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An At-Will Employee May Be Fired Despite Motives Which Violate State Public Policy.

Kelsey Menzel

MASTER AND SERVANT—Retaliatory Discharge—An "At-Will" Employee May Be Fired Despite Motives Which Violate Stated Public Policy.

Maus v. National Living Centers, Inc.,
633 S.W.2d 674 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

In 1979, National Living Centers, Inc. purchased the nursing home in which Sofia Maus had worked as a nurse's aide for thirteen years.[1] Maus was concerned about the well-being of the nursing home patients and complained to superiors that they were not receiving adequate care.[2] As a result of her complaints, her at-will employment with the nursing home was terminated.[3] Maus brought suit for retaliatory discharge, alleging her dismissal violated stated public policy because employees of health care facilities are legally required to report any instances of patient neglect or abuse.[4] The trial court granted National Living Centers' motion for summary judgment, and Maus perfected her appeal to the Austin Court of Appeals.[5] Held—*Affirmed.* An "at-will" employee may be fired despite motives which violate stated public policy.[6]

When the duration of an employment contract is indefinite, English courts presume a one-year term.[7] Although some American courts recognized this presumption in the nineteenth century,[8] a new rule, suggested

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1. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

2. *See id.* at 675. Maus personally administered CPR to a stroke victim and kept the patient alive for several days when the nursing home director refused to call a doctor. *See id.* at 675.

3. *See id.* at 675.

4. *See id.* at 675; TEX. REV. CIV. STAT. ANN. art. 4442c, § 16(a) (Vernon Supp. 1982). Failure to report abuses in nursing homes constitutes a Class A misdemeanor. *See id.* § 16(g)(2). Although a person reporting under this statute is granted immunity from civil or criminal liability, there is no provision which prevents an employer from firing an employee who complies with the statute. *See id.* § 16(c).

5. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

6. *See id.* at 676-77.

7. *See* C. LABATT, MASTER & SERVANT § 156, at 504-05 (1913); H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 271 (1877); Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332 (1982); Note, *Guidelines for a Public Policy Exception to the Employment at Will Rule: the Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 617 (1981); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 206 (1982).

8. *See, e.g.*, Adams v. Fitzpatrick, 26 N.E. 143, 143 (N.Y. 1891) (salesman hired at an-

by Horace Wood in his 1877 treatise on master and servant law,[9] quickly found favor in this country.[10] The rule, as articulated by Wood, stated that "a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it a yearly hiring, the burden is upon him to establish it by proof."[11] The rapid acceptance of the "at-will" doctrine is usually attributed to the emerging industrial economy of that period.[12] The idea that an employee could be terminated at any time was of great

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nual salary had one-year contract); Douglas v. Merchants' Ins. Co., 23 N.E. 806, 807 (N.Y. 1890) (hiring at annual salary indicates hiring for year); Davis v. Gorton, 16 N.Y. 255, 255 (1857) (favorable reference by court to English rule); *see also* C. LABATT, MASTER & SERVANT § 159, at 516 (1913); Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 334 (1982). The master's role in the relationship was paternalistic; he was responsible for his servant's security. *See* Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980).

9. *See* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

10. *See, e.g.*, Savannah F. & W. Ry. v. Willett, 31 So. 246, 247 (Fla. 1901) (citing Wood's rule with approval); Speeder Cycle Co. v. Teeters, 48 N.E.2d 595, 597 (Ind. 1879) (indefinite hiring is at-will regardless of pay period); Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (rule correctly stated by Wood). Texas adopted the Wood rule in 1888. *See* Eastline & Red River R.R. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). Texas courts have consistently followed the at-will employment rule. *See* United Servs. Auto. Ass'n v. Tull, 571 S.W.2d 551, 553 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.—Amarillo 1974, no writ); Scruggs v. George A. Hormel & Co., 464 S.W.2d 730, 731 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.); Robertson v. Panhandle & Santa Fe Ry., 77 S.W.2d 1078, 1080 (Tex. Civ. App.—Austin 1934, writ dism'd); San Antonio Fire Fighters' Local Union No. 84 v. Bell, 223 S.W. 506, 509 (Tex. Civ. App.—San Antonio 1920, writ ref'd). In 1979, the Dallas Court of Civil Appeals rejected an at-will employee's contention that the court should find the at-will doctrine contrary to public policy because the legislature is the appropriate agency to determine public policy. *See* Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (employee terminated after being promised "steady" work).

11. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). The authority which Wood cited has been questioned. *See* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 343-46 (1974). Wood cited *United States v. Wilder*, which dealt with a contract for transporting goods, not general hirings. *See* United States v. Wilder, 80 U.S. 254, 256 (1871); *see also* DeBriar v. Minturn, 1 Cal. 450, 451 (1851) (action was for unlawful ejection rather than breach of employment contract); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 59 (1870) (jury could properly determine nature of employment contract from evidence); Franklin Mining Co. v. Harris, 24 Mich. 115, 116-17 (1871) (jury could consider all facts and infer a one-year term); H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 n.4 (1877).

12. *See* C. LABATT, MASTER & SERVANT § 160, at 519 (1913); Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 335 (1982); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 207 (1982).

financial benefit to the employer because it allowed him to vary the size of his workforce according to his immediate need, thus reducing operating costs and increasing profit margin.[13] The government maintained a "hands off" attitude toward employment practices which allowed for termination at will thereby facilitating the country's rapid industrial growth.[14]

The at-will employment doctrine finds legal justification in nineteenth century contract law.[15] Mutuality of obligation required that both parties to a contract be legally bound to perform their promises;[16] therefore, if the employee was not obligated to continue providing his services, the employer would likewise not be obligated to continue providing employment.[17]

The employer's absolute right to terminate an employee has been eroded in recent years. For example, at least twelve states have recognized a cause of action for a wrongfully discharged at-will employee.[18]

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13. *See* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 335-36 (1982); Note, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 619 (1981).

14. *See* Note, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 619 (1981). "Freedom of enterprise" is another term used to describe the governmental attitude of this period. *Id.* at 619 n.17.

15. *See* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 725 (Ct. App. 1980); Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967).

16. *See, e.g.*, Schimmel v. Martin, 213 P. 33, 34 (Cal. 1923) (promise to supply water, no promise to buy it); Davis v. Phillips A. Ryan Lumber Co., 248 S.W. 448, 450 (Tex. Civ. App.—Texarkana 1923, writ dism'd) (promise to permit use of railroad tracks but no promise to use them); Osner & Mehlhorn, Inc. v. Loewe, 191 P. 746, 747 (Wash. 1920) (promise to attorney to give him all legal work, no promise by attorney to do work).

17. *See, e.g.*, Tinnon v. Missouri Pac. R.R., 282 F.2d 773, 777 (8th Cir. 1960) (suit for employer's breach of promised employment fails for lack of mutuality); Meadows v. Radio Indus., Inc., 222 F.2d 347, 348 (7th Cir. 1955) (claim for wrongful discharge from "permanent" employment defeated by lack of mutuality); Hope v. National Airlines, Inc., 99 So. 2d 244, 247 (Fla. Dist. Ct. App. 1957) (promise of future employment unenforceable). Contract law of that period failed to acknowledge the inequality in the bargaining positions of employer and employee, thus insulating the employment contract from even minimal demands of fairness. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826 (1980).

18. *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 387 (Conn. 1980); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358 (Ill. 1978); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Adler v. American Standard Corp., 432 A.2d 464, 473 (Md. 1981); Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. App. 1976); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512

Wrongful discharge may give rise to an action in tort, based on an employer's duty not to discharge an employee for engaging in an activity which is protected by public policy.[19] The courts are more inclined to recognize this exception to the at-will rule where public policy, legislatively articulated in a statute, confers a right or duty on the employee[20] or prohibits an act demanded of him by his employer.[21] Some states have en-

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(N.J. 1980); Nees v. Hocks, 536 P.2d 512, 515 (Or. 1975); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. Ct. 1978); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978). At least fourteen other states have indicated a willingness to permit a wrongfully discharged employee to recover under appropriate circumstances. *See* Larsen v. Motor Supply Co., 573 P.2d 907, 908 (Ariz. Ct. App. 1977); M.B.M. Co. v. Counce, 596 S.W.2d 681, 684 (Ark. 1980); Lampe v. Presbyterian Medical Center, 590 P.2d 513, 515 (Colo. Ct. App. 1978); Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 57 (Idaho 1977); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 456 (Iowa 1978); Johnson v. National Beef Packing Co., 551 P.2d 779, 783 (Kan. 1976); Scroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977); Keneally v. Orgain, 606 P.2d 127, 130 (Mont. 1980); Mau v. Omaha Nat'l Bank, 299 N.W.2d 147, 152 (Neb. 1980); Chin v. AT&T, 410 N.Y.S.2d 737, 741 (Sup. Ct. 1978); Dockery v. Lampart Table Co., 244 S.E.2d 272, 275 (N.C. Ct. App. 1978); Jones v. Keogh, 409 A.2d 581, 582 (Vt. 1979); Roberts v. Atlantic Richfield Co., 568 P.2d 764, 770 (Wash. 1977); Ward v. Frito-Lay, Inc., 290 N.W.2d 536, 537 (Wis. Ct. App. 1980). But the public policy exception has specifically been rejected by at least three states. *See* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1132 (Ala. 1977); Catania v. Eastern Airlines, Inc., 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 876 (Miss. 1981). Some federal courts, interpreting the laws of certain states, have recognized a cause of action for wrongful discharge. *See, e.g.*, Moore v. Home Ins. Co., 601 F.2d 1072, 1075 (9th Cir. 1979) (applying Arizona law); McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (applying Pennsylvania law); Keating v. BBDO Int'l, Inc., 438 F. Supp. 676, 683 (S.D.N.Y. 1977) (applying New York law). *But see* Perdue v. J.C. Penney Co., 470 F. Supp. 1234, 1239 (S.D.N.Y. 1979) (applying Texas law; employees terminated as part of kickback cover-up did not allege cause of action). *See generally* Seligman, *At-Will Termination: Evaluating Wrongful Discharge Actions*, TRIAL, Feb. 1983, at 60.

19. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1332, 164 Cal. Rptr. 839, 841 (1980) (termination for refusal to participate in price fixing scheme); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 356 (Ill. 1978) (termination for filing workers' compensation claim); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W. Va. 1978) (termination for notifying employer of consumer credit law violations). Public policy has been defined as "the interests of society." Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959). *Petermann* was one of the first cases to articulate the public policy exception. *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1333, 164 Cal. Rptr. 839, 842 (1980). The legislature is the primary agency for the declaration of public policy. *See* Watson v. Zep Mfg. Co., 582 S.W.2d 178, 180 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

20. *See* Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973) (filing workers' compensation claim is right conferred by IND. CODE ANN. § 22-3-2-2 (Burns 1974)); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121 (Pa. Super. Ct. 1978) (jury service is duty imposed by 17 PA. CONS. STAT. ANN. § 1336 (Purdon 1962)).

21. *See* Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (discharge for refusal to commit perjury; false testimony is prohibited by CAL. PENAL CODE § 118 (Deering 1971)); Trombetta v. Detroit, T. & I. R.R., 265 N.W.2d

acted laws which expressly prohibit the firing of an employee for engaging in certain activities.[22] A few courts have articulated public policy based solely on the social desirability of an activity or its importance to the community.[23] In determining whether a wrongful discharge gives rise to a cause of action, courts frequently weigh the importance of the violated public policy against the value of enforcing the traditional rule.[24] To evaluate the substantiality of a particular public policy, consideration is given to its source and to its potential impact on society as a whole.[25]

Courts have also recognized a cause of action for retaliatory discharge based on contract.[26] The discharge of an at-will employee motivated by bad faith or malice defeats the expectations of the employee and may

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385, 388 (Mich. Ct. App. 1978) (employee discharged for refusing to falsify state pollution control reports; falsification would have subjected him to criminal complaint under MICH. STAT. ANN. § 3.529 (Callaghan 1978)).

22. *See, e.g.*, MASS. ANN. LAWS ch. 56, § 33 (Michie/Law Co-op. 1978) (prohibits discharge for political activity); N.D. CENT. CODE § 27-09.1-17 (Supp. 1981) (prohibits discharge for jury service); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1982-1983) (prohibits discharge for filing workers' compensation claim).

23. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 879-80 (Ill. 1981) (employee discharged for informing police of criminal activity of co-worker; public policy favors co-operation of citizens in exposing crime); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978) (public policy demands protection of those who seek to insure compliance with law; employee discharged for notifying employer of consumer credit law violations). "Whistle blowers" come in under this category. *See* Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777. "Whistle blowing" is the act of an individual who reports his employer's illegal activity. *See id.* at 777-78 n.4.

24. *See* Percival v. General Motors Corp., 400 F. Supp. 1322, 1323 (E.D. Mo. 1975) (discharged for complaining about deceptive trade practices), *aff'd*, 539 F.2d 1126, 1130 (8th Cir. 1976); Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 26 (Cal. Dist. Ct. App. 1959) (discharged for refusal to commit perjury); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (discharged for filing workers' compensation claim); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. 1976) (discharged for filing workers' compensation claim); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (discharged for serving on jury).

25. *See* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980) (discharged for notifying employer of mislabeling which violated state law); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (discharged for jury service). The at-will rule, on the other hand, derives its strength from stare decisis, judicial restraint, and the "free enterprise" concept that an employer should run his business as he pleases. *See* Note, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 622 (1981).

26. *See, e.g.*, Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (discharged for union activities); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (employee discharged for discouraging advances of her superior); O'Sullivan v. Mallon, 390 A.2d 149, 150 (N.J. 1978) (discharge of nurse for refusal to administer treatment for which she was not licensed).

operate as a breach of the employment contract.[27] A criticism of this contract theory is that it exposes the employer to a cause of action each time he discharges an employee under a contract terminable at will.[28] One court which denied a cause of action in contract to an at-will employee noted that the wrongful act, if any, was not the discharge of the employee; rather, it was the employer's violation of public policy in accomplishing the discharge.[29]

In *Maus v. National Living Centers, Inc.*,[30] the Austin Court of Appeals considered whether a cause of action exists for retaliatory discharge from at-will employment.[31] Acknowledging the conflict between the employer's common law right[32] and a legislatively articulated public policy,[33] the court declined to recognize this new right of recovery on the grounds that to do so would be outside the authority of an intermediate court.[34] The court noted but did not dwell on the legislature's failure to create a cause of action for Maus;[35] rather, it suggested that any exceptions to the well-settled employment-at-will rule should be made by the Texas Supreme Court.[36] A brief concurring opinion states that the at-will doctrine is the law in Texas, and that it is the court's duty to apply the law.[37]

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27. *See* Savodnik v. Korvettes, Inc., 488 F. Supp. 822, 824 (E.D.N.Y. 1980) (fourteen year employee terminated to prevent receipt of retirement benefits); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (discharged for discouraging superior's advances). This result is achieved by requiring good faith in contractual dealings. *See* CORBIN ON CONTRACTS § 654A, at 657-58 (Kaufman Supp. 1982).

28. *See* Daniel v. Magna Copper Co., 620 P.2d 699, 703 (Ariz. 1980) (hospital employee terminated for bringing malpractice action against hospital).

29. *See* Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 182 (W. Va. 1980) (suggesting employee discharged for filing workers' compensation claim had sued under wrong theory).

30. Maus v. National Living Centers, Inc., 633 S.W.2d 674 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

31. *See id.* at 675.

32. *See* Eastline & Red River R.R. v. Scott, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888) (citing at-will employment rule).

33. *See* TEX. REV. CIV. STAT. ANN. art. 4442c, § 16 (Vernon Supp. 1982) (nursing home employees must report incidents of neglect and abuse).

34. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.). The court relied on *McKisson v. Sales Affiliates, Inc.*, which extended strict liability to include hair care products. *See id.* at 676. The Supreme Court praised the exercise of judicial restraint by the court of civil appeals in not creating a new right of recovery. *See* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 791 (Tex. 1967).

35. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676-77 n.1 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

36. *See id.* at 676. An extensive footnote details the recognition of retaliatory discharge as a cause of action in other jurisdictions. *See id.* at 676 n.1.

37. *See id.* at 677 (Shannon, J., concurring).

A case of first impression imposes on the court a responsibility to consider the social implications of its decision.[38] The *Maus* court avoided that responsibility by relying on judicial restraint to deny a cause of action for wrongful discharge.[39] Judicial restraint is appropriate in an intermediate court only when the issue has already been decided by a superior court.[40] Arguably, the issue before the court in *Maus* had never been decided by either the Texas Supreme Court or a court of appeals.[41] When an issue is one of first impression as in *Maus*, the court is making law regardless of whether it grants or denies relief.[42]

Stare decisis, a fundamental legal concept, stands for the proposition that rules of law established in prior decisions should not be changed merely for the sake of change.[43] When, however, the policies underlying the employment-at-will rule no longer exist, it is time to reevaluate the rule.[44] The government abandoned its *laissez-faire* attitude toward indus-

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38. *See* Sims v. Century Kiest Apartments, 567 S.W.2d 526, 532 (Tex. Civ. App.—Dallas 1978, no writ) (explaining this intermediate court's recognition of cause of action for retaliatory eviction); *cf.* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 349 n.118 (1982) (policies underlying cause of action for retaliatory eviction compared to those protecting "whistle blowers" from retaliatory discharge).

39. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 676 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

40. *See, e.g.*, Jones v. Hutchinson County, 615 S.W.2d 927, 933 (Tex. Civ. App.—Amarillo 1981, no writ); Newman v. Minyard Food Stores, Inc., 601 S.W.2d 754, 757 (Tex. Civ. App.—Dallas 1980, no writ); Bruno v. Bruno, 589 S.W.2d 179, 180 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). The court of appeals has a duty, as an intermediate court, to follow decisions of the Texas Supreme Court and leave changes to the court of last resort. *See* U.S. Fidelity & Guar. Co. v. Borden Metal Prods. Co., 539 S.W.2d 170, 173 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).

41. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

42. *See* Sims v. Century Kiest Apartments, 567 S.W.2d 526, 533 (Tex. Civ. App.—Dallas 1978, no writ). Justice demands that stare decisis be limited to questions raised and decided on full consideration. *See* State v. J.M. Huber Corp., 193 S.W.2d 882, 885 (Tex. Civ. App.—Austin 1946), *aff'd*, 145 Tex. 517, 199 S.W.2d 501 (1947).

43. *See* BLACK'S LAW DICTIONARY 1577 (4th ed. 1957). Stare decisis is adherence to previous decisions of the court. *See id.* at 1577.

44. *See* Gutierrez v. Collins, 583 S.W.2d 312, 317 (Tex. 1979) (overruling common law doctrine of dissimilarity as defense). Stare decisis does not prevent any change at all, it merely prevents change for the sake of change. *See id.* at 317. Prior decisions should control only if they are logical. *See* Middleton v. State, 476 S.W.2d 14, 16 (Tex. Crim. App. 1972). Oliver Wendell Holmes stated:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

try in the 1930's,[45] and formal contract law, which required mutuality of obligation, has been modified by such concepts as unconscionability and detrimental reliance.[46] Even more significant than these changes in the socio-economic conditions and contract theories which gave rise to the employment-at-will doctrine is the fact that the common law rule followed in *Maus* is at odds with public policy.[47] The practical effect of the court's disallowance of a cause of action for wrongful discharge where the employer has violated stated public policy is to force the employee to choose between acting on his statutory right or duty and maintaining his job.[48] All legislation has a purpose,[49] and permitting an employer to frustrate the purpose of a statute by firing the employee who complies with it conflicts with the basic principles of justice.[50] Stare decisis does not require adherence to the employment-at-will rule where it operates to frustrate public policy.[51] Other jurisdictions have circumvented the legislature's failure to articulate a remedy by reasoning that the legislation is ineffective without it; therefore, a remedy based on public policy is implicit.[52] The Texas Supreme Court's refusal to hear Maus' application for writ of error has left to the legislature the responsibility of protecting its public policy.[53] Unfortunately, any action which the legislature may take to put "teeth" into its nursing home law will not correct the injustice done to Sofia Maus. The Austin Court of Appeals should have recognized a public policy exception to the at-will rule.

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45. *See* Murg & Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 338 (1982). Government regulation began with passage of the National Labor Relations Act in 1935 and has rapidly increased in recent years. *See id.* at 338; *see, e.g.*, 15 U.S.C. § 1671(a) (1976) (prohibits discharge of employees whose wages are garnished); 29 U.S.C. § 215(a)(3) (1976) (prohibits discharge for rights guaranteed under OSHA); 45 U.S.C. § 152 (1976) (protects union activity).

46. *See* J. JACKSON, CONTRACT LAW IN MODERN SOCIETY 950 (1973). Mutuality of obligation is no longer an important principle of contract law. *See id.* at 950; CORBIN ON CONTRACTS § 152, at 198 (Kaufman Supp. 1982).

47. *See* TEX. REV. CIV. STAT. ANN. art. 4442c, § 16(a) (Vernon Supp. 1982).

48. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1979) (employee discharged for filing workers' compensation claim, exercised right at expense of job).

49. *Cf.* TEX. CONST. art. III, § 30 (no bill shall be amended so as to change original purpose).

50. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1979); Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 ST. MARY'S L.J. 77, 89 (1980). One should not profit from one's own wrong. *Id.* at 88-90.

51. *Cf.* Middleton v. State, 476 S.W.2d 14, 16 (Tex. Crim. App. 1972) (stare decisis should control only where logical).

52. *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358-59 (Ill. 1979); Sventko v. Kroger Co., 245 N.W.2d 151, 153-54 (Mich. Ct. App. 1976); Harless v. First Nat'l Bank, 246 S.E.2d 270, 276 (W. Va. 1978).

53. *See* Maus v. National Living Centers, Inc., 633 S.W.2d 674, 675 (Tex. Ct. App.—Austin 1982, writ ref'd n.r.e.).

The rights of the employer cannot be disregarded in shaping a public policy exception.[54] He must be able to discern which motives for firing an employee will give rise to a cause of action.[55] Statutory public policy places the employer on notice of the limitations on his power to terminate an at-will employment relationship.[56]

Had the Austin Court of Appeals recognized a public policy exception, it then could have utilized the balancing test employed by other jurisdictions: the traditional at-will rule versus public policy.[57] The traditional rule was sharply undercut by changes in the contract law and government attitude which supported it.[58] The public policy in *Maus*, on the other hand, is substantial and, more importantly, it is legislatively articulated.[59] Although no purpose was explicitly stated, it is implicit that the legislature intended to insure the well-being of nursing home patients, a matter of general public concern.[60] By calling the attention of her superiors to incidents of patient neglect, Sofia Maus was complying with the spirit, if not the letter, of the law.[61]

The socio-economic conditions and contract theories which led to the development of the employment-at-will rule have changed, yet this nineteenth century doctrine continues to threaten the job security of the American workforce. It is reasonable to impose a duty on the employer not to fire an employee for engaging in an activity which has been authorized by statutory public policy. Moreover, failure to impose this duty re-

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54. *Cf.* Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 223-34 (1982) (suggesting that non-statutory public policy too nebulous to place employer on notice).

55. *See, e.g.*, Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (statute prohibiting perjury gave employer notice); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (statute granting right to file compensation claim placed employer on notice); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (statute making jury service mandatory was notice to employer).

56. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980). The employer knows that unless he acts contrary to public policy he may discharge employees at-will for any reason. *See id.* at 512.

57. *See* Percival v. General Motors Corp., 400 F.Supp. 1322, 1323 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126, 1130 (8th Cir. 1976); Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

58. *See* Adler v. American Standard Corp., 432 A.2d 464, 470-71 (Md. 1981).

59. *See* TEX. REV. CIV. STAT. ANN. art. 4442a-1 (Vernon Supp. 1982-1983).

60. *See generally* Comment, *Regulation of Nursing Homes—Adequate Protection for the Nation's Elderly?*, 8 ST. MARY'S L.J. 309, 309 (1976). In 1976 there were 980 licensed nursing homes in Texas which had a total of 93,509 beds. *See id.* at 309 n.1.

61. TEX. REV. CIV. STAT. ANN. art. 4442c, § 16(a)(1) (Vernon Supp. 1982-1983). "Any . . . employee of an institution having cause to believe that an institution resident's physical or mental health . . . may be adversely affected . . . shall report . . . ." *Id.* at § 16(a)(1).

sults in a frustration of the purpose underlying that policy. The employer is protected from surprise lawsuits because the statute gives him notice of the limitations on his right to terminate an at-will employee. Sofia Maus, fired for complying with the spirit of a legislatively articulated public policy, should have been allowed legal recourse against her employer.

Kelsey Menzel