson,* 665 F.2d at 656 n.19.

71. *Ross,* 759 F.2d at 365. The *Ross* court adopted the sequence of burdens of proof and production that the court used for Title VII retaliation cases from the sequence that the United States Supreme Court, in *McDonnell Douglas Corp. v. Green,* prescribed for Title VII disparate treatment claims. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The Supreme Court in *McDonnell Douglas* established that the plaintiff in a Title VII trial must carry the initial burden of establishing a prima facie case of a Title VII violation. *Id.* at 802. After the plaintiff has established by a preponderance of the evidence that the defendant has violated the protection that Title VII affords employees, the defendant has the burden of producing a legitimate, nondiscriminatory reason for taking the allegedly violative employment-related action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). Should the defendant produce a legitimate nondiscriminatory reason for acting against the plaintiff, the plaintiff must then offer further proof that the defendant's exculpatory explanation is pretextual. *Id.* at 253. The *Ross* court stated that this sequence of burdens of proof and production, although originally prescribed for Title VII discriminatory treatment cases, also applies to Title VII retaliation cases. *Ross,* 759 F.2d at 365; *see* Williams v. Boorstin, 663 F.2d 109, 116 (D.C. Cir. 1980) (*McDonnell Douglas* sequence of burdens for Title VII discriminatory treatment cases applies to Title VII retaliation cases); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) (applying sequence of burdens from disparate treatment cases to Title VII retaliation cases), *cert. denied,* 451 U.S. 985 (1981).

71. *Ross,* 759 F.2d at 364; McDonnell Douglas Corp. v. Green, 411 U.S. at 802-05.

72. *Ross,* 759 F.2d at 364.

73. *Id.*

The employee must establish that the employee engaged in protected activity, that the employer took adverse employment action against the employee, and that a causal connection existed between the protected activity and the adverse action.[74] The Fourth Circuit stated that by establishing the prima facie case, the employee creates a presumption that the employer has violated Title VII.[75] The court stated that the employer could then rebut the presumed violation by producing a legitimate nondiscriminatory reason for the adverse action.[76] The *Ross* court, however, emphasized that the employer need not actually prove conclusively a legitimate nondiscriminatory explanation, so long as the employer's explanation raises a genuine issue of fact.[77] The court stated that if the employer produced a legitimate, nondiscriminatory explanation, the employee would have the additional burden or proving that the employer's explanation is pretextual.[78]

In holding that the district court erred in granting preclusive effect to the prior ESA decision, the Fourth Circuit correctly decided that collateral estoppel did not apply to preclude the relitigation in the district court of the issue of whether COMSAT discharged Ross in retaliation for Ross' filing charges with the EEOC.[79] In *Kremer v. Chemical Construction Corp.*,[80] upon which the Ross court relied, the United States Supreme Court established that when a state court has upheld a state fair employment practice agency's decision on an employment discrimination claim, a federal court, in a subsequent Title VII action, must grant the same preclusive effect to the state court decision as that state's own courts would grant.[81] The *Kremer*

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74. *Id.* at 365.

75. *Id.* at 364; *see Womack,* 619 F.2d at 1296 (plaintiff's prima facie case in Title VII retaliation case creates inference that employer retaliated in violation of Title VII).

76. *Ross,* 759 F.2d at 365; *see Womack,* 619 F.2d at 1296 (employer must produce evidence to dispel inference of retaliation by establishing existence of legitimate reason for adverse action).

77. *Ross,* 759 F.2d at 365; *see* Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 252 (employer need only produce legitimate nondiscriminatory explanation for adverse action to rebut presumption of retaliation in Title VII case).

78. *Ross,* 759 F.2d at 365; *see Burdine,* 450 U.S. at 253 (employee must prove that employer's profferred reason for discharge is pretextual); *Womack,* 619 F.2d at 1296 (overall burden of persuasion remains with plaintiff employee in Title VII action).

79. *See supra* notes 50-52 (dissimilarity of Title VII and Maryland Unemployment Insurance Law destroys identity of issues for collateral estoppel purposes.

80. 456 U.S. 461 (1982).

81. *Kremer,* 456 U.S. at 478. In *Kremer,* the United States Supreme Court held that a state court's decision to uphold a state agency's dismissal of an employment discrimination claim precluded a subsequent federal action under Title VII. *Id.* at 485. Following his discharge from Chemical Construction Corporation, Kremer, a Polish, Jewish immigrant, filed a complaint with the EEOC alleging discrimination based on religion, age, and national origin. *Id.* at 463. The EEOC referred the charge to the New York State Division of Human Rights (NYHRD). *Id.* at 463-64; *see supra* note 4 and accompanying text (discussing procedural aspects for filing employment discrimination charges with EEOC). Following an investigation, the NYHRD found no probable cause to believe that Chemical Construction had engaged in discriminatory practices. 456 U.S. at 464. The NYHRD Appeal Board upheld the agency decision. *Id.* Kremer filed for a review of the Appeal Board's decision with the New York State Court of Appeals and refiled

Court recognized that the decisions of state agencies empowered to address claims of employment discrimination do not, absent affirmation by a state court, preclude subsequent decisions by either the EEOC or the federal courts in Title VII actions.[82] The Supreme Court reasoned that since the statutory provisions of Title VII empower the EEOC to review discrimination charges previously rejected by state agencies and empower the federal courts to enforce EEOC decisions,[83] to allow the EEOC to review and reject the findings of a state agency would be pointless if the federal courts were bound to abide by the prior state agency decision.[84] The *Kremer* Court held, however, that when a state court has reviewed a state agency finding, federal courts must grant full faith and credit to that state court's decision.[85] If the state's courts would grant preclusive effect to that state court's decision in a

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his complaint with the EEOC. *Id.* The New York court upheld the order of the Appeal Board. *Id.* The EEOC found Kremer's employment discrimination claim meritless and issued a right-to-sue letter. *Id.* at 465. Kremer then brought a Title VII action in the United States District Court for the Southern District of New York, which dismissed Kremer's complaint on grounds of res judicata. Kremer v. Chemical Constr. Corp., 477 F. Supp. 587, 594 (S.D.N.Y. 1979); *see Kremer,* 456 U.S. at 467 n.6 (res judicata and collateral estoppel are related doctrines used broadly to encompass both claim and issue preclusion). The United States Court of Appeals for the Second Circuit affirmed the district court's decision to dismiss. Kremer v. Chemical Constr. Corp., 623 F.2d 786, 791 (2d Cir. 1980). On appeal, the United States Supreme Court also affirmed. 456 U.S. 461. In affirming the dismissal of Kremer's Title VII action, the Supreme Court stated that, in Title VII actions, when a state court has affirmed the decision of a state employment discrimination agency, federal courts must grant the decision the same preclusive effect that the state's courts would grant. *Kremer,* 456 U.S. at 478.

82. *Kremer,* 456 U.S. at 477-78; *see* Alexander v. Gardner-Denver Co., 415 U.S. at 50 (state fair employment practice laws are part of Title VII scheme but enforcement power remains in federal courts).

83. 42 U.S.C. § 2000e-5(f-g) (1976) (United States district court has power to enforce provisions of Title VII).

84. *Kremer,* 456 U.S. at 470 n.7. The *Kremer* Court noted that under 42 U.S.C. § 2000e-5(f)(1) EEOC decisions do not preclude a trial de novo in federal court. *Id.* The *Kremer* Court held that Congress would not have established standards for EEOC examination of cases subsequent to state proceedings if Congress intended to bar the federal courts from considering such cases. *Id.* If Congress had intended such a limitation on the federal courts, the EEOC, which lacks enforcement power, would be attempting to interpose between parties at variance whom the state courts already protected from any further litigation. Batiste v. Furnco Constr. Corp., 503 F.2d 447, 451 (7th Cir. 1974), *cert. denied,* 420 U.S. 928 (1975).

85. *Kremer,* 456 U.S. at 478; 28 U.S.C. § 1738 (1976). The res judicata principles codified in § 1738 require federal courts to grant preclusive effect to prior state court decisions if the state courts themselves would grant the prior decisions preclusive effect. Allen v. McCurry, 449 U.S. 90, 96 (1980). The United States Courts of Appeals for the Third, Seventh, and Eighth Circuits have held that a federal court may not grant preclusive effect to a state court's review of a state agency decision in a subsequent Title VII action. *See* Unger v. Consolidated Foods Corp., 657 F.2d 909, 914 (7th Cir. 1981) (foreclosure of Title VII judicial remedy would discourage plaintiffs from fully pursuing state proceedings); Smouse v. General Electric Co., 626 F.2d 333, 336 (3rd Cir. 1980) (per curiam) (Pennsylvania Supreme Court affirmance of state Human Rights Commission decision is not res judicata in plaintiff's Title VII claim); Gunther v. Iowa State Mens Reformatory, 612 F.2d 1079, 1084-85 (8th Cir.) (state proceedings granted substantial evidentiary weight but not collateral estoppel effect in subsequent Title VII action), *cert. denied,* 446 U.S. 966 (1980). Prior to *Kremer,* the Fourth Circuit had adopted a slightly narrower view in holding that parties cannot relitigate only the issues resolved in a de

subsequent hearing, the federal courts also must grant preclusive effect to that state court decision in a Title VII action.[86]

Applying the *Kremer* rule, the Fourth Circuit in *Ross* correctly held that Maryland law would deny collateral estoppel effect to the judicially affirmed ESA findings in a subsequent Title VII action.[87] The *Ross* court relied upon *Cicala v. Disability Review Board for Prince George's County*[88] as the controlling Maryland law on the issue of whether a Maryland court would grant a judicially affirmed state agency decision collateral estoppel effecting a subsequent hearing before a different state agency.[89] The *Cicala* court considered the issue of whether a Worker's Compensation Commission (Commission) finding that a policeman's injury arose out of and in the course of employment[90] was binding on a subsequent determination by the Disability Review Board (Disability Board) concerning whether the policeman's injury was service-connected.[91] The *Cicala* court held that the issue

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novo state court proceeding, as opposed to issues resolved in administrative hearings, in a subsequent Title VII action. Moosavi v. Fairfax County Bd. of Educ., 666 F.2d 58, 59 (4th Cir. 1981) (determination of discrimination issue by state court of competent jurisdiction precludes subsequent relitigation of discrimination issue in Title VII action).

86. *Kremer,* 456 U.S. at 468-76. The *Kremer* Court found no express or implied repeal of § 1738 in any of the provisions of Title VII and therefore declined to find any exception to the full faith and credit provisions of § 1738. *Id.* Consequently, the *Kremer* Court held that a federal court must grant preclusive effect when a state court would do so. *Id.*

87. *Ross,* 759 F.2d at 363. The *Ross* Court noted that the district court failed to include any reference to Maryland law in its opinion. *Id.*

88. 288 Md. 254, 418 A.2d 205 (Md. Ct. Spec. App. 1980).

89. Cicala v. Disability Review Bd. for Prince George's County, 288 Md. at 263, 418 A.2d at 211. In *Cicala,* a Prince George's County, Maryland, policeman, John Cicala, suffered accidental injuries. *Id.* at 258, 418 A.2d at 208. The Maryland Workmen's Compensation Commission found that Cicala's injuries arose in the course of Cicala's employment. *Id.* at 258, 418 A.2d at 208; *see* MD. CODE ANN. art. 100, § 15 (1985) (employer shall provide employee compensation for disability resulting from injury arising out of and in course of employment). Cicala later applied to the Disability Review Board for service-connected disability retirement benefits based on the same injury for which Cicala received workmen's compensation benefits. *Cicala,* 288 Md. at 258, 418 A.2d at 208; *see* PRINCE GEORGE'S COUNTY (MD.) CODE § 16-231 (1975) (statutory authorization for Prince George's County Police Pension Plan); PRINCE GEORGE'S COUNTY (MD.) POLICE PENSION PLAN §§ 4.3(a) & 4.3(c)(1) (1975) (providing enhanced retirement benefits for disability caused by injury suffered as result of employee's performance of duties). In the Disability Review Board hearing, Cicala asserted that the principles of res judicata applied and that the determination by the Workmen's Compensation Commission that Cicala's injury arose "out of and in the course of employment" was conclusive with respect to the issue of whether Cicala's disability was the "result of [Cicala's] performance of his duties." *Cicala,* 288 Md. at 263, 418 A.2d at 211. The Disability Review Board disagreed. *Id.* at 258, 418 A.2d at 208. Cicala appealed to the Circuit Court for Prince George's County, which affirmed the Disability Review Board's decision that res judicata did not apply. *Id.* at 258, 418 A.2d at 208. Cicala then appealed to the Maryland Court of Special Appeals, which also affirmed the Board's decision. *Id.* at 258, 418 A.2d at 208.

90. *Cicala,* 288 Md. at 263, 418 A.2d at 211; *see* MD. CODE ANN. art. 100, § 15 (1985) (employer shall provide employee compensation for disability resulting from injury arising out of and in the course of employment).

91. *Cicala,* 288 Md. at 263, 418 A.2d at 211; *see* PRINCE GEORGE'S COUNTY (MD.) POLICE PENSION PLAN § 4.3(c)(1) (1975) (disability defined as injury suffered as result of employee's performance of duties).

that the Commission had decided carried no preclusive effect in the Disability Board hearing.[92] The *Cicala* court stated that underlying the rationale for its decision was the dissimilarity between the legislative histories, purposes, scopes of coverage, language, standards, procedures, and policies of the Worker's Compensation statute and the Disability Review Board Pension Plan statute.[93] Although the *Cicala* court pointed out the similarity in the issues presented to both the Commission and the Disability Board, the court held that the dissimilarity of the statutes guiding each agency would yield differing results in the agencies' determinations of fact.[94] The *Cicala* court held, therefore, that the likely differences in issue resolution destroyed the identity of the issues for res judicata purposes.[95]

Although the *Kremer* decision directed the Fourth Circuit in *Ross* to examine whether Maryland law would require a Maryland court to grant preclusive effect to a prior Maryland Court's affirmance of an agency decision, and *Cicala* addressed the issue of whether one agency should grant preclusive effect to a different agency's decision,[96] the Fourth Circuit correctly relied on *Cicala* as the controlling Maryland law.[97] Although in *Cicala* a

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92. *Cicala,* 288 Md. at 263, 418 A.2d at 211. Although the *Cicala* court used "res judicata" to refer to the preclusion of the issue that Cicala claimed the Workmen's Compensation Commission had concluded, the *Ross* court categorized the principles to which the *Cicala* court referred as those of collateral estoppel rather than those of res judicata. *Ross,* 759 F.2d at 362 n.8.

93. *Cicala,* 288 Md. at 263, 418 A.2d at 211.

94. *Cicala,* 288 Md. at 266-267, 418 A.2d at 213. The *Cicala* court noted that even the seemingly minor procedural differences between the Workmen's Compensation Act guiding the Workmen's Compensation Commission and the Police Pension Plan guiding the Disability Review Board could have substantial impact because the differences could result in the presentation of different facts upon which the Workmen's Compensation Commission and the Disability Review Board would base their respective decisions. *Id.; see* Tipler v. E. I. duPont de Nemours & Co., 443 F.2d 125, 129 (6th Cir. 1971). In *Tipler v. E. I. duPont deNemours & Co.,* the United States Court of Appeals for the Sixth Circuit held that an NLRB decision that racial prejudice did not motivate an employer's discharge of a minority employee did not preclude litigation of the discrimination issue in a Title VII action. *Id.* The Sixth Circuit in *Tipler* based its rationale on the dissimilarity of the National Labor Relations Act and Title VII. *Id.; see* Gee v. Celebrezze, 355 F.2d 849, 850 (7th Cir. 1966) (Social Security Administration not bound by agency determinations made under standards different from those applicable to Social Security determination of disability). Lane v. Railroad Retirement Bd., 185 F.2d 819, 822 (6th Cir. 1950) (Railroad Retirement Board not bound by decision of National Railroad Adjustment Board because of difference in statute prescribing determination of employee disability).

95. *Cicala,* 288 Md. at 267, 418 A.2d at 213.

96. Compare *id.,* 288 Md. at 267, 418 A.2d at 213 (judicially unreviewed Workmen's Compensation Commission decision not afforded preclusive effect in Disability Review Board decision) *with Kremer,* 456 U.S. at 478 (judicially affirmed state fair employment practice agency decision preclusive with respect to subsequent Title VII fair employment practice claim); *see supra* note 92 (collateral estoppel and res judicata are related doctrines).

97. *See supra* notes 81-84 & 96 (discussing *Kremer* rule of res judicata effect of judicially affirmed state agency decision on subsequent Title VII action and comparing *Kremer* with *Cicala* decision on interagency collateral estoppel issue); *see also supra* note 92 (collateral estoppel and res judicata are related doctrines).

Maryland state court never affirmed the Workmen's Compensation Commission's decision, the Fourth Circuit was correct in relying on *Cicala* as governing Maryland law.[98] The *Cicala* court's rationale in denying preclusive effect to the issue decided by the Commission rested on the statutory dissimilarity between the Commission and the Disability Board.[99] Neither judicial affirmance nor reversal of the Commission's decision would alter the statutory dissimilarity.[100] Therefore, the denial of collateral estoppel in *Cicala* and in similar interagency situations functions independently of judicial affirmance or reversal of the prior agency decision.[101] The *Ross* court, therefore, correctly applied Maryland law as *Kremer* requires.[102]

Moving from a consideration of applicable state law to a consideration of the applicable standard for determining a causal connection between an employer's motivation and an employer's discharge of an employee, the Fourth Circuit correctly chose the "but for" standard over the "in part" standard in Title VII retaliation cases.[103] The "but for" test, as the *Ross*

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98. *See supra* note 96 (comparing *Cicala* with *Kremer).*

99. *See supra* notes 89-90 and accompanying text (*Cicala* court holding that applicability of collateral estoppel depends not only on identity of issues in prior and subsequent hearings but substantial similarity of statutes that guide consideration of issues); *see also* 2 DAVIS, ADMIN. LAW TREATISE § 18.04 at 577-78 (1958). Courts must take into account the context of the statute by which the administrative agency determines an issue in determining whether collateral estoppel applies to preclude relitigation of a facially identical issue in a subsequent agency proceeding. *Davis, supra* at 577-78. A variation in purpose, scope, and procedure between two statutes alters the form of the issues' consideration between two different agency hearings and so renders collateral estoppel inapplicable. *Id.* Collateral estoppel and res judicata are both "soft" rules. *Id.* at 548. Courts will qualify or reject "soft" rules when their application would contravene an overriding public policy or result in manifest injustice. *Id.; see* United States v. Stauffer Chemical Co., 464 U.S. 165, 180 (1984) (White, J., concurring) (refusal of preclusion justified if effect of applying preclusion is to give prior litigant favored position solely because prior litigant has asserted issue and prevailed).

100. *See supra* note 99 (collateral estoppel based on statutory dissimilarity functions independently of judicial consideration).

101. *See supra,* text accompanying note 100 (statutory dissimilarity exists independently of judicial consideration).

102. *See supra* notes 99-101 and accompanying text (Ross courts' application of *Cicala* correct despite variation in facts between *Cicala* and *Kremer).*

103. *Ross,* 759 F.2d at 366. The *Ross* court noted correctly that most of the other United States Circuit Courts of Appeal favor the "but for" standard as the test of employer motivation in retaliatory discharge cases under Title VII. *Id.* The Fifth Circuit has adopted firmly the "but for" standard for "mixed motive" discharges when legally protected activity is involved. McMillan v. Rust College, Inc., 710 F.2d 1112,, 1116 (5th Cir. 1983); DeAnda v. St. Joseph Hosp., 671 F.2d 850, 856 (5th Cir. 1982); Smalley v. City of Eatonville, 640 F.2d 765, 769 (th Cir. 1981); *accord* McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 928 (7th Cir. 1984) (Title VII plaintiff may make "but for" showing directly by persuading court that protected activity most likely motivated employer or indirectly by showing employer's profferred explanation is pretextual); Kauffman v. Sidereal Corp., 695 F.2d 343, 345 (9th Cir. 1982) (Title VII plaintiff must show by preponderance of evidence that but for engaging in protected activity employer would not have discharged plaintiff). *Williams,* 663 F.2d at 117 (D.C. Cir. 1980) (employer must demonstrate by clear and convincing evidence that employee would have lost job absent retaliatory employer motive); *Womack,* 619 F.2d 1297 (8th Cir. 1980) (employee's

court correctly noted, tightly focuses the factfinders' attention on the prevailing reason for the employee's discharge while safeguarding the employee's legal right to protest perceived discrimination.[104] Since an "in part" test of employer motivation might insulate an employee from adverse action notwithstanding the employee's misconduct, the *Ross* court correctly held the the "but for" test allows an employee to exercise the rights established in Title VII while not sanctioning conduct unprotected by Title VII.[105] Only the United States Court of Appeals for the Ninth Circuit has applied an "in part" test of employer motivation, and in that case, *Cohen v. Fred Meyer, Inc.*,[106] the Ninth Circuit relied upon precedent calling for a "but for" test of employer motivation.[107] The Ninth Circuit in *Cohen* did not address any

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discharge would not have occurred in absence of employee's Title VII suit against employer); Montiero v. Poole Silver Co., 615 F.2d 4, 9 (1st Cir. 1980) (employer motive in retaliation for employee opposition to discrimination must be determinative factor in discharge decision).

104. *Ross,* 759 F.2d at 366. The United States Supreme Court has expressed a preference, in areas of constitutional law, for tests of causation that distinguish between a result caused by a constitutional violation and a result caused by a legitimate nonviolative means. Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977). In *Mt. Healthy Bd. of Educ. v. Doyle,* the Supreme Court held that the proper test to apply in a case of employer retaliation for constitutionally protected first amendment activity properly would protect against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of the protected rights. *Id.* at 287. The *Mt. Healthy* Court held that when an employee alleges that an employer failed to rehire the employee because of the employee's exercise of protected rights, the employee must show that but for his protected activity the employer would have rehired him. *Id.* Under *Mt. Healthy,* an employer may avoid a constitutional violation by showing that he would have taken adverse action in the absence of protected activity. *Id.* As an example of pretext, in *McDonnell Douglas Corp. v. Green,* the Supreme Court stated that when employees of different races engage in misconduct and the employer discharges only the members of one race, the misconduct likely is a pretext for the discharge. McDonnell Douglas Corp. v. Green, 411 U.S. at 804. The Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.* stated that the use in *McDonnell Douglas* of the term "pretext" does not mean that the Title VII plaintiff must show that, regardless of any misconduct, his employer eventually would have discharged him because of his race. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). Instead, the employee must show only that, in the context of misconduct, his race was the "but for" cause of his discharge. *Id.*

105. *Ross,* 759 F.2d at 366; *see Williams,* 663 F.2d at 116-17 (Congress designed Title VII to protect employee rights but not to shield employee from normal sanctions for work-related misconduct or flaws).

106. 686 F.2d 793 (9th Cir. 1982).

107. *Id.* at 798. In *Cohen v. Fred Meyer, Inc.,* the United States Court of Appeals for the Ninth Circuit relied on *Womack v. Munson* and *Montiero v. Poole Silver Co.* in requiring a Title VII plaintiff to prove that her employer acted, "at least in part," with a retaliatory intent or motive. *Id.; see Womack,* 619 F.2d at 1297 (employee must show that "but for" protected activity employer would not have taken adverse action); *Montiero,* 615 F.2d 4, 9 (1st Cir. 1980) (employee must prove that employer would not have taken adverse action in absence of protected activity). The United States Court of Appeals for the Eighth Circuit, in *Bibbs v. Block,* adopted a test of employer motivation that is similar to the "in part" test mentioned in *Cohen v. Fred Meyer, Inc.* Bibbs v. Block, 749 F.2d 508, 511-13 (1984). In *Bibbs,* the Eighth Circuit held that when an employee shows that racial discrimination more likely than not motivated the employer in the employer's decision to discharge the employee, then the employee establishes the employer's liability under Title VII. *Bibbs,* 749 F.2d at 511-12. The Eighth

policy considerations that would render the "in part" test superior to the "but for" test and handed down a decision in conflict with another Ninth Circuit case decided the same year, *Kaufman v. Sidereal Corp.*[108] The *Kaufman* court held that courts could best determine employer motivation in a Title VII case of retaliatory discharge using a "but for" standard.[109]

The Fourth Circuit, in *Ross,* addressed and resolved the conflict now facing the Ninth Circuit by firmly adopting the "but for" standard of employer motivation in Title VII cases of retaliatory discharge.[110] Fourth Circuit practitioners should note that the "but for" test comes into play at the third stage of the analysis,[111] when the employee attempts to disprove the employer's legitimate, nondiscriminatory explanation for the employee's discharge.[112] Absent some direct evidence that the employer discharged the employee solely for engaging in protected activity,[113] two alternative methods generally suffice to show "but for" causation. The first method requires the plaintiff to show that Title VII protected the plaintiff or the plaintiff's activity, that the plaintiff and other employees engaged in the activity that the employer claims is the legitimate, nondiscriminatory reason for the plaintiff's discharge, and that the employer discharged only the plaintiff for

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Circuit then stated that once the employee shows race to be a discernible factor motivating the employee's discharge, the relative weight of the employer's discriminatory motivations for discharging the employee were not only incalculable but irrelevant to a Title VII analysis of a discharge. *Id.* The *Bibbs* court further stated that a "but for" analysis was inherently inconsistent because the "but for" test allows for the presence of discernible racial discrimination in an employer's decision to terminate an employee, but permits that decision if the decision would have occurred in the absence of racial discrimination. *Id.* at 512. The inconsistency of the "but for" test, according to the *Bibbs* court, is that once discernible racial discrimination becomes apparent in an employer's decision on an employee's hiring or tenure, racial considerations affect the outcome of an employer's decision. *Id.* The *Bibbs* test, because it eliminates the "but for" measurement of the weight of an employer's impermissible motives, facilitates the determination of whether an employer has violated Title VII. *Id.* The *Bibbs* test, however, ignores the possibility that an employer may rely on more objective criteria than race, sex, or national origin in making employment decisions. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (rarely does one single dominant or primary concern motivate decisions).

108. 695 F.2d 343 (9th Cir. 1982).

109. *Id.* at 345. The *Kauffman* court relied for its application of a "but for" standard on *McDonald v. Santa Fe Trail Transportation Co.* and *De Anda v. St. Joseph Hospital. Id.; see McDonald,* 427 U.S. 273, 282 n.10 (1976) (employee in Title VII action must show racial discrimination is sole reason for discharge); De Anda v. St. Joseph Hosp., 671 F.2d 850, 857 n.12 (5th Cir. 1982) ("but for" analysis allows plaintiff in mixed motive case to prove that impermissible motive was determinative factor in adverse action).

110. *Ross,* 759 F.2d at 366.

111. *See supra* note 71 (sequence of burdens of proof and production established by *Burdine* and applied to Title VII retaliation cases by *Ross).*

112. *Id.*

113. *See* Unger v. Consolidated Foods Corp., 657 F.2d 909, 918 (1981). The *Unger* court held that employers who, upon learning of the plaintiff employee's employment discrimination charge, called and harassed the plaintiff and urged her to drop the charge, and who immediately terminated the plaintiff upon her refusal to drop the charge, presented overwhelming evidence of retaliatory motive. *Id.*

this allegedly nondiscriminatory reason.[114] The second method of proving "but for" causation when direct evidence of employer motivation is not available depends not upon a showing of disparate treatment of the plaintiff as compared to other employees but rather upon a change over time in the employer's treatment of the plaintiff.[115] Under the second method, the plaintiff must show that the plaintiff engaged in the activity that the employer claims is the legitimate, nondiscriminatory reason for the plaintiff's discharge, but that the employer discharged the plaintiff only after the plaintiff engaged in protected Title VII activity.[116] Under the second method, the discharge must follow closely on the heels of the protected activity.[117] Under either method, however, the employer still may legitimize the discharge if the employer can show that the discharge would have occurred even in the absence of the protected activity.[118]

The *Ross* decision also intimates that Fourth Circuit practitioners should pay particular attention to prevailing state law when seeking to preclude in a Title VII trial the relitigation of issues that a state court previously had considered.[119] A practitioner's analysis of state law should examine first the individual state's doctrine with respect to collateral estoppel.[120] If the practitioner seeks to preclude issues arising from the hearing of an agency not empowered to address employment discrimination, the practitioner should examine whether the state's collateral estoppel doctrine recognizes the concept that a substantial dissimilarity between the statutes under which agencies consider an issue destroys the identity of the issue for purposes of collateral estoppel.[121] If state law is silent on the subject, as is true in most Fourth

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114. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 283. The *McDonald* court established that, while an employer may decide that certain conduct will render an employee unfit for employment, an employer violates Title VII if the employer excuses that conduct in some employees and condemns the conduct in others, if the employer bases such condemnation on an element that Title VII protects. *Id.*

115. *See Womack,* 619 F.2d at 1296. The *Womack* court held that discharge soon after the employer learns of the employee's protected activity justifies an inference of retaliatory motive. *Id.*

116. *Id.* at 1296 n.6.

117. *Id.*

118. *See* Montiero v. Poole Silver, 615 F.2d at 9 (employer may produce legitimate nondiscriminatory explanation to show that employer would have discharged employee in absence of protected activity).

119. *See supra* note 86 (discussing application of full faith and credit to judicially affirmed state agency decisions).

120. *See, e.g.,* Monongahela Power Co. v. Starcher, 328 S.E.2d 200, 202 (W. Va. 1985) (collateral estoppel requires first judgment to be rendered on merits by court of competent jurisdiction); Tar Landing Villas Owners' Ass'n v. Atlantic Beach, 64 N.C. App. 239, 244 307 S.E.2d 181, 185 (N.C. App. 1983) (policy supporting collateral estoppel is not so unyielding that courts invariably must apply collateral estoppel); Bates v. Devers, 214 Va. 667, 671, 202 S.E.2d 917, 921-922 (1974) (collateral estoppel applies to preclusion of issues but not causes of action).

121. *See* DAVIS, ADMINISTRATIVE LAW TREATISE § 18.04 at 577-78 (1958) (determination of issue not necessarily preclusive when same question arises under identical words of another statute). Of the states within the Fourth Circuit, only Maryland explicitly has followed Professor

Circuit states,[122] the practitioner who seeks to preclude relitigation of an issue may argue that an agency's binding, prior determination of an issue best serves the public policies furthered by the doctrine of collateral estoppel: relieving parties of the costs and vexations of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudications.[123] A practitioner who seeks to avoid the use of collateral estoppel may argue that the application of the doctrine of collateral estoppel would contravene an overriding public policy or result in manifest injustice.[124]

In *Ross v. Communications Satellite Corp.*, the Fourth Circuit reversed the district court's holding that a prior Maryland Employment Security Administration decisions precluded relitigation of the issue of employer motivation in a Title VII action.[125] Adhering to the principle that federal courts must apply state law to determine whether to grant collateral estoppel effect in Title VII cases to judicially affirmed, prior state agency decisions,[126] the *Ross* court found that Maryland law did not give collateral estoppel effect to a Maryland ESA decision in a subsequent Title VII action.[127] The Fourth Circuit's holding in *Ross* decreases the probability that federal courts will afford preclusive effect to state agency decisions that rest on statutes substantially dissimilar from those that guide the federal courts' consideration of issues under Title VII.[128] The Fourth Circuit's decision in *Ross* also

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Davis' approach to interagency issue preclusion. *See Cicala,* 418 A.2d at 211-12 (quoting Davis on collateral estoppel effect of prior agency decision); *see supra* note 99 (discussing Davis' approach to interagency issue preclusion).

122. *See supra* note 121 (only Maryland explicitly has followed Davis' "dissimilarity of statute" approach to interagency issue preclusion); *cf.* Shrewsbury v. State Workmen's Compensation Comm'r, 187 S.E.2d 597 (Sup. Ct. App. W. Va. 1972). In *Shrewsbury v. State Workmen's Compensation Commissioner,* the West Virginia Supreme Court of Appeals held a final decision by the West Virginia Silicosis Medical Board, denying benefits to plaintiff, was not preclusive with respect to subsequent claim for workmen's compensation benefits for an occupational disease other than silicosis. *Id.* The *Shrewsbury* court gave no preclusive effect to the prior decision because silicosis under the applicable statute was a separate occupational disease from the disease for which the plaintiff sought workmen's compensation benefits. *Id.*

123. *Kremer,* 456 U.S. at 467; Allen v. McCurry, 449 U.S. 90, 94 (1980); *see* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940) (dissimilarity between first and second agencies' decisions not necessarily crucial if underlying issue remains nominally the same in subsequent hearing).

124. *See* Title v. Immigration and Naturalization Serv., 322 F.2d 21, 23-24 (9th Cir. 1963) (courts should relax or qualify doctrine of collateral estoppel to suit needs of case); *see supra* note 99 and accompanying text (collateral estoppel is "soft" rule); *see also supra* note 1 (Congress did not intend to screen from EEOC those civil rights problems that state authorities could not settle).

125. *See supra* notes 48-55 and accompanying text (discussing *Ross* court's analysis of applicability of collateral estoppel under controlling Maryland law).

126. *See supra* notes 12-13, 81-86 (discussing *Kremer* rule of preclusive effect in Title VII action of prior state agency decision).

127. *See supra* notes 88-95 (discussing Maryland law of interagency issue preclusion).

128. *See supra* notes 94, 98-101 (discussing precedential and policy arguments against extensive application of collateral estoppel to non-fair-employment-practice agency decisions in subsequent Title VII actions).