EMPLOYEES SERVING AT THE PLEASURE OF THE UNIVERSITY: EMERGING PUBLIC POLICY EXCEPTIONS TO “AT WILL” EMPLOYMENT

Ellen M. Babbitt
Thomas Mead Santoro
Lucy A. Singer

Stetson University Conference on Law & Higher Education, 2004

Employment issues at institutions of higher education are abundant because of the number and variety of employees found at colleges and universities. At public institutions, terms of employment for many employees may be covered by state civil service statutes, or state rules or regulations. At both public and private institutions, collective bargaining agreements may dictate terms and conditions of employment for other employees. Faculty members may enjoy unique privileges and protections if they are tenured or employed pursuant to multi-year contract appointments.

Yet another category of employees, generally professional/administrative employees, is hired to serve “at the pleasure of” the institution. These include University Presidents, senior academic administrators, athletics personnel, medical center officials, in-house university counsel, or any employee with oversight responsibility for a specialized program such as animal research. Such employees are typically exempt from civil service statutes or rule protections. As management level employees, they are classically ineligible for membership in any collective bargaining unit. Employment of
these individuals is considered “at will”: either the employee or the institution may terminate the employment at any time without cause.

Traditionally, colleges and universities enjoyed broad latitude to regulate the conditions of employment, including termination, for any professional staff serving at the pleasure of the institution. Over time, however, these employment relationships have been circumscribed by an array of federal and state human rights laws prohibiting discriminatory or retaliatory treatment of employees, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq.; the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq.; the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.; and the Family and Medical Leave Act, 29 U.S.C. §§ 2612 et seq. In addition, nearly all states have enacted their own human rights or civil rights legislation that parallels the prohibitions of federal law. These federal and state protections apply to virtually all employees of higher education institutions. Other federal and state statutes including traditional labor laws and whistleblower acts have created more categories of protected activity. Additionally, courts have carved out exceptions to the “at will” doctrine to protect employees who engage in conduct mandated, protected, or strongly encouraged by important public policies.

The purpose of this presentation is not to address the federal and state laws limiting termination of employment or to discuss the limitations arising under collective bargaining agreements. Rather, we will review recent, judicially created exceptions to the common law doctrine of at-will employment. We will also examine the circumstances under which courts (and juries) have permitted wrongful discharge actions
by terminated employees serving at the pleasure of the institution. And, in the process, our discussion will necessarily address how this evolving law may affect our institutional hiring practices, contractual commitments, policy development, and program administration.

**Evolution Of The Doctrine of Employment At Will**

Historically, employees hired for an unspecified duration and without a contractual agreement to discharge only for “just cause” could be terminated for good reason, bad reason, or no reason at all. Along with the advent of laws protecting individuals from discrimination, however, courts began to whittle away at the “at-will” doctrine. Over time, courts have created contract and tort causes of action for employees complaining of unjust discharge. Some courts have found that employment manuals and policies include implied contractual terms that allow discharge only for just cause. Courts have also applied the common law principle of promissory estoppel, which requires an evaluation whether an employee has reasonably relied upon the word or conduct of the employer in a manner that enhances the employee’s pre-termination rights.

The most frequently debated and litigated cases, however, involve judicially created tort causes of action for wrongful discharge in violation of public policy. All represent important limitations and constraints that an institution must consider when terminating – and, indeed, when hiring – senior, “at will” employees.

**I. Implied Contractual Limitations Upon The Right To Terminate**

Several courts have evaluated whether a contractual promise to discharge an employee only for “just cause” can be inferred from language found in the employer’s manual or personnel policies. One such case is *Allen v. City of Pocahontas*, 340 F.3d 551
The facts of Allen are spectacular even by employment litigation standards. In 1980, Judy Allen began to work for the Pocahontas Housing Authority. In 1993 or 1994 she was subpoenaed to testify against the Executive Director of the Housing Authority, Carolyn Loggains, who had been charged with fraud and wrongful eviction of a tenant.

Loggains was not convicted, and the relationship between Allen and Loggains deteriorated quickly after this incident. Loggains terminated Allen’s employment in February 1997. One month after the termination, however, Allen received a letter from the Housing Authority’s Board of Commissioners revoking the termination and reinstating Allen with back pay and benefits. The Board offered the cryptic explanation that, while it thought the original termination was appropriate, the personnel policies under which the decision was made were “outdated and in need of revision.” 340 F.3d at 554.

The day before Allen’s return to her employment, she circulated a petition among the Housing Authority tenants, complaining about Loggains’s treatment of the tenants. One of the tenants called the police to report Allen’s conduct, asserting that Allen had threatened him with eviction if he refused to sign the petition. Id.

Shortly after her return to work, Allen was given a copy of the Housing Authority’s revised personnel policies. The next day, she was also given a letter of reprimand, in which Loggains disciplined Allen for allegedly making obscene gestures and mouthing an obscenity at Loggains. Under the newly revised personnel policies, Allen requested and was granted a grievance hearing, which concluded with the decision to place the reprimand letter in Allen’s personnel file. Id.
The saga continued. One month after the hearing, Loggains resigned as Executive Director. Allen’s situation, however, did not improve. The tenant who had earlier complained about Allen notified the police that Allen was still harassing him. Shortly after learning of this complaint, the new Acting Executive Director terminated Allen for insubordination and tenant complaints. Allen again requested and received a grievance hearing, this time arising from her termination. She also sued on a number of legal theories, including the argument that her Fourteenth Amendment rights to due process had been violated because the Housing Authority’s personnel policies afforded her certain “property” and “liberty” interests in continued employment.

In reviewing Allen’s due process claim, the Court noted that she was an at-will employee, subject to termination without cause, notice, or procedural rights. The applicable state law created two narrow exceptions to the at-will doctrine: (1) where the applicable personnel manual specifies that termination will only be for “just cause”; or (2) where the written employment agreement specifies the same.

Allen argued that the personnel policies effective at the time of her original termination created an employment relationship that could be terminated only for cause and only after prior notice and hearing. The Court disagreed. The Court found instead that the personnel policies in place at the time of Allen’s second termination were the relevant policies; those policies were held to prove only for a post-termination grievance procedure, which did not create a legally protectable property interest in continued employment. 340 F.3d at 555.

Furthermore, the Court found that even the earlier version of the personnel policies would not have afforded Allen a property interest in continued employment. The
Court explained that, “where the procedures place no significant substantive restrictions on the decision-making, the procedures themselves will not create a property interest in the employment.” *Id.* (internal quotations omitted).

Another court recently addressed the claim that an employment policy providing procedures for termination gave rise to a legitimate claim of “just cause” employment. In *Mannix v. County of Monroe*, 348 F.3d 526 (6th Cir. 2003), Donald Mannix was hired as a network administrator for the county government. The offer of employment described the position as an “at-will” position. *Id.* at 529. The County’s personnel policies also stated that employees should understand that their employment could be terminated at any time, without notice. *Id.* In contrast to the policies at issue in *Allen*, however, the County of Monroe’s policies listed 23 specific offenses that could result in discipline up to discharge. The County also had established Work Rules and Regulations, which listed three groups of offenses that could warrant discipline, up to and including termination. *Id.* at 529-30.

During his employment, Mannix became aware of conduct suggesting that the Information Systems Director and the Chief Administrative Officer had engaged in financial improprieties. Mannix expressed his concerns to several County commissioners. 348 F.3d at 530. Mannix also misused his access as network administrator to monitor his supervisor’s e-mail clandestinely, in an attempt to verify these concerns. When Mannix’s misconduct was discovered, he was terminated. *Id.*

Mannix sued on many theories, including that of promissory estoppel: specifically, he asserted that his employer’s personnel policies gave him a legitimate expectation that he could be discharged only for just cause and only after being afforded
the procedures set forth in the policy. The Sixth Circuit disagreed, holding that the particular policies and rules did not create a “promise” of continued employment. *Id.* at 532-33.

The Court first took note of the employer’s written letter of offer to Mannix, which expressly warned him that his employment was at-will. *Id.* at 533. The Court also found that this express limitation was not modified by the applicable personnel policies. Although those policies enumerated a number of offenses that might warrant discipline and discharge, this list was not described as exhaustive. *Id.* at 534-35. During the course of Mannix’s employment, the policies were also revised to include a statement that all County employment was terminable at the will of either party. *Id.* at 535. Given the express statements set forth in Mannix’s offer of employment and in the policy manual, the Court concluded that Mannix lacked a legitimate expectation of continued employment or “just cause” discharge. *Id.* at 535-36.

Recently, the United States Court of Appeals for the Seventh Circuit addressed a similar allegation of implied promise, this one brought by a terminated ward superintendent for the City of Chicago. *Phelan v. City of Chicago,* 347 F.3d 679 (7th Cir. 2003). Phelan was hired by the City of Chicago as a police officer in 1992. In 1993, he was granted a leave of absence. While still on leave from the Police Department, he was then hired as ward superintendent by the City. *Id.* at 680-81. In July 1997, Phelan went out on sick leave from his position as ward superintendent and subsequently took FMLA leave. While on his 1997 leave, however, Phelan was indicted for mail fraud. The City asked Phelan to resign, but he refused. On the day that he returned from his FMLA leave, he was terminated. *Id.*
Phelan sued on several theories, including the theory that he had a due process property interest in continued employment based on an implied promise. Phelan claimed that he legitimately believed his employment would continue because he was “hardworking, productive, and effective in the position of Ward Superintendent” who had “received favorable performance evaluations and merit salary raises.” 347 F.3d at 682.

The Seventh Circuit soundly rejected this argument. The Court reasoned that the legitimate expectation required to demonstrate an implied promise of continued employment must be more than an abstract need, desire, or sense of one’s fitness for further employment. Other factors “such as longevity of service, good performance reviews and periodic salary increases are insufficient to show a property interest in continued employment.” Id., citing Shlay v. Montgomery, 802 F.2d 918, 922 (7th Cir. 1986).

The cases discussed above involved unsuccessful challenges to the “at will” doctrine using theories of implied contract. All such aggrieved plaintiffs argued that, despite contractual silence on the term of employment (or, in one case, despite express statements of “at will” intent), the employer nevertheless committed itself through its personnel policies or conduct to terminate employees only for “just cause.” The resulting decisions demonstrate the weaknesses in this theory. Most courts are extremely reluctant to infer contractual obligations for employers based solely upon general personnel policies -- particularly where the employment agreement itself expressly articulates an “at will” relationship. Nor has the enumeration in a personnel manual of potentially terminable offenses been held sufficient to convert an at-will relationship to a just-cause
relationship. Historically “good” performance, evidenced by positive performance
evaluations, also does not create an implied promise to continue employment.

Although claims of implied contract are obviously difficult for a plaintiff to
pursue successfully, they may present some risk where an employer’s contracts are not
consistent with its policies or seem to work unfairness upon the employee. It is therefore
prudent to engage in periodic review of all language in personnel policies related to
misconduct or to the rights of employees before and after termination. Addition of
limiting language helps to minimize risk. Language stating clearly that the personnel
policy does not create a contract and that the institution may revise its policies at any time
will help to overcome any argument that an employee reasonably interpreted those
policies to afford him an implied contract of continued employment. Likewise, inclusion
in standard offer letters of language identifying the relationship as “at will employment”
undermines any argument that the employee reasonably believed the relationship required
termination only for “just cause.”

Finally, it is important to ensure that the provisions set forth in standard offer
letters and agreements are consistent with the provisions set forth in the employer’s
personnel manual and other rules. Circumstances in which a manual’s provisions are
inconsistent with those of the employment agreement may be interpreted against the
employer, who likely drafts both, and the employer may pay a penalty where such
ambiguities work to the disadvantage of the employee. Such situations must be seen as
carrying some risk that a court will decide to infer a “just cause” limitation – or let a jury
infer it.
II. Limitations Arising From The Tort of Wrongful Discharge

While employees have found themselves unlikely to prevail on a claim of implied promise, employees have been more successful pursuing the judicially created tort claim of wrongful discharge in violation of public policy. Such claims may, indeed, raise substantial risk management issues for any college or university.

The parameters of the “wrongful discharge” tort claim vary by state and jurisdiction. Generally, though, “to support a tort claim of wrongful discharge . . . the policy in question ‘must be: (1) delineated in either constitutional or statutory provisions; (2) public in the sense that it inures to the benefit of the public’ rather than serving merely the interests of the individual; and (3) well established at the time of the discharge; and (4) substantial and fundamental.” *Hartt v. Sony Electronics Broadcasting & Professional Co.*, 2003 WL 21675576 **1 (9th Cir. 2003)(internal quotations omitted).1 Such cases tend to involve employee conduct falling into one of the following three categories:

- The Plaintiff employee’s exercise of a legal right or interest;
- Plaintiff’s performing an act that public policy would encourage or refusing to engage in conduct that public policy would condemn;
- Plaintiff’s exposure of an employer’s wrongdoing (the “whistle-blower” cases).

---

1 While the precise contours of the public policy exception vary from state to state, the law generally follows the criteria as established by courts in the United States Court of Appeals for the Ninth Circuit and summarized above. Certain themes are universal to all “wrongful discharge” cases. For instance, virtually all courts assert that the exception is to be narrowly interpreted. Virtually all courts also require a showing of a “substantial” public policy grounded in well-established law. The cases diverge in the application of these precepts to particular facts or statutory schemes, which can result in dramatically different outcomes. For a recent, comprehensive survey of wrongful discharge decisions by jurisdiction, see W.M. Howard, “Common Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees,” 105 *ALR 5th* 351 (2003).
These cases should be of compelling interest to institutions of higher education. The myriad state and federal regulations applicable to colleges and universities result in such institutions frequently confronting the issue of “whistleblowing.” Moreover, administrators and professional staff serving at the pleasure of the Board or President are often the recipients of such information or the “whistleblowers” themselves. Research protocols involving human subject research, use of public funds in financial decision-making and accounting practices, and appropriate and safe medical care practices are only a few of the range of issues that may be implicated in a case involving alleged discharge in violation of public policy, and most such matters are supervised at the senior administrative level.

The following sampling of recent decisions underscores the potentially serious risks raised by such claims. Certainly the inconsistent results rendered in these decisions indicate that such cases will turn on their facts and that an institution needs to be sensitive to the facts that spawn serious wrongful discharge disputes.

A. Wrongful Discharge For The Exercise Of A Legal Right Or Interest

A recent decision offers a classic illustration of the intractable dispute that may result when the termination of a difficult employee coincides with that employee’s exercise of a legal right. In Wounaris v. West Virginia State College, 588 S.E.2d 406, 2003 WL 21057353 (W.Va. 2003), Plaintiff Wounaris was the Assistant Vice President for Administrative Affairs at West Virginia State College at the time he was terminated. Originally hired as the Director of Fiscal Affairs, Wounaris had been elevated to Assistant Vice President for Administrative Affairs some ten years later. Each year of his employment, Wounaris had signed an annual “Notice of Appointment” stating that his
position was administrative and that he served at the pleasure of the College President. *Id.* at *2.

A few years after his promotion, Wounaris complained in a letter to the College’s President that Wounaris was the victim of reverse race discrimination. Wounaris demanded a new job title, a change in his duties, and a significant increase in his salary. He threatened to file complaints with the state’s human rights and ethics commissions, and he also threatened litigation if his demands were not met. Three days after he delivered this letter, Wounaris was fired. *Id.* at *3.

West Virginia statutes set forth a grievance process governing employment disputes involving state employees, and Wounaris filed a grievance pursuant to this statute. When the College failed to respond to the grievance, an Administrative Law Judge (“ALJ”) entered findings in favor of Wounaris and ordered his reinstatement. *Id.* at *3. The day after Wounaris was reinstated, however, the College again fired him, apparently relying on information about Wounaris’s job performance obtained while the first grievance was pending.

Wounaris proceeded to grieve this second termination but this time an ALJ ruled against him. The ALJ found that Wounaris’s second termination was not an act of retaliation for his having exercised his statutory right to file the first grievance. The ALJ instead concluded that the College had a legitimate, performance-related business justification for its second termination of Wounaris’s employment.

Wounaris then filed a lawsuit and his case went to a jury, which found against him. Wounaris appealed this decision, asserting that the trial judge had failed to give the jury proper instructions about the law of wrongful discharge in violation of public policy.
In reviewing this claim, the Court of Appeals defined the law of wrongful discharge as follows:

The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer’s motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.


Applying this principle, the Court identified a substantial public policy of West Virginia law embodied in the statutory grievance process: to provide a “simple, expeditious, and fair process” to resolve disputes, encourage employer and employee to reach solutions, and improve good morale and effective job performance. 2003 WL 21057353 at *8. The Court further found that, in enacting the grievance process, the legislature intended that employees be strongly encouraged to use the grievance process. Id.

Significantly, the West Virginia statute at issue did not appear to include any express prohibition against retaliation. The Court, however, found that the existence of a statutory grievance process was itself sufficient indication of a substantial public policy to support a tort claim of wrongful discharge: “it is clear from expressions of legislative intent and the case law that this procedure exists in support of the substantial public purpose ‘that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served.’” Id. at *9, quoting W.Va.Code § 18-29-1 (1992). The Court thus remanded this case for a new jury trial.
The *Wounaris* Court’s willingness to infer a public policy from general statutory language stands in stark contrast to the narrow approach undertaken by the United States Court of Appeals for the Tenth Circuit in *Wilburn v. Mid-South Health Development Inc.*, 343 F.3d 1274 (10th Cir. 2003). *Wilburn* involved two employees of a residential care facility who suspected another employee of stealing and using residents’ medications. 343 F.3d at 1276. The two employees made an internal report of their suspicions but bypassed the proper chain of command, which would have been to report their suspicions to an individual who happened to be a close personal friend of the suspected employee. When the reporting employees reported their suspicions to another supervisory employee, they were fired for doing so. *Id.*

In the resulting lawsuit, the terminated employees argued that they were terminated in violation of strong public policies favoring disclosure of abuse of residents, misuse of medications, and illegal use of narcotics. As sources for these public policies, the employees relied upon several state statutes related to the care and welfare of nursing home and residential care residents, as well as the state criminal code addressing the theft of narcotics. When the Court examined each such provision, however, it concluded that no such policies could be discerned: the regulations at issue were inapplicable to this residential care facility, and the statutes at issue did not place upon these employees the unambiguous duty to make an internal report of suspected theft or misuse of residents’ medications. 343 F.3d at 1279-82. The Tenth Circuit thus concluded that these employees had no cause of action for wrongful discharge under Oklahoma law.

*Wounaris* and *Wilburn* offer radically different views of the scope of the public policy exception. The *Wounaris* Court was clearly willing to infer the requisite “strong
public policy” even where the relevant statute protected only the individual rights of employees and lacked an express prohibition against retaliation. In contrast, the Wilburn Court was not willing to infer the requisite public policy, absent express language prohibiting retaliation, even though the general public policies invoked in Wilburn could scarcely have been stronger or more directly implicated by the reporting employees’ conduct. The different results that inured in these two cases indicate that the law is unsettled and that the jurisdiction and the particular policies being invoked will play a crucial role in determining whether an aggrieved employee can state a claim for “wrongful discharge” under this prong of the tort.

B. Wrongful Discharge Claims Based On Conduct That Public Policy Would Encourage

Terminated employees have also attempted, so far unsuccessfully, to extend the tort of wrongful discharge to circumstances in which an employee was allegedly terminated for conduct that is merely encouraged, not mandated, by public policy. For instance, in Hartt v. Sony Electronics Broadcasting & Professional Co., 2003 WL 21675576 (9th Cir. 2003), two employees were discharged for moonlighting, which was prohibited by the employer. The employees brought suit on the theory that public policy prohibits an employer from discharging employees for engaging in otherwise lawful activity outside of work time and encourages privacy and the right to pursue productive work.

The Ninth Circuit found that no California statute or constitutional provision could be interpreted to embody these public policies. Id. at *2. The Court further held that even if a state statute or constitutional provision could be broadly read to articulate such a policy, the policy was not “public” but of benefit only to the individual. Finally,
the court rejected the employees’ theory on the ground that the policy urged was not well-established, substantial, or fundamental. *Id.*

The *Hartt* decision exemplifies the likely judicial response to an attempt to extend the wrongful discharge claim to conduct that is merely “desirable” or “lawful,” rather than compelled by law or by strong public policy considerations. A public policy exception that attaches whenever an employee engages in “desirable” or “lawful” activity would quickly swallow up the “at will” doctrine completely, and employees are unlikely to be successful advancing such a broad interpretation of “wrongful discharge.”

C. *Wrongful Discharge Claims Premised On Retaliation For Exposure Of The Employer’s Wrong-Doing*

The last decade has, however, seen a significant increase in successful allegations that an employee has been terminated for reporting conduct or policies of the employer that the employee believes to be illegal. Such “whistleblower” actions are numerous, and they often result in costly, intractable litigation. Whistleblower cases present particularly sensitive issues for colleges and universities. Given the proliferation of federal grants in the university community, and the overlay of regulatory constraints that come with those grants, opportunities for serious “whistleblower” incidents are numerous. They also tend to be sensational, sparking intense media scrutiny or even government investigation. And the persons most likely to be the focus of “whistleblower” claims tend to be senior administrators serving at the pleasure of the institution.

Understanding the legal issues presented by “whistleblower” cases is therefore essential for decisionmakers confronted with threats to publicize allegations of
misconduct\textsuperscript{2}. And, indeed, administrators could benefit significantly from an understanding of these looming issues at the time employment is entered into, or contracts are negotiated with senior “at will” employees.

A recent such case is \textit{Rabkin v. Oregon Health Sciences University}, 350 F.3d 967 (9\textsuperscript{th} Cir. 2003). Dr. Rabkin, the former Director of the University Liver Transplant Program, brought suit against the University when he was removed from the position of Director. His lawsuit, however, was only the culmination of a long period of internal strife and difficulties involving Dr. Rabkin’s involvement with the University’s Liver Transplant Program.

Prior to his removal as Director, Dr. Rabkin made complaints to the University administration about the well-being of patients under a fellow physician’s care.\textsuperscript{3} Specifically, Dr. Rabkin lodged the incendiary allegation that the mortality rate of the other physician in the Liver Transplant Program was double his own. \textit{Id.} at 969-70. The University responded by retaining a consultant to review the program. After conducting his review, the consultant concluded “that the Liver Transplant Program ‘requires a change in philosophy and a short-term investment to create a solid core of a multidisciplinary transplant team.’” \textit{Id.} Dr. Rabkin was informed one month later that he

\textsuperscript{2} It is worth noting that some jurisdictions, notably Florida, have different whistleblower protections for private and public sector employees, where both the procedural and substantive protections may be significantly different. Contrast that state’s private-sector whistleblower’s statute, §§448.101 F.S. et seq. with its public sector Whistleblower’s Act, §§112.3187, F.S. et seq.

\textsuperscript{3} The facts of this case reveal a highly dysfunctional team. Working with Dr. Rabkin was apparently so difficult that one of the other two surgeons hired for this program left the program shortly after Dr. Rabkin became director. Soon thereafter, Dr. Rabkin and the remaining surgeon, Dr. Orloff, began to clash. Dr. Rabkin also alienated others in the University, including the head of General Surgery. Dr. Rabkin was first notified in 1999 that he would be removed as Director, partly because of his inability to treat Dr. Orloff “‘in a collegial manner.’” 350 F.3d at 969. Dr. Rabkin was subsequently reinstated as Director, but in the face of a warning that reinstating him as director would result in the University’s losing “a ‘potentially excellent academic surgeon’ and be[ing] left with the ‘sociopath’ Dr. Rabkin.” \textit{Id.} at 970. Such animosity among professionals, particular in the medical field, is a recipe for disaster, likely to result in intractable litigation like the \textit{Rabkin} case.
was no longer to serve as Director and that a third surgeon would be recruited as Director. Dr. Rabkin remained with the University as a faculty member in the Program.

After being removed as Director, Dr. Rabkin filed an internal grievance complaining that he was being removed in retaliation for his complaints about patient safety and the mortality rates of his colleague. The University’s grievance committee dismissed the claims as unsubstantiated, whereupon Dr. Rabkin filed suit. The jury found in favor of Dr. Rabkin on his claim of termination in violation of public policy. Id. at 969-70.

On appeal, the Court evaluated the state’s whistleblower law and had no trouble concluding that a strong public policy issue was presented. The statute at issue “impose[d] a legal duty not to retaliate against an employee for disclosing information that the employee reasonably believes is evidence of a danger to public health and safety.” 350 F.3d at 972. The Court found that the statute expressed a clear public policy of the State of Oregon to prevent retaliation for reports of dangers to public health. The jury verdict that Dr. Rabkin had been terminated in violation of this public policy was therefore affirmed.

Rabkin involved a case where the public policy of the state is clearly articulated in the express language of the statute, allowing the terminated employee’s claim to proceed to a jury. The result was then predictable: while Dr. Rabkin clearly had performance problems justifying termination, the jury was understandably more concerned with ensuring prompt reports of medical misconduct by the medical community at large. Where the public policy at issue is more nebulous, or the subject matter of the
whistleblower’s complaint less directly related to health and safety, such claims may not
make it to the jury and the outcome may be very different.

For instance, in *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3rd Cir.
2003), the United States Court of Appeals for the Third Circuit ruled that no jury issue
was raised, and judgment was due the employer, despite the terminated employee’s
having reported arguably illegal insurance practices. Fraser, an insurance agent for
Nationwide Mutual, filed complaints with the Pennsylvania Attorney General’s Office,
alleging that Nationwide engaged in certain illegal insurance practices. Fraser also wrote,
but did not send, letters to competing insurance companies asking whether they were
interested in acquiring the policies of some of Nationwide’s policyholders. When
Nationwide found out about these letters, Fraser was fired. *Id.* at 109-10.

Fraser sued, alleging that his termination violated the state’s strong public policy
favoring the disclosure of illegal conduct. Fraser also argued that he was terminated for
refusing to commit a crime and for attempting to comply with a statutorily imposed
reporting duty. In reviewing Fraser’s claims, however, the Court emphasized that the
public policy exception to at-will employment must be narrowly construed “lest the
exception swallow the general rule.” 352 F.3d at 111. The Court found no evidence that
the practices of which Fraser complained actually constituted criminal conduct or that
Fraser had been forced to commit a crime. Furthermore, the Court held that nothing in
the statute cited by Fraser created an affirmative duty to report the activity of which he
complained and, therefore, the Court was unwilling to infer a public policy favoring such
reports.4 *Id.* at 112.

---

4 Fraser also argued that his termination violated his right to free speech protected by the First Amendment. The Court declined to consider the First Amendment as a source of public policy because the employer was
In *Fraser*, as opposed to *Rabkin*, the statute cited to support a public policy did not expressly mandate that Fraser report improper activity, nor did it prohibit retaliation for making any such report. Moreover, the *Fraser* Court did not analyze whether the employee acted in “good faith” when he reported alleged illegal conduct of the employer but simply noted that Nationwide’s policies and practices did not evidence criminal conduct. Underlying this decision was an apparent hesitancy on the part of the *Fraser* Court to infer a strong public policy in the absence of a compelling health and safety concern; the prevention of insurance company misconduct apparently did not rise to the level of a compelling concern, nor was the legislature’s focus upon such conduct clearly discernible in the statutory provisions that Fraser cited.

In a case involving reports of unsafe employment practices, the United States Court of Appeals for the Ninth Circuit approached the problem differently. The Ninth Circuit focused upon whether a claim of wrongful discharge requires the employee to show actual wrongdoing on the part of the employer, or whether the employee’s good faith belief that wrongdoing occurred is sufficient to confer upon the employee the protections of public policy. In *Freund v. Nycomed Amersham*, 347 F.3d 752 (9th Cir. 2003), Jeffrey Freund worked as a pharmacist in the Nycomed Amersham’s laboratory. Freund complained to his supervisor that the department’s staffing practices raised safety concerns. Specifically, Freund complained that the pharmacists were overworked, which placed customers at risk of lethal pharmacist errors; he also complained that his

---

a private entity, not a state actor: “we note that Pennsylvania courts have repeatedly rejected claims that a private employer as opposed to a public employer violated public policy by firing an employee for whistle-blowing, when the employee was under no legal duty to report the acts at issue.” *Id.* at 112-13. (internal quotations and citations omitted).
supervisor violated protocols by failing to report a needle-stick incident resulting in a blood spill. 347 F.3d at 756-57.

Subsequently, Freund received a poor performance review and a written reprimand by that same supervisor. *Id.* The following day, Freund was summoned to a telephone conference with other managers in which he was criticized for his confrontational attitude and his poor relationship with his supervisor. *Id.* at 757. Freund continued to make complaints to and about his supervisor and was soon terminated for “disruptive behavior.” *Id.*

Freund sued, alleging that his termination violated California public policy. He relied upon a California labor law prohibiting discrimination or retaliation against any employee making a complaint based on health or safety. Freund’s claim was allowed to proceed to a jury, which found in favor of Freund and awarded $20,000 in emotional distress damages, $1,130,000 in compensatory damages and $1,150,000 in punitive damages. *Id.*

On appeal, the Court agreed that the California labor statute upon which Freund relied did indeed support a tort claim for wrongful discharge in violation of public policy. The employer had argued that this protection should not attach unless the employee could prove an actual violation of a state health or safety law. The Court determined, however, that the employee need only be acting upon a good faith belief that the employer’s practice might result in an unsafe condition. *Id.* at 759. Significantly, the broad wording of the California Labor Code encouraged the reporting of any condition that the employee believed might threaten health or safety. Given these broad, clear legislative
statements, the Court concluded that the employee need not demonstrate an actual health or safety violation but simply hold a good faith health or safety concern.

In contrast to the Ninth Circuit’s ruling in Freund, the United States Court of Appeals for the Fifth Circuit imposed a stricter burden upon the employee, indicating that an employee must complain about actual criminal activity to support a tort claim for wrongful discharge. An employee at a Mississippi water treatment plant reported what he believed to be OSHA violations. Howell v. Operations Management International, Inc., 77 F.3d 248 (5th Cir. 2003). The employee was suspended without pay and ordered to attend counseling. In reviewing the wrongful discharge claim that resulted, the Fifth Circuit held that under Mississippi law the wrongful discharge tort exception must involve a complaint about criminal illegality, not merely an allegation of regulatory violation. Id. at *252.5

Another variation on the “whistleblower” cases is the allegation that the employer has retaliated against an employee for making a complaint protected by Title VII or other civil rights laws. The federal civil rights laws authorize civil lawsuits by employees who believe that they have been the subject of discrimination or retaliation. But often an aggrieved employee must first seek relief using administrative mechanisms, such as an internal grievance process or the filing of an agency charge. The question has therefore arisen whether an employee may bring a state tort claim for wrongful discharge without first pursuing his or her remedies under the civil rights laws; in at least one case, the answer was “yes.”

5 It is important to remember that many state and federal statutes requiring or providing a mechanism for reporting health and safety violations include clauses prohibiting retaliation for good faith complaints. Even if a wrongful discharge tort claim is not actionable in a given state, colleges and universities should
In *McLean v. Patten Communities, Inc.*, 332 F.3d 714 (4th Cir. 2003), an employee was terminated after complaining that her supervisor sexually harassed her and other female employees and used racial slurs. The facts of this case, as set forth in the Court’s opinion, are particularly egregious. McLean’s supervisor and other male employees regularly used derogatory language about the female employees, made sexual advances, described sexual activity, and made racial slurs to and about employees. 332 F.3d at 716-17. When the employee was eventually terminated, after complaining, she did not proceed under either Title VII or under the comparable North Carolina statute but instead filed a state law claim of wrongful discharge in violation of public policy.

The Court permitted the action. The Court found that McLean was not required first to file a charge under Title VII because she was not complaining primarily about gender discrimination but about her wrongful discharge for refusing to consent to gender discrimination (in this case, the sexual advances of her employer). *Id.* at 720. The Court held that McLean had a valid cause of action because the North Carolina civil rights statute expressly articulated the “public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap . . . .” *Id.*

Interestingly, Plaintiff McLean might have had an equally powerful retaliation claim under Title VII or the North Carolina Civil Rights laws, but she might have been required to exhaust her administrative remedies before suing on that basis. That the Fifth Circuit was willing to authorize a state law claim that bypassed these predicate statutory

not take safety complaints lightly, even where unfounded, and react too quickly to discipline or discharge an employee who has made a complaint found to be unsubstantiated.
requirements is probably attributable to the egregious nature of the challenged conduct, but it also illustrates that a clearly strong public policy, such as that of civil rights enforcement, may be seen as compelling enough to justify expansion of the remedies available to an aggrieved Plaintiff.

**Conclusion**

The cases discussed above are only a few of the increasing number of serious public policy cases arising under judicially-created exceptions to the “at will” employment doctrine. While cases in which a court infers a contract provision are few, cases in which a court or jury finds that an employee’s discharge violates public policy are definitely on the rise. The tort of wrongful discharge is being permitted to address an expanding variety of employer behaviors, depending upon the state public policy at issue and the conduct alleged.

Colleges and universities considering termination of an at-will senior employee should be aware of this significant potential limitation upon any attempt to discipline or terminate an employee. Where an employee has previously complained about serious safety or health concerns, or exercised a legal right recognized as significant under the relevant state law, the institution should take care to confer with legal counsel before taking employment action that may result in an intractable legal dispute. Recent jury verdicts in favor of terminated employees indicate that even a troublesome employee with significant performance issues has substantial protection under the law after documenting serious concerns about matters of strong public policy. The existence of such a prior complaint does not mean that an employee cannot be disciplined or
terminated, but it does require an institution to scrutinize its conduct carefully and document its legitimate, business justification for the job action being proposed.