

PUBLIC POLICY AND WRONGFUL DISCHARGE: THE CONTINUING TRAGEDY OF *BIGELOW V.* *BULLARD*

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I. INTRODUCTION

Michael Anthony Bullard worked as an at-will employee for the Bigelow Holding Company: a company whose assets include rental properties in the Las Vegas area and whose practices included “strong evidence”¹ of discriminatory measures.² Bullard probably knew of his employer’s biases against African-Americans and he may have even been a company agent in their application.³

One day while at work in the Bigelow office, Bullard heard that the company intended to remove three African-American males from one of its properties by way of physical beatings.⁴ Disapproving of Bigelow’s treatment of African-Americans, and its proposed violent eviction of them, Bullard protested to his coworker Carol Swenson, “Blacks have rights, too.”⁵ A few minutes following Bullard’s remark, Swenson spoke with her supervisor, Donna Dallman, who immediately approached Bullard, grabbed the piece of paper upon which he was writing and asked him, “What’s your fucking problem?”⁶ He answered that he didn’t have a problem, to which Dallman responded by calling him a “fucking nigger lover,” telling him to get his “fucking ass out of here,” and proclaiming, “I don’t want you working for me anymore.”⁷

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¹ *Bigelow v. Bullard*, 901 P.2d 630, 632 (Nev. 1995).

² *Id.* at 633. Significantly regarding the known discrimination at the company, the Nevada Supreme Court stated, “It could be inferred from the evidence in this case that the Bigelow company had in fact adopted a rental policy of discriminating against African-Americans. It has been claimed that the agents of Bigelow were instructed to use deception and subterfuge to prevent African-Americans from becoming tenants in Bigelow rentals.”

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 632.

⁶ *Id.* at 638.

⁷ *Id.*

Bullard subsequently filed suit against Bigelow.⁸ He sought to recover judgment based on a tortious discharge claim alleging that the company had terminated his employment because of his objection to the employer's known racial policies and practices.⁹ Consequently, the district court rendered judgment in Bullard's favor pursuant to a jury verdict.¹⁰ The Nevada Supreme Court reversed the lower court's decision holding that Bullard failed to establish a prima facie case of tortious discharge, because the at-will doctrine permits an employer to terminate employment for any or no reason, even if that reason is "to discharge [an] employee for his perceived sympathy toward African-Americans."¹¹

This comment will examine the Nevada Supreme Court's 1995 decision in *Bigelow v. Bullard*.¹² The analysis will begin by considering the at-will employment doctrine and continue by examining the general theories under which an employee may bring a claim of wrongful termination against the employer, specifically theories of contract and public policy. The focus will then turn to Nevada's interpretation and consequent understanding of the public policy exception in *Bigelow*.¹³ The paper will conclude with a discussion of the court's decision by addressing how the court should have interpreted the public policy exception to the at will doctrine in light of similar cases outside of Nevada.

II. THE COMING OF AT-WILL

Historically, English laws concerned themselves with the duration of service relationships. Specifically, the laws addressed how soon a party in the relationship should receive or provide notice of the relationship's termination and how long the relationship should endure in the absence of a termination date.¹⁴ Regarding the issue of notice, the courts decided that reasonable notice would

⁸ *Id.* at 630. In addition to Bullard's claim of tortious discharge, two other employees filed claims against Bigelow. Ricky Hammer filed a claim of tortious discharge and wrongful eviction and Susan Vaughan filed a claim for assault and battery. Although the plaintiffs joined their claims against their former employer, only Bullard's claim of tortious discharge linked his termination to Bigelow's alleged discriminatory practices. Bullard believes that his employment discharge resulted from his statement "Blacks have rights, too." The Nevada Supreme Court quickly dismissed Hammer's tortious discharge claim, because the company asserts that Hammer's termination resulted from his unsatisfactory work performance. The court commented that Bigelow could have fired Hammer, an at-will employee, for any reason. The court further noted that Hammer's dismissal lacked any association to the company's racially discriminatory policies. Thus, this comment treats only Bullard's tortious discharge claim to propose expanding the public policy exception to the employment at-will doctrine.

⁹ *Id.* at 631.

¹⁰ *Id.* at 630.

¹¹ *Id.* at 634.

¹² 901 P.2d 630 (Nev. 1995).

¹³ *Supra* note 7. This comment will address only the employer's discharge of Bullard.

¹⁴ Jay M. Feinman, *The Development of the Employment at Will Rule*. 20 AM.J. LEGAL HIST. 118, 119 (1976).

suffice to terminate the service relationship.¹⁵ Regarding the issue of a relationship's unspecified termination date, Sir William Blackstone stated:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective season, as well when there is work to be done as when there is not.¹⁶

English law considered the service relationship between the master and servant as a domestic, and even familial, one.¹⁷ However, the English law's domesticity had little application in late nineteenth-century United States as society's industry gave way to widespread commercialism. In contrast to the English law of master and servant, the American Rule, which Horace Wood authored in 1877, provided, ". . . a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out to be a yearly hiring, the burden is upon him to establish it by proof."¹⁸

The popularity and strength of Wood's treatise of the employment relationship had quickly materialized as the United States' mainstream employment doctrine. Today, and nearly automatically, it applies in the absence of an employer's alternative discharge policy and dictates that an employment contract of indefinite duration be terminable at the will of either party. It embodies the principle that employers in the United States are free to terminate workers for any nondiscriminatory reason and thus, subject to statutory restrictions, an employer's justification to terminate the employment of a worker has no legal relevance.¹⁹ The at-will terminable employment relationship still flourishes in employment contracts throughout the country, and of specific interest, in the

¹⁵ *Id.* at 119. Also Feinman addresses the notion of what is reasonable. He writes, "What constituted reasonable notice was a question of fact to be decided anew in each case, but certain conventions grew up. Domestic servants, who presumably no longer needed the benefit of the seasons, could be given a month's notice. Other types of employees could also be given a month's notice; three months was another common term, although some special cases required six or even twelve months' notice. Although notice was a separate question in each case, the custom of the trade was often determinative."

¹⁶ Sir William Blackstone, *Commentaries*. 410 (1765).

¹⁷ *Id.* Additionally, Blackstone discusses the "three great relations in private life." He suggests that they are a) master and servant, b) husband and wife, and c) parent and child. These relations imply a hierarchical power structure, but nevertheless they connote a kind of intimacy and personal connection between the relation's two parts.

¹⁸ Horace G. Wood, *A Treatise on the Law of Master & Servant* § 134 at 272 (John D. Parson, Jr., 1877). See also Gregory Mark Munson, *A Straitjacket for Employment At-Will: Recognizing Breach of Implied Contract Actions for Wrongful Demotion*, 50 *VAND. L. REV.* 1557, 1580 (1997); Feinman, *supra* note 15.

¹⁹ Khan, Steven C., *Personnel Director's Legal Guide*, 2nd ed., Warren, Gorham & Lambert, Inc., Boston, Massachusetts, 1990, at 7.01. The American Rule reacted against the English Rule, which sought to prohibit employers from discharging employees unless for a reasonable and sufficient cause. Most U.S. jurisdictions had abandoned the English Rule by the late 1800s, reasoning that restrictions on terminating employment were inconsistent with the *laissez-faire* philosophy then prevalent in the United States.

state of Nevada.²⁰

The Nevada Supreme Court has interpreted the at-will employment doctrine consistent with the American Rule. That is, the court has held that an employer may terminate the employment of an at-will employee at any time for any reason or for no reason at all, and that an employer may dismiss an at-will employee even on a mere whim.²¹ Furthermore, the court has held that employment contracts are ordinarily and presumably contracts that are terminable at-will.²²

The at-will employment doctrine nevertheless is not impenetrable. Holes in the doctrine began to develop because of Congress' chipping away at it to find and impose limitations on the at-will employment relationship. For example, Congress prohibited employment termination against civil service employees without cause and it prohibited discrimination against employees for their union activity.²³ Congress further broke through the doctrine's walls in 1964 when it prohibited employment discrimination based on race, sex, religion, age, and impairment or handicap.²⁴ However, despite occasional congressional intervention, the doctrine has given considerable power to employers who have abused it to terminate wrongfully the American worker.

A terminated at-will employee may bring a wrongful discharge claim against the employer under theories of contract or public policy.²⁵ In the pre-

²⁰ Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1493 (1996). Commenting on the status quo of the at-will employment doctrine, McGinley notes that it "thrives" and makes specific reference to the Nevada Supreme Court's decision in *Bigelow* as an egregious example of the victory of the employment at-will doctrine over sanity.

²¹ *Bigelow v. Bullard*, 901 P.2d 633 (Nev. 1995).

²² *D'Angelo v. Gardner*, 819 P.2d 206, 211 (Nev. 1991).

²³ 29 U.S.C. § 158 (1994)

²⁴ Many congressional limitations on the employment at-will doctrine exist and among them are:

- a) Title VII, the Civil Rights Act of 1964, 28 USCS § 1447 (1998).
- b) Age Discrimination in Employment Act of 1967, 29 USCS § 621 (1998).
- c) Civil Rights Act of 1991, 42 USCS § 1981
- d) Americans with Disabilities Act of 1990, 42 USCS § 12101 (1996).
- e) Immigration Reform and Control Act of 1986, 8 USCS § 1101 (1998).
- f) Civil Service Reform Act of 1978, 5 USCS § 1101
- g) Labor Management Relations Act of 1947, 29 USCS § 141 (1996).
- h) Fair Labor Standards Act, 1938, 29 USCS § 201 (1998).
- i) Occupational Safety and Health Act of 1970, 5 USCS § 5108 (1998).

²⁵ Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397 (1989). Of particular note, Perritt states, "The most significant employment law development in the last quarter of the 20th century has been the erosion of the employment-at-will rule and the recognition of a family of common law rights protecting individual employees against wrongful dismissal. Under these wrongful dismissal doctrines, terminated employees may be able to recover damages when they can show that their terminations violated employer promises, jeopardized clear public policies, or, sometimes, when the terminations did not comport with good faith and fair dealing. The wrongful dismissal common law doctrines have substantially eroded the operation of the employment-at-will rule."

sent case of *Bigelow*, Bullard pursued his claim of wrongful discharge against the Bigelow Holding Company under a theory of public policy and not one of contract. Nevertheless, contract theory warrants a brief discussion in the context of wrongful termination even though the at-will doctrine signifies only a rebuttable presumption to a breach of contract. The discussion will address specifically 1) oral contracts, 2) the implied covenant of good faith and fair dealing, and 3) personnel manuals as binding contractual obligations.²⁶

III. CONTRACT THEORY

A. Oral Contracts

Oral contracts require the courts to look beyond the express terms of employment to understand, honor, and execute the parties' intent. For example, in *Pugh v. See's Candies, Inc.*, Wayne Pugh brought a wrongful termination action against his employer for violating an implied promise that it would not act arbitrarily with him.²⁷ Early on in his employment, the then president and general manager of the company frequently assured Pugh, "If you are loyal to See's and do a good job, your future is secure."²⁸ Pugh's loyalty and performance merited promotions, consequently elevating his position from dishwasher to company vice president and member of the board of directors without a single formal or written criticism of his work.²⁹ Nevertheless, after his 32 years with the company, See's terminated his employment.³⁰

The court held that Pugh had demonstrated a prima facie case of wrongful termination in violation of an implied promise in contract.³¹ The court noted that the contract implied a promise to Pugh that See's would not act arbitrarily in dealing with him as evidenced by the "totality of [the] parties' relationship."³² The court held that a contract of employment is terminable only for good cause if independent consideration supported it, or that the employer and the employee agreed, either expressly or impliedly, that the employee's termination could only be for good cause.³³

The court reasoned that the general rule requiring independent considera-

²⁶ See Khan, *supra* note 18. Contract theory in the specific context of employment contracts may consist of several sub-theories. In addition to oral contracts, the implied covenant of good faith and fair dealing, and personnel manuals as binding contractual obligations, the employment relationship may consider written contracts, independent consideration, and promissory or equitable estoppel.

²⁷ 116 CA. App. 3d 311 (1st Dist.)

²⁸ *Id.* at 919.

²⁹ *Id.*

³⁰ *Id.* at 918.

³¹ *Id.* at 927.

³² *Id.*

³³ *Id.* at 925.

tion is a rule of construction, and not of substance.³⁴ Consequently, a contract for permanent employment, whether or not the contract is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if the contract contains an express or implied condition to the contrary.³⁵ Furthermore, the court discovered the existence of an implied promise by considering several factors. Among these were "personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged."³⁶

Similarly, the Nevada Supreme Court has held that employment contracts are *presumably* at will.³⁷ Thus, an employer "may expressly or impliedly agree with an employee that employment is to be for an indefinite term and may be terminated only for cause or only in accordance with established policies or procedures."³⁸ This agreement creates a contract of continued employment that an employee can enforce according to its terms.³⁹

B. Implied Covenant of Good Faith

The implied covenant of good faith and fair dealing obligates both the employer and the employee to execute the employment contract in good faith and it imposes a duty upon each of them to deal fairly with one another.⁴⁰ At the very least, the covenant demands that the employer and employee refrain from acting in bad faith. For example, in *Fortune v. National Cash Register Co.*, Orville Fortune sought to recover sales bonuses from sales he made prior to his employment termination.⁴¹ Fortune had worked for National Cash Register Co. as a sales person and had successfully secured a large sale from which he would earn a commission.⁴² The sale entitled him to a bonus, seventy-five percent of which the company paid prior to terminating its employment relationship with

³⁴ See also Khan, *supra* note 18. Several states have found that the presumption of at-will employment is rebutted where the employee has given consideration beyond that normally provided to an employer. Typically, these cases involve a plaintiff who has left a secure job, has moved a great distance, or has otherwise suffered unusual hardship in order to accept new employment.

³⁵ *Id.* at 925 quoting *Drzewiecke v. H & R Block, Inc.*, 101 Cal.Rptr. 169.

³⁶ *Id.* at 925-6.

³⁷ *D'Angelo v. Gardner*, 819 P.2d 206, 211 (Nev. 1991).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Parties who have entered into a contract with one another must act in good faith. Cases are many which have developed and upheld this principle, and among them is every case cited in this comment, save *Bigelow*. Additionally, the Uniform Commercial Code serves as a strong source governing the parties' execution of a contract. For example, U.C.C. § 1-203 is an obligation of good faith, stating, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." *Commercial and Debtor-Credit Law: Selected Statutes*, 1999 ed. at 21.

⁴¹ 364 N.E.2d 1251, 1253 (Mass. 1977).

⁴² *Id.* at 1254.

him.⁴³

The court held that Fortune successfully demonstrated that National Cash Register Co. acted in bad faith.⁴⁴ Although noting that the company rightfully discharged Fortune under the governing at-will employment doctrine, the court nevertheless believed that the employer should act in good faith toward the employee.⁴⁵ Significantly, the court stated that an employer's acting in good faith does not hamper the freedom and control the employer has over an at-will employee.⁴⁶

The court reasoned that National Cash Register Co. sought to deprive Fortune of compensation by terminating the contractual relationship while he was "on the brink of successfully completing the sale."⁴⁷ Consequently, the court concluded that the company had acted in bad faith and thus breached its employment contract with Fortune.⁴⁸ Additionally, the court stated the rule that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."⁴⁹

C. Personnel Manuals

Personnel manuals may bind the employer to contractual obligations of employment even when the parties are at will.⁵⁰ For example, in *Woolley v.*

⁴³ *Id.*

⁴⁴ *Id.* at 1257.

⁴⁵ *Id.* at 1255-57.

⁴⁶ *Id.* at 1256.

⁴⁷ *Id.* at 1257.

⁴⁸ *Id.* See also *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) upon which *Fortune* relies. In *Monge*, an at-will employee alleged that her oral contract of employment had been terminated because she refused to date her supervisor. The court held, "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he see fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two . . . a termination by the employer of a contract of employment at will which is motivated by bad faith or malice . . . constitutes a breach of the employment contract."

⁴⁹ *Id.* citing *Uproar Co. v. National Broadcasting Co.*, 81 F.2d 373, 377 (1st Cir. 1936). See also *Perritt*, *supra* note 24. *Perritt* discusses a decline of the implied covenant doctrine and considers the very protection that it had offered. In this regard he states, "Juries apparently were to be allowed to decide for themselves what constituted good faith and to decide if the employer's actions met the standard thus derived by them. Under this approach, the implied covenant doctrine would give employees very broad protection." Also, for the Nevada component of the implied covenant of good faith see *infra* notes 94-105 and accompanying text.

⁵⁰ See Gregory Mark Munson, *A Straitjacket for Employment At-Will: Recognizing Breach of Implied Contract Actions for Wrongful Demotion*, 50 VAND. L. REV. 1577, 1581 (1997). Commenting on the application of employee handbooks, Munson observes that it is an "ever-widening source for implied contracts." Although the acceptance of personnel manuals as implied contracts may be an increasing trend, they may, in some cases, fail to have an influence on the at-will employment doctrine. See *T. Paca v. K-Mart Corp.*, 775 P.2d 245

Hoffman-La Roche, Inc.,⁵¹ Richard Woolley filed a complaint against his former employer alleging breach of contract: a contract effected by the express and implied promises of the employment manual he received from his employer. Hoffman-La Roche hired Woolley as an at-will employee and shortly thereafter gave him the personnel manual that included a provision that secured employment to effective employees.⁵² The company subsequently retained him for more than eight years, promoted him twice, lost confidence in him, asked him to resign, and fired him without cause.⁵³ It simply ignored the termination procedures that it outlined and distributed to its workers, among whom was Woolley.⁵⁴

The court concluded that pursuant to the reasonable expectations of the employee, the personnel manual bound the employer to the termination procedure of its employees.⁵⁵ It held that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause was enforceable against the employer even when employment was for an indefinite term and would otherwise be terminable at will.⁵⁶ The court recognized that the parties' relationship was at-will which characteristically permits the employer to discharge the employee without cause.⁵⁷ However, it also recognized that the personnel manual listed specific provisions permitting terminations for cause and noted, "Whatever Hoffmann-La Roche may have intended, that which was read by its employees was a promise not to fire them except for cause."⁵⁸

Similarly, the Nevada Supreme Court has held that a personnel manual may

(N.M.1989). In that case, an at-will worker filed a wrongful termination claim against K-Mart alleging that the company's personnel manual contractually altered the at-will employment relationship. The handbook applied only to hourly wage employees and the plaintiff worked as a salaried managerial employee. The handbook clearly expressed that K-Mart employees were terminable at will. The court held that personnel manuals containing such statements "do not create an implied contract altering the parties' 'at will' relationship."

⁵¹ 491 A.2d 1257 (N.J. 1985).

⁵² *Id.* at 1258.

⁵³ *Id.*

⁵⁴ *Id.* at 1264.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1269-70.

⁵⁷ *Id.* at 1259 n. 2. Significantly, the personnel manual's language included the provision, "It is the policy of Hoffman-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."

⁵⁸ *Id.* at 1266. See also *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 NW 2d 880, 892 (1980). In that case, the court held that "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. . . . It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a 'situation instinct with an obligation.'"

establish a contractual obligation of continued employment.⁵⁹ Specifically, the court has stated, "The relationship of an employer and employee may be such that the employer has a contractual obligation not to discharge the employee without first abiding by conditions relating to dismissal which are either expressly agreed upon by the parties or inferable from the dealings and practices of the parties."⁶⁰ Thus in Nevada, a personnel manual may form part of the contract.

IV. PUBLIC POLICY

Contract theory may provide remedial avenues to a wrongfully discharged worker in an at-will employment relationship, but an increasingly popular alternative exists: the public policy exception. Holding that a typical at-will employment relationship grants the employer an absolute right to dismiss an employee, courts have added that an employer cannot exercise that right if its execution would offend public policy.⁶¹ This theory allows an employee to recover in tort when the employee's termination violates a known public policy and requires that the plaintiff prove the following elements:

- a. The existence of a clear public policy;
- b. The termination in the context of the plaintiff would offend public policy;
- c. The motivation for terminating the employee relates to the public policy; and
- d. The employer lacked "overriding legitimate business justification" to terminate.⁶²

These criteria provide the means to exercise some power against abuse of the at-will doctrine. Application of these criteria requires specific circumstances in which public policy violations occur. These specific circumstances are:

1. discharges for refusing to violate criminal or civil laws;⁶³

⁵⁹ D'Angelo v. Gardner, 819 P.2d 206, 209 (Nev. 1991).

⁶⁰ *Id.*

⁶¹ Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984), K-Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987), D'Angelo v. Gardner, 819 P.2d 206 (Nev. 1991), and Bigelow v. Bullard, 901 P.2d 630 (Nev. 1995). Many courts nation-wide hold that the at-will doctrine cannot protect the employer when the termination of the worker offends public policy, but these Nevada cases most appropriately fall within the scope of this comment.

⁶² See Perritt, *supra* note 24 at 398-99. See also Pugh, *supra* note 28; Fortune, *supra* note 42. In both of these cases, the plaintiffs ultimately showed that their employers lacked, "overriding legitimate business justification to terminate" them.

⁶³ Gantt v. Sentry Ins., 824 P.2d 680, 685 (Cal. 1992). The California Court in *Gantt* recognized, "A review of the pertinent case law in California and elsewhere . . . reveals that few courts have recognized a public policy claim absent a statute or constitutional provision evidencing the policy in question." Among those cases contributing to the *Gantt* court's categories are Tamenny v. Atlantic Richfield Co., 610 P.2d 1330, and Foley v. Interactive Data Corp., 765 P.2d 373.

2. discharges for having performed civic duties or statutory obligations;⁶⁴
3. discharges for asserting statutory or constitutional rights or privileges;⁶⁵
4. discharges for socially desirable performances not required by law;⁶⁶ and
5. discharges for what are recognized as socially reprehensible reasons.⁶⁷

An early example of the public policy exception stemmed from a plaintiff who found himself within the first of the five circumstances listed above. Peter Petermann followed the four-step criteria against his former employer to prove that his termination violated public policy.⁶⁸ Petermann worked as a business agent for the union International Brotherhood of Teamsters which instructed him to testify falsely in front of a legislative committee.⁶⁹ The union instructed Petermann that if he failed to provide the false testimony, it would terminate his employment.⁷⁰

The court noted that the at-will doctrine governed in the absence of fixed employment terms, thereby rendering it terminable by any party for any reason whatsoever; but further noted, that an at-will employment contract may have statutory or public policy limitations.⁷¹ The court found that the Penal Code § 118 dictates the unlawfulness of perjury and held, "The public policy of this state as reflected in the penal code sections referred to above would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. . . . The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered."⁷² Reacting to his termination for refusing to violate a law, Petermann successfully executed an action against the union.⁷³

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* Peck, Cornelius J.. *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 744 (1991). *See also, supra* note 19, at 1491 ("Although the employment at will doctrine was once an impenetrable sheath, courts have pierced it with many holes. Public policy exceptions, breach of an implied in fact contract, implied covenants of good faith and fair dealing, the increased use of the law of defamation in the workplace, and the creation of contractual rights in employment manuals are some of the theories the courts have used to avoid unfair application of the employment at will doctrine").

⁶⁸ *Petermann v. Teamsters Local*, 396, 344 P.2d 25 (Cal.App.1959). *See also Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (1980). *Tameny* reflects the facts of *Petermann* insofar as the employer terminated the plaintiff's employment, because the plaintiff refused to engage in illegal or criminal activity.

⁶⁹ *Id.* at 26.

⁷⁰ *Id.* at 28.

⁷¹ *Id.* at 27.

⁷² *Id.*

⁷³ *Id.* at 28. *See also* Bud F. Barela v. C.R. England & Sons, Inc., 197 F.3d 1313 (1999). The elements of a prima facie case of wrongful termination in violation of public policy are: 1) the employer terminated the worker; 2) a clear and substantial public policy existed; 3) the employee's conduct brought the policy into play; and 4) the discharge and the conduct bringing the policy into play are causally connected.

The successful application of the public policy exception in *Petermann* invited further consideration of a public policy definition.⁷⁴ In *Gantt v. Sentry Insurance*,⁷⁵ the court confronted the difficulty of defining it. In that case, Vincent Gantt filed an action against Sentry Insurance for terminating him in violation of public policy, for which a jury rendered a verdict of \$1.34 million in his favor.⁷⁶ The facts reveal that Gantt had agreed to testify truthfully to the Department of Fair Employment and Housing (DFEH) regarding the company's sexual discrimination against a former fellow-employee.⁷⁷

The court determined that Sentry Insurance had constructively discharged Gantt, because of his refusal to testify dishonestly or not to testify at all to the DFEH.⁷⁸ The court found that the company's actions against Gantt violated public policy, but refused to define the public policy.⁷⁹ Instead, the court relied on varied sources to identify the public policy that Sentry Insurance violated.⁸⁰ These sources include legislation, administrative rules, regulations, decisions, judicial decisions, constitutional schemes, statutory schemes, the constant practice of government officials, and professional codes of ethics.⁸¹

Significantly, the court noted that public policy claims must have some link to statutory or constitutional provisions, and absent that link, a court would very likely refuse to recognize the existence of a public policy at issue.⁸² The court reasoned that although Sentry Insurance did not discriminate against Gantt on account of his sex within the meaning of the constitutional provision, "there is nevertheless direct statutory support for the jury's express finding that Sentry violated a fundamental public policy when it constructively discharged [the] plaintiff . . ."⁸³

⁷⁴ *Id.* at 27. The court tackled the meaning of public policy by considering several precedent decisions. Specifically, the court stated, "The term 'public policy' is inherently not subject to precise definition. . . . 'Public policy is a vague expression, and few cases can arise in which its application may not be disputed.'" The court adds, quoting from Mr. Story, in his work on Contracts (section 546), "'By 'public policy' [it] is intended 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 . . .'"

⁷⁵ 824 P.2d 680 (Cal. 1992).

⁷⁶ *Id.* at 682-3.

⁷⁷ *Id.* at 683.

⁷⁸ *Id.*

⁷⁹ *Id.* at 688. The court held that Sentry Insurance violated public policy "expressed in [the] Fair Employment and Housing Act (FEHA) provision specifically enjoining obstruction of Department of Fair Employment and Housing (DFEH) investigation when it constructively discharged [the] district sales manager . . ."

⁸⁰ *Id.* at 685.

⁸¹ *Id.*

⁸² *Id.* at 684. The court recognized four categories where employment discharge may constitute a violation of public policy. These categories are: 1) refusing to commit unlawful acts; 2) exercising statutory rights; 3) performing public functions; or 4) reporting an employer's unlawful conduct.

⁸³ *Id.* at 688. See also McGinley, *supra* note 19 at 1494, "No court has defined public policy so broadly. In fact, many of the states recognizing the public policy exception have defined

The courts continue to follow *Petermann* today, and among them is the Nevada State Supreme Court. In 1984, the state decided *Hansen v. Harrah*'s⁸⁴ and applied the public policy exception to the at-will employment doctrine.⁸⁵ The plaintiff, Edward Hansen worked as a video pinball repairman, injured himself while working, and filed a workers' compensation claim.⁸⁶ Harrah's retaliated against his filing of the claim by terminating his employment.⁸⁷

The court held that an employer's retaliatory discharge, stemming from an injured employee's filing of a workmen's compensation claim, is actionable in tort.⁸⁸ The court concluded that an employer violates public policy when it discharges an injured worker for having filed a workmen's compensation claim.⁸⁹ The court reasoned that an employee's consequential fear of being discharged would have a "deleterious effect on the exercise of a statutory right."⁹⁰ That is, an employee would not file a claim to preserve his or her employment, thereby relieving the employer of its obligation.⁹¹

Significantly, the Nevada court confronted a problem that *Petermann* and the upcoming *Gantt* had not addressed. The California courts stated that the public policy exception applies only when public policy has roots in statutory or constitutional enactments.⁹² However, the *Hansen* court confronted a public policy violation without the precedent support of legislative measures; that is, Nevada had not yet adopted the public policy exception of retaliatory discharge.⁹³ Nevertheless, the court noted, ". . . the failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude this Court from providing a remedy for what we conclude to be tortious behavior."⁹⁴

public policy very narrowly. According to these courts, public policy is embodied only in legislative enactments. An employer does not violate public policy by firing an employee unless he demands that the employee violate the law in order to keep his job."

⁸⁴ 675 P.2d 394 (Nev. 1984).

⁸⁵ *Id.* at 397.

⁸⁶ *Id.* at 395.

⁸⁷ *Id.*

⁸⁸ *Id.* at 394.

⁸⁹ *Id.*

⁹⁰ *Id.* at 396.

⁹¹ *Id.*

⁹² The *Gantt* court noted, "A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interest of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law" 824 P.2d 680, 687-88 (Cal.1992).

⁹³ *Hansen* at 396.

⁹⁴ *Id.* at 396-97. Significantly, the Nevada court suggested, and consequently defined, the public policy pertaining to insurance filing. The court stated, "It would not only frustrate the statutory scheme, but also provide employers with an inequitable advantage if they were able to intimidate employees with the loss of their jobs upon the filing of claims for insurance benefits as a result of industrial injuries."

Additionally, in 1987 Nevada decided *K Mart v. Ponsock* and expanded the public policy exception to include the tort of an employer's bad faith termination of its worker.⁹⁵ George J. Ponsock worked as an employee for K Mart for ten years.⁹⁶ The company regarded him as an excellent employee, increased his wages to \$9.40 per hour, and fired him just six months prior to his vesting all of his retirement benefits.⁹⁷ K Mart discharged him for having painted a battery cover on a forklift in an attempt to repair the battery.⁹⁸ The company told him to clean off the paint, report to the personnel office, and accept his final check.⁹⁹ The termination stunned Ponsock and presented him with no opportunity to explain his actions.¹⁰⁰ Of particular note, the consequences to Ponsock included loss of pension, a long period of unemployment, several short and part-time jobs, an eventual full-time \$4.20 per hour job with no benefits, and foreclosure of the family house.¹⁰¹

The court examined the power differential of the parties' relationship and determined that K Mart had abused its superior position.¹⁰² The court likened the parties' relationship to one of insurer and insured to recognize the bad faith tort in these specific facts.¹⁰³ The analogy to insurance parties implies the special relationship that can exist between the employer and employee: a relationship requiring special protection.¹⁰⁴ The court concluded, "The special relationships of trust between *this* employer and *this* employee under *this* contract under *this* kind of abusive and arbitrary dismissal cries out for relief and for a remedy beyond that traditionally flowing from breach of contract."¹⁰⁵ Importantly, in *Hansen*-like fashion, it determined that in the absence of a declared legislative enactment it could recognize a public policy of bad faith dis-

⁹⁵ 732 P.2d 1364, 1369 (1987). The special relationship to which the court refers lies beyond the at-will employment doctrine, because of the employer's grossly superior power over the employee.

⁹⁶ *Id.* at 1366. K Mart hired Ponsock as a tenured employee; that is, until his retirement. The company agreed that if Ponsock's performance became deficient, it would provide assistance and discharge him only after a series of correction notices. K Mart further agreed that it would terminate Ponsock's employment only if it determined that his performance stayed unacceptable.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1367.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1367-68

¹⁰² *Id.* at 1372.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1371. Regarding Ponsock's special protection, the court asked three questions: "1) whether there is, as in the insurance cases, such a superior-inferior power differential as to create a "special element of reliance" resulting from the employee's reliance on the employer's credibility and the employer's promise and powerfully expectant guarantee of retirement benefits?; 2) whether contract damages hold employers like K Mart accountable for this kind of misconduct; and 3) whether contract damages, under circumstances such as these, make an aggrieved employee whole."

¹⁰⁵ *Id.* at 1372.

charge.¹⁰⁶ Nevada continued to develop the public policy exception in the 1991 case, *Western States v. Jones*.¹⁰⁷ In that case, Robert Jones worked as an at-will employee for the Western States Mining Company and operated heavy equipment, which had one day broken down.¹⁰⁸ The company assigned him temporary duty in the cyanide leach pit and he refused because of an open wound from which he suffered.¹⁰⁹ Jones learned that the company safety manual discouraged any worker with an open wound to remain near cyanide, and thus asked for reassignment.¹¹⁰ The company fired him for insubordination.¹¹¹

The court recognized that the Western States Mining Co. violated public policy in its termination of Jones' employment.¹¹² The court discovered the requisite legislative support for the public policy in the Nevada Occupational Safety and Health Act (NOSHA) whose objective was a safe and healthy working environment for all employees.¹¹³ Thus, the court held that the company violated public policy when it discharged Jones for "refusing to work under conditions unreasonably dangerous to the employee."¹¹⁴

The development and application of the public policy exception in Nevada have produced a safeguard against unjust employment discharge, but in 1995 that safeguard failed. In that year the Nevada Supreme Court decided *Bigelow v. Bullard* and withheld the exception's application to protect the at-will employee Michael Bullard.¹¹⁵

V. BIGELOW

The facts reveal that Bullard worked for the Bigelow Holding Company under the supervision of Donna Dallman.¹¹⁶ The company had engaged in discriminatory practices to which Bullard may have been an agent.¹¹⁷ The company became sensitive to Bullard's apparent sympathy towards African-

¹⁰⁶ *Id.* at 1370. Specifically, the court stated, ". . . we now recognize a bad faith discharge case in this fact-specific instance of discharge by a large, nationwide employer of an employee in bad faith for the improper motive of defeating contractual retirement benefits."

¹⁰⁷ The Nevada Supreme Court combined *Western States Mineral Corp. v. Jones and D'Angelo v. Gardner*, and consequently cites the case as *D'Angelo v. Gardner*, 819 P.2d 206 (Nev. 1991).

¹⁰⁸ *Id.* at 213.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 216

¹¹³ NEV. REV. STAT. 618.015(2), NEV. REV. STAT. 618.375, NEV. REV. STAT. 618.385(1), and NEV. REV. STAT. 618.445(1). Courts have interpreted the federal and state OSHA statutes to include a right that employees may assert to refuse unsafe or unhealthy employment. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1. Consequently, Jones had the statutory right, and subsequent protection, to refuse exposure to unsafe or unhealthy employment conditions.

¹¹⁴ *Western States*, 819 P.2d (Nev. 1991) at 216.

¹¹⁵ *Bigelow v. Bullard*, 901 P.2d 630 (Nev. 1995)

¹¹⁶ *Id.* at 632.

¹¹⁷ *Id.* at 633.

Americans and fired him.¹¹⁸ The following excerpt from the transcript reveals the conversation leading up to his termination:

Q: How were you terminated?

A: We had three black males came [sic] on the property. Carol Swenson radioed Donna Dallman [sic] on her radio— . . . I told Carol that blacks had rights, too. Approximately five to ten minutes passed. Donna came into the office. Carol and Donna conversed. I don't know what they said. Donna walks up to where I'm sitting, picks up the piece of paper that I'm writing on, and she said, "What's your fucking problem?" I said, "I don't have a problem." She said, "I think you do." She said, "I think you're a fucking nigger lover. Sit your God damn ass down on the fucking stool, shut your mouth, and do your fucking work."

Q: What happened next?

A: Then she said, "On second thought, get your fucking ass out of here. I don't want you working for me anymore."

Q: And what was the time span between those two statements by Ms. Dallman [sic]?

A: Not even 30 seconds.

. . .

Q: Why did you make the statement, "Blacks have rights, too"?

A: Because I knew that they were fixing to physically assault the black males to get them off the property.¹¹⁹

The court determined that the at-will doctrine controlled the parties' relationship and refused Bullard the protection of public policy, because he failed to establish a prima facie case of tortious discharge, and consequently, dismissed his claim.¹²⁰ The court reasoned that Bullard's inability to establish a prima facie case was because he simply refused to object to his employer's known discriminatory practices. The court, in reaching its conclusion, relied solely on the *Western States*' rule.¹²¹ As noted earlier, the court in *Western States* held that an employee may bring a survivable claim of tortious discharge against the employer when an employer dismisses the employee in retaliation for the employee's actions which are consistent with public policy and the public good.¹²² Significantly for the court in *Bigelow*, the plaintiff in *Western States* refused the

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 632-33.

¹²⁰ *Id.* at 631.

¹²¹ *D'Angelo v. Gardener (Western States v. Jones)*, 819 P.2d 206 (Nev. 1991). In the wake of *Western States*, the *Bigelow* court ruled, "The only exception to the general rule that at-will employees can be dismissed without cause is the so-called public policy exception discussed in *Western States*, a case in which tort liability arose out of an employer's dismissing an employee for refusing to follow his employer's orders to work in an area that would have been dangerous to him."

¹²² *Id.* at 216.

employer's demand to work in an area that would have been physically dangerous to him.¹²³

In *Hansen*, the court held that a retaliatory discharge by the employer stemming from an injured employee's filing of a workmen's compensation claim is actionable in tort.¹²⁴ The court reasoned that if an employer penalized an employee for filing a workmen's compensation claim, the employer would violate public policy, because the employee's consequential fear of termination would negatively affect a statutory right and would relieve the employer of its obligation to the employee.¹²⁵

Based on *Hansen*, the court in *Western States* concluded that employment termination for refusal to work in unreasonably dangerous conditions violated public policy.¹²⁶ The court noted:

Achievement of the statutory objective—a safe and healthy working environment for all employees—requires that employees be free to call their employer's attention to such conditions, so that the employer can be made aware of their existence, and given opportunity to correct them if correction is needed. The public policy thus implicated extends beyond the question of fairness to the particular employee; it concerns protection of employees against retaliatory dismissal for conduct which, in light of the statutes, deserves to be encouraged, rather than inhibited.¹²⁷

But the court in *Bigelow* refused to apply the *Western States* rule. Rather, it reasoned that a tortious discharge claim survives only when the employee refuses to comply with an employer's demand that the employee engage in improper activity.¹²⁸

The court's focus upon a kind of requisite expressed objection to known illegal activity appears inconsistent with recent cases. For example, in *Liberatore v. Melville Corp.*,¹²⁹ James Liberatore filed a complaint against his former employer alleging wrongful termination. He worked as a pharmacist for thirteen years in an at-will employment relationship with People's Drug Store, which the Melville Corporation purchased in 1990.¹³⁰ In 1993, the employer relocated the pharmacy inside the store to a glass-enclosed section that extended beyond the building's exterior wall; consequently, the glass-enclosed section affected the temperature which adversely affected certain drugs.¹³¹ Liberatore notified his supervisor of the situation, but the employer neglected to remedy

¹²³ *Id.*

¹²⁴ *Hansen v. Harrah's*, 675 P.2d 394 (Nev. 1984).

¹²⁵ *Id.*

¹²⁶ *D'Angelo*, 819 P.2d at 216.

¹²⁷ *Id.* at 216, quoting *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 298, 188 Cal.Rptr. 159 (1982).

¹²⁸ *Supra* note 114 at 635.

¹²⁹ 168 F.3d 1326 (1999). Liberatore appealed from the grant of summary judgment to the Melville Corporation on his claim of wrongful discharge.

¹³⁰ *Id.* at 1328.

¹³¹ *Id.*

the problem.¹³² Seven months later, he threatened to report the problem to the Federal Drug Administration and about a week later, received notice of his termination.¹³³

In reversing summary judgment, the court noted that the public policy exception to the at-will employment doctrine is “not limited to cases where an at-will employee was discharged for having outright refused to violate the law.”¹³⁴ The court recognized that the parties’ relationship was at-will which nearly always permits the employer to discharge the employee without cause.¹³⁵ However, it observed that Liberatore’s conduct implicated the public policy underlying the legal warnings against the mishandling and inappropriate storage of drugs.¹³⁶

Furthermore, the court noted that Liberatore never complained to an outside agency, but merely internally to his supervisor.¹³⁷ In considering the consequences of supporting employees who disagree to management, the court stated, “Were the court to agree that discharges from employment in retaliation for internal complaints of law violations are not protected by the public policy exception, it would ‘create perverse incentives by inviting concerned employees to bypass internal channels altogether and immediately summon the police.’”¹³⁸

Additionally, the courts have validated the employee’s complaints even when the employee has engaged in the employer’s illegal activity. For example, in *Paolella v. Browning-Ferris, Inc.*,¹³⁹ Michael Paolella filed a complaint against his former employer alleging wrongful termination.¹⁴⁰ In 1991, the waste disposal company reacted to the Delaware Solid Waste Authority’s 25% price increase of its landfill disposal rate by scheming to bill illegally its clients.¹⁴¹ Paolella learned of his employer’s illegal activity, acted in his capacity to execute the activity, and complained about the activity to his car pool partner on a regular basis.¹⁴²

The court held that the public policy exception to the at-will employment doctrine applies in a situation where the employee has participated in the employer’s illegal activity.¹⁴³ The court stated, “Although the exceptions to the at-will doctrine are to be narrowly drawn, the policy reasons for protecting whistleblowers remain whether or not the employee can avoid involvement in the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1327 citing *Carl v. Children’s Hospital*, 702 A.2d 159 (D.C. 1997).

¹³⁵ *Id.* at 1330.

¹³⁶ *Id.* at 1331.

¹³⁷ *Id.*

¹³⁸ *Id.* quoting *Belline v. K Mart Corp.*, 940 F.2d 184, 187 (7th Cir. 1991).

¹³⁹ *Michael Paolella v. Browning-Ferris, Inc.*, 158 F.3d 183 (3rd Cir. 1998)

¹⁴⁰ *Id.* at 187-88.

¹⁴¹ *Id.* at 186.

¹⁴² *Id.*

¹⁴³ *Id.*

illegal activity.”¹⁴⁴ Significantly, the court noted that while Paoella questioned the propriety of Browning-Ferris’ business practices, he raised legal, as opposed to ethical concerns about his employer’s conduct.¹⁴⁵ Consequently, the exception applies. Furthermore, the court considered the exception’s effect, stating, “to preclude even a penny of recovery to a whistle-blower plaintiff because that plaintiff had some slight participation in that wrongdoing would be a disincentive to rooting out corruption, and would mute more than a few whistles.”¹⁴⁶

Like the plaintiffs in *Liberatore* and *Paoella*, Bullard complained only internally about the rights of African-American tenants and participated as an agent in his employer’s illegal activity.¹⁴⁷ Nevertheless, the court in *Bigelow* withheld application of the public policy exception because it failed to regard Bullard’s internal complaint as a expressed objection:

Bullard’s protest, or, better, protestation (if, indeed it can be called that) was pretty sickly. He apparently was not willing to make such statements in the presence of Dallman. When Dallman asked him if he had “a problem” with the company he was quick to deny it. If Bullard had ever “stood up” to Dallman and said something like, “Look here, Dallman, I am sick and tired of the way you treat Blacks around here and I am not going to put up with it any longer” he might have had a different case.¹⁴⁸

The court focused on the moment when Bullard’s supervisor asked him if he had a problem, and it bases its decision on his responding “no”. The court reasoned that *Western States* has no application, because in that case the plaintiff articulated an express objection to his working in toxic conditions to his employer. In the present case, the court found that Bullard directed his comment “Blacks have rights, too” to a coworker and not to the employer directly, specifically Dallman. However, the court failed to consider that his comment reached management within five to ten minutes, and that his comment registered with management as evidenced by Dallman’s acknowledging that Bullard indeed has a problem.¹⁴⁹ The court failed to account for Bullard’s diminutive bargaining capacity as an employee, and it also failed to account for specific facts revealing Bullard’s inferior position.

¹⁴⁴ *Id.* at 191.

¹⁴⁵ *Id.* at 191. Browning-Ferris Inc. contends that the public policy exception cannot apply to Paoella because his complaints fail to address a specific public interest which has some legislative, administrative, or judicial authority. However, the court will apply the exception in cases where the employer has engaged in activity which breaks the law. Here, the company designed a billing scheme to defraud its customers: a scheme violative of the law.

¹⁴⁶ *Id.* at 188 quoting the testimony of Paoella.

¹⁴⁷ *Supra* note 114 at 633.

¹⁴⁸ *Id.* at 634.

¹⁴⁹ *Id.* The court noted, “It may be true that Bullard apparently felt some disapproval of the way his employer was treating African-Americans and, in an aside, expressed his disapproval to one of his co-workers; but this expression of disapproval was made to a coworker, and not to the company or its management. This comment to another employee is a far cry from his having refused to carry out directions that were violative of public policy.”

The court assumed that the at will employment relationship empowers the company to terminate Bullard even on a mere whim.¹⁵⁰ Nevertheless it failed to account for the at will doctrine's primary premise of equal terminable power between employer and employee.¹⁵¹ The power differential gave the company superior bargaining capacity over Bullard that it wielded abusively. Evidence of its perverse execution includes Dallman's approaching Bullard following his remark to a coworker. She confronted him at his desk and not in a private place away from other workers, grabbed the paper upon which he was writing, and asked, "What's your fucking problem."¹⁵² She called him a "fucking nigger lover," told him to sit his "God damn ass down on that fucking stool, shut your mouth, and do your fucking work."¹⁵³ Immediately following her instructions to him she said, "On second thought, get your fucking ass out of here. I don't want you working for me anymore."¹⁵⁴

The court failed to consider the explicit superiority of the company and the resulting inferiority of Bullard. It only reasoned that when asked "What's your fucking problem," Bullard failed to recognize the question as his opportunity to object to the company's known discriminatory practices. The court adds that even if it understood his comment "Blacks have rights, too" as an objection, "it is important to remember that the remark was not made to management and was not made in opposition or objection to the company's supposed discriminatory policies."¹⁵⁵ The subservient context of Bullard's job suggests that he could not have made an express objection to company management without the inevitable likelihood of losing his job.¹⁵⁶

¹⁵⁰ *Id.* at 633. The court noted, "When one reads the dialogue between Dallman and Bullard, it would appear that when Dallman finally decided to dismiss Bullard, it was on the basis of her personal dislike for him and her general dissatisfaction with Bullard as an employee. Even if that dissatisfaction were based (as Bullard suspects) largely upon his 'Blacks-have-rights-too' remark to Carol Swenson, Dallman still had the perfect right to dismiss him at her whim, for no reason or even for 'wrong' reasons, so long as she did not dismiss him for a refusal to carry out employment tasks that were contrary to public policy or for his performing acts that were favored by public policy."

¹⁵¹ *Id.* at 634.

¹⁵² *Id.* at 632.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 634.

¹⁵⁶ In *Rankin et al. v. McPherson*, 483 U. S. 378, the United States Supreme Court addressed an employee's First Amendment right to free speech. In that case, McPherson, a clerical worker for a public employer, conversed privately with her boyfriend (who was also her co-employee) at her workplace about a report of an assassination attempt on United States President Ronald Reagan. In response to the report, McPherson communicated to her boyfriend, "If they go for him again, I hope they get him." Another employee overheard the remark and reported it to management. Of consequence, the employer fired McPherson. The Court held that the employer's "interest in discharging [McPherson] did not outweigh [McPherson's] interest in exercising her First Amendment rights." Although *McPherson* involved a public employer, its application to *Bigelow* serves as a source of public policy recognizing First Amendment protection for Bullard's remark.

If indeed the court had found the Bigelow company's actions violated public policy, the public policy exception to the at-will employment doctrine would have given a voice to an individual whose abusive employer sought to subvert it. Rather, the court explained that if it had expanded the exception to cover Bullard, then "such a ruling would invite a large number of tortious discharge claims that the employer fired the employee merely for not agreeing with company decisions or for expressing vague objections to what the employee might have seen as untoward company policy."¹⁵⁷ Importantly, however, the company policy pertaining to these specific facts is no generic company policy, but a harmful and illegal one; that is, strong evidence suggests the company creates, endorses, and executes policies of racial discrimination.¹⁵⁸

The fear of opening a floodgate of tortious discharge claims is inconsistent with previous Nevada Supreme Court holdings; that is, the court has not reserved the public policy exception to specific circumstances warranting careful consideration.¹⁵⁹ The present case calls for such consideration of the following circumstances:

- a) Bullard's knowledge of the company's known discriminatory activity;
- b) Bullard's sitting on a stool while his supervisor, Dallman, was standing;
- c) Dallman's grabbing the piece of paper upon which Bullard was writing;
- d) Dallman's asking Bullard, "What's your fucking problem;"
- e) Dallman's calling Bullard a "fucking nigger" lover;
- f) Dallman's ordering Bullard, "Sit your God damn ass down on that fucking stool;"
- g) Dallman's ordering Bullard to shut his mouth;
- h) Dallman's ordering Bullard, "Do your fucking work;"
- i) Bullard's knowledge that the employer intended to inflict physical violence upon the three African-American males; and
- j) the thirty seconds in which the exchange took place.

Bullard knew of his employer's discriminatory practices and intention to assault three African-American males. An inference of his apprehension to object expressly or didactically to these actions is reasonable. His comment served as an objection to his employer's intention of placing the lives of the three males in danger and as an objection to his employer's allegedly known discriminatory practices: an objection worthy of *Western States'* application of

¹⁵⁷ *Bigelow*, 901 P.2d at 635.

¹⁵⁸ *Id.* at 632. Commenting on the company's harmful policies, the court stated, "There is strong evidence that Bigelow, as a company, was engaging in racially-discriminatory practices . . ."

¹⁵⁹ See *K Mart v. Ponsock*, 732 P.2d 1364, 1372 (Nev. 1987). The court held that, "The special relationship of trust between *this* employer and *this* employee under *this* contract under *this* kind of abusive and arbitrary dismissal cries out for relief and for a remedy beyond that traditionally flowing from breach of contract. To permit only contract damages as the sole remedy for this kind of conduct would be to render K Mart totally unaccountable for these kinds of actions."

the public policy exception.¹⁶⁰

The court in *Bigelow* contends that in order for Bullard to have a cause of action for tortious discharge, the company must terminate his employment for his having affirmatively acted in a manner consistent with public policy suggesting that objecting to company actions violative of public policy would warrant the exception's application.¹⁶¹ However, where the wrongfully discharged worker struggles to implicate a clear standing public policy, such as objecting to an employer's actions violative of public policy,¹⁶² courts have been willing to bridge the gap with strong public policy support.

Courts have had to infer the implicated public policy in the absence of expressly statutorily violative behavior. For example, in one of the final cases of the twentieth century, the Tenth Circuit U. S. Court of Appeals reviewed de novo a wrongful termination claim in violation of public policy.¹⁶³ In *Barela v. C.R. England*, the employee learned of the company's miscalculated salaries and wages it promised its new truck drivers.¹⁶⁴ Barela calculated that the projected earnings mandated an illegal number of driving hours and induced fraudulent behavior.¹⁶⁵ The supervisor instructed Barela not to answer new employees' questions about pay, criticized him for undermining the company's goals, and three weeks later terminated his employment.¹⁶⁶

The court recognized that the at-will doctrine governed the parties' employment relationship, but noted that the public policy exception could overcome it.¹⁶⁷ The court's analysis focused on the plaintiff's establishing a prima facie case of wrongful termination in violation of public policy.¹⁶⁸ Specifically, the analysis required that the Barela show that 1) the company discharged him; 2) a clear and substantial public policy existed; 3) his conduct brought the policy into play; and 4) the discharge and the conduct bringing the policy into play are causally connected.¹⁶⁹

The court found that Barela satisfied the first two elements easily, but determined that it needed to inspect more closely the third element's satisfac-

¹⁶⁰ See Rankin, *supra* 157.

¹⁶¹ *Bigelow*, 901 P.2d at 634.

¹⁶² See Perritt, *supra* note 26 at 398-99. As noted earlier, establishing a prima facie case generally requires Bullard's satisfaction of the following elements:

- a. The existence of a clear public policy;
- b. The termination in the context of the plaintiff would offend public policy;
- c. The motivation for terminating the employee relates to the public policy; and
- d. The employer lacked "overriding legitimate business justification" to terminate.

¹⁶³ 197 F.3d 1313 (1999).

¹⁶⁴ *Id.* at 1314.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1315 citing *Ryan v. Dan's Foods Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998).

¹⁶⁸ *Id.* at 1316. See also Perritt, *supra* note 24.

¹⁶⁹ *Id.*

tion.¹⁷⁰ The third element requires his showing that his conduct brought a public policy into play.¹⁷¹ The court found that Barela's conduct implicated only the private interests of the company, but found that such internal reporting alone suffices to bring a public policy into play.¹⁷² Consequently, the court determined that Barela's conduct "implicated policies that indisputably affect the public interest: promoting safe roads and deterring fraud."¹⁷³

Similarly, Bullard's conduct implicates public policy based upon a number of sources. However, one need consider the discriminatory context in which Bullard made his remark when regarding the sources of public policy. The Bigelow Company is a large company whose holdings include apartment complexes and other rental properties. The court recognized that there was strong evidence suggesting the company discriminated against African-Americans and added, "It has been claimed that the agents of Bigelow were instructed to use deception and subterfuge to prevent African-Americans from becoming tenants in Bigelow rentals."¹⁷⁴ Furthermore, (and specific to his comment, "Blacks have rights, too") Bullard understood that the company intended to assault physically three African-American males on one of Bigelow's properties.¹⁷⁵ The discriminatory context provides a foreground for Bullard's comment "Blacks have rights, too." Furthermore, his comment would likely attract favorable public support and his consequent termination would likely attract considerable public disapproval.

A possible source of the public policy favoring Bullard's remark is the Civil Rights Act of 1866.¹⁷⁶ It provided, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."¹⁷⁷ Additionally supportive public policy is the consequential ratification of the Fourteenth Amendment in 1868.¹⁷⁸

Furthermore, public policy sustaining Bullard's remark stems from the speech protection of the First Amendment.¹⁷⁹ Traditionally this constitutional

¹⁷⁰ *Id.* at 1317.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 1318. The court ultimately found that Barela satisfied the first three elements of the prima facie case, but remanded the case for the district court to determine whether Barela can establish the causal connection between his discharge and his conduct.

¹⁷⁴ *Bigelow*, 901 P.2d at 633.

¹⁷⁵ *Id.*

¹⁷⁶ 42 U.S.C. § 1981 (1994). Furthermore, 42 U.S.C. § 1981 guarantees African-Americans the same rights to contract as Caucasian Americans. Congress made this provision a part of the Civil Rights Act of 1866 and amended the provision in 1991 when it amended Title VII.

¹⁷⁷ *Id.*

¹⁷⁸ The Fourteenth Amendment provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹⁷⁹ The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech . . ." Although First Amendment speech protection applies generally to public em-

protection extended only to the public workplace. However, in *Novesel v. Nationwide Ins. Co.*,¹⁸⁰ the Third Circuit of the United States Court of Appeals provided First Amendment protection to a private employee.¹⁸¹ The court expressed the greater value of the free speech right over the tradition of the private workplace:

[These] cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate terms of employee political activities. In dealing with public employees, the cause of action arises directly from the Constitution rather than from common law developments. The protection of important political freedoms, however, goes well beyond the question whether the threat comes from state or private bodies.¹⁸²

Another is the public policy source of The Civil Rights Act of 1964, 42 U.S.C. § 2000. The Act focuses on discouraging and eradicating discrimination in the workplace. The Act provides that an employer's discrimination is unlawful against any individual with respect to his or her "compensation, terms, conditions, privileges of employment, because of such individual's race, color, religion, sex, or national origin."¹⁸³ Although the African-Americans who were the subject of Bullard's comment were not employees of Bigelow, the retaliation provision of Title VII discourages Bigelow's action against Bullard because of them.¹⁸⁴

Furthermore, the congressional charge to employers not to discriminate in the workplace could extend to a public policy of simply discouraging discrimination against a person, "because of such individual's race, color, religion, sex, or national origin."¹⁸⁵ Or rather, it could extend to a public policy favoring an employee's objecting to an employer's known discriminatory practices.

Additionally, the federal Fair Housing Act, 42 U.S.C. §§3601-3619, 3631 (1994), which Congress originally enacted in 1968, is a source of public policy.

ployers only, Lisa Bingham comments on its application to private employers, such as Bigelow. She states, "There is a substantial argument that state action triggers constitutional protections when a state court rejects an employee's claim that a private employer fired him or here in violation of the public policy embodied in the First Amendment. The essence of this argument is that the state court's decision itself provides the requisite government involvement. Although private parties are not otherwise bound by constitutional protections, the judiciary may not countenance the deprivation." Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 OHIO ST. L.J. 341, 362 (1994).

¹⁸⁰ *Novesel v. Nationwide Ins. Co.* 721 F.2d 894 (1983).

¹⁸¹ *Id.*

¹⁸² *Id.* at 900.

¹⁸³ § 703(a) of Title VII.

¹⁸⁴ *Id.* The provision provides "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

¹⁸⁵ *Id.*

In short, the Act prohibits discriminatory practices in the sale or rental of property.¹⁸⁶

Nevertheless, the *Bigelow* court found no applicable public policy exception to the at-will employment doctrine.¹⁸⁷ However, in the workmen's compensation case *Hansen v. Harrah's*, the Nevada Supreme Court previously held that, "the at-will employment rule is subject to limited exceptions founded upon strong public policy; and the failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude this Court from providing a remedy for what we conclude to be tortious behavior."¹⁸⁸ Thus, *Hansen* suggests that the court could fashion an appropriate remedy even in the absence of anti-discriminatory statutes if public policy were sufficiently strong:

For at root, the public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large; this the delicate balance which holds such societies together. Accordingly, while an at-will employee may be terminated for no reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy.¹⁸⁹

Although public policy strongly disfavors unlawful discrimination, the *Bigelow* court found that it could not include Bullard's employment termination.¹⁹⁰ It reasoned that the Bigelow company rightfully dismissed him as an at will employee, because his termination was not for "a refusal to carry out employment tasks that were contrary to public policy or for his performing acts that were favored by public policy."¹⁹¹ The company simply never asked Bullard to execute any of its known discriminatory policies, but it discharged him

¹⁸⁶ Specifically, 42 U.S.C. § 3604.

¹⁸⁷ *Bigelow*, 901 P.2d at 635. The court concluded, "In sum, then, we do not deem it to be consistent with the employment law of this state to hold that an employee's merely expressing to a fellow employee or some third person disapproval of or 'objection' to company policy (as distinguished from refusal to carry out that policy can be the predicate for a tortious discharge action)."

¹⁸⁸ 675 P.2d 394, 396 (Nev. 1984). Significantly, *Hansen* is the central case in *Western States* which is the central case for *Bigelow*.

¹⁸⁹ *Gantt v. Sentry Insurance*, 824 P.2d 680,687 (Cal. 1992).

¹⁹⁰ *Supra* note 114 at 633.

¹⁹¹ *Id.*

as a result of his commenting on them.

The Nevada Supreme Court's refusal to apply the public policy exception to these specific facts surrounding Michael Bullard is harmful to workers. Holding that employees must express an objection to a company's violative policies and practices compels employees to risk losing their employment. It disregards the power structure of employment and forces the employees to stand up against those who issue their paychecks. Thus, employees may lose incentive to express any objections because of fear of losing their jobs. The result silences employees' voices, empowers unreasonably the employer, and breaks down the safeguard against abuse of the at-will employment doctrine. The comment, "Blacks have rights, too" should have place in American society without fear that its utterance will lead to employment termination.