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COMMENTS

EMPLOYMENT DEFAMATION EXPANDS EMPLOYER LIABILITY IN THE AT-WILL CONTEXT

[Lewis v. Equitable Life Assurance Society of the United States, 389 N.W.2d 876 (Minn. 1986); Frankson v. Design Space International, 394 N.W.2d 140 (Minn. 1986)]

INTRODUCTION

More than two-thirds of the non-agricultural work force in the United States is employed under the at-will employment doctrine. According to the at-will rule, an employee may be terminated at any time for any reason, even for a reason morally wrong, without the

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1. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 321 n.6, 171 Cal. Rptr. 917, 921 n.6 (1981) (noting that somewhat less than 28% of the non-agricultural workforce is employed under terms of a union agreement); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1816 n.2 (1980) [hereinafter Protecting Employees] (citing U.S. Census Bureau statistics which state that 60% to 65% of all American employees are hired on an at-will basis, while 22% are unionized, and 15% are federal or state employees); see also Peck, Unjust Discharges From Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1, 8-10 (1979) (discussing the prevalence of at-will employment and estimating that as many as 300,000 at-will employees could state colorable claims for unjust discipline or discharge each year).

2. The at-will doctrine allows the discharge of employees without regard to equitable considerations, such as the length of faithful service, foregone opportunities, or ability to secure future employment. See, e.g., Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir. 1964) (the court found no claims for wrongful discharge even though the employee's ability to secure substitute employment was limited by reason of his long service to the former employer), cert. denied, 379 U.S. 914 (1964); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (the employee was discharged after 45 years of faithful service and satisfactory performance with but one year remaining before his retirement).

3. An illustration of the power and prerogative vested in the employer by the at-will doctrine is found in cases of sexual harassment in the workplace. See, e.g., Comerford v. Int'l Harvester Co., 235 Ala. 376, 178 So. 894 (1932). In Comerford, the plaintiff was discharged because his wife refused to sleep with her husband's supervisor. The court dismissed the husband's wrongful discharge suit on the grounds that the at-will doctrine gave the employer the right to discharge employees for any reason whatsoever.

A legal mechanism to prevent sexual harassment of employees was not in place until the passage of Title VII of the Civil Rights Act of 1964. Even then, it wasn't until the mid 1970's that the courts decided that this legislation was applicable to sexual intimidation of employees by their supervisors and employers. See, e.g., Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (where a female employee was dismissed for refusing to consent to sexual intercourse with her super-
employer being subject to legal liability. However, the rule has come under increased attack during the last decade. Courts in the United States have developed numerous exceptions to the rule, imposing employer liability for wrongful discharge under both tort and contract theories.

In addition to liability for wrongful discharge, an employer may be held liable for independent tort claims, which often flow from the very same set of facts. Examples of such claims include intentional infliction of emotional distress and interference with employment

visor; the court decided that she had a claim under Title VII of the Civil Rights Act of 1964); see also Tomkins v. Public Serv. Electric Gas Co., 568 F.2d 1044, 1045 (3rd Cir. 1977) (the court overturned the grant of a motion to dismiss for failure to state a claim for wrongful discharge for refusal to participate in sex with the supervisor).

4. The at-will doctrine is often illustrated by a passage from an early Tennessee case, which describes the doctrine as follows: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong." Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Waters, 132 Tenn. 527, 540, 179 S.W. 134, 137 (1915).


6. See infra notes 23-47 and accompanying text.


8. See Hubbard v. United Press Int'l, 330 N.W.2d 428 (Minn. 1983). In Hubbard, the employee argued that his employer, UPI, "discriminated against him on the basis of an alleged disability, alcoholism." Id. at 431. The employer discharged him in retaliation for his engaging in protected activity to protest that discrimination. Id. In addition, Hubbard asserted that UPI intentionally and recklessly conducted a continuous "campaign of harassment" against him when he disclosed that he was completing a program of treatment for alcoholism, and that UPI thereby intentionally inflicted emotional distress on him. Id. The court, in Hubbard, recognized for the first time in Minnesota the separate and independent tort of intentional infliction of emotional distress, discarding the previous requirement of contemporaneous physical injury. Id. at 438; see also Note, Minnesota's "New Tort": Intentional Infliction of Emo-
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contract. Since these claims lie in tort, punitive, as well as compensatory, damages are available. Recently, the defamation claim has become the basis for expanded employer liability.

Generally, an employer is not liable for defamation if he does not publish false statements to a third party. Similarly, an employee may not recover for damages resulting from his own publication. Recent decisions by the Minnesota Supreme Court have modified these settled principles, expanding employer liability for defamation in the at-will context. Under current law, an employer may be liable in defamation for stating reasons for discharge which are later proven false.

In Lewis v. Equitable Life Assurance Society of the United States, four former employees brought suit against their employer for breach of an employment contract and for defamation based upon self-publication.

9. See, e.g., Potthoff v. Jefferson Lines, Inc., 363 N.W.2d 771 (Minn. Ct. App. 1985). The tort of interference with employment contract occurs when a third party induces the employer to discharge an employee. The elements of intentional interference with a present contract are: (1) the existence of a contract; (2) the alleged wrongdoer’s knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. Id. at 775. See also Furlev Sales and Associates, Inc. v. North American Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982); Snowden v. Sorenson, 246 Minn. 526, 532, 75 N.W.2d 795, 799 (1956). In Potthoff, the discharged employee alleged that Jefferson Lines and its president intentionally interfered with his contractual relations with his employer. Id. at 777. Jefferson had employed Potthoff as a bus driver. Id. He was terminated after he was involved in an accident. Id. Contemporaneously, Jefferson entered into a contract with another bus company, Four Star Bus Lines, to take over some of the less profitable routes that Jefferson was required to operate under its license from the ICC. Id. Potthoff was employed by Four Star after losing his job with Jefferson. Id. Because of the contract between Jefferson and Four Star, Four Star stored and serviced its buses at the Jefferson facility. Id. This made it necessary for Four Star drivers to come onto Jefferson property to leave and pick up buses. Id. at 774. When Jefferson’s president learned that Potthoff was coming onto Jefferson property and using Jefferson facilities, he informed Four Star that if they did not terminate Potthoff, he would revoke the bus contract Jefferson had with them. See id. Four Star immediately discharged Potthoff, who subsequently sued for tortious interference of employment contract. See id. The trial court ruled for the plaintiff, awarding damages for lost wages, emotional suffering, and punitive damages. Id. The Minnesota Court of Appeals affirmed the award of lost income and punitive damages, but reversed the award for emotional suffering. Id. at 778.

10. See infra note 31.
11. See infra notes 57-79 and accompanying text.
13. Id. at 802.
14. 389 N.W.2d 876 (Minn. 1986).
During application for employment following discharge, the employees felt compelled to restate the false reason given by the employer for their termination. The employees consequently failed to secure new employment. The Minnesota Supreme Court affirmed the lower court decision in favor of the employees on both the contract and defamation claims, thereby adopting an exception to the general rule that a party may not recover for his own defamatory publication.

In Frankson v. Design Space International, the Minnesota Supreme Court held that an employer may be liable for defamation even where publication is made only to employees and agents within the corporation itself. Under the facts of Frankson, preparation of a defamatory termination letter and distribution of that letter to two officers of the corporation and to plaintiff's personnel file constituted publication of the defamatory statement. In both Frankson and Lewis, the false reasons for dismissal became grounds for a defamation claim.

These decisions have significant implications for future litigation. Employment defamation strikes at the heart of the at-will doctrine, which permits an employer to discharge an employee at any time and for any reason not otherwise illegal. Minnesota's recent decisions on defamation sharply qualify the at-will rule: termination may still be made at any time and for any reason, but the reason for termination must be "true," in fact and not only in belief. These decisions have resulted in increased liability for employers. They have broad implications for future litigation, because the alleged wrongful basis of any discharge will, at the same time, be grounds for employer liability in defamation. Minnesota has rejected, until only recently, a tort action for wrongful discharge. Now, however, an employee may nevertheless receive a tort judgment in defamation if the basis for the discharge is proven not to be true. After Lewis and Frankson, the wrongful basis of any discharge may be grounds for a defamation claim.

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15. Id. at 877.
16. 394 N.W.2d 140 (Minn. 1986) (affirming on publication, but reversing on employer privilege).
17. Id. at 144.
18. Minnesota has recently adopted a tort action for wrongful discharge based upon a public policy exception to the employment at-will doctrine. See Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588, 592 (Minn. Ct. App. 1986), review granted. See also Wild, 302 Minn. at 442, 234 N.W.2d at 790. See also infra notes 53, 140-57 and accompanying text.
19. The dissents in both Lewis and Frankson recognize the implication of these decisions upon future litigation. Justice Kelly disagrees with the majority in Lewis in its view that liability will be narrowly "imposed only where the plaintiff was in some significant way compelled to repeat the defamatory statement and such compulsion
To understand the legal implications of these recent cases, one must look at both the law of at-will employment as well as the law of defamation. This Comment will focus upon the interrelationship and apparent conflict between these two bodies of law. Part I describes the nature of the at-will employment rule and its judicially developed exceptions, including Minnesota's own position with respect to the tort of wrongful terminations. Part II describes the relevant aspects of defamation law in the at-will termination context. Part III is a description of the significant aspects of the Lewis and Frankson decisions. Finally, Part IV will discuss the implications of these developments in the broader context of at-will employment law.

I. THE AT-WILL EMPLOYMENT DOCTRINE

A. Generally

According to early common law, an employment agreement without a fixed term was terminable by either party at any time without incurring liability.20 The at-will rule was applied almost universally was, or should have been, foreseeable to the [employer]." Lewis, 389 N.W.2d at 896 (Kelly, J., dissenting). Kelly charges that "[i]n claims brought by ex-employees against employers for defamation when the employment was terminated for 'incompetence,' 'dishonesty,' 'insubordination,' or for any other reason carrying a connotation of immorality, ineptness, or impropriety, 'compulsion' will almost automatically be found in connection with future job applications by the discharged employee. Such 'compulsion' would, with certainty, be foreseeable by the ex-employer." Id. Consequently, the adoption of the re-publication doctrine "substantially expands the scope of the defamation action." Id.

Similarly, the dissent in the Minnesota Court of Appeals' decision in Frankson, charged that Frankson extends the holding in Lewis, itself an extension of the law. Frankson, 380 N.W.2d at 573 (Wozniak, J., dissenting). While Lewis involved the self-publication of a defamatory statement to potential employers, in Frankson there was no publication outside the corporation. Id. Where the contents of a termination letter are communicated only to company employees, the critical issue in a defamation action is whether publication exists. Id.

20. English common law viewed employment as a contractual relationship which continued a year at a time unless the parties indicated their intention otherwise. Blackstone's statement of the English rule is as follows:

[If the hiring be general without any particular time limited, the law construes it to be a hiring for a year;... and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of this term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace, but they may part by consent, or make a special bargain.

1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 425 (2d ed. 1872). The yearly presumption could be rebutted, but only if a yearly contract was not the intent of the parties. Under the English rule, the parties must have expressly agreed that the employment was at-will. Adoption of the English rule in America was unsettled
by the courts until the early 1950's. Contemporary courts have formulated numerous exceptions, based both on tort and contract


At the turn of the 20th century, courts in the United States took the position that an employment contract with an indefinite duration was terminable at-will by either party. This principle was first articulated by H.G. Wood in 1877. See H.G. Wood, A Treatise On the Law of Master and Servant § 134 (1877). Wood stated the at-will employment rule as follows: "[t]he rule [in America] is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." Id. at 272.

Earlier commentators held to the English rule. See C. Smith, A Treatise on the Law of Master and Servant, 53-57 (1852). Some courts continued to state the one year (English) hiring rule despite Wood’s pronouncement. See Feinman, supra, at 125-29.

While the English rule held that a contract which failed to specify its duration was for one year, the new American rule held that a contract of employment was terminable at any time and for any reason unless the parties expressly agreed otherwise. If the parties intend an employment contract for a definite duration, they must include an express term to that effect within the contract. Without such an express term, the employment is terminable at any time and for any reason by either party.

21. Wood’s concept of at-will employment became the standard followed by a majority of American courts. Wood’s rule was first applied in Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895), where the court indicated that its application of the at-will rule followed directly from Wood’s earlier formulation of the at-will doctrine. Scholars and jurists agree that Wood’s treatise was responsible for nationwide acceptance of the rule. They also agree, however, that the doctrine is not supported by the authority on which Wood relied, nor that it depicts the law as it then existed. See Feinman, supra note 20, at 126-27; Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481, 485 (1976); Protecting Employees, supra note 1, at 1825 n.51; Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335 (1974) [hereinafter Job Security]; see also Pugh, 116 Cal. App. 3d at 320, n.3, 171 Cal. Rptr. at 921 n.3.

The at-will rule was firmly integrated into American common law by the United States Supreme Court in Adair v. United States, 208 U.S. 161, 175-76 (1908) and Coppage v. Kansas, 296 U.S. 1, 10-13 (1915). In Adair, the court declared unconstitutional a federal statute which imposed criminal penalties for the discharge of employees for union membership. The Supreme Court ruled the law unconstitutional because it was contrary to the fifth amendment guarantee of individual liberty, property, and freedom of contract. In Coppage, the U.S. Supreme Court struck down a Kansas statute forbidding “yellow dog” contracts which required employees, as a condition of employment, to agree not to join a union.

The new American rule emerged during the late nineteenth century at a time when political and judicial attitudes favored policies of laissez faire economics, freedom of contract, and free enterprise. The decisions in Adair and Coppage illustrate the attitude of the period. The Supreme Court reasoned that by restricting the employer’s liability and increasing his freedom to hire and fire employees, the at-will doctrine would foster free enterprise and stimulate economic growth. For a description of the social and economic attitudes associated with the adoption of the at-will doctrine, see generally Blades, supra note 5; Feinman, supra note 20. The at-will doctrine was almost universally followed by the courts in the United States until the 1950’s.
principles. In some cases, legislatures have mandated reform. In judicial reevaluation of the at-will doctrine began in 1959 with *Petemann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25, 27 (1959) which established the public policy exception. "Public policy" is defined as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . ." *Safeway Stores v. Retail Clerks Int'l Ass'n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953) (quoting *Noble v. City of Palo Alto*, 89 Cal. App. 47, 50-51, 264 P. 529, 530 (1928)). The primary criticism of the public policy exception has been the difficulty associated with defining "public policy." See infra note 38.

The employee in *Petemann* had been discharged because he refused to commit perjury before a legislative committee. The court acknowledged that the at-will rule applied, but held that the right to discharge was limited by public policy considerations. *Petemann*, 174 Cal. App. 2d at 186, 344 P.2d at 27. The *Petemann* court stated the public policy rationale as follows:

The public policy of this state . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare.

Id. at 186, 344 P.2d at 27.


Eventually, other states followed with exceptions of their own. In *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), the Indiana Supreme Court held that an employee discharged for filing a workers' compensation claim had a civil cause of action for wrongful discharge. *Id.* at 254, 297 N.E.2d at 428. A year after *Frampton* was decided, the state of New Hampshire, in *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), adopted an exception to the at-will rule based upon the concept of "good faith and fair dealing" as part of every employment contract. In *Monge*, the plaintiff was discharged when she resisted the sexual advances of her supervisor. The court decided that the termination was made in bad faith and violated public policy because it was not in the best interest of the economic system or the public good. *Id.* at 133, 316 A.2d at 551.

Litigation has increased since these first cases. By 1982, a majority of courts had adopted a cause of action for wrongful discharge based on a variety of theories. See Weiss, *State by State: Chipping Away at Employment At-Will*, NATIONAL L. J. 26 (Jan. 18, 1982).

In *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594 (Ala. 1980), the Alabama Supreme Court refused to find a judicial exception to the at-will rule where an employee had been discharged as a result of serving on a grand jury. The position taken by the Alabama Supreme Court was that state statutory protection for an employee from loss of compensation while serving on a grand jury does not extend to protect him from discharge. *Id.* at 595. The Alabama Legislature promptly enacted a statute to prevent discharge under such circumstances. *Ala. Code § 12-16-8.1* (1986).

Other states have passed similar legislation, sometimes under similar circum-
fact, Congress and state legislatures have been steadily chipping away at the at-will rule since at least the 1930's.24

24. The at-will doctrine has been eroded by federal labor legislation passed since the 1930's, as well as by federal civil rights legislation of the 1960's, and subsequent state legislation. For a list of the specific legislation see Protecting Employees, supra note 1, at 1827 nn.63-67. During the 1930's, Congress recognized that individual employees were powerless to demand a definite term contract. Congressional response to this inequality in bargaining power was the passage of the National Labor Relations Act. See 29 U.S.C. § 151 (1982); see also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In Jones & Laughlin Steel, the Supreme Court upheld the validity of the National Labor Relations (Wagner) Act. The Court noted that in its statement of findings and policy concerning the National Labor Relations Act, Congress declared that, because of the inequality of bargaining power, freedom of contract was an illusory right, nonexistent in the employer-employee relationship. The purpose of this legislation was to protect the employee's right to collective bargaining. The act states that one of its purposes is to protect the right of employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1982). Most collective bargaining contracts contain provisions which prohibit dismissal without "cause," or "just cause," thereby abrogating the at-will doctrine. Approximately 80% of all nonagricultural collective bargaining contracts contain a requirement that all dismissals be for cause or just cause. See Peck, supra note 1, at 8. In 1981, only 25 percent of the nonagricultural work force was covered by a collective bargaining agreement. See Protecting Employees, supra note 1, at 1934.

Exceptions to the at-will doctrine can be divided into three general categories: exceptions with a tort basis, exceptions based upon contract principles, and exceptions which imply a concept of "good faith and fair dealing." Tort actions for wrongful termination are based upon the assumption that some public duty or policy has been violated by the termination. Tort remedies, such as


State governments have passed legislation similar to that provided at the federal level which affords additional protection for certain employee groups. For a tabulation, see Larson, supra note 5, at chapter 10. Minnesota, for example, has passed legislation which protects employees. Minnesota Human Rights Act, Minn. Stat. § 363.14 (1986) (makes employers civilly liable to employees for discrimination on the basis of age, sex, race or marital status); Minn. Stat. § 182.669 (1986) (for discharge of an employee who refuses to work under conditions which violate the Minnesota State Occupational Safety and Health Act). See also Minn. Stat. § 593.50, subd. 3 (1986) (civil cause of action for an employee who has been discharged for serving on a jury); Minn. Stat. § 176.82 (1986) (for filing workers compensation claim); Minn. Stat. § 181.75 (1986) (for refusing to take a lie detector test); Minn. Stat. § 571.61, subd. 2 (1986) (for having his or her wages garnished).

25. See infra notes 28-37 and accompanying text.
26. See infra notes 38-40 and accompanying text.
27. See infra notes 41-46 and accompanying text.
28. See Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). In Tameny, the court held that a wrongful discharge lawsuit exhibits the classical elements of a tort case, as distinguished from contract. Most significantly, the court found a duty outside the promises found in the contract itself. In reaching this conclusion, the court wrote as follows:

[A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied "promises set forth in the [employment] contract . . ." but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes.

Id. at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844 (quoting Eads v. Marks, 39 Cal.2d 807, 811, 249 P.2d 257, 260 (1952)).

29. Principles of public "duty" or "policy" are frequently defined by statutory or constitutional reference. Few courts have permitted "public policy" to embrace principles not expressed explicitly in public law. See Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981). See also Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 652 P.2d 625 (1982), where the court suggested a guide as to how "public policy" in wrongful discharge cases should be determined:

In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.

Id. at 631.

Similarly, the Supreme Court of Wisconsin wrote as follows: "[a] wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The public policy must
punitive damages, are available in such cases. 30

Tort liability has been found to exist in many situations. For example, liability has been found where the employee is terminated for filing a worker's compensation claim; 31 for refusing to give false testimony at a trial or administrative hearing; 32 for serving on a jury; 33 be evidenced by a constitutional or statutory provision." Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 573, 335 N.W.2d 834, 840 (1983).

30. The most significant distinction between tort and contract theories of wrongful discharge has to do with the issue of damages. Punitive damages are generally not available in contract actions. See, e.g., Ford Motor Co. v. Mayes, 575 S.W.2d 486, 486 (Ky. Ct. App. 1978); White v. Benkowski, 37 Wis.2d 285, 290-92, 155 N.W.2d 74, 77 (1967). This rule applies in the employment context as well. See Fincke v. Phoenix Mut. Life Ins. Co., 448 F. Supp. 187, 191 (W.D. Pa. 1978). The rationale for the rule rests upon the contract principle that a promisee should not be put in a better position than he would have been in had the promisor performed. See FARNSWORTH, CONTRACTS § 12.8, at 842 (1982). Therefore, under the contract theory of wrongful termination, the employee may recover only compensatory damages, such as lost wages.

However, in the case of wrongful termination based upon tort theory, the employee may recover punitive as well as compensatory damages. See, e.g., Tameny, 27 Cal. 3d at 167, 610 P.2d at 1330, 164 Cal. Rptr. at 839. The purpose of punitive damages is often related to some public policy objective which is accomplished by punishing the defendant. See, e.g., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981). It is also intended to deter defendant or others from engaging in similar future conduct. See, e.g., Zarcone v. Perry, 572 F.2d 52, 55 (2d Cir. 1978); Arie v. Intertherm, Inc., 648 S.W.2d 142, 159 (Mo. Ct. App. 1983). See also Palmateer, 85 Ill. 2d at 124, 421 N.E.2d at 876; sources cited supra note 7; supra note 29 and accompanying text.


32. See, e.g., Petermann, 174 Cal. App. 2d at 184, 344 P.2d at 25. In Petermann, the plaintiff was fired because he refused to commit perjury before a legislative committee. The court stated:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. Id. at 188-89, 344 P.2d at 27.

See also Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985). With this case, North Carolina adopted for the first time the tort of wrongful discharge based upon public policy. Id. at 343, 328 S.E.2d at 826. The employee in Sides was a nurse anesthetist who was discharged in retaliation for testifying in a medical malpractice action. Id. at 332-34, 328 S.E.2d at 820-22. The court stated its reasons for adopting the "public policy" tort as follows:

[I]n a civilized state where reciprocal legal rights and duties abound the words "at will" can never mean "without limit or qualification," .... Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent. We hold, therefore, that no employer in this State, notwithstanding that an employ-
or for refusing to commit an unlawful or unethical act such as violating antitrust, consumer protection, or health safety laws.

Because of the inherent difficulty with defining the public "duty"

Id. at 342, 328 S.E.2d at 826.

33. See, e.g., Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983). In Wiskotoni, a bank manager was fired less than two weeks after being subpoenaed to appear before a grand jury, but over two months after his employer had been informed by an FBI agent that the manager was being investigated for his involvement in a numbers racket. The court cited a number of Michigan statutes intended to protect the grand jury system. It held that the "system would be affected adversely if an employer could discharge with impunity an employee for the reason that the employee had been called to appear and testify before a grand jury" and that such "legislative statements of public policy clearly imply the existence of a cause of action for wrongful discharge" under these circumstances. Id. at 383.

But cf. Bender Ship Repair, Inc. v. Stevens, 379 So.2d 594 (Ala. 1980). The court, in Bender, noted the lack of an express legislative mandate that would justify a wrongful discharge action where the employee was discharged for missing work while serving on a grand jury. Id. at 595. The court reasoned that state law, Alabama Code section 12-16-8 (1975), which protected an employee from loss of usual compensation while serving on a grand jury, did not extend to protect him from discharge itself. Id.

An exception based on public policy which encourages jury service, however, does not require statutory support for its application. See Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). In Nees, the employee was discharged because she did not seek to be excused from jury duty after her employer told her that a month's absence from work for that reason would be too long. The court held that the employee was entitled to recover compensatory damages. Id. at 220-21, 536 P.2d at 516. The court stated that the employee's right to recover was recognized "because of the substantial 'societal interests' in having citizens serve on juries." Id.

34. See, e.g., Tameny, 27 Cal. 3d at 167, 610 P.2d at 1335, 164 Cal. Rptr. at 839. In Tameny, the employee alleged that he was fired in retaliation for his refusal to participate with his supervisor in a scheme to fix the retail price of gasoline. The scheme violated the Sherman Act, the Cartwright Act, and certain consent decrees which had been entered into in a previous antitrust prosecution against Atlantic Richfield. Id. at 170-71, 610 P.2d at 1331-32, 164 Cal. Rptr. at 840-41. The basis for the court's decision in favor of the plaintiff employee is that the employer's duty to refrain from discharging such an employee is imposed by a fundamental duty not itself derived from or dependent upon the promises found in the contract. Id. at 176-77, 610 P.2d at 1335-36, 164 Cal. Rptr. at 844-45. See also supra note 29.

35. See, e.g., Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978). In Harless, the plaintiff was the office manager of the defendant bank's consumer credit department when he became aware of intentional customer overcharges for prepayment on installment loans, which violated federal and state laws. Id. at 272. After Harless reported the violations to his supervisors, the bank files involved were ordered destroyed. He was discharged after he rescued the files and delivered them to the bank's auditors. Id. In holding for the employee on the basis of wrongful discharge based on public policy, the court cited provisions of the state's Consumer Credit and Protection Act establishing a right of action for persons subjected to practices prohibited by the Act. Id. at 275-76. The court stated that such an implied cause of action would enhance the Act's enforcement:
or "policy" on which a tort action is based, many states have de-

We have no hesitation in stating that the Legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection. Such manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge.

Id. at 276.

36. See, e.g., Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984). In Garibaldi, the plaintiff had been discharged after he reported to state health officials that he had been compelled to deliver adulterated milk. Id. at 1368. The Ninth Circuit noted that the sale or delivery of "impure, polluted, tainted, unclean, unwholesome, stale or adulterated milk" is prohibited by California law and that the employee's disclosures in order to protect the public health and safety was precisely the type of conduct protected by Tameny, an earlier California decision. Id. at 1373-74.

37. A definition of "public policy" is the single most significant element in a court's decision whether to invoke the public policy exception. Developing a coherent definition of public policy, however, has long been recognized as a source of judicial difficulty and confusion. See, e.g., Palmateer, 85 Ill. 2d at 130, 421 N.E.2d at 878, where the court stated that "the Achilles heel of the principle lies in the definition of public policy."

Similarly, Story wrote that "[p]ublic policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day . . . that it is difficult to determine its limits with any degree of exactness." W. STORY, LAW OF CONTRACTS § 546, 547 (3d ed. 1851).

Another court stated that "judges to this day have been unable to fashion a truly workable definition of public policy . . . [J]udges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity." Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena, 282 Md. 588, 605, 386 A.2d 1216, 1228 (1978) (reference omitted).

The fact that courts are reluctant to define public policy in the absence of a clear legislative mandate is illustrated by the following two cases. In Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), the discharged employee was a salesman for a company in the business of selling steel pipe for oil exploration. Id. at 173, 319 A.2d at 175. He was concerned that steel pipe intended for use under high pressure was not adequately tested and constituted a hazard to the user. He reported his concern to his superior but was told to "follow directions." He then took his case to a vice-president. The pipe was eventually retested and withdrawn from the market. The employee was discharged shortly thereafter. Geary argued that he took his actions in the best interest of the public and to have done otherwise would have violated public law. Id. The court rejected Geary's argument, not because public policy was irrelevant, but because such actions were not Geary's job. Id. at 181, 319 A.2d at 179. The court held that Geary was not sufficiently qualified to uphold public policy in this area. Id.

A further example of the reluctance of courts to recognize a wrongful discharge action in the absence of a clear legislative mandate is illustrated by Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). In Pierce, the employee was a medical doctor who was responsible for research on a new drug. The doctor's team was faced with deciding whether to test an experimental drug on human subjects. Initially, the entire team advised against testing for fear the drug may cause cancer. The company pressured the team into changing its opinion. Dr. Pierce protested the
clined to recognize an action for wrongful termination based upon tort concepts. An alternative to tort-based actions for wrongful termination are exceptions based upon contract principles.

In contract-based cases, courts often seek merely to enforce the intent of the parties by finding an implied-in-fact contract. In an at-will employment agreement, the parties have failed to specify its duration. The parties may introduce the missing terms unilaterally, the terms may be implied as a matter of law, or by the action of the parties themselves. For example, courts have held that an employer may unilaterally modify an otherwise at-will agreement by communicating, either orally or in an employment handbook, that the employee will not be terminated except for just cause or by specific procedures.

The principle which emerges from these cases is that the issue as to whether public policy is clearly defined rests within the discretion of the court. Courts have generally been reluctant to define the nature of public policy in the absence of clear legislative guidance, however.

38. See generally Note, Employee Handbooks and Employment At-Will Contracts, 1985 Duke L.J. 196, 206-12 (examines both the traditional and progressive views of the contractual status of employee handbooks).

39. In Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980), the employee argued that his employment contract was based on both written and oral promises. The employee was given a manual of Blue Cross personnel policies which stated that, for those employees who had completed their probationary period, it was the company’s policy “to treat employees leaving Blue Cross in a fair and consistent manner and to release employees for just cause only.” Id. at 617, 292 N.W.2d at 893. The manual also contained a list of specific procedures to be followed before an employee could be fired. Id. The court, in Toussaint, concluded that the employee had stated a cause of action based, in part, on the employee manual. Id. at 598-99, 292 N.W.2d at 885. For a more detailed analysis of Toussaint, see Casenote, Master & Servant-Employment Contracts - The burden of establishing standards of performance as a basis for employment termination rests upon the employer: Toussaint v. Blue Cross & Blue Shield, 59 U. Det. L. Urb. L. 83 (1981).

40. Employee handbooks can state a contract for managerial personnel as well as non-managerial employees. In Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), the employee signed an employment application which stated that his employment would be subject to the provisions of the employee handbook. Id. at 460, 443 N.E.2d at 442, 457 N.Y.S.2d at 194. When Weiner, in his own managerial capacity, fired subordinate employees, he was warned by his superiors that failure to discharge for just cause and in accordance with the proce-
Some courts have found covenants implied at law, such as good faith and fair dealing, which can modify an otherwise at-will employment agreement. Most states hold that there is a requirement of good faith and fair dealing implied as a matter of law in all formal written employment contracts where the duration of employment is already expressly stated. Good faith and fair dealing is also required where there is a promise not to terminate as long as services are performed “satisfactorily.”

Only a few jurisdictions, however, have adopted the good faith and fair dealing requirement in the at-will employment context. Procedures outlined in the employee handbook could make the employer legally liable to the discharged employee. In Weiner, the fact that company policy was expressly stated tended to work in the employee’s favor and to the employer’s disadvantage. This is not always the case, however. Written policy statements do not always work against the employer, but can protect him as well. In Novosel v. Sears, Roebuck & Co., the employee signed an employment application stating that he understood his employment could be terminated with or without cause at any time, regardless of what the employee might have been told by other managerial employees subsequent to the commencement of employment. When the employee sued for wrongful termination, the court held that the statements found in the employment application and also in the employee manual could be used as evidence to show that the intent of the parties was to keep the employment at-will.


42. See, e.g., Rosecrans v. Intermountain Soap & Chem. Co., 100 Idaho 785, 787, 605 P.2d 963, 965 (1980) (stating that when a contract has a definite term, the employee can only be terminated prior to expiration of contract when employee breached a contractual provision or for other “good cause” reason).

43. See, e.g., Crest Coal Co. v. Bailey, 602 S.W.2d 425, 426 (Ky. 1980) (applying subjective test allowing employer to discharge employee based on work record where employer acts in good faith).

44. The principle of good faith and fair dealing to be applied in the at-will context was stated by the California Supreme Court as follows: “there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agree-
Others have taken the position that employers and employees may
ment." Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958) (emphasis in the original), quoted in Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980). See also Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). In Fortune, the plaintiff alleged that he was terminated because the employer sought to avoid paying him commissions on a five million dollar sale. Id. at 96-97, 364 N.E.2d at 1253. The plaintiff was employed under a written contract, which specified that he could be terminated at will. Id. The court affirmed a jury verdict for the plaintiff, stating the principle that, in every contract, there exists an implied covenant of good faith and fair dealing not to deprive the other party the benefit of the contract. Id. at 104, 364 N.E.2d at 1257.

A party breaches the obligation of good faith if he exercises discretion conferred upon him by the contract for reasons not within the parties' reasonable contemplation at the time of contract formation. See Burton, supra note 41, at 385-86. Reasons for breach within the parties' reasonable contemplation in the at-will context are likely to be restricted to economic and performance criteria. If the employer's motivation for dismissal is performance related, the dismissal does not breach the duty of good faith. See Note, Ensuring Good Faith in Dismissals, 63 Texas L. Rev. 285, 290 (1984). It is often non-performance motives, however, such as spite or ill-will, that terminated employees challenge. See, e.g., Mongo v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

In Mongo, a female machine operator had been demoted and eventually discharged after refusing her supervisor's sexual advances. Id. at 130, 316 A.2d at 550. The court, in ruling for the employee, imposed a duty of good faith when it stated that a "termination by the employer . . . motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." Id. at 133, 316 A.2d at 551. Since the dismissal derived from the sexual harassment, it was not performance related, involved ill-will and spite and therefore contravened the notion of good faith. Dismissal with malicious intent to injure the employee invariably constitutes a breach of the obligation of good faith. See Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1, 2-3 (1st Cir. 1977); Wild v. Rarig, 302 Minn. 419, 439-42, 234 N.W.2d 775, 789-90 (1975), appeal dismissed, 424 U.S. 902 (1976); see also Blades, supra note 5, at 1407-09; Note, supra, at 289-90.

45. At least four jurisdictions have adopted a requirement that an employer exercise the power to discharge only in good faith. See Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 568-72, 479 A.2d 781, 788-89 (1984) (court announced good faith requirement in employment contracts and discharges but, in doing so, was not ready to go so far as imply discharge only for good cause); Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983) (holding that good faith would preclude termination to prevent sharing in profits); Fortune v. National Cash Register Co., 373 Mass. 96, 104-05, 364 N.E.2d 1251, 1257 (1977) (finding employer acted in bad faith by terminating employee to avoid paying commission); Gates v. Life of Montana Ins. Co., 196 Mont. 178, 184, 638 P.2d 1063, 1067 (1982) (holding distribution of handbooks creates an employee expectation of fair dealing). California has implicitly adopted the rule, see Pugh, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917. New Hampshire, where the rule was first announced, has retreated and now requires that the discharge violate public policy. See Howard v. Dorr Woollen Co., 120 N.H. 295, 414 A.2d 1273 (1980). Wisconsin and Hawaii have expressly refused to follow the rule requiring discharges be only in good faith. See Parnar, 65 Hawaii at 377, 652 P.2d at 629; Brockmeyer, 113 Wis.2d at 569, 335 N.W.2d at 858 (declining to adopt a good faith requirement, but recognizing a public policy exception).
agree between themselves as to the good faith and fair dealing requirement.46

B. Minnesota

Minnesota continues to hold to the common law doctrine of at-will employment,47 but has followed the modern trend in recognizing ex-

46. To settle the issue as to whether the parties intended to adopt a covenant of good faith and fair dealing, courts often look to the actions of the parties themselves. See, e.g., Fischer v. Pinske, 309 Minn. 202, 243 N.W.2d 733 (1976); accord House v. Baxter, 371 N.W.2d 26 (Minn. Ct. App. 1985). Factors considered to be important may vary, but taken together they might imply a promise by the employer not to terminate the employee without cause. See Pugh, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927. In Pugh, a long-time vice-president of the company was terminated after thirty-two years of service. Id. The court found that the plaintiff had stated a cause of action based on the "totality of the parties relationship." The court held that an implied covenant of good faith could exist based on the facts of the case, including factors such as duration of employment, the recommendations and promotions received, the lack of direct criticism, the assurances given by the employer and the companies acknowledged policies. Id.; Accord Cleary, 111 Cal. App. 3d at 455-56, 168 Cal. Rptr. at 729.

47. Minnesota law in regard to at-will employment was described by the Minnesota Supreme Court in Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) and Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W.2d 213 (1962). In Skagerberg, the plaintiff had taken a permanent position with Blandin Paper Company as the company's power supervisor and mechanical engineer at a plant in Grand Rapids, Minnesota when he was subsequently terminated. Skagerberg, 197 Minn. at 293, 266 N.W. at 873. When the plaintiff accepted the position, he was self-employed as a consulting engineer and also had a job offer from Purdue University to be a part of their faculty. Id. at 292-93, 266 N.W. at 872-73. The plaintiff performed satisfactorily for almost two years with Blandin Paper before he was terminated. Id. at 292-94, 266 N.W. at 873. The Minnesota Supreme Court held on appeal that no contract existed. The court stated that, in the absence of additional consideration over and above the services rendered, an employee hired for permanent employment could be terminated at will. Id. at 296-98, 266 N.W. at 874. The court clarified that giving up other employment in order to accept a new position does not constitute additional valuable consideration leading to an exception to the at-will doctrine. Id. at 301, 266 N.W. at 877.

In Cederstrand, the plaintiff had been employed as the company personnel director. Part of her job involved maintaining a manual of personnel policies. One of those company policies stated that no employee would be discharged without cause and that, ordinarily, the employee would be given disciplinary warnings and a chance to improve performance before termination would be made. Cederstrand, 253 Minn. at 525, 117 N.W.2d at 215-16. The policy manual was not, however, generally distributed to employees. The plaintiff was discharged and subsequently sued for wrongful discharge, arguing that the discharge was made without cause and without the procedures specified by the employee manual. Id. at 526-27, 117 N.W.2d at 218. The Minnesota Supreme Court, nevertheless, held that since the plaintiff was employed under an at-will agreement she could be discharged at any time. In holding for the defendant employer, the court stated the at-will employment rule as follows:

The usual employer-employee relationship is terminable at the will of either; the employer can summarily dismiss the employee, the employee is under no obligation to remain at the job. A hiring for an indefinite term is
ceptions to the at-will doctrine. Until recently, these exceptions have been based primarily upon traditional contract principles, including an implied-in-fact contract exception derived from personnel manuals. Applying contract law, the Minnesota Supreme Court had decided that definite language in an employee handbook can create contractual obligations which are enforceable against the employer.

**Exceptions to the at-will rule in Minnesota include cases which follow the principles of "independent consideration" and "promissory estoppel."** In Bussard v. College of St. Thomas, Inc., 294 Minn. 215, 200 N.W.2d 155 (1972), the plaintiff conveyed his interest in the Catholic Digest Magazine to St. Thomas College. The defendant had paid $175,000, but half of the stock was conveyed as a gift. The plaintiff argued that the agreement included the condition that he remain the publisher of the magazine. Id. at 219-20, 200 N.W.2d at 159. Five years after the transfer of ownership of the magazine, the plaintiff was "involuntarily" retired and subsequently sued. On appeal, the Minnesota Supreme Court held that the transfer of the magazine constituted independent consideration which could support the argument of an oral contract. Id. at 228, 200 N.W.2d at 163. The plaintiff may have, in effect, purchased a lifetime position by giving valuable consideration over and above that found in the services rendered by the employee. Id.

In Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981), the Minnesota Supreme Court adopted an exception based upon promissory estoppel. The plaintiff, in *Grouse*, had accepted a position as a pharmacist with the defendant. After the plaintiff was told that he had been hired, he resigned his present job and turned down another. Id. at 115-16. Before he actually started working with Group Health, the job offer was revoked. The court held that a contract could be implied as a matter of law in this case based upon the doctrine of promissory estoppel. Id. at 116. In dicta, the court suggested that the same principle might apply in other at-will circumstances as well. Id. *See also* Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371 (Minn. Ct. App. 1984), *pet. for rev. denied* (Minn. Nov. 1, 1984). In *Eklund*, the court held that employees terminated even after four years of employment might utilize the doctrine of promissory estoppel. Id. at 378.


51. In *Pine River*, the Minnesota Supreme Court held that provisions in an employee handbook which meet the requirements of a unilateral contract may become enforceable as part of the employment contract. *Pine River*, 333 N.W.2d at 626-27. To create a unilateral contract, a promise of employment on particular terms of unspecified duration must be presented in the form of an offer and must be accepted by the employee. Id. at 626. The offer must be definite in form and must be communicated to the employee. Id. Continued employment by the employee constitutes acceptance of the offer of a unilateral contract, providing the necessary consideration for the offer. Id. at 627. The plaintiff, in *Pine River*, was employed as a loan officer in a small rural bank. The bank distributed an employee manual which specifically addressed such issues as "job security" and "disciplinary policy," which included progressive disciplinary procedures. Id. at 624-26. Although the court found that the
Minnesota has declined to adopt an exception based upon the concept of good faith and fair dealing.\textsuperscript{52} The state has recognized only recently a tort action for wrongful discharge based upon public policy.\textsuperscript{53} Minnesota had previously declined to recognize a tort action

plaintiff was an at-will employee, it concluded that the language in the employee handbook had transformed the at-will agreement into an enforceable contract. \textit{Id.} at 630. In addressing the issue of consideration for the new contract derived from the employee handbook, the court decided that the employee had provided sufficient consideration merely by remaining on the job after receiving the handbook. \textit{Id.} at 629. Once the handbook had been communicated to the employee, the employer was obliged to follow the procedures outlined in it. When the employer failed to follow those procedures, he was in breach of the employment contract. \textit{Id.} at 631. See also \textit{Case Note, At-Will Employment—Contractual Limitation of an Employer’s Right to Terminate: Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), 7 Hamline L. Rev. 463 (1984)}.

52. \textit{See Wild,} 302 Minn. at 440-41, 234 N.W.2d at 790. The plaintiff, in \textit{Wild,} argued that an implied covenant of good faith and fair dealing was contained in his employment contract and that bad faith or malicious breach provided for a tort remedy. \textit{Wild} stands for the proposition that Minnesota does not imply a covenant of good faith in employment contracts as a matter of law. The court recently reiterated its reluctance to adopt the good faith exception. \textit{See Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 858-59 (Minn. 1986); see also Mason v. Farmers Ins. Co., 281 N.W.2d 344, 347 (Minn. 1979)}.

Both the Minnesota Supreme Court and court of appeals have considered the issue of good faith. \textit{See Pine River,} 333 N.W.2d at 622 (it should be noted that the court’s main focus involved creation of an employment contract from an employee handbook); \textit{Eklund,} 351 N.W.2d at 378. On both occasions, the courts responded positively toward good faith as a concept to which the parties could agree within the contract itself. This agreement may be expressly stated or implied from the actions of the parties. However, given the Minnesota court’s previous positions on at-will employment, it seems unlikely that the courts will adopt the position that there is an implied at law covenant of good faith in employment contracts. Such a position would take the court out of contract theory and into tort. \textit{See generally Protecting Employees, supra note 1 (suggesting the application of either modern contract or tort concepts); Covenant of Good Faith, supra note 41 (proposing balancing the employer - employee interests in discharges to situations legitimately related to the conduct of business); Note, supra note 44 (advocating notice of dismissal and participatory review procedures to protect an employee against bad faith and/or arbitrary dismissals)}.

53. \textit{Phipps v. Clark Oil & Refining Corp.,} 396 N.W.2d 588 (Minn. Ct. App. 1986). In \textit{Phipps}, the plaintiff had been employed by Clark Oil Refining Corporation as a cashier at a self-service gas station. A customer asked Phipps to pump leaded gasoline into an automobile equipped to operate only on unleaded fuel. Phipps’ manager told him to comply with the request, but Phipps refused, believing that pumping leaded gasoline into the tank of an automobile designed to use only unleaded fuel was a violation of the law. Phipps was willing to pump unleaded gasoline into the car, but his employer fired him nevertheless. \textit{Id.} at 589.

Phipps brought an action against the employer for wrongful discharge and defamation. The trial court granted Clark Oil’s motion for judgment on the pleadings, stating that Minnesota law allowed Phipps’ termination for any reason or for no reason at all. Phipps appealed. \textit{Id.} at 589-90.

The Minnesota Court of Appeals reversed, recognizing for the first time in Min-
for wrongful discharge, but left the door open for actions under special circumstances where the defendant had committed an independent tort.\textsuperscript{54} Tort remedies, including punitive damages, are available in such a case.\textsuperscript{55} Employment defamation is one of the independent torts for which an employer may be liable.

II. EMPLOYMENT DEFAMATION

The elements of common law defamation are well settled in the United States.\textsuperscript{56} For a statement to be defamatory, it must be communicated to someone other than the plaintiff, it must be false, it must not be invited,\textsuperscript{57} and it must tend to harm the reputation\textsuperscript{58} of nesota a tort action for wrongful discharge based upon a public policy exception. The court noted that a majority of jurisdictions recognize a public policy exception to the employment at-will doctrine. \textit{Id.} at 592-95. Courts have reached the public policy exception as a means to balance the competing interests of society, the employee, and the employer. One significant societal interest is the maintenance of lawful conduct. Society has an interest in opposing an employer conditioning employment on a requirement that the employee participate in unlawful conduct. An employer's authority does not include the right to demand that an employee commit a criminal act. \textit{Id.} at 590-92. Therefore, the court held, an employer is liable if an employee is discharged for reasons that contravene a clear mandate of public policy. \textit{Id.} at 592.

\textsuperscript{54} In \textit{Wild}, 302 Minn. at 423-24, 234 N.W.2d at 781, the plaintiff argued that his employment contract contained an implied covenant of good faith and fair dealing and that a bad faith or malicious breach of that covenant provided for a tort remedy. The court noted that when a plaintiff seeks to recover for an alleged breach of contract, the plaintiff is limited to damages flowing from breach alone, except in exceptional circumstances, where the defendant's breach of contract constitutes or is accompanied by an independent tort. The \textit{Wild} court held that the breach of an employment contract was not one of those exceptional cases where a breach amounted to an independent tort. \textit{Id.} at 442, 234 N.W.2d at 790.

\textsuperscript{55} Tort remedies are available in five types of cases: (1) breach of a fiduciary duty; (2) fraud; (3) breach of a public service contract; (4) breach of a duty of good faith and fair dealing; and (5) where breach is accompanied by an independent tort. See \textsuperscript{Mallor, supra note 7; see also Punitive Damages, supra note 7.}


\textsuperscript{57} W. PROSSER AND W. KEETON, supra note 12, § 114, at 829; see, e.g., Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549 (11th Cir. 1984) (the court reversed defamation claim in favor of defendant where plaintiff knew prior to authorizing prospective employer to contact defendant that defamatory statement might be made). But see Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984),
the plaintiff and lower him in the esteem of the community.\(^5\) Accusations of crimes,\(^6\) or offenses involving moral turpitude,\(^6\) and def-

\(^5\) See, e.g., Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 483 A.2d 456 (Pa. Super. Ct. 1984). In Agriss, the court held that the issue as to whether a statement can be defamatory depends upon the audience and the scope of publication. The plaintiff, in Agriss, received a warning letter from his employer accusing him of "opening company mail." The warning letter was widely circulated among plaintiff’s fellow employees. Agriss sued for defamation. The trial court entered a nonsuit, and Agriss appealed. Id. at 460. On appeal, the defendant argued that the words "opening company mail" were incapable of defamatory meaning as a matter of law. The Superior Court of Pennsylvania, however, ruled that the words "opening company mail," as applied to Agriss and circulated among his fellow employees, were factual allegations charging Agriss with a concrete act of impropriety capable of impugning appellant’s good name or reputation and, as such, were capable of defamatory meaning. Id. at 462-63.

\(^6\) See Restatement (Second) of Torts §§ 558-59 (1977). See also Stuempees v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980); W. Prosser and W. Keeton, supra note 12, § 111, at 771.

\(^5\) The court held that the plaintiff had not invited the defamatory statement because, while plaintiff could expect that the former employer would give his opinion, plaintiff did not know that Hall’s employees would defame him when the investigator made his inquiries. Id. at 617. The defendant also argued that he was tricked into making the defamatory statements. The court replied that a defendant could not escape liability by showing that, although he desired to defame the plaintiff, he did not desire to defame him to the person to whom he, in fact, intentionally published the defamatory statements. A publication is complete even though the publisher is mistaken as to the identity of the person to whom the publication is made. Id. at 618 (citing Restatement (Second) of Torts § 577 comment e (1977)).

\(^6\) See also Rainey v. Shaffer, 8 Ohio App. 3d 262, 456 N.E.2d 1328 (1983). In Rainey, the plaintiff had been turned down for a position after what she regarded as a successful interview. Plaintiff then requested her present employer to do a reference check with a former employer she had listed as a reference to determine the fairness of the former employer’s reference. Id. at 262-63, 456 N.E.2d 1330. The court considered the question as to whether the defamatory remarks used by the defendant were excused because they were made as a result of plaintiff’s requested investigation. The court held that if an investigation is conducted without the intent to bring suit or to trick the defendant into making a slanderous statement, the plaintiff is not estopped from maintaining an action. An honest inquiry by the person defamed as to the existence, source, content or meaning of a defamatory publication is not a defense to an action for defamation. Id. at 263-64, 456 N.E.2d at 1331.

\(^5\) See, e.g., Gibby v. Murphy, 325 S.E.2d 673 (N.C. Ct. App. 1985), where the employer, by and through his agent, falsely accused the plaintiff of being charged with crimes of embezzlement. In Gibby, the plaintiff worked for Orkin Exterminating Company (Orkin) as a salesman of exterminating contracts. While on a sales call, Gibby sold a customer an exterminating contract and also a contract to have her house insulated by Gibby’s step-father. The customer gave Gibby a single check for both contracts. Gibby cashed the check and paid the appropriate sum to Orkin and the remainder to his stepfather for the insulation work. The customer later complained to Orkin that she had been overcharged for the extermination contract. Orkin wrote Gibby a letter which accused him of misappropriation of company funds...
as well as fraudulent tactics with a customer. The letter was delivered to Gibby and a copy was also delivered to the customer's accountant, who forwarded it to her attorney. After his termination, Gibby was unable to find other employment. When a prospective employer contacted Orkin, Orkin's office manager stated that Gibby was no longer employed by Orkin, that there was a warrant outstanding for him for embezzlement and fraudulent misuse of money and that Orkin would not recommend Gibby for employment. Id. at 674-75. At trial, the jury found that Orkin had abused its qualified privilege by falsely accusing Gibby of being charged with a crime. Id. at 675. On appeal, the court affirmed. Id. at 676.

See also Kelly v. General Telephone Co., 136 Cal. App. 3d 278, 186 Cal. Rptr. 184 (1982). In Kelly, the employee had voluntarily terminated his employment, and upon subsequently applying for reemployment, discovered that he was ineligible because of alleged slanderous statements made by his former supervisor. Kelly, 136 Cal. App. 3d at 284, 186 Cal. Rptr. at 186. The California Court of Appeals held: (1) That there was publication despite the fact that the alleged libelous statements were made by one of defendant's employees only to other employees of defendant. Id. at 284-85, 186 Cal. Rptr. at 186. (2) That the alleged statement that plaintiff falsified invoices clearly implied that plaintiff did so with intent to defraud, and was therefore slanderous per se, thereby charging plaintiff with forgery. Id. at 285, 186 Cal. Rptr. at 186. (3) There is a duty to make a reasonable investigation of the matter before communicating the suspicion that a particular employee has falsified records if the communication is motivated by malice. Id. at 286, 186 Cal. Rptr. at 187. (4) “[T]he spreading of deliberately false statements that a former employee in effect committed forgery is extreme and outrageous conduct” justifying a claim for intentional infliction of emotional distress. Id. at 287, 186 Cal. Rptr. at 188.

61. See, e.g., Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108 (Iowa 1984). In Vinson, the court held that a statement that the employee was fired for making incorrect entries on her time card could reasonably be taken as imputing dishonesty to the employee and was defamatory per se. Id. at 116. Plaintiff was employed as a school bus driver by defendant. Id. at 111. Plaintiff was paid according to a designated route time for the route she drove each day. The designated route time was not the actual time it took to drive the route but the amount of time determined by the plaintiff's supervisor as a reasonable time within which the route should be completed. The school district payroll system required employees to make entries on time cards even though pay was based on a designated route time rather than actual driving time. In filling out her time-cards, plaintiff recorded her return time as the actual time shown on the office clock when she returned to the bus barn. In late October of 1980, plaintiff's supervisor told her to fill out her time cards to show her return time as the designated route time, regardless of the actual driving time. Plaintiff did not comply. Instead, she recorded her actual completion time rather than the designated return time. Id. at 112. She continued this practice until December 1, 1980, when plaintiff's supervisor again requested that she change her time card to show the designated return time. She refused. Plaintiff's supervisor then issued her a written memorandum on the subject of "Falsifying Time Cards." When plaintiff persisted in recording her actual rather than designated check-out time on her time cards, she was suspended with another memorandum entitled "Suspension for falsifying time cards." Id. at 113. When plaintiff returned to work after her suspension, she continued to record her actual check-out time, claiming that to record the designated time would in fact be a falsification of her time card. The school district discharged the plaintiff. Plaintiff subsequently applied for a school bus driving job with another school district. When the prospective employer inquired of the defendant why Vinson had been discharged, her former supervisor replied that she had been terminated "for recording the incorrect time on time cards." Id. at 114. At trial,
amation affecting the plaintiff in his business,\textsuperscript{62} trade or profession constitute defamation \textit{per se} and are actionable without proof of actual damage.\textsuperscript{63} Truth is a complete defense, however, and true statements no matter how disparaging are not actionable.\textsuperscript{64}

An employer has a qualified privilege to describe the discharge of an employee,\textsuperscript{65} if the description is done in good faith\textsuperscript{66} and for a plaintiff was awarded $59,500 compensatory and $31,000 punitive damages on her defamation claim. \textit{Id.} On appeal, the Iowa Supreme Court stated that a statement that an employee was fired for making incorrect entries on her time card could reasonably be taken as imputing dishonesty to the employee. \textit{Id.} at 116. The court subsequently affirmed the lower court decision on the defamation claim, including punitive damages. \textit{Id.} at 118, 121.

62. See, e.g., \textit{Litman}, 739 F.2d 1549 (11th Cir. 1984) (applying Florida law). The court, in \textit{Litman}, affirmed a jury award of $150,000 and remanded for redetermination of punitive damages for slander resulting from statements made by defendant to Litman's own employees, indicating that the reason for plaintiff's termination was that plaintiff was a "bad" or "lousy businessman." \textit{Id.} at 1555. The court held that the record reflected that there was much disagreement as to whether Litman was in fact a "bad businessman." The court decided that the jury could have properly found that Litman was not a "bad businessman," as alleged by defendant's employees, or that he was terminated for that reason. \textit{Id.} at 1561. The court determined that the statements were slander \textit{per se} and that Litman's reputation was extensively damaged because of wide dissemination of the defamatory statements. \textit{Id.} See also \textit{Geyer v. Steinbronn}, 351 Pa. Super. 536, 506 A.2d 901 (Pa. Super. Ct. 1986). The employee in \textit{Geyer} applied for employment as a security assistant with Sears, Roebuck & Co., listing Miley Security Services on his application as his former employer. When Sears contacted Miley Security regarding Geyer's work record, Miley's report included information that Geyer was unable to cope with the duties assigned, that he had a drinking problem, and that he was being investigated for forgery of checks from the employees' credit union. \textit{Geyer}, 506 A.2d at 906. This information was given to Sears by a company vice-president who knew these facts were false at the time. \textit{Id.} at 908. Sears subsequently refused to hire Geyer. \textit{Id.} at 907. Geyer sued for defamation and intentional interference with prospective contractual relations. Geyer's wife entered claims for loss of consortium. The jury awarded verdicts in favor of Geyer for $100,000 in compensatory damages for Geyer, $35,000 damages for Mrs. Geyer's loss of consortium, and $50,000 in punitive damages against the vice-president. \textit{Id.} at 904. On appeal the Superior Court of Pennsylvania affirmed. \textit{Id.} at 905.


64. W. \textit{Prosser} and W. \textit{Keeton}, \textit{supra} note 12, § 116, at 839.

65. See \textit{Lewis}, 389 N.W.2d at 890. \textit{Lewis} is not the only "insubordination" case where the reason for termination later became the basis for a defamation claim. See, e.g., \textit{Agarwal v. Johnson}, 25 Cal.3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979). In \textit{Agarwal}, the employee was terminated for "insubordination," "lack of cooperation and lack of job knowledge." \textit{Id.} at 943, 603 P.2d at 65, 160 Cal. Rptr. at 148. Agarwal sought employment unsuccessfully for 13 months. Two potential employers indicated that the defendant had given the plaintiff bad recommendations. Agarwal subsequently filed suit for defamation, infliction of emotional distress, and interference with business relationships. The jury returned a verdict in favor of Agarwal for $16,400 in general damages and $46,000 in punitive damages. \textit{Id.} at 944, 603 P.2d at 890.
legitimate purpose. An employer may lose his qualified privilege

65, 160 Cal. Rptr. at 148. On appeal, the supreme court affirmed. Id. at 938, 603 P.2d at 62, 160 Cal. Rptr. at 145.

The jury found that the reasons for termination, including "insubordination" were untrue, and maliciously motivated for the purpose of terminating the plaintiff. Id. at 945, 603 P.2d at 66, 160 Cal. Rptr. at 149. The jury also found that there was no dissatisfaction with, or criticisms of the plaintiff's job knowledge and cooperation until maliciously motivated false reasons for discharge became grounds for various independent torts, including defamation. Id.

66. See, e.g., Buck, 678 S.W.2d at 612. In Buck, the court noted that malice is sometimes equated with "a want of good faith." Id. at 620. The court noted that malice could be proved by circumstantial evidence. While evidence of ill will alone is not enough to establish malice, proof that the defendant entertained ill will toward the plaintiff is probative evidence. When coupled with other evidence, proof of ill will may furnish sufficient basis for a jury's finding of malice. Id. The plaintiff, in

Buck, had been an executive vice-president for the insurance firm of Alexander & Alexander and ranked nationally in the top five as salesman for Alexander before he began work for defendant. Defendant agreed to pay Buck an annual salary of $80,000, plus incentive commission up to a maximum of $600,000, plus fringe benefits. Id. at 616. Before the year was up, plaintiff had been discharged. Plaintiff attempted to find reemployment in the insurance industry, but was not successful. Id. at 617. In an attempt to discover the true reason for his discharge, Buck hired an investigator, who tape recorded defamatory statements made by defendant's president and other management employees. The remarks included that Buck was untrustworthy, untruthful, disruptive, paranoid, hostile, and guilty of padding his expense account; that Buck was horrible in a business sense, irrational, and ruthless; that he was a "classical sociopath"; that he had stolen files and records from his former employer, Alexander & Alexander; and that he could have been charged for theft. Id. The court found that the statements were made with actual malice, noting that one of the individuals who made the defamatory statements, although Buck's supervisor, drew less than half the salary than Buck was paid. Also, the defendant saved about $75,000 in commission and salary by terminating Buck early. Id. at 621. Plaintiff was awarded damages of $605,000 in actual damages and punitive damages of $1,300,000. Id. at 630. See also Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979). In Agarwal, the court upheld a jury finding that the plaintiff's termination for lack of job knowledge and insubordination was maliciously motivated, justifying the loss of employer privilege. The jury finding was supported by circumstantial evidence that there had been no dissatisfaction with, or criticism of Agarwal's job knowledge and cooperation until the last two days of his employment. As such, the court held that there was sufficient evidence which could lead the jury to believe that statements of lack of job knowledge and lack of cooperation were maliciously motivated for the purpose of terminating Agarwal. Id. at 945, 603 P.2d at 66, 160 Cal. Rptr. at 149.

67. W. PROSSER AND W. KEETON, supra note 12, § 115, at 827; RESTATEMENT (SECOND) OF TORTS § 593 (1977); the law in Minnesota is:

[A] communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.

Stuempges, 297 N.W.2d at 256-57.

if he abuses it.69 Examples of such abuse are acting with malice.70

used a balancing test instead. On the one side, the court put the interests of the employee and, on the other, the interests of the employer and society. The court wrote:

Weighing the relative consequences to the employer and the employee, of granting or denying privilege, aids in deciding which would further the interest of society. . . . Contemplate the effect of an accusation, as here made, upon the future life of the employee. Any prospective employer generally requires an applicant to furnish the names of all prior employers. In one way or another the prospective employer usually contacts prior employers. This one unproved accusation could then become the basis for permanently depriving a man of his dignity, good name, self-respect and right to earn for the support of himself and his family. Whether the employer publishes with malice or without it, the effect on the employee is the same.

On the other hand the publishing employer suffers no consequences whatever either by making or by not making the unproved accusation. The prospective employer may suffer consequences if such an accusatory statement is not made, but only if it is true. The publishing employer's interest and duty, imperfect or otherwise, but required by reason and the interest of society, are either to refrain from making the statement or if it is made, then to be prepared either to prove it or to reimburse the employee upon failure of such proof.

Id. at 614-15, 174 N.W.2d at 887.

69. See, e.g., Bolling v. Baker, 671 S.W.2d 559 (Tex. Ct. App. 1984), cert denied, 106 S.Ct. 79 (1985). In Bolling, the court affirmed a jury award of $125,000 to a nurse in a slander action against her physician employer, finding that the nurse showed that statements concerning her discharge, though subject to a qualified privilege, were made with actual malice. Id. at 564-66. Prior to plaintiff's discharge, defendant accused her of changing the order of lab slips on a patient's chart in an alleged attempt to cover up a mistake made by plaintiff when she sent a patient to the lab for a test which had already been performed. Defendant demanded that plaintiff discover the guilty party or be terminated. Id. at 563. Following plaintiff's termination, defendant called a staff meeting. Referring to plaintiff, defendant informed the employees that he could not work with someone who was a liar and who was not trustworthy and loyal to his practice. Plaintiff brought suit, alleging that defendant had falsely accused her of being dishonest. At trial, the jury found that the statements made by defendant were false and made with actual malice. The jury awarded $65,000 in actual and $60,000 in exemplar damages. Id. at 564.

On appeal, defendant asserted that the statements were qualifiedly privileged. The court noted, however, that a privilege is lost when actual malice is shown. Id. Evidence was presented that plaintiff had resisted defendant's romantic advances and that defendant had attempted to retaliate. On one occasion, after plaintiff turned down an invitation by defendant to go out with him, defendant performed a "procedure," described as either an abortion or spontaneous miscarriage, at his clinic late in the evening and left the room in a particularly offensive state for plaintiff to find and clean the following morning. Id. at 565. Also, defendant's own testimony suggested that he did not himself believe that the defamatory statements were true. The court concluded that defendant's own acts were not consistent with a belief that plaintiff was the guilty party, and lack of belief in the truth of the conditionally privileged communication is an important factor in determining malice in a defamation case. Id. Finding sufficient evidence to support the jury conclusion, the court affirmed. Id. at 565-66.

70. See, e.g., Stuempges, 297 N.W.2d at 257. The standard applicable to an employer-defendant is lower than that of a media defendant. The defendant in Stuempges argued that it should be held to an actual malice standard similar to a media stan-
when making the publication or publishing in an improper manner to an improper party. To be actionable, the defamation must be made to someone other

standard, where the defendant has actual knowledge that the defamatory statement is false, or acts with reckless disregard to its falsity. The court, in Stuempges, rejected the defendant's argument, holding that the correct standard in an employment case would focus on the defendant's attitudes toward the plaintiff, rather than on the truth of what he said. The court noted that, in the employer-employee situation, it is important to protect the job seeker from malicious undercutting by a former employer. In such a context, the state of mind of the utterer of the alleged defamation is more significant than whether he knew that what he was saying was false. Id. at 258. See also W. Prosser and W. Keeton, supra note 12, § 115, at 832-35.

71. See, e.g., Gonzalez v. Avon Products, Inc., 609 F. Supp. 1555 (D. Del. 1985). In Gonzalez, terminated employees brought a libel action against their former employer on the basis of a speech given by the employer's general manager charging the terminated employees with theft. The case was before the court on a summary judgment motion. Following discharge of plaintiffs, the employer called a special meeting of all plant employees, consisting of approximately 900-1000 people, and read to them a statement which referred to the plaintiffs as having been terminated for cause and continued in general terms about a violation of trust, the importance of contributing to and not taking away from the company, and the need for random searches as a "reminder to stop and think before doing something that will have lifelong implications." Id. at 1557. The court denied the summary judgment motion on the grounds that there was a material issue of fact to be resolved, including an issue of abuse of employer privilege. Id. at 1560.

See also Worley v. Oregon Physicians Serv., 69 Or. App. 241, 686 P.2d 404 (1984). In Worley, the plaintiff brought a libel action against her former employer for statements to fellow employees which accused plaintiff of theft. Plaintiff's termination resulted from her unauthorized possession of a key to her place of employment. Following plaintiff's termination, her supervisor called a meeting of all department personnel. At the meeting, he stated that an unidentified employee had been terminated for possession of an unauthorized key. The supervisor went on to state that several items of personal property had been missing before that date and that if any other employees had unauthorized keys, they should turn them in. Plaintiff was the only employee who had been discharged that day. Plaintiff sued, charging that the combined statements made at the personnel meeting falsely accused her of theft. The jury agreed, returning a general verdict in plaintiff's favor. On appeal, the court affirmed, noting that there was evidence which could support the jury's conclusion of abuse of employer privilege. Id. at 244-45, 686 P.2d at 406-07.

72. See, e.g., Agriss, 334 Pa. Super. at 295, 483 A.2d at 456. Agriss was employed as a truck driver by Roadway Express Inc. (Roadway). He received a "warning letter" from Roadway stating that he had violated company policy by opening company mail. A copy of the warning letter and protest by Agriss were forwarded to the union business agent. Agriss then went on vacation. When he returned, a number of drivers asked him about the warning letter and he also heard reference to the letter over the C.B. radio. Over the next year, Agriss received numerous questions about the letter from fellow truck drivers and from union officials. Agriss sued Roadway for defamation. Roadway claimed that the statements were qualifiedly privileged, since the letter was published to individuals entitled to receive it under the collective bargaining agreement. The court noted, however, that the privilege could be lost if the publisher exceeds the scope of his privilege by publishing to unauthorized parties. In Agriss, the warning letter was widely disseminated to people who were not authorized to see it. Since there were only a few possible sources of the publication, it was
than the person defamed. It may be made to any third person, even when made to the defendant’s own agent or employee, where the defendant is a corporation. For example, dictation of the defamatory matter to a stenographer is sufficient publication.

reasonable for the jury to conclude that Roadway was responsible for the letter’s wide publication. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983). In Benassi, the employee brought a defamation action against his employer for its statement to other employees that the former employee had been terminated because he had been “drunk and misbehaving.” The court found that the defendant abused its privilege by exceeding the scope of the defamatory publication. The court noted that the privilege to publish depends on the position of the employees to whom the information is given. It may be necessary to make a full disclosure to supervisory personnel, while a simple statement to assembly line workers is sufficient to protect the legitimate interests of the employer. In Benassi, the employer addressed approximately 120 employees for an explanation of plaintiff’s discharge. Some of the employees were two levels in rank below plaintiff. The court held that the privilege had been abused. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983).

73. See W. PROSSER AND W. KEETON, supra note 12, § 113, at 797.

74. See, e.g., Ramos v. Henry C. Beck Co., 711 S.W.2d 331 (Tex. Ct. App. 1986). In Ramos, the plaintiff brought an action against his former employer for wrongful termination and slander, where the plaintiff was informed by the general manager in the presence of plaintiff’s foreman that the reason for the termination was theft. The district court entered summary judgment in favor of defendant. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983). In Benassi, the employee brought a defamation action against his employer for its statement to other employees that the former employee had been terminated because he had been “drunk and misbehaving.” The court found that the defendant abused its privilege by exceeding the scope of the defamatory publication. The court noted that the privilege to publish depends on the position of the employees to whom the information is given. It may be necessary to make a full disclosure to supervisory personnel, while a simple statement to assembly line workers is sufficient to protect the legitimate interests of the employer. In Benassi, the employer addressed approximately 120 employees for an explanation of plaintiff’s discharge. Some of the employees were two levels in rank below plaintiff. The court held that the privilege had been abused. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983).

75. See W. PROSSER AND W. KEETON, supra note 12, § 113, at 798. The authors note that there is some authority to the contrary, but apparently as the result of confusing publication with privilege. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983). In Benassi, the employee brought a defamation action against his employer for its statement to other employees that the former employee had been terminated because he had been “drunk and misbehaving.” The court found that the defendant abused its privilege by exceeding the scope of the defamatory publication. The court noted that the privilege to publish depends on the position of the employees to whom the information is given. It may be necessary to make a full disclosure to supervisory personnel, while a simple statement to assembly line workers is sufficient to protect the legitimate interests of the employer. In Benassi, the employer addressed approximately 120 employees for an explanation of plaintiff’s discharge. Some of the employees were two levels in rank below plaintiff. The court held that the privilege had been abused. See also, e.g., Benassi v. Georgia-Pacific, 62 Or. App. 698, 662 P.2d 760 (1983).

76. See W. KEETON AND W. PROSSER, supra note 12, § 113, at 798-99; The Restatement (Second) of Torts § 577 comment h (1977) states in part:
The dictation of a defamatory letter to a stenographer who takes shorthand notes is itself a publication of a libel by the person dictating the letter even
Ordinarily, the defendant is not liable for publication made by the plaintiff. But where there is a strong compulsion on the part of the injured party to republish the defamatory remarks and the compelled republication is reasonably foreseeable by the defendant, the defendant is liable. Under certain circumstances, even an em-

Id.

77. W. Prosser and W. Keeton, supra note 12, § 113, at 802.

78. See McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980). In McKinney, the plaintiff sued his former employer for defamation based on his employment discharge. The plaintiff argued that, having given false reasons for his dismissal to the plaintiff, it must have been foreseeable to the employer that the plaintiff would be under a strong compulsion to republish the statement to prospective employers when they inquired. Id. at 797-98, 168 Cal. Rptr. at 94-95. The employee argued that the employer should be liable for the foreseeable consequences of his acts. The court agreed with the plaintiff, giving him the judgment. Id. at 798, 168 Cal. Rptr. at 95.

See also Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969). In Grist, the plaintiff brought an action for wrongful discharge and slander. Like the plaintiffs in Lewis, the employee in Grist alleged that Upjohn had given her false and defamatory reasons for her discharge, which she was thereafter forced to repeat to prospective employers when they asked about her former employment. Id. at 485, 168 N.W.2d at 406. The trial court instructed the jury that they could find slanderous statements even if the statements were made only to the plaintiff by Upjohn. In affirming the trial court, the Michigan Appellate Court wrote:

Where the conditions are such that the utterer of the defamatory matter intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person, a publication may be effectuated.

Id.

See also Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946). In Colonial Stores, an employee was discharged for alleged misconduct toward fellow employees. Id. at 840, 38 S.E.2d at 307-08. The employer wrote the reason for the discharge on the employee's certificate of availability. The certificate card was required at the time by the War Manpower Commission. Employees could not interview with prospective employers without first presenting the card. Consequently, it was probable that the employer was aware that any statement placed upon the certificate card would necessarily be republished by the plaintiff when he presented it to prospective employers. In stating the principle of republication, the court wrote:

The rule, that there is no publication when words are communicated only to the person defamed, is subject to exception or qualification. . . . There may be publication where the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending.

Id. at 840, 38 S.E.2d at 307.

See also Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. Ct. App. 1985). In Neighbors, the employee was employed as a clinic manager when she was terminated. Id. at 823. At her request, the employer issued a service letter to serve as a reference, pursuant to state law. The letter stated that Neighbors was terminated because she had breached the confidentiality of a patient at the clinic. The employer-defendant published the letter only to the plaintiff, who republished it to prospective employers, with predictable consequences. Neighbors sued her em-
ployer's silence is actionable if it can be expected that such silence could result in damage to the plaintiff.79

III. THE LEWIS DECISION

A. Facts

In the spring of 1980, the plaintiffs were employed by Equitable Life Assurance Society as dental claims approvers in its St. Paul office.80 Each employee received a personnel handbook when they were hired. The handbook contained statements about job security, disciplinary procedures and severance pay.81 When each employee was hired, she was assured that her job was secure as long as her production stayed at a satisfactory level.82

In the fall of 1980, the plaintiffs were sent to Equitable's Pittsburgh office on a temporary basis to work.83 The plaintiffs were briefed on expenses but were not told that they would be required to submit written expense reports.84

Upon their return to St. Paul, the four employees were com-
mended for their superior performance in Pittsburgh.85 Each employee was asked at this time to reconstruct her expenses and submit a report. After doing so, Equitable indicated to them that the reports submitted were unacceptable. Equitable requested changes in regard to certain tips for maid services. Each employee complied, but Equitable refused to accept the changed reports. Equitable then asked that lower totals be entered and indicated the appropriate amounts. The employees refused to comply, claiming that the lower totals did not reflect their actual expenses.86

In January of 1981, the employees received a letter from Equitable demanding that the reports be altered to reflect even lower amounts than earlier specified. The employees again refused to comply and were put on probation.87 A week later, Equitable decided to terminate the four employees for “gross insubordination.”

Before two of the employees were told that they were to be fired, they were asked to repay advances for expenses over the actual amount spent on the Pittsburgh trip. Each employee complied, after which each was asked again to alter her report. When they refused, they were terminated for “gross insubordination.”88 “Because they were fired for ‘gross insubordination,’ the plaintiffs received no severance pay. Had they been fired for other reasons, they would have been entitled to as much as one month’s severance pay.”89

When seeking new employment, each of the plaintiffs was requested by prospective employers to disclose the reasons for leaving their employment with Equitable. During the interviews, each plaintiff disclosed that they had been terminated for “gross insubordination.”90

Equitable neither published nor stated to any prospective employer that the plaintiffs had been terminated for gross insubordina-

85. Id. at 881.
86. Id.
87. Id. The court found that the “probations” given to the plaintiffs prior to their dismissal were for the benefit of company management, providing them with time to decide whether to terminate the employees. Id. at 884.
88. Id. at 881. The plaintiffs were terminated in accord with Equitable’s human resources manual, which gave examples of conduct it considered serious violations of acceptable behavior. The examples included gross insubordination and falsification of records, the very issue in dispute between the parties. The relevant section of the manual provides as follows:

Gross misconduct is a serious violation of accepted standards of behavior. Examples are: assaulting another employee, involvement in drug traffic, theft or destruction of Equitable’s or another employee’s property, or misusing an I.D. card. Gross misconduct also includes gross insubordination and falsification of any Equitable records including employment papers.

Id. at 881-82 n.3.
89. Id. at 882.
90. Id.
tion. It is Equitable's policy to give only the dates of employment and the final job title of former employees unless specifically authorized in writing to release additional information. 91

Only one of the plaintiffs found employment while being completely truthful with a prospective employer about her termination by Equitable. A second plaintiff gained employment after she misrepresented on her application her reason for leaving Equitable. A third obtained employment only after leaving the question blank as to her reasons for leaving her last employment. The fourth plaintiff was unable to find full-time employment. 92 The employees subsequently commenced an action against Equitable for breach of contract, wrongful termination, and defamation. 93

B. Holding and Analysis

A Ramsey County jury found that Equitable breached employment contracts and defamed the plaintiffs. The jury awarded the plaintiffs both compensatory and punitive damages. 94 The Minnesota Court of Appeals affirmed the trial court on all issues except damages for future harm. 95 The Minnesota Supreme Court affirmed on both the breach of contract 96 and defamation claims, 97 but reversed on the award of punitive damages for defamation. 98

On the defamation claim, the Minnesota Supreme Court found that Equitable defamed the plaintiffs when it stated false grounds for

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91. Id.
92. Id.
93. Id. at 880.
94. Lewis, 361 N.W.2d 875 (Minn. Ct. App. 1985). The trial court award to the four plaintiffs was as follows:

95. Id. at 884.
96. Lewis, 389 N.W.2d at 884. On the breach of employment contract claim, following the standard laid down in Pine River, the Minnesota Supreme Court found that Equitable's employee handbook was sufficiently definite to create a binding employment contract. Lewis, 389 N.W.2d at 883. The handbook stated that salaried employees would be dismissed only for "serious misconduct," and then only after a warning and a probationary period wherein the employee could bring performance up to a satisfactory level. Id. at 883. Equitable breached the employment contract when it discharged the employees without following the procedures required by the Equitable employment manual. Id. at 884.
97. Lewis, 389 N.W.2d at 880, 891.
98. Id. at 880, 892.
the termination of the employees. Generally, there is no publication where the defendant communicates a statement directly to a plaintiff, who then recommmunicates it to a third person. An exception exists where the plaintiff is compelled to repeat the defamatory statement to a third person, and it is foreseeable by the defendant that the plaintiff would be so compelled.

In *Lewis*, the court found that the employees were compelled to repeat to prospective employers the false reasons given for their dismissal. Furthermore, Equitable knew that the employees would be so compelled. The only alternatives open to the employees when asked by prospective employers to identify the reasons for their discharge was either to repeat the reasons given by their former employer or to lie. Reasoning that deliberate fabrication is an unacceptable alternative in terms of public policy, the court found that the employees were compelled to republish the defamatory reasons for their dismissal. Accordingly, the court held Equitable liable on the defamation claim, even though the employees had published the defamatory statements themselves. The court thereby adopted, in *Lewis*, the doctrine of self-publication in the context of employment defamation.

99. *Id.* at 889.

100. *Restatement (Second) of Torts*, § 577 comment m (1977).

101. *Lewis*, 389 N.W.2d at 886-87. *See also supra* note 78 and accompanying text.

102. *Lewis*, 389 N.W.2d at 888.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.*

107. Other issues in *Lewis* included the defense of truth, privilege and punitive damages. Equitable argued that the issue of truth presented a question as to whether the plaintiffs had been fired for gross insubordination. The court decided that the issue of truth must center upon the truth or falsity of the underlying implications of the statement—that the plaintiffs had in fact engaged in gross insubordination. *Lewis*, 389 N.W.2d at 889 (citing *Restatement (Second) of Torts*, § 581A comment e (1977)).

On the issue of privilege, the court recognized that there might be concern by employers that self-publication could result in liability every time an employer stated a reason for dismissal. Unless a privilege is recognized, employers might decline to inform employees of reasons for dismissal. *Id.* at 890.

In addition, the court noted that, where the employer would be entitled to a privilege if it had actually published the statement, it makes little sense to deny the privilege where the identical statements are communicated to the same third parties but only the mode of publication is different. *Id.* Therefore, the court held that an employer has a qualified privilege even in the case of defamatory republication. *Id.*

Finally, the court held that punitive damages will not be available in the case of compelled republication. *Id.* at 891-92. The availability of punitive damages might encourage publication of defamatory statements, where the plaintiff, rather than the defendant, does the actual publication. In addition, the imposition of punitive dam-
IV. THE FRANKSON DECISION

A. Facts

Frankson was employed by Design Space International (DSI) from November, 1974 until November, 1980. DSI sells and leases mobile offices and other modular structures. Frankson's employment was governed by a series of contracts, with new contacts signed only when he received pay increases or duty changes. Frankson was moving into the job of Major Projects Manager from Branch Sales Manager when he signed his last contract in February, 1980.108

In addition to his salary, Frankson's employment contract provided for the payment of commissions on sales, which were governed by a separate agreement entitled "Compensation Plan." The agreement contained a clause which set a $5,000 limit on commissions payable from sales to a single customer during a single year.109 Frankson signed the 1979-80 Compensation Plan but inserted a waiver stipulation on the $5,000 commissions limit. Frankson requested that DSI's president, Ray Wooldridge, acknowledge the waiver, but Wooldridge failed to act on the request.110

Frankson testified that he added the stipulation regarding the limit on commissions in anticipation of his advancement into the position of Major Projects Manager. Frankson also testified that his supervisor, William Lindelow, DSI's vice president, assured him that there would be no commission limitation for salesmen in Major Projects.111

Between February 1, 1980 and July 31, 1980, Frankson had sales of more than $2 million to a single customer, Montana Power. These sales were made during a period when there was no written compensation plan specifically applicable to Major Projects. Prior to August 1, 1980, DSI had made individual agreements with the salespeople involved in the Major Projects program.112

When the dispute over commissions arose, Lindelow, Frankson's supervisor, advised him to prepare a memorandum indicating the sales to Montana Power and the commissions payable on these sales. When Lindelow received the memorandum, he approved payment and forwarded the memo to Ray Wooldridge, DSI's president. Wooldridge refused to approve payment of the commissions, which totaled $28,196.27. A DSI compensation committee later offered to

ages on employers might deter employer communication of the reason for discharge.

109. Id.
110. Id.
111. Id.
112. Id. at 142.
pay Frankson $10,000 on the commissions, but Frankson did not cash the check which DSI tendered to him.\footnote{113}

On November 17, 1980, Frankson was presented with a letter of termination, giving the reason for discharge as “failure to increase business as a Major Projects Representative.”\footnote{114} The letter was prepared by DSI’s personnel manager, Edward Burns. It was distributed to Lindelow and Wooldridge. A copy of the letter was placed in Frankson’s personnel file.\footnote{115}

At trial, Frankson presented evidence of superior sales achievements as Major Project Manager up to September, 1980. Lindelow testified, however, that Frankson had no sales in the quarter prior to his termination.\footnote{116}

Frankson subsequently brought suit for defamation, breach of employment contract, wrongful termination, and compensation in quantum meruit for the reasonable value of his services.\footnote{117}

\textbf{B. Holding and Analysis}

The jury found that Frankson was employed at-will, and that DSI had not breached employment agreements in determining Frankson’s compensation or in terminating his employment.\footnote{118} The jury also found that statements in Frankson’s termination letter were untrue, and that they were made with actual malice.\footnote{119} The jury awarded Frankson $70,000 in compensatory damages and $125,000 in punitive damages on the defamation claim.\footnote{120}

The Minnesota Court of Appeals affirmed the trial court on all issues,\footnote{121} including quantum meruit,\footnote{122} publication,\footnote{123} malice,\footnote{124} and punitive damages.\footnote{125} The Minnesota Supreme Court affirmed on the issue of publication,\footnote{126} but reversed on the issue of employer
privilege.\textsuperscript{127}

The primary issue in \textit{Frankson} involves publication, the first element which must be proven in any defamation action.\textsuperscript{128} On appeal, DSI argued that Frankson had not shown that the statement contained in the termination letter was published. DSI argued that "in-house" communication, limited to the corporate personnel director and the president of the corporation, is not communication to a third party sufficient for the purpose of publication.\textsuperscript{129}

The Minnesota Supreme Court disagreed, holding that an in-house communication of a defamatory statement is publication.\textsuperscript{130} The court noted that other jurisdictions are divided on this issue.\textsuperscript{131}

\begin{flushright}
127. \textit{Id.} at 144-45. \\
128. In order for a statement to be defamatory (1) it must have been communicated (published) to someone other than the plaintiff, (2) it must be false, and (3) it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community. \textit{Steumpges}, 297 N.W.2d at 255. If the plaintiff was affected in his business, trade, profession, office, or calling by the defendant's statement, it constitutes defamation per se satisfying the third element of the action without proof of actual damages. \textit{Id.} \\
129. \textit{Frankson}, 394 N.W.2d at 142-43. \\
130. \textit{Id.} at 144. \textit{See also} \textit{Hebner v. Great N. Ry. Co.}, 78 Minn. 289, 80 N.W. 1128 (1899). In \textit{Hebner}, the plaintiff-employee went to his employer after his discharge to get a copy of his service record. While at the employer's office, the book containing these records was brought into the office and a clerk read the reason for the employee's discharge in the presence of another clerk, the employee-plaintiff, and the employer-defendant. \textit{Id.} at 290-92, 80 N.W. at 1128-29. The trial court, in \textit{Hebner}, held that the communication was sufficient publication. \textit{Id.} The case suggests that communication between two corporate employees, both with a need to know, is sufficient publication to support a defamation action. \textit{Id.} \\
\textit{See also} \textit{McKenzie v. Burns Int'l Detective Agency, Inc.}, 149 Minn. 311, 183 N.W. 516 (1921). In \textit{McKenzie}, a defamatory statement was found by implication to be published when the only listeners were the plaintiff-employee and his ex-employer's manager. However, the primary issue in \textit{McKenzie} was "privilege," not publication. \textit{Id.} at 312-13, 183 N.W. at 516-17. \\
131. \textit{Frankson}, 394 N.W.2d at 143; \textit{see also} \textit{Luttrell}, 236 Kan. at 711, 695 P.2d at 1279 (the court decided that inter-office communication between supervisory personnel was publication "to a third person sufficient for a defamation action"); \textit{see also} \textit{Rickbeil v. Grafton Deaconess Hosp.}, 74 N.D. 525, 542, 23 N.W.2d 247, 256 (1946) (dictation to a stenographer of a letter was held sufficient publication to be libelous even though the notes for the letter "are never transcribed nor read by the stenographer or any other person"). \\
\textit{But see} \textit{Ellis v. Jewish Hosp. of St. Louis}, 581 S.W.2d 850, 851 (Mo. Ct. App. 1979) (no publication when the contents of personnel files are communicated only to supervisory personnel within the corporation); \textit{see also} \textit{Prins v. Holland-N. Am. Mortgage Co.}, 107 Wash. 206, 208, 181 P. 680, 680-81 (1919) (where the court decided that communication between agents of the same corporation in the course of regular business could not be publication of libel on the part of the corporation). The courts in these cases appear to treat communication between agents of a corporation as merely the corporation speaking to itself, holding that there is no communication to third persons in such cases.
Some confuse publication with privilege.\textsuperscript{132} Both the Restatement (Second) of Torts\textsuperscript{133} and leading commentators, however, support the position that intra-corporate communication is publication.\textsuperscript{134} The court held that, under the facts of \textit{Frankson}, preparation of the defamatory letter and distribution of that letter to a personnel file and to two officers of the corporation, Lindelow and Wooldrige, constituted publication of the defamatory statement.\textsuperscript{135}

Finding publication, the court went on to define a broad qualified privilege for the employer.\textsuperscript{136} The jury found that statements contained in Frankson's termination letter were not true and were made with actual malice.\textsuperscript{137} On appeal, the Minnesota Court of Appeals

\begin{footnotes}
\item[132.] See, e.g., Ranous v. Hughes, 30 Wis.2d 452, 462, 141 N.W.2d 251, 256 (1966) (where the court noted that the issue of publication turned on whether the communication was privileged); see also Hoff v. Pure Oil Co., 147 Minn. 195, 199, 179 N.W. 891, 892 (1920) (where the court reasoned that since the communication was privileged it was not a publication for the purpose of a defamation action); W. Prosser and W. Keeton, \textit{supra} note 12, § 113, at 798 n.15 (where the authors remark that publication is often confused with the issue of privilege).

\item[133.] See \textit{Restatement (Second) of Torts} which states:
\begin{quote}
The dictation of a defamatory letter to a stenographer who takes shorthand notes is itself a publication of a libel by the person dictating the letter even though the notes are never transcribed nor read by the stenographer or any other person.
\end{quote}
\textit{Restatement (Second) of Torts} § 577 comment h (1977).

\item[134.] Prosser, for example, states:
\begin{quote}
There may be publication to any third person. It may be made to . . . the defendant's own agent, employee or officer, even where the defendant is a corporation. The dictation of defamatory matter to a stenographer generally is regarded as sufficient publication, although it may be privileged.
\end{quote}
W. Prosser and W. Keeton, \textit{supra} note 12, § 113, at 798-99 (citing \textit{inter alia}, Rickbeil v. Grafton Deaconess Hospital, 74 N.D. 525, 23 N.W.2d 247 (1946)).

In \textit{Rickbeil}, the only publication was dictation to a stenographer. In stating the publication rule, the court wrote:
\begin{quote}
Publication of the defamatory matter is the communication of the same to a third person. . . . The action may be maintained even if published to one person only. . . . To publish is to intentionally exhibit the defamatory words to one other than the libellee. No words more definitely convey the idea requisite in law to support an action for writing defamatory words.
\end{quote}
Id. at 533, 23 N.W.2d at 251.

\item[135.] \textit{Frankson}, 394 N.W.2d at 144.

\item[136.] According to Minnesota law, an employer has a qualified privilege to describe the discharge of an employee, if the description is done in good faith and for a legitimate purpose. See \textit{supra} notes 65-67. An employer may lose his qualified privilege if he abuses it, such as acting with malice when making the publication. See \textit{supra} notes 68-70. The malice standard in Minnesota is defined as "actual ill will, or a design causelessly and wantonly to injure plaintiff." See McBride v. Sears, Roebuck & Co., 306 Minn. 93, 98, 235 N.W.2d 371, 375 (1975). Whether the employer's qualified privilege has been lost through abuse is a jury question. See \textit{Lewis}, 389 N.W.2d at 890. The court, in \textit{Lewis}, also noted that the initial determination of whether a communication is privileged is a question of law for the court to decide. \textit{Id.} (citing \textit{Restatement (Second) of Torts}, § 619 (1977)).

\item[137.] \textit{Frankson}, 394 N.W.2d at 144. The Minnesota Court of Appeals concluded
\end{footnotes}
concluded that there was sufficient evidence to sustain the jury's verdict on malice. The Minnesota Supreme Court ruled, however, that neither the language used ("failure to increase sales"), nor the mode and extent of publication (communication only to those involved in the corporate decision making process, and deposit of a copy in Frankson's personnel file), allowed for the conclusion that Frankson's termination was the result of ill will and malice on the part of Frankson's employer. To prove malice, the supreme court stated, a plaintiff must present specific evidence beyond the mere assertion that there is another possible reason for the discharge. The court concluded that Frankson had not met his bur-

that the jury found evidence of a greater degree of malice than needed for Frankson's defamation claim. Frankson, 380 N.W.2d at 567. The trial judge's instructions to the jury described malice in several ways, including knowledge of falsity and reckless disregard of the truth or falsity of the defamatory statement. Id. This instruction overstated the applicable standard, since knowledge of falsity and reckless disregard of the truth or falsity is applicable only in the case of media defendants. Id. (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)). That overstatement suggests that the jury found evidence of a greater degree of malice than needed for Frankson's claim. See Frankson, 380 N.W.2d at 567.

138. Frankson, 380 N.W.2d at 567.

139. 394 N.W.2d at 144.

140. The court noted that malice may be proven by "intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of privilege." Frankson, 394 N.W.2d at 144 (quoting Friedell v. Blakely Printing Co., 163 Minn. 226, 231, 203 N.W. 974, 976 (1925)).

141. The court noted that there was direct evidence that Frankson's termination was motivated by his poor sales record. Lindelow, Frankson's immediate supervisor, testified that Frankson made no sales in his final quarter with DSI, August through October, 1980. Frankson, 394 N.W.2d at 145. Lindelow and Burns testified that the commission dispute was not discussed at the meeting at which they decided to terminate Frankson. Id. Contra supra note 138.

142. 394 N.W.2d 144. The standard requiring "specific" evidence to prove malice will be difficult for a future plaintiff to meet. Ordinarily, malice may be proved by inference from circumstantial evidence. See supra note 66. The court of appeals, for example, suggests that the fact that DSI would fire one of its top sales employees because he demanded performance on an oral agreement on commissions suggests malice on the part of the employer. See Frankson, 380 N.W.2d at 568. The court of appeals also notes that the disparity between the alleged reason for termination and Frankson's actual sales record, along with DSI's testimony at trial that the commission dispute was not even discussed prior to a decision to discharge Frankson may have influenced the jury. Id. at 569. Frankson presented quarterly sales performance statistics showing that he was first among Major Projects Managers in September 1980. He also presented evidence that had his sales been included in the quarterly figures for the quarter ending in October 1980, he would have again been first, with sales of 71,120 square feet. The second place salesperson sold 15,532 square feet. As of September, 1980, Frankson also showed that he was first in sales for the portion of 1980 through September, and that he had an outstanding sales record when he was Branch Sales Manager. Id. at 565.
den of proving loss of employer privilege.\textsuperscript{143}

V. DISCUSSION

The issues raised by \textit{Lewis} and \textit{Frankson} include, first, whether the ruling on publication in these cases amounts to the recognition of a "tort of wrongful discharge in disguise." Second, they raise the issue of an employee's interest in reputation and if the courts should seek to protect. The final issue is the concern that these decisions will increase the frequency of defamation claims.

\textbf{A. Tort of Wrongful Discharge in Disguise}

The dissent at the appellate court level in \textit{Lewis} makes the charge that the adoption of the doctrine of self-publication amounts to a recognition of the tort of wrongful discharge in disguise.\textsuperscript{144} The allegation is renewed by one of the dissenters at the court of appeals in \textit{Frankson} with regard to intra-corporate publication.\textsuperscript{145} Similarly, the defendant in \textit{Lewis} argued that recognition of the doctrine of self-publication amounts to creating tort liability for wrongful discharge which, at the time \textit{Lewis} was argued, had been rejected\textsuperscript{146} by the Minnesota Supreme Court.\textsuperscript{147}

\textit{1. Wrongful Discharge and Defamation}

The defendant in \textit{Lewis} argued to the court of appeals that an employment defamation claim must be decided without consideration

\textsuperscript{143} \textit{Frankson}, 394 N.W.2d at 145.

\textsuperscript{144} \textit{Lewis}, 361 N.W.2d at 884. The court wrote as follows:

The majority opinion, recognizing that it is making new law in Minnesota, adopts the doctrine of self-publication in defamation actions against former employers. This doctrine, as adopted here, would greatly increase employer liability, fundamentally ignoring the principle of mitigation of damages and recognizing, in thin disguise, the tort of wrongful termination rejected by our supreme court in \textit{Wild v. Rarig}. (citation omitted).

\textit{Id.} (Forsberg, J., dissenting).

\textsuperscript{145} \textit{See Frankson}, 380 N.W.2d at 573. The dissent, in \textit{Frankson}, notes that the majority decision makes a drastic extension of the law of defamation in Minnesota; extending even further the court's decision in \textit{Lewis}, itself an extension of existing law. \textit{Id.} The dissent, in \textit{Frankson}, continues as follows:

While \textit{Lewis} involved the self-publication of a defamatory statement to potential employers, our case is considerably narrower. Here, there is no claim of publication to any person outside the corporation. The argument presented by the dissent in \textit{Lewis} applies with even greater force here: "The majority ruling recognizes, in thin disguise, the tort of wrongful termination rejected by our supreme court."

\textit{Frankson}, 380 N.W.2d at 573 (Wozniak, J., dissenting) (citations omitted).

\text-superscript{146} Minnesota has since adopted a tort action for wrongful discharge based upon public policy. \textit{See supra} note 53.

\textsuperscript{147} \textit{Lewis}, 389 N.W.2d at 887.
of whether the plaintiffs' discharge was wrongful.\textsuperscript{148} The court disagreed, stating that the cause for discharge is properly an issue both in breach of employment contract and in defamation.\textsuperscript{149} The dual function served by the issue of cause is fundamental to the allegation that employment defamation is but a tort of wrongful discharge in disguise. To reach a defamation claim, like wrongful discharge, the court must examine the basis for the discharge. The cause for termination is an element both in employment defamation as well as in an action for wrongful termination. In each case, the employee is allowed a hearing on the justification for the discharge. The key difference between the two lies within the underlying purpose for examination of cause. In defamation, the primary purpose is to decide the truth or falsity of the defamatory statement; while in wrongful discharge, examination of cause may be relevant to a breach of an employment contract or to a violation of some public policy. As a practical matter, however, the analysis of cause in each case is similar. \textit{Lewis} is an illustration of this fact.

In \textit{Lewis}, the plaintiffs intentionally and repeatedly refused to obey numerous company requests to submit revised travel expense reports that complied with established company policies. From the employer's standpoint, such conduct might appropriately be categorized as "gross insubordination."\textsuperscript{150} One of the oldest recognized duties in the employment relationship is the employee's obligation to render obedient, respectful service to the employer.\textsuperscript{151} The employment contract implies that the employee will obey all "reason-

\textsuperscript{148} See \textit{Lewis}, 361 N.W.2d at 881.

\textsuperscript{149} \textit{Id.} The court of appeals in \textit{Lewis} rejected the defendant's argument that the basis for dismissal could not be considered in a defamation action. The court wrote as follows:

Because the supreme court has not recognized a cause of action for wrongful, bad faith termination of an employment contract, appellant contends a defamation claim must be decided without considering whether the dismissal was wrongful. The logic of this argument is illusory. Cause for discharge is examined here due to evidence of malicious false statements, not just bad faith. Similarly, with or without bad faith, cause for discharge might be reviewed in an action for breach of a relevant contract.

\textit{Id.} (citation omitted).

\textsuperscript{150} Justice Kelly, in his dissent in \textit{Lewis} seems to imply that there is a sense in which the conduct of the employees in \textit{Lewis} could be appropriately categorized as "gross insubordination." See \textit{Lewis}, 389 N.W.2d at 895. (Kelly, J., dissenting). Justice Kelly writes as follows:

Notwithstanding the crudeness with which the supervisory employees handled the situation, still the fact remains that, over the course of three months, respondents intentionally, adamantly, and repeatedly refused to obey numerous company policies for such accounts. Thus, from the standpoint of the company supervisor, that conduct is appropriately categorized as "gross insubordination."

\textit{Id.}

\textsuperscript{151} Obedience to the employer's orders has been described as the employee's
able” rules and orders. Insubordination\textsuperscript{152} will justify immediate discharge. This was the action taken in \textit{Lewis}.

The primary issue in many cases, whether the claim is breach of contract\textsuperscript{153} or defamation,\textsuperscript{154} however, is whether the rule or order is “reasonable.” In an action for defamation, the jury will be allowed to decide the issue of truth or falsity of the defamatory statement in a context similar to an action for wrongful discharge. The jury will decide the issue on the basis of both the reasonableness of the employee’s actions and the justification for the discharge itself.

The jury in \textit{Lewis} decided that the explanation for the discharge given by the employer was false.\textsuperscript{155} Similar to an action in wrongful discharge, the jury was asked to decide whether it was “reasonable” for the plaintiffs to disobey their employer.\textsuperscript{156} If the employees were reasonable in their disobedience, they were not guilty of gross insubordination. The jury’s decision led to the conclusion that the employer’s subsequent explanation for the discharge was false and defamatory. The wrongful basis for discharge, while in itself was not actionable in the context of at-will employment, resulted in liability


\textsuperscript{153} See Stevens, The Legality of Discharging Employees For Insubordination, 18 Am. Bus. L. J. 371 (1980). The issue of “reasonableness” in a breach of contract action is central to wrongful discharge actions involving insubordination. The employer’s right to discharge in such cases is not absolute. See, e.g. Resilient Floor & Decorative Covering Workers v. Wilco Mfg. Co., 552 F.2d 1029, 1033 n.4 (8th Cir. 1976), where the court wrote: “in every civilized employer-employee relationship there is an implicit recognition that not every act of insubordination ... justifies an employer in hiring the employee in question.” Id. The issue of “reasonableness” is a fact question for the jury, but where there is no dispute as to the facts, and no question of provocation or condemnation, it is for the court to decide as a matter of law whether the discharge is justified. See Helsby v. St. Paul Hosp. and Casualty Co., 195 F. Supp. 385, 393 (D. Minn. 1961), aff’d \textit{per curiam}, 304 F.2d 758 (8th Cir. 1962).

\textsuperscript{154} See infra note 156.

\textsuperscript{155} \textit{Lewis}, 389 N.W.2d at 889.

\textsuperscript{156} In \textit{Lewis} the jury received the following instructions:

In determining the truth or falsity of the phrase “gross insubordination,” you may consider that an employee has a duty to comply with all reasonable orders of her employer, however, she is not required to comply with an unreasonable order or her employer.

Appellant’s Brief at 21, \textit{Lewis}, 361 N.W.2d 875 (Minn. Ct. App. 1985) (C84-1065) (Trial Transcript at 1030;A. 44)
for defamation when the employees were given false reasons for their discharge.

On appeal, Equitable argued that the issue of truth should focus on the verbal accuracy of the alleged defamatory statement, rather than the underlying implications of the statement. As such, the issue would be whether it was true the plaintiffs were discharged for gross insubordination as stated by their employer, not whether the reasons for the discharge were, in fact, true. Disagreeing, the supreme court affirmed the jury finding, stating that the appropriate issue was the underlying question of whether the plaintiffs had indeed engaged in the alleged misconduct of gross insubordination. The ruling confirms a conclusion that cause for discharge is a proper element in employment defamation, as well as in breach of contract.

In addition to a ruling on cause for discharge as a proper element within the issue of truth, the defamation claim will provide an opportunity to address the issue of malice as it is associated with the discharge itself. The motive for a defendant's conduct is relevant in a tort, but not a contract context. In a breach of contract action, the motive for breach is irrelevant to a recovery. Similarly, in the at-will employment context, the employer may discharge an employee for any reason not otherwise illegal. Bad faith is not a proper issue in either case. In a defamation context, however, malice can be addressed. As the court of appeals stated, "[f]or discharge is examined here due to evidence of malicious false statements, not just bad faith." Not only will the defamation claim allow for a ruling on the cause for discharge, but it will also consider the issue of malice associated with the discharge. A tort action for wrongful discharge will do no more.

The allegation that the rulings in Lewis and Frankson amount to a

157. Lewis, 359 N.W.2d at 888-89.
158. Id. at 889.
159. Lewis, 361 N.W.2d at 881. See also supra notes 148-49. In the wrongful discharge context, it is often discharge for non-economic motives, such as spite and ill will that terminated employees challenge. Most employment relationships contemplate termination for performance related reasons only. If a discharge is motivated by performance reasons, it will coincide with the good faith intentions of the parties. Termination is often motivated, however, by specific malicious intent to injure the employee. It is often this element of bad-faith conduct which employees and sympathetic courts seek to address in the wrongful discharge context. See, e.g., Note, supra note 44, at 290, n.25 and accompanying text. See also, Pstragowski, 553 F.2d at 2-3; Blades, supra note 5, at 1407-09. In many jurisdictions, such as Minnesota, where wrongful discharge can be addressed only within an action for breach of contract, the element of bad faith or malice associated with discharge cannot be examined. See Wild, 302 Minn. at 439-42, 234 N.W. at 789-90. The defamation action is not so restricted, but will provide the discharged employee a mechanism for redress of maliciously motivated injury which is not otherwise available.
creation of tort liability for wrongful discharge is also related to the
historical distinction between tort and contract. The distinction is
significant in regard to a number of issues, including the nature of
the duties imposed and damages.

2. Tort and Contract Duties

The dichotomy between contract and tort regarding punitive dam-
ages is in part related to the nature of the duties themselves. Tort
liability is derived from the breach of a duty imposed by society as a
whole, while contract liability is derived from the contract agreement

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160 Similar issues also derived from the distinction between contract and tort
have been considered in other common law countries. It was not possible until re-
cently to join a defamation claim with a breach of employment contract claim in a
Canadian lawsuit. The rationale for the prohibition is similar to that argued by the
dissents in Lewis and Frankson, resting upon the distinction between contract and tort
and focusing on the issue of damages. See Addis v. Gramaphone Co. Ltd., A.C. 488
(1909). The court, in Addis, refused to allow recovery for loss of reputation due to
breach of employment contract. The court wrote, for example:

If there be a dismissal without notice the employer must pay an indemnity;
but that indemnity cannot include compensation either for the injured feel-
ings of the servant, or for the loss he may sustain from the fact that his
having been dismissed of itself makes it more difficult for him to obtain fresh
employment.

Id. at 491.

The "Addis principle," as it is called in Canada, holds that damage for defamation is
not recoverable in a breach of contract action. See M. Grosman, Wrongful Dismissal:
Damages for Loss of Reputation or Stature, 4 ADVOCATES' QUARTERLY 317 (1983). How-
ever, in recent decades, the rule had given way to changes in Canadian law regarding
at-will employment. See, e.g., Johnston v. Muskoka Lakes Golf and Country Club Ltd.,
40 O.R.2d 762 (1983), where the court wrote about the nature of the issue regarding
damages and the separation of tort and contract:

What the plaintiff is pleading in the two paragraphs mentioned relates
to a developing theory of law as to what may be included in damages for
breach of contract, including breach of contracts of employment. While the
learned County Court judge has, I think, been referred to the essential au-
thorities which bear on this point, it must be said that the question whether
damages that are often associated with tort actions may become the subject
of compensation by way of damages in breach of contract cases has been,
in the last few years, the subject of considerable debate and flexibility.

Id. at 764.

The court continued as it justified the decision to allow the claim for loss of reputa-
tion to continue to trial:

What we are here confronted with, as I see it, is the fact that, in recent
years, the rigidity of the principle laid down in Addis v. Gramaphone is being,
to use the expression of some of the judges, "eroded". The whole of the
law of damages arising out of breach of contract and out of torts, where the
two may overlap, is in process of being reconsidered and clarified. In my
opinion, this situation applies equally to what may be termed a claim for loss
of reputation arising out of a breach of a contract, including a contract of
employment. How that head of claim may be dealt with by a trial judge will
depend very much, of course, on the evidence led before him.

Id. at 765.
A breach of contract is a violation of a duty owed only to the parties to the contract. Because a breach of contract only breaches a private duty owed to those parties, it does not violate societal standards to the same extent as tortious conduct. Therefore, the need for admonition is not as great in contract claims as it is in tort claims. Consequently, the distinction between the nature of the duties imposed justifies application of punitive damages in tort claims but not in contract claims.

3. Punitive Damages

Generally, punitive damages are not available in a contract action. The rule applies in the employment context as well. Under a contract theory of wrongful termination, the employee may recover only compensatory damages, such as lost wages, but never punitive damages.

There are, however, specific exceptions to the punitive damages rule. One such exception is where the breach of employment contract is accompanied by an independent tort. Accordingly, the Minnesota Supreme Court stated early on that it would permit tort recovery in an action for breach of employment contract under certain special circumstances. In Lewis, the court clarified the fact that defamation can be one of the independent torts which allows for recovery. The court stated in Lewis that it is a misreading of Minnesota law to preclude tort liability for wrongful discharge. In Wild v. Rarig, the court held that the bad-faith termination of an employment contract is not in itself an independent tort of the kind that will permit tort recovery. The court did not hold in Wild, however, that harm resulting from a bad-faith termination of a contract could never give rise to a tort recovery. It recognized such a possibility when it stated that a plaintiff is limited to contract damages "except in exceptional cases where the defendant's breach of

161. See Strausberg, supra note 7, at 280; see also Sullivan, supra note 7, at 218-19 (noting that breach of contract abuses no external societal standards of conduct); W. Prosser and W. Keeton, supra note 12, § 92, at 655-56 (discussion of distinction between tort and contract obligations).
162. See generally supra notes 30, 54-55.
163. See, e.g., supra note 55.
164. See, e.g., supra notes 7-9, 54-55 and accompanying text.
165. See Wild, 302 Minn. at 442, 234 N.W.2d at 790. It should be noted that the issue as to whether defamation was one of the special circumstances referred to by the court was not addressed at that time. The court did specify, however, that bad faith breach of an employment contract was not one of those independent torts. Id.
166. Lewis, 389 N.W.2d at 887-88.
167. Id.
168. 302 Minn. 419, 234 N.W.2d 775 (1975).
169. Id. at 442, 234 N.W.2d at 790.
After clarifying the issue as to whether defamation has a legitimate function in the context of a contract action, the Lewis court went on to minimize the effect of tort damages. The court ruled that punitive damages would not be available in self-publication cases. The court was concerned that punitive damages may encourage plaintiffs' republication of employers' defamatory statements as well as discourage communication of reasons for discharge by employers.

Even with the elimination of punitive damages, however, the damages issue does not become moot. In a defamation action, recovery is not limited to specific damages, as it might be under a contract theory of wrongful discharge. Under the contract theory, a plaintiff must prove actual damages. Since defamation in the employment context is defamation per se, proof of specific damages is not required but, rather, general damages are presumed. This being the case, a defamation claim, even without punitive damages, will allow residual recovery above that allowed in the contract context alone. In any case, proof of damages in the defamation per se context is less burdensome than proof of damages for breach of contract. As such, the issue of damages is still significant, even without the possibility of punitive damages.

In addition, it should be noted that the preclusion of punitive damages in the self-publication context does not foreclose the award of punitive damages in other cases. Punitive damages are still available under normal circumstances, including those similar to that found in Frankson, where publication is intra-corporate.

B. Damages for Loss of Reputation or Stature

The unique aspect of Lewis and Frankson is the fact that recovery

170. Id. at 440. 234 N.W.2d at 789. See also Lewis, 389 N.W.2d at 887.
171. Lewis, 389 N.W.2d at 892.
172. Id.
173. In adopting a tort-based cause of action for wrongful discharge in Phipps, 396 N.W.2d at 592, the court recognized the distinction between contract and tort, both in terms of analysis and damages. The court also noted the Minnesota Supreme Court's discussion of punitive damages in Lewis, 389 N.W.2d at 891-92, with the possible implication that punitive damages may be withheld in other newly recognized actions as well. Phipps, 396 N.W.2d at 593 n.4. However, the supreme court's rationale for its ruling in Lewis, will not justify a conclusion that punitive damages should be unavailable in all new tort-based actions. Punitive damages have a useful and necessary function under appropriate circumstances. Historically, part of the rationale behind the punitive damages rule in contract law has to do with the idea that the efficient allocation of resources requires the breach of unwise contracts. However, society's economic interest in promoting freely escapable contracts must be tempered by a competing societal interest in discouraging conduct which amounts to willful and malicious disregard for the rights of others. See generally Mallor, supra note 7; Strausberg, supra note 7.
was for the loss of reputation flowing from the discharge itself. It is submitted here that such a claim is appropriate. Prominent commentators note that tort law has always been very protective of the reputation of tradespersons. There is a basis for the protection of reputation in contract as well as in tort law. Associated with every contract of employment is the implied assumption that the employee will be allowed the opportunity to enhance or at least maintain her reputation in that field of endeavor. Since the opportunity to enhance one's reputation is an integral part of every employment contract, a loss of reputation upon termination is within the contemplation of the parties and should be compensable. A person who enters into an employment contract is not only seeking monetary reward but also an opportunity to advance her reputation in the chosen field. The "reputation" factor is an implied term of many employment contracts. Therefore, the opportunity to enhance one's reputation or maintain it at a level which already exists in any given area of endeavor is an integral part of the employment agreement. This may also be true in the case of at-will employment. Upon the occasion of a "wrongful" termination, loss of reputation due to the termination itself should be actionable.

C. Frequency of Defamation Claims

Following Lewis and Frankson, every wrongful discharge action in Minnesota may also include a tort claim for defamation. The requirements of most employee applications are such that any false reason given for discharge is likely to be republished, either by the employee on the occasion of application for a new job, or intra-corporately by the employer. Standard application procedures, including application forms and employment interviewers, uniformly require that the employee reveal information concerning their past employment. Such required information invariably includes reasons for termination of past employment. As such, in nearly all cases of employee discharge, there is a compulsion to republish which is foreseeable to the employer. Since statements which affect an em-

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174. See M. Grosman, supra note 160. The author of this paper suggests that the employee has a property right in reputation and that any termination may justify a recoverable loss.

175. See W. Prosser and W. Keeton, supra note 12, § 112, at 790.

176. Addressing the issue as to the likelihood that defamatory reasons for discharge will be repeated during subsequent employment application, Judge Forsberg of the Minnesota Court of Appeals writes as follows:

Standard employment application forms, as well as nearly all employment interviewers, uniformly require information on past employment, almost always including reasons for termination of past employment. All employers can be held accountable for knowledge of this practice. Therefore, there is in virtually all cases of employee discharge a strong compulsion to republish, foreseeable to the employer. Since any statement
ployee in his business or profession are defamatory per se, and all terminations for employee misconduct or incompetence have this potential, it follows that terminations may result in a defamation action. Consequently, after Lewis and Frankson, every wrongful discharge action in Minnesota may also include a claim for defamation.

**Conclusion**

Employer defamation strikes at the central proposition of the at-will doctrine, which is the right to terminate at any time and for any reason. Minnesota’s recent decisions on defamation sharply qualify the traditional rule that termination may be made at any time and for any reason. After Lewis and Frankson, termination may be made at any time and for any reason, but the reason for termination must be true. These cases result in increased potential liability for employers. In addition, they have significant implications for future litigation because the alleged wrongful basis of any discharge will, at the same time, be grounds for employer liability in defamation.

Verdell F. Borth

adversely affecting an employee in his business or profession is defamatory per se, and all terminations for employee conduct or performance have this potential, all such terminations may give rise to a defamation action. Lewis, 361 N.W.2d at 884 (Forsberg, J., dissenting) (citation omitted).

Similarly, in his dissent, Justice Kelly of the Minnesota Supreme Court stated:

In claims brought by ex-employees against employers for defamation when the employment was terminated for “incompetence,” “dishonesty,” “insubordination” or for any other reason carrying a connotation of immorality, ineptness, or improbity, “compulsion” will almost automatically be found in connection with future job applications by the discharged employee. Such “compulsion” would, with certainty, be foreseeable by the ex-employer. Lewis, 389 N.W.2d at 896 (Kelly, J., dissenting).

177. See e.g., supra notes 60-63.

178. The reader is reminded that all wrongful discharge actions in Minnesota are contract-based actions, with the one exception of the newly recognized tort action for wrongful discharge based upon public policy. See supra notes 53 and 173.