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The New Property

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COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
before the
PHILADELPHIA CHAPTER
FEDERAL BAR ASSOCIATION
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THE NEW PROPERTY

Those of us who are in the federal service often times take great pride in being associated with the protector of the people, the government. Government is known for its ability to instantaneously react to a problem and create, over night, new mechanisms to deal with a perceived wrong. I could give you many examples of this characteristic of government; however, I think that I need give you only a few.

Starting with the Equal Employment Opportunity Commission, an organization on which I am proud to be a member, it was established in 1965 to deal with a nationally recognized problem of discrimination in employment based on race, color, sex, religion and national origin. In passing Title VII, Congress limited the right of an employer to adversely affect one's job by using the forbidden factors of race, color, sex, religion or national origin. Stated in other words, Congress created a right in the individual not to have his or her job adversely affected by those forbidden factors.

This same pattern can also be seen in other areas where laws have forbidden employers from adversely affecting the employment of individuals based on proscribed factors. For example, the Age Discrimination in Employment Act forbids an

employer from discriminating against an individual because he or she is between the ages of forty and seventy. The Equal Pay Act prohibits an employer from paying women a lower wage than men for performing substantially the same work. The Rehabilitation Act prohibits certain employers from discriminating against individuals because of handicapp. The National Labor Relations Act prohibits an employer from discriminating against an individual for engaging in certain protected union activity. The Occupational Safety and Health Act prohibits an employer from retaliating against an individual for complaining about unsafe work situations.

All of these examples, and of course many more, are situations where laws have limited the unfettered right of employers to do whatever they please. Or stated otherwise, those laws created rights in employees and potential employees to be free from having their employment adversely affected by those limited, forbidden factors.

In assuring these statutorily-created rights, Congress created administrative agencies to, in many instances, determine on a case-by-case basis whether or not an individual's rights were violated and, upon finding a violation, ordering corrective action. Moreover, since the rights created by these statutes are generally limited, the agencies charged with enforcing these rights very often have very limited jurisdiction as a consequence. Therefore, often times the same action may violate

more than one of these limited rights. But because the agencies created have limited authority, often times more than one investigation may be conducted because the same action may violate different statutes. On the one hand, one could call this multiplicitous action duplication. Yet, on the other hand it could be called a natural flaw that flows from a piece-meal approach to a larger problem.

Although most legislation created to deal with employment problems fit the mold which I just described, there are other approaches which blankedly prohibit adverse employment decisions from being made for other than for good cause. Two examples of this approach that readily come to mind are union agreements and civil service laws. These two, rather than creating many individual prohibitions like the legislative approach that I mentioned a short time ago, generally deal with the same types of concerns in a broader fashion.

The legislative approach can with one stroke of the pen change the contours of the universe overnight. The collective bargaining approach can gradually create rights for its members, depending on the relative strength of the union vs. management at any given time.

The judiciary, although slowly, often times reacts to these same changing realities but in a different manner. Unlike the legislative branch's ability to sweepingly change the status quo overnight, the judiciary often times creates one exception to a general rule at a time. However, this slow process over a

period of time can convert what was an exception to the general rule into the general rule.

With this in mind, I would like to now trace the approach that the judiciary has taken to the right to the job. At the common law, the relationship between employer and employee was treated as one of the master and servant. Master-servant relations law very early adopted the characteristics of contract law. Therefore, it is not surprising that the great majority of American courts by the end of the 19th century adopted the rule that an employment with no fixed duration was presumptively an employment at will, terminable for any or no reason by either party at any time. This doctrine, known as Woods law, although first asserted without analysis or judicial support, was consistent with prevailing lassez-faire notions.

While the rule of free terminability of the employment relationship was becoming generally accepted, no rule seemed more certain than a rule of domestic-relations law which held that a marriage was terminable only for serious cause. The contrast between the rule regarding the termination of a marriage and the one concerning termination of employment becomes more startling upon reflecting on the fact that both relationships were governed by the same domestic relations rules at one point.

Amazingly, the rules regarding termination of employment and termination of a marriage have crisscross again. Marriage is now terminable by either spouse at will in the majority of states, while most employees in the labor force can be discharged only for cause.

The erosion of the rule that employment is terminable by either party for any or no reason at any time can be seen in several cases during the last several decades.

A. Public Policy Exception

One of the first exceptions to the free terminability rule was articulated in the case of Petermann v. International Brotherhood of Teamsters, 174 Cal. App 2d 184, 344 p. 2d 25 (1959). In Petermann, a former business agent of the Teamsters Union brought a wrongful discharge suit against his employer-union, alleging that he had been fired because of his refusal to commit perjury at this employer's request. The California Court of Appeal held that Petermann had stated a claim for relief and that considerations of public policy might limit the employer's right to discharge an employee. This exception of the free terminability rule is referred to as the public policy exception.

B. Abandoning the General Rule

While some courts have attempted to soften the harshness of the rule of free terminability by creating limited exceptions to the general rule, others have attempted to rewrite the rule itself. In Monge v. Beeke Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), the plaintiff claimed that her discharge had resulted from her foreman's hostility towards her because she refused to go out with him. She sued for damages for breach of her oral contract of employment. The New Hampshire Supreme Court ruled in the plaintiff's favor, thus becoming the first state Supreme Court to repudiate Wood's rule. The Court stated that the

"employer has long ruled the workplace with an "iron hand" by reason of Woods rule, and that "courts cannot ignore the new climate prevailing generally in the relationship of employer and employee". The court stated a new standard to govern discharge cases:

> "We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract...Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably."

The court in Monge, unlike Wood's rule, balanced the interest of the employer against the interest of the employee to arrive at the public interest. Stated the court:

> "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees 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."

Another court to reformulate Wood's rule was the Massacuhsetts Judicial Court in Fortune v. National Cash Register, 364 N.E. 2d 1251 (1977). In Fortune, a sixty-one year old salesman was terminated shortly after he completed arrangements for a 5 million dollar sale of cash registers. He brought an action for unpaid sales commissions. Although the company had paid Fortune the

portion of the commission due under the literal terms of his contract, Fortune alleged that his employer terminated his employment to avoid paying him additional amounts that would have become due under the contract. The jury found that the company had acted in bad faith in terminating the employment. The issue on appeal was whether the at-will contract was breached by this bad faith termination.

The Supreme Judicial Court noted that under traditional law and under the express terms of the contract, the company clearly could have terminated Fortune without cause, and that he had received all the commissions to which the contract entitled him. Nevertheless, the court agreed with Fortune that, despite the express terms of the contract, he was entitled to a jury determination as to the company's motives in terminating his employment. The court held that Fortune's contract contract contained an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract.

The court found authority for its decision in the uniform commercial code, stating:

> "[W]e are merely recognizing the general requirement in this commonwealth that parties to contracts and commercial transactions must act in good faith towards one another. Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard."

This analysis shows how the various branches of government react to unfairness. No one would argue that Woods law was fair. The fallacy of its inception was that it assumed equal bargaining strength between employer and employee. Based on that faulty assumption, it assumed that if the parties wanted the employment to last for a longer period of time, they would have indicated that in the contract of employment.

The underlying fallacy of this argument was probably highlighted by the provision in collective bargaining agreements forbidding termination for other than good cause. Moreover, such agreements showed the harshness of Woods rule.

Even though the harshness of Woods law is quite evident, it is amazing how the market place through collective bargaining, the legislative branch of government, and the judiciary all reacted differently to Woods rule.

The legislative branch, as pressure groups gained political power, responded to the individual groups by trying to cure their individual problems. The judiciary, while circumscribed by precedent, used the old concept that you must come to the court with clean hands. And the market place reacted to its new muscle by declaring that if it does not interfere with my work, you should not be able to do it.

Although the collective bargaining and legislative approaches may in the end bring about the same result, the collective bargaining approach is less bureaucratic.

Although the judiciary has responded to the problem in a less sweeping way than the other two, the judiciary approach does'nt appear to be too far from declaring that one has a property right in the job. If the judiciary so declares, it will only be reflecting what the legislative branch and collective bargaining are already saying more subtly.