claim for breach of implied covenant of good faith in abrupt termination of credit agreement); Rizzitiello v. McDonald's Corp., 868 A.2d 825 (Del. 2005) (white employee who claimed breach of implied good faith covenant through racial discrimination by black supervisor would need to show disparate treatment on basis of her race; trial court found no evidence of racial animosity).

Professor Steven Burton has taken the position that, while other contract law doctrine may prevent race discrimination in performance of contracts, the implied duty of good faith cannot be used to rule out racially discriminatory conduct. Burton bases this conclusion on the theory that implied terms should rest on the agreement of the parties and, realistically, parties in an "unjust society" might not rule out racial discrimination. Steven J. Burton, Racial Discrimination in Contract Performance: *Patterson* and a State Law Alternative, 25 Harv. C.R.-C.L. L. Rev. 431, 464 n.116 (1990). In response, Professor Neil Williams asserted that society has reached a consensus, reflected in a number of civil rights laws, that racial discrimination is wrong. In Williams' view, construing the implied duty of good faith to prohibit racial discrimination would give "effect to the reasonable expectations of the parties that they will not be treated in a manner offensive to prevailing community norms." Neil G. Williams, Offer, Acceptance, and Improper Considerations: A Common Law Model for the Prohibition of Racial Discrimination in the Contracting Process, 62 Geo. Wash. L. Rev. 183, 214 (1994). In a similar vein, Professor Emily Houh has argued that the concept of good faith could be productively applied in the employment context to reach certain types of invidious discriminatory treatment based on factors such as race or gender but not cognizable under existing statutory law. Emily M.S. Houh, Critical Race Realism: Re-Claiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law, 66 U. Pitt. L. Rev. 455 (2005). Would it be consistent with the express terms and implicit understanding of the parties in *Locke* to imply a term that Warner would not reject Locke's movie proposals based on her gender?

Donahue v. Federal Express Corp.

Superior Court of Pennsylvania
753 A.2d 238 (2000)

Judges: Before: McEwen, President Judge, Lally-Green, J., and Cirillo, President Judge Emeritus.

Lally-Green, J.:

In this employment case, Appellant Brion O. Donahue appeals from the order dated April 29, 1999, granting preliminary objections in the nature of a demurrer filed by Defendants/Appellees Federal Express Corporation ("FedEx") and Robert W. Marshall and entering judgment in Appellees' favor. We affirm.

On January 22, 1999, Appellant filed a complaint against FedEx and Marshall, alleging the following. Appellant was a FedEx employee from November 1979 until January 1997. Complaint, Docket Entry 1, P 4. Appellant's final position was Commercial MX Service Administrator. Id. Marshall was Appellant's immediate supervisor. Id., P 3.

Appellant questioned numerous invoices which did not comport with repair orders in his department. Id., P 6. Appellant also called FedEx's attention to other improprieties, such as FedEx's failure to pay invoices and Marshall's practice of directing auto body work to a Cleveland auto body shop owned by a person with whom Marshall vacationed. Id., P 12. After Appellant complained to Marshall about the invoice-discrepancy issue, Marshall accused Appellant of gross misconduct. Id., P 6. Specifically, Appellant was accused of making a racial remark in front of another FedEx employee, and was accused of making derogatory remarks about Marshall to vendors and others. Id., P 7. In the months leading to his discharge, FedEx management denied Appellant the clerical assistance that he requested, gave Appellant additional duties of tire purchasing and file maintenance, and ordered Appellant to falsify data to meet administrative requirements. Id., P 8.

FedEx has a Guaranteed Fair Treatment Procedure ("GFTP") for employee grievances. Id., P 5. Appellant appealed his termination through Step 1 of the GFTP. Id. FedEx management upheld the termination, concluding that Appellant violated FedEx's Acceptable Conduct Policy. Id., P 10 & Exhibit D. Appellant appealed through Step 2 of the GFTP, alleging that Marshall was seeking retribution for exposing the vendor non-payment issue. Id., P 11 and Exhibit E. FedEx management again upheld the termination. Id., P 13. Finally, Appellant appealed through Step 3 of the GFTP, alleging that FedEx accused him of making unprofessional remarks, "but did not identify the purported comments, nor give [Appellant] the opportunity to deny the same." Id., P 14. Again, FedEx management upheld the termination. Id., P 16.

In Count 1 of his complaint, labeled "Wrongful Termination," Appellant alleges: (1) FedEx breached the implied covenant of good faith and fair dealing in at-will employment contracts; (2) FedEx violated public policy insofar as the termination violates the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §951 et seq.; (3) Appellant supplied sufficient additional consideration to remove his status from that of an at-will employee; and (4) FedEx violated public policy by retaliating against him for lodging complaints against Marshall. Id., P 19.

Count 2 of the complaint alleges that FedEx violated the PHRA. Id., PP 21-26. Count 3 alleges that Marshall intentionally interfered with Appellant's contractual relations with FedEx, and that Marshall and FedEx defamed Appellant. Id., PP 27-35. Count 4 alleges that FedEx breached its implied employment contract with Appellant. Id., PP 36-38.[1]

On March 17, 1999, FedEx and Marshall filed preliminary objections in the nature of a demurrer. Docket Entry 3. Appellant filed a responsive brief. Docket Entry 5. On April 29, 1999, the esteemed trial court, the Honorable Eugene Strassburger, granted the preliminary objections and entered judgment in favor of FedEx and Marshall. This appeal followed.[2]

1. On appeal, Appellant raises no challenge to the dismissal of his PHRA, intentional interference, and defamation claims.

2. In his Concise Statement of Matters Complained of on Appeal, Appellant contended that the court erred by: (1) dismissing his wrongful termination claim; (2) finding that the law does not impose an implied duty of good faith and fair dealing in an at-will employment relationship; (3) ruling that no statute or public policy was implicated by his termination; (4) failing to find additional consideration to rebut the presumption of at-will employment; (5) failing to find that Marshall specifically intended to harm Appellant; and (6) failing to find an implied employment contract arising from the GFTP. Docket Entry 12.

Appellant raises four issues on appeal:

I. Whether the court below erred in granting Preliminary Objections where appellant raised [the] breach of the duty of good faith and fair dealing exception to [the] at-will employment rule.
II. Whether the court below erred in granting Preliminary Objections where [the] doctrine of necessary implication dictated that parties in an employment relationship do and perform those things that according to reason and justice they should do in order to carry out the employment relationship.
III. Whether the court below erred in granting Preliminary Objections where [the] Guaranteed Fair Treatment Procedure of employer created a promise to dismiss only for cause.
IV. Whether the court below erred in granting Preliminary Objections where appellant alleges employer specifically intended to harm appellant.

Appellant's Brief at 3.

Our standard and scope of review are well settled.

> Our standard of review mandates that on an appeal from an order sustaining preliminary objections which would result in the dismissal of suit, we accept as true all well-pleaded material facts set forth in the Appellant['s] complaint and all reasonable inferences which may be drawn from those facts. . . .

Ellenbogen v. PNC Bank N.A., 1999 PA Super 131, 731 A.2d 175, 181 (Pa. Super. 1999) (citations and footnote omitted).

First, Appellant argues that the trial court erred by dismissing his claim for breach of the implied duty of good faith and fair dealing. Specifically, Appellant claims that FedEx breached this duty "by terminating him in contravention of its GFTP and engaging in a sham review of his conduct in the GFTP." Appellant's Brief at 10.

Every contract in Pennsylvania imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 671 A.2d 716, 722 (Pa. Super. 1996), *appeal denied,* 546 Pa. 645, 683 A.2d 883 (1996), citing, inter alia, Somers v. Somers, 418 Pa. Super. 131, 613 A.2d 1211, 1213 (Pa. Super. 1992), *appeal denied,* 533 Pa. 652, 624 A.2d 111 (1993). Good faith has been defined as "honesty in fact in the conduct or transaction concerned." *Kaplan,* 671 A.2d at 722. Appellant relies on *Somers* for the proposition that the implied duty of good faith and fair dealing applies to at-will employment relationships.

In that case, plaintiff Somers entered into an at-will employment relationship (as a consultant) with a corporation. The consulting contract further provided that if net profits were realized from a particular project, Somers would receive 50% of the profits. *Somers,* 613 A.2d at 1212. In order for profits to be realized, it was necessary for the corporation to resolve a claim with a third party. Id. Somers and the corporation disagreed as to how to handle this claim; as a result, Somers was fired. Id. Moreover, Somers alleged that the corporation showed a lack of good faith and due diligence in resolving its dispute

with the third party, and in settling the claim for significantly less than was owed, thereby depriving him of approximately $3 million as his share of the proceeds. Id. at 1215. The trial court dismissed Somers' claim for breach of the implied duty of good faith and fair dealing.

This Court reversed, stating that "the duty to perform contractual obligations in good faith does not evaporate merely because the contract is an employment contract, and the employee has been held to be an employee at will." Id. at 1213, citing Baker v. Lafayette College, 350 Pa. Super. 68, 504 A.2d 247 (Pa. Super. 1986), *affirmed,* 516 Pa. 291, 532 A.2d 399 (1987), and Jacobs v. Kraft Cheese Co., 310 Pa. 75, 164 A. 774 (1933).[4] We concluded that Somers should have the opportunity to establish that the corporation acted in bad faith when it settled the claim in such a manner as to deprive him of his fair share of the profits related to the project. *Somers,* 613 A.2d at 1215.

Somers and the cases cited therein provide that, in an at-will employment relationship, the duty of good faith and fair dealing applies to those contractual terms that exist beyond the at-will employment relationship. For example, the plaintiff in *Somers* could recover for breach of implied duties connected to the profit sharing provision, but could not recover for the termination per se.

Baker involved a two-year employment contract between a college and a professor. The college's faculty handbook, which was explicitly made part of the contract itself, obliged the college to conduct an honest and meaningful evaluation of the professor's performance before deciding whether or not to extend the contract beyond its original term. *Baker,* 504 A.2d at 255.

The Court affirmed the grant of summary judgment in favor of the college and held that the implied duty of good faith and fair dealing applied to this reevaluation provision.[5] Id. Thus, the college was contractually obligated "to render a sincere and substantial performance of these contractual undertakings, complying with the spirit as well as the letter of the contract." Id. The *Baker* Court stressed that its holding was narrowly tailored to the facts of that case:

> We emphasize that our holding is a narrow one. This case does not present the more difficult issue whether an obligation of good faith and fair dealing should be implied into any employer-employee relationship, including at-will employment. Consequently, we do not decide that issue. We hold only that when an employer such as the College here expressly provides in an employment contract for a comprehensive evaluation and review process, we may look to the employer's good faith to determine whether the employer has in fact performed those contractual obligations.

Id.

4. In *Jacobs,* plaintiff Jacobs approached Kraft with a new method for making cream cheese. Kraft hired Jacobs for a fixed term of 78 weeks. The employment contract expressly stated that Jacobs' employment was conditioned on his producing a cream cheese "satisfactory to the market," as measured by sales. After nine weeks, Kraft fired Jacobs, declaring that the cheese was unmarketable. Kraft had not attempted to market the product. A jury found in Jacobs' favor. Our Supreme Court affirmed the verdict, holding that, under the circumstances, Kraft had an implied duty to attempt to market the cheese before firing Jacobs.

5. In *Baker,* the trial court had granted summary judgment to Lafayette College on Baker's breach of contract/bad faith claim. We affirmed, holding that the record contained no evidence tending to establish that the College's review procedures were a sham or otherwise undertaken in bad faith. *Baker,* 504 A.2d at 256. Our Supreme Court affirmed. *Baker,* 516 Pa. 291, 532 A.2d 399 (1987).

In the years since *Baker* was decided, it appears that no Pennsylvania appellate court has held that an implied duty of good faith and fair dealing applies to termination of a pure at-will employment relationship. Indeed, our Supreme Court has held that "an at will employee has no cause of action against his employer for termination of the at-will relationship except where that termination threatens clear mandates of public policy." Pipkin v. Pennsylvania State Police, 548 Pa. 1, 5, 693 A.2d 190, 191 (1997). See also Werner v. Zazyczny, 545 Pa. 570, 579, 681 A.2d 1331, 1335 (1996); Paul v. Lankenau Hosp., 524 Pa. 90, 95, 569 A.2d 346, 348 (1990). In keeping with the above authority, we hold that Appellant cannot as a matter of law maintain an action for breach of the implied duty of good faith and fair dealing, insofar as the underlying claim is for termination of an at-will employment relationship.

Appellant suggests that he can maintain a cause of action for breach of the implied duty of good faith and fair dealing arising out of his claim that he was not treated fairly under the GFTP. Appellant's Brief at 10. If the GFTP were expressly incorporated into Appellant's employment contract, his claim would be analogous to *Baker,* which held that such a claim is viable. Appellant's complaint, however, points to no specific provision of the GFTP indicating that its provisions imposed separate contractual duties on FedEx.[7] In fact, the GFTP expressly states that "the policies and procedures set forth by the Company provide guidelines for management and other employees during employment but do not create contractual rights regarding termination or otherwise." Docket Entry 1 (Complaint), Exhibit A, page 3. Because Appellant has failed to allege facts indicating that the GFTP imposes any additional contractual duties on FedEx, Appellant's first claim lacks merit.

Appellant also argues that his termination violates public policy because he was fired for "blowing the whistle" on FedEx's failure to pay invoices and other unscrupulous practices. Appellant's Brief at 11-12. Generally, as noted above, no cause of action exists for termination of an at-will employment relationship unless the termination violates public policy. See *Pipkin,* supra. For example, "an employer (1) cannot require an employee to commit a crime, (2) cannot prevent an employee from complying with a statutorily imposed duty, and (3) cannot discharge an employee when specially prohibited from doing so by statute." Spierling v. First Am. Home Health Servs., Inc., 1999 PA Super 222, 737 A.2d 1250, 1252 (Pa. Super. 1999), quoting Hennessy v. Santiago, 708 A.2d 1269, 1273 (Pa. Super. 1998). In an appropriate case, the courts may announce that a particular practice violates public policy, even in the absence of a legislative pronouncement to that effect. Shick v. Shirey, 552 Pa. 590, 602, 716 A.2d 1231, 1237 (1998). On the other hand, a court's power to announce public policy is limited: "public policy is to be ascertained by reference to the

7. In this respect, Appellant's claim is more analogous to Banas v. Matthews Int'l Corp., 348 Pa. Super. 464, 502 A.2d 637, 647-648 (Pa. Super. 1985) (en banc). In that case, Banas was fired for using company materials for personal projects without permission. Banas alleged that he had permission, and pointed to sections of the employee handbook which stated that employees could use company materials for certain personal projects so long as they had permission. We found that the handbook was immaterial to the case, and that Banas could be fired at will regardless of the handbook because it did not create any contractual promise of job security.

laws and legal precedents and not from general considerations of supposed public interest." Id. (citations omitted).

Our Courts have repeatedly rejected claims that a private employer violated public policy by firing an employee for whistleblowing, when the employee was under no legal duty to report the acts at issue. See Geary v. United States Steel Corp., 456 Pa. 171, 183, 319 A.2d 174, 180 (1974) (no wrongful discharge claim where employee complained to superiors about substandard and potentially unsafe quality of employer's product); *Spierling*, 737 A.2d at 1254 (no wrongful discharge claim where employee was fired after searching discarded files for evidence of Medicare fraud and reporting such fraud to investigators). . . .

Appellant contends that employees should not be fired from private companies for reporting unscrupulous practices.[8] Appellant has failed to identify any relevant statutes or legal precedents indicating that such retaliation violates public policy. Accordingly, Appellant's claim for wrongful discharge under the public policy exception cannot stand.

Next, Appellant argues that the trial court failed to recognize duties imposed on FedEx by the "doctrine of necessary implication." Appellant's Brief at 13-15. According to Appellant, contracting parties have a duty to do those things that reason and justice dictate are necessary to ensure that the other party is not deprived of the fruits of the contract. Id. Upon review of this claim, we find that it is indistinguishable from Appellant's arguments concerning the implied duty of good faith and fair dealing. For the reasons set forth above, this claim lacks merit.

Next, Appellant argues that he furnished sufficient additional consideration to overcome the presumption that he is an at-will employee. An employee can defeat the at-will presumption by establishing that he gave his employer additional consideration other than the services for which he was hired. Cashdollar v. Mercy Hosp. of Pittsburgh, 406 Pa. Super. 606, 595 A.2d 70, 72-73 (Pa. Super. 1991). Additional consideration exists "when an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform." 595 A.2d at 73 (citation omitted). For example, in *Cashdollar,* we found sufficient additional consideration where the employee, in response to the employer's persistent recruitment efforts, gave up a stable position in another state, sold his house, and relocated to a new city with his pregnant wife, only to be fired after sixteen days on the job. Id. On the other hand, our Courts have found no additional consideration where the employee "has suffered detriments, in the course of his or her employment, that are 'commensurate with those incurred by all manner of salaried professionals.' " Id., citing Veno v. Meredith, 357 Pa. Super. 85, 515 A.2d 571, 580 (Pa. Super. 1986) (no additional consideration when employee was fired after eight years over a difference of opinion with his employer, even though employee had originally moved from Newark to Pennsylvania and had foregone other employment opportunities over the years), *appeal denied,* 532 Pa. 665, 616 A.2d 986 (1992).

8. Unlike Appellant, public employees are protected by Pennsylvania's Whistleblower Law. *Holewinski,* 649 A.2d at 715; 43 P.S. §1421 et seq.

Appellant argues that he gave additional consideration by conferring "substantial, superior job performance." Appellant's Brief at 17. A general allegation of superior work performance is insufficient to establish additional consideration. First, performing well on the job does not generally confer a substantial benefit on his employer beyond that which the employee is paid to do. Moreover, performing well on the job does not generally constitute a detriment beyond that which is incurred by all manner of salaried professionals. After reviewing Appellant's complaint as a whole, we conclude that Appellant has alleged no facts tending to establish that he conferred additional consideration. This claim fails.

Finally, Appellant argues that the trial court erred in granting preliminary objections because Appellant alleged that FedEx specifically intended to harm him. In *Krasja,* 622 A.2d at 360, we held an employee cannot maintain a cause of action for wrongful discharge based on a "specific intent to harm" theory. We reasoned that such a theory was no longer viable in light of our Supreme Court's decision in *Paul,* supra, which held that an at-will employee has no cause of action for wrongful discharge unless the termination violates public policy. Id. Accordingly, Appellant's "specific intent to harm" claim fails as a matter of law.

Order affirmed.

McEwen, President Judge, Concurs in the Result.

Notes and Questions

1. *Presumption of employment at-will and its limitations.* The "at-will" doctrine is a concept that we have encountered before. You should recall from the *Leibel* case earlier in this chapter that a franchise contract of indefinite duration is presumed to be at-will, meaning that either party is free to terminate the contract at any time and without a requirement of good or just cause. Application of the at-will doctrine to employment contracts in the United States has been traced back to the nineteenth century and it is widely recognized as "the prevailing rule throughout the country." Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 280 (Iowa 2000). See also Restatement of Employment Law §2.01, Comment. *b* (2015) (noting that 49 states and District of Columbia recognize at-will employment as presumptive rule; sole exception is Montana, which has a "good cause" rule by statute).

By definition, the at-will doctrine does not apply to a contract with a specified duration, e.g., a one-year or five-year contract. A contract that includes a specified duration is construed to mean that the employee may be terminated only for just or good cause. Mart v. Forest River, Inc., 854 F. Supp. 2d 577 (N.D. Ind. 2012) (discussing two types of employment contacts under Indiana law—definite term in which the employee may only be fired for cause and at-will in which the employee may be fired regardless of reason); Lynn v. Wal-Mart Stores, Inc., 280 S.W.3d 574 (Ark. 2008) (recognizing that contract for a definite duration may not be terminated before the end of the stated term except for cause unless the contract specifically provides for termination). The presumption of at-will employment, however, cannot be easily overcome and therefore an agreement for a term must be specific. See Bernard v. IMI Systems,

Inc., 618 A.2d 338 (N.J. 1993) (overruling judicial precedent that salary stated in annual terms would implicitly create a year-long contract; more required to overcome at-will presumption). But see Rooney v. Tyson, 697 N.E.2d 571 (N.Y. 1998) (agreement to employ fight trainer "for as long as [defendant] fought professionally" established legally cognizable duration and was not contract subject to termination at-will).

Another possibility is that the employee and the employer have an agreement that, although for an indefinite period, the employment contract can be terminated only with just or good cause. The parties may have an explicit agreement to this effect or the employee might allege that the commitment took the form of a promise of "permanent employment." Courts steeped in the traditional approach to at-will employment contracts have routinely denied the latter type of claim, holding that permanent employment does not mean employment "for life," merely that the employee's position will be of indefinite duration. See Reddington v. Staten Island Univ. Hosp., 511 F.3d 126 (2d Cir. 2007) (finding that statements made to hospital employee that new position would "always" be available did not overcome presumption that employment was at-will). Even if interpreted literally, promises of "permanent" employment have customarily been held to be unenforceable unless supported by some additional consideration beyond the employee's performance of her duties on the job. See, e.g., Worley v. Wyoming Bottling Co., 1 P.3d 615 (Wyo. 2000).

2. *The implied duty of good faith and at-will employment.* The *Donahue* court recognizes, as have the other cases in this section, that the implied covenant of good faith and fair dealing applies to every contract and identifies at least two situations in which the implied duty might be breached in an at-will employment contract. First, the court cites its earlier decision in Somers v. Somers, 613 A.2d 1211 (Pa. Super. Ct. 1992), in which an at-will employee sufficiently stated a claim for breach of the duty of good faith in alleging that the employer deprived him of compensation that appeared to have already been earned before termination. Other courts have recognized similar claims that termination that deprives the at-will employee of earned compensation would violate the duty of good faith. See, e.g., Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (discharge motivated by desire to deny plaintiff the benefit of a sales commission that had been earned in full would be breach of duty of good faith). See also Wilson v. Career Educ. Corp., 729 F.3d 665 (7th Cir. 2013) (employer may breach covenant of good faith by using its discretion to terminate bonus plan with intent to deprive employee commission already earned).

The *Donahue* court also recognized as a second possibility that the implied duty of good faith might apply with regard to the manner in which an at-will employee is terminated, holding that a promised evaluation must be conducted in good faith. See also E. I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996) (breach of the implied covenant of good faith would be established by proving that employer created false grounds and fictitious basis for termination of at-will employee but not by the termination itself). The *Donahue* court and many others, however, have emphatically rejected the proposition that the implied covenant of good faith will transform an at-will employment relationship into one that generally requires good cause for discharge. See Bollinger v. Fall River Rural Elec. Co-op., Inc., 272 P.3d 1263 (Idaho

2012). Furthermore, some jurisdictions take the position that the implied duty of good faith simply does not exist in at-will employment relationships. See Weaver v. John Lucas Tree Expert Co., 2013 WL 5587854 (D.S.C.) (applying South Carolina law).

3. *Other exceptions to at-will doctrine.* The *Donahue* court and other jurisdictions have recognized a number of other possible limitations on the ability of an employer to terminate an at-will employee:

Public policy. A clear majority of jurisdictions recognize a public policy exception to the at-will employment doctrine and often treat such claims as sounding in tort. See Wholey v. Sears, Roebuck & Co., 803 A.2d 482, 488-489 (Md. 2002) (citing 30 jurisdictions recognizing public policy exception in nonexhaustive listing). The decision usually regarded as the leading case applying the public policy limitation is Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959), which held that an at-will employee would be entitled to relief for wrongful discharge if he were fired because he refused to commit perjury at the request of his employer. See also Kmak v. American Century Companies, Inc., 754 F.3d 513 (8th Cir. 2014) (Missouri public policy would prohibit former employer from recalling stock options to deny earned dividends to former employee in retaliation for truthful testimony in judicial proceedings); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984) (employee's discharge would be tortious if based on steps taken to comply with anti-bribery measures in Foreign Corrupt Practices Act).

As indicated in *Donahue,* however, courts generally restrict this theory to circumstances involving a "clear mandate" of public policy founded on constitutional, legislative, administrative, or established judicial authority. See Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731 (Conn. 2002) (public policy exception adopted by courts in effort to balance competing interests of employees and employers, but claim must be predicated on employer's violation of important and clearly articulated public policy; statute established policy against discrimination based on pregnancy, but it did not apply to businesses with fewer than three employees). Some jurisdictions have rejected the public policy limitation altogether. See, e.g., De Petris v. Union Settlement Ass'n, Inc., 657 N.E.2d 269 (N.Y. 1995) (confirming that New York does not recognize a tort of wrongful discharge in at-will employment); Pacheo v. Raytheon Co., 623 A.2d 464 (R.I. 1993) (stating unequivocally that in Rhode Island there is no tort for wrongful discharge). What is the nature of the public policy argument raised in *Donahue*? Do you agree with the court's decision on that issue?

Additional consideration as basis of implied "for cause" term. The employee in *Donahue* argued that he gave additional consideration to the employer. The court recognized that, if proved, such consideration would defeat the at-will presumption and require just cause for termination. See NRG Solutions v. Neurogistics Corp., 2011 WL 1118838 (N.D. Ill.) (plaintiff adequately pled additional consideration to overcome at-will presumption in that she agreed to transfer assets of business she owned, including client database, to new employer and became full-time employee). The *Donahue* court referred to precedent holding that the additional consideration can be found in the employee's relinquishment of another job, at least in circumstances where there are persistent recruitment efforts by the employer and the employee

incurs expense and other hardship in relocating. For such courts the role of extra consideration is to indicate the parties' intent to have a more lasting relationship than a presumed at-will contract. See, e.g., Ciardi v. Laurel Media Inc., 2012 WL 70656 (W.D. Pa.). What claim of additional consideration does Donahue make?

Employee handbook as basis of implied "for cause" term. Yet another exception to the at-will presumption is found in cases recognizing a cause of action for breach of contract when the defendant employer had committed itself, by public statements in personnel manuals or otherwise, to refrain from terminating employees except for good cause. A leading decision in this area is Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980), in which the employee received assurance of job security before accepting employment and the company manual stated there would be dismissal only for cause. The court deemed the company's statement to create an "implied-in-fact" term that the employee would be discharged only for cause. Id. at 894. See also Becker v. Fred Meyer Stores, Inc., 335 P.3d 1110 (Alaska 2014) (employee policy manual may have altered at-will employment if it created reasonable expectation that termination could occur only with stated disciplinary procedures). Not all courts agree, however, that statements of job security made in policy manuals are contractually binding. See, e.g., Fleming v. AT&T Info. Services, Inc., 878 F.2d 1472, 1474 (D.C. Cir. 1989) (company's written policies of treating employees fairly and of providing post-termination counseling are "irrelevant" in determining whether the employee is hired at-will). As indicated by the *Donahue* court, the inclusion of a disclaimer in an employee manual stating that the document does not create a binding obligation may preclude a claim on that basis, but the disclaimer will not necessarily be effective. See Tomlinson v. NCR Corp., 345 P.3d 523 (Utah 2015) ("clear and conspicuous" disclaimer will prevent employee manual from creating an implied-in-fact contract that would alter at-will term; prominence, placement, and language will determine whether disclaimer is effective).

Promissory estoppel. Some courts have also held that detrimental reliance by a discharged employee may serve as a basis for relief. See Sheppard v. Morgan-Keegan, 266 Cal. Rptr. 784 (Ct. App. 1990) (employee who resigned a position and moved across country would not expect to be terminated before he had a chance to perform in job; summary judgment for employer reversed, citing promissory estoppel as well as the implied covenant of good faith); Nelson v. Town of Johnsbury Selectboard, 115 A.3d 423 (Vt. 2015) (promissory estoppel may modify at-will relationship, but promise must be definite and specific in nature and not just vague assurance). On the other hand, a number of jurisdictions have held that a promissory estoppel claim by an employee is fundamentally inconsistent with at-will status. See, e.g., Krueger v. Home Depot USA, Inc., 2015 WL 4763653 (W.D. Ky.) (at-will status precludes promissory estoppel claim under Kentucky law); Murtagh v. Emory Univ., 152 F. Supp. 2d 1356 (N.D. Ga. 2001) (there is ample Georgia law that one cannot state a claim for promissory estoppel when the underlying promise is for at-will employment).

The Restatement of Employment Law §2.02(b) adopts the view that detrimental reliance may make a promise enforceable as a limitation on an otherwise at-will employment relationship. Consistent with the promissory estoppel rule in §90 of the Restatement (Second) of Contracts, the promise must

be sufficiently definite to reasonably induce reliance and the remedy may be limited as justice requires. See Restatement of Employment Law §9.01(d) and Comment *i*.

4. *At-will doctrine and personnel actions other than discharge.* The plaintiff in *Donahue* appeared to allege that retaliatory personnel actions were taken against him before his actual discharge. If a court recognizes restrictions on an employer's right to discharge an at-will employee, will such limitations also apply to demotions or other changes in employment conditions? Compare Scott v. Pacific Gas & Electric Co., 904 P.2d 834 (Cal. 1995) (extending policy manual exception to demotions), with White v. State of Washington, 929 P.2d 396 (Wash. 1997) (refusing to extend public policy exception to employer's personnel actions that are less than discharge).

5. *At-will employment and ethical duties of lawyers.* Termination of at-will employees may raise additional questions when the party terminated is an attorney. In Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992), the New York Court of Appeals ruled that an associate attorney's employment contract with a law firm should be read to implicitly incorporate certain ethical standards of the profession, such as the duty to report suspected unfitness of other attorneys. Thus, the court found a termination wrongful when the plaintiff associate was discharged for reporting another attorney's misconduct. But see Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998) (law firm could not be held liable in damages for wrongful expulsion of partner who alleged in good faith that another partner engaged in unethical conduct). *Wieder* and *Bohatch* both involved lawyers in private firms who were discharged because they reported misconduct by other attorneys. Lawyers employed by private corporations rather than law firms have also brought wrongful discharge claims. Compare General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (recognizing right of in-house counsel to bring claim for wrongful discharge based on public policy and implied contract theories), with Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (in-house counsel did not have cause of action against employer for wrongful discharge when employer fired him after he threatened to take whatever action was necessary to prevent company from selling defective kidney dialysis machines).

6. *Scholarly analysis.* What interests are at stake in a decision like *Donahue*? Many legal scholars have advocated a change in the at-will doctrine to benefit employees based on the individual's interest in freedom from unjust discharge, along with the public's interest in a securely employed labor force. See, e.g., Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 Tex. L. Rev. 1655 (1996); Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L. Rev. 105 (1997). Cf. Samuel Estreicher and Jeffrey M. Hirsch, Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism, 92 N. C. L. Rev. 343 (2014) (observing that actual difference between U.S. at-will law and "just cause" approach in many other trading partner countries is not as great as might be generally thought).

Other writers have argued in favor of the employment at-will rule on grounds of efficiency. Limitations on an employer's right of discharge increase litigation costs and may harm employees as a class by making employers more reluctant to hire risky employees. See Richard A. Epstein, In Defense of the

Contract At Will, 51 U. Chi. L. Rev. 947 (1984). See also John P. Frantz, Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements, 20 Harv. J.L. & Pub. Poly. 555 (1997); Andrew P. Morriss, Bad Data, Bad Economics, and Bad Policy: Time to Fire the Wrongful Discharge Law, 74 Tex. L. Rev. 1901 (1996).

A rebuttal to the efficiency arguments can be found in Peter Linzer, The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory, 20 Ga. L. Rev. 323, 409-415 (1986). Professor Linzer asserts that many attempts by the courts to ground relief against wrongful discharge on one of the traditional common law bases—contract or tort—are not entirely convincing and that the traditional subject-area divisions should not be controlling. Id. at 335-369. Relying on a variety of strands of theory (including modern notions of "the firm" and the "relational contract" theories of Professor Ian Macneil), Linzer argues that relief from improper discharge in many cases is appropriate and, moreover, that the courts, and not merely the legislatures, are appropriate organs for creating such rules of relief.

> I think it can even be argued that courts are institutionally at least as capable as legislatures to apply community values to problems of private law. Courts—at least Anglo-American courts—have done this as long as there have been courts. Certainly they can easily get out of touch, and in any event we are not speaking of a Gallup Poll. But judges seeking a policy basis will be affected by the attitudes of the time, as well as by their own ethical, economic, social and political biases. Legislators hear from constituents and lobbyists, but with many private law matters they are likely to be importuned more loudly, and to hear more clearly, after the courts have acted rather than while the issue is "abstract" and unresolved.

Id. at 423. Noting that "inaction" is action that preserves the employer-dominant power regime, Linzer concludes by calling on courts to return to "common law creativity" by discerning and applying community values in this and other areas where traditional common law rules appear inadequate. Id. at 424. Linzer also urges courts to recognize that "all contributors to an enterprise deserve some security and some share of the enterprise itself." Id. at 425. For an empirical survey aimed at measuring the reactions of employees to various discharge scenarios, see Larry A. DiMatteo et al., Justice, Employment, and the Psychological Contract, 90 Or. L. Rev. 449 (2011).

PROBLEM 6-1

Ed Evers owned an accounting company in Santa Carlita, your city. Last January, Ed was approached by Fran Farmer of Acme Accountants, a large accounting firm with a number of branch offices in Santa Carlita and neighboring communities. Fran suggested that Ed come to work for Acme as a manager. "You'll be paid a salary plus commissions," Fran told Ed, "and I'm sure you'll make more money than you're making now." "That's tempting," Ed responded, "I plan to retire in five years or so, and it sure would be nice to get rid of the headache of running my own business in the meantime. But I averaged $10,000 per month in profits over the last five years. Can you match