When applying principles of employment law, evaluating whether a dismissal of an employee was legally proper is not the same as making a normative judgment about the fairness of the employer's action. Unfortunately, there are many situations in which an employee can be "unfairly" but "legally" discharged from his or her job. This difference can be illustrated using three examples. Let us suppose both a layperson and an attorney were asked their opinions about the propriety of these dismissals.

In the first example, a person is fired from her job because she involuntarily missed work while serving on a jury, a duty which she was compelled to perform. In the second, a person is terminated in retaliation for having reported certain workplace accidents as required by law. Finally, a third person is discharged for buying the employer's merchandise at a discount in a transaction handled by another employee, even though the company's "employee handbook" said that she was entitled to make the purchase in this manner.

The average person probably thinks that none of these people was lawfully terminated. Twenty years ago, the opposite answer was equally obvious to the lawyer. That is because the Commonwealth of Pennsylvania, along with every other state in the country, applied (and in many cases continues to apply) the presumption of "employment at will" to contracts between employers and employees.

The essence of the employment at will doctrine is a presumption that an employment relationship will continue for an indefinite period of time and can be terminated by either the employer or the employee at any time, for any reason, or for no reason at all. However, because the doctrine is merely a legal inference, rather than an immutable rule of law, it does not apply if the employer and employee have agreed to a contract that specifies different terms regarding the length of employment or reasons for termination of the relationship.

Therefore, about the only questions an attorney would have had to ask 20 years ago were whether each of the employees either had negotiated a formal contract with his or her employer or was covered by a collective bargaining agreement. If there were a collective bargaining agreement, it probably would limit discharges to those for which there was "just cause," as that term is construed by labor arbitrators on a case-by-case basis. In the rare case where an employee had entered into an explicit contract directly

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with the employer, the terms of that contract would be consulted to determine under what circumstances a termination was allowed.7 But in the typical employment relationship, which is governed by neither type of contract, the attorney would state with confidence that each of the three employees in our example could be fired, unless protected by a statute providing a remedy for discharge based on those reasons.

Today, a lawyer presented with these three scenarios would scramble to the library before answering. The reason for such caution is the progressive development, during the past twenty years, of tort and contract forms of recourse for employees without contracts, so-called "employees at will" who have been "wrongfully discharged." Throughout the country, the highest court in almost every state has considered the viability of wrongful discharge theories.8 The most common of these theories are the tort of discharge in violation of public policy and contract claims based upon the policies contained in employee handbooks.

The causes of this veritable revolution in employment law are debatable. The wrongful discharge phenomenon may be related to a judicial climate which has nurtured new common law theories of liability in recent years, most notably in the personal injury and products liability areas.9 The decline of union membership throughout the country has also doubtlessly played a role. Significantly fewer employees are covered by contractual provisions that limit the employer's discretion to discharge, prompting employees to press new causes of action in the courts.10 In addition, as employee handbooks began to replace collective bargaining agreements as the documents most often defining the employment relationship, the courts may have been compelled to acknowledge that reexamination of the rules governing termination of employees at will was needed. (The courts needed to decide, for example, if employees with handbooks were still employees at will.)

Pennsylvania's role in this revolution has been curious. In its 1974 opinion in Geary v. United States Steel Corp.,11 the Pennsylvania Supreme Court rendered one of the earliest and most influential decisions in the wrongful discharge area. During the next fifteen years, however, that court did not consider another wrongful discharge case, even while its sister courts throughout the nation were deciding public policy tort and employee handbook issues. In the absence of guidance from the supreme court, the Superior Court of Pennsylvania developed wrongful discharge principles for the state during that period. Finally, within an eight-month period beginning in 1989, the Pennsylvania Supreme Court decided three cases which permit insight into its attitudes about the wrongful discharge theories of the public policy violation tort, the employee handbook claim, and promissory estoppel.12 Although the first two decisions by the court express support for the public policy tort and employee handbook claim, the third opinion raises doubts about the viability of both claims. The third opinion also indicates that the court may have reservations about the inroads made into the employment at will doctrine which will affect subsequent wrong-
ful discharge rulings in Pennsylvania.

This article examines the development of wrongful discharge law in Pennsylvania, focusing on the pronouncements of the Pennsylvania Supreme Court and their effects. Section I reviews the development of wrongful discharge law up to the trilogy of decisions by the supreme court in 1989. It begins by looking at turn of the century decisions in which the Pennsylvania Supreme Court adopted and defined the employment at will presumption. The section then examines the supreme court’s ground-breaking Geary decision, in which the court suggested, in response to a challenge to the employment at will doctrine, that a cause of action could arise when an employee is discharged for reasons violating "public policy." The section concludes with a survey of the development of common law doctrines for wrongful discharge by the Pennsylvania Superior Court during the fifteen-year period following Geary, during which the supreme court did not consider any cases that raised common law exceptions to employment at will.

Section II of this article analyzes the reasoning and scope of the supreme court’s three recent decisions, in which it ended its post-Geary silence on wrongful discharge. Finally, Section III discusses what the future most likely holds for Pennsylvania employees without employment contracts who seek remedies for their dismissals. It explains how those opinions, when read together, have created some doubts about the viability of wrongful discharge remedies where there were none before. This section identifies which issues have been resolved by the trilogy of decisions, what questions remain open, and what can be expected of the supreme court’s next foray into this area of the law.

I. THE DEVELOPMENT OF COMMON LAW CAUSES OF ACTION ARISING OUT OF TERMINATIONS OF EMPLOYMENT IN PENNSYLVANIA.

A. Development of the Employment at Will Doctrine

A common misperception about the employment at will doctrine is that it came into existence with the birth of the master/servant relationship. In fact, the doctrine has only been recognized since the turn of the century. The first opinion of the Pennsylvania Supreme Court to endorse the doctrine was Henry v. Pittsburgh & Lake Erie R.R. In Henry, a railroad employee brought suit after he was suspended and eventually discharged as a result of an investigation into irregularities within his department. In response to the plaintiff’s argument that his employer could not suspend him maliciously, unnecessarily and without probable cause, the court replied that an employer "may discharge an employee with or without cause, at pleasure, unless restrained by some contract; so that . . . malice and want of probable cause [do not] have anything to do with the case." The employment at will doctrine was reaffirmed in subsequent decisions of the supreme court. These decisions, however, made clear that this doctrine was a presumption that could be rebutted by a showing that the parties had different intentions regarding the terms of employment. Through the
larger part of the century, then, employees could not challenge their dismissals under Pennsylvania common law unless they could demonstrate that they had employment agreements which guaranteed employment for a fixed duration, or which limited the permissible reasons for discharge.

B. Geary and the Birth of Wrongful Discharge

The long-standing principle that employees at will could not sue employers under the common law for damages arising from their loss of employment was directly confronted by the Pennsylvania Supreme Court in 1974. In *Geary v. United States Steel Corp.*, an employee who conceded that he had an "at will" relationship with his former employer brought suit after he was discharged, allegedly for expressing reservations to his superiors about the safety of a product sold by the company. Geary argued that the court should allow him to assert a tort cause of action for damages arising from his loss of employment, despite the fact that he lacked an employment contract. Recognizing that it was being "beckon[ed] into uncharted territory" because of the dearth of precedent for nonstatutory causes of action for employees at will, the court acknowledged that it was presented with the question of "whether the time has come to impose judicial restrictions on an employer's power of discharge." It noted that the weight of authority in other states was in accordance with Pennsylvania's presumption of employment at will. The court recognized, however, that "economic conditions have changed radically since the time of *Henry* . . . [and that] the huge corporate enterprises which have emerged in this century [now] wield an awesome power over their employees." Against this historical background, the court considered Mr. Geary's two theories of recovery: (1) that United States Steel had discharged Mr. Geary with the specific intent to harm him, and (2) that his dismissal by the employer violated public policy. The court acknowledged that Pennsylvania law had accepted torts imposing liability in other contexts for conduct motivated by a specific intent to cause harm. The court conceded that Mr. Geary's "analogies to cases involving the malicious abuse of recognized rights seems apt enough."

Despite its recognition that the "specific harm" tort theory was susceptible of being extrapolated into the employment context, the court was troubled by the allegations of Mr. Geary's complaint, which, as the court read them, did not establish a claim of specific intent to cause harm. The court found it persuasive that Geary's complaint alleged that he had been discharged after the product about which he had complained was removed from the market. Under these circumstances, the court indicated, the inference to be drawn from Mr. Geary's allegations was that he had "made a nuisance of himself" with his complaints and was discharged to preserve peace in the company.
The court concluded that Mr. Geary’s allegations could not permit an inference that he was terminated with the specific motivation of causing him harm. It may be granted that there are areas of an employee’s life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer’s power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

The court also evaluated Mr. Geary’s argument that he was entitled to damages for his discharge based on considerations of public policy. While observing that his argument would be compelling for an expert with responsibility for making judgments on the safety of United States Steel’s products, the court concluded that, as a salesperson, Mr. Geary lacked both the qualifications and the job description of a safety expert. The court refused to shelter Mr. Geary with public policy considerations merely because his intentions were good. Noting the interest of the company in preventing disruption of its internal operating procedures, the court decided that a nonstatutory cause of action was not justified by public policy considerations in such a case.

Despite its conclusion that no "public policy violation" tort could be recognized in the case before it, the court gave signs that it would accept such a cause of action in a case with different facts. It declined to reject the reasoning of decisions in California and Indiana which had adopted causes of action for discharges violating clear public policies. In addition, the court observed that the argument for constitutional protections of an employer’s right to discharge free of restrictions had long ceased to have any force.

Most significantly, the court expressed agreement with the concept that considerations of public policy could limit an employer’s actions in dismissing employees at will:

The court concluded its opinion by declining to "define in comprehensive fashion" the limits on an employer’s privilege to discharge, and holding that an employee at will cannot sue his employer in wrongful discharge where the reason for termination does not violate a clear mandate of public policy.

Three justices dissented from the majority opinion in Geary, two without joining any opinion. In the lone dissenting opinion, Justice Roberts read the majority opinion as "conced[ing] the employment relationship is a proper subject for judicial action." However, he criticized the court for not going far enough, characterizing the majority’s posture as "blind acceptance of the employer’s absolute right of discharge" in the face of a social and economic reality in which employees have become highly vulnerable because of their increasing dependence on employment by others.

Despite Justice Roberts’ criticism, the majority’s opinion in Geary represents a clear break with the court’s prior precedents, which held that an employee at will could be discharged for any or no reason. The court affirmed the dismissal of Mr. Geary’s claims because it concluded that he had not pled
factual allegations making out the legal theories upon which he purported to rely. Nevertheless, the court acknowledged that the tort theories advanced by Mr. Geary appeared applicable in the employment context, even though it declined to expound upon them in the absence of facts making out the causes of action. According to one commentator, "Geary was among the first five cases in the country to admit even the possibility of an exception to the doctrine of employment at will." Geary would, however, be the last statement of the Pennsylvania Supreme Court on common law wrongful discharge actions for fifteen years.

C. Post-Geary Developments in Wrongful Discharge Law

In retrospect, the supreme court’s Geary decision was a cornerstone in the foundation of a reformulation of employment law which would soon take hold throughout the country. In the decade since Geary, common law causes of action for non-union employees have gained widespread acceptance, carving out significant exceptions to the general principle of at will employment. The exceptions most commonly accepted throughout the United States have been the "public policy violation" tort addressed in Geary, and a contract cause of action based upon employee handbooks. In the fifteen year period following Geary, the Pennsylvania Superior Court wrestled with both theories, as well as a promissory estoppel theory premised upon oral representations of the employer.

During the period leading up to the supreme court’s recent decisions, the superior court credited Geary with establishing common law causes of action for discharges motivated by an employer’s specific intent to harm the employee, and for discharges contrary to public policy. However, it refused to find that a public policy violation tort was implicated in the vast majority of cases it examined. To date, the superior court has found a public policy violation to be implicated in only four alleged situations: (1) where an employee was fired for reporting an incident to the Nuclear Regulatory Commission, as required by a federal safety statute; (2) where an employee was discharged for refusing to take a polygraph test; (3) where an applicant was not hired because of criminal convictions which had been unconditionally pardoned; and (4) where an employee was discharged for serving jury duty.

The superior court also has been repeatedly presented with the theory that discharges of employees at will could be restricted by representations in handbooks distributed to them by employers. In Richardson v. Charles Cole Memorial Hosp., its first decision examining the contractual effect of an employee handbook, the court indicated that an employer’s failure to comply with its employee handbook did not give rise to a wrongful discharge claim. In Banas v. Matthews Int’l Corp., the superior court, sitting en banc, ruled that an employee could not bring a wrongful discharge claim based upon a handbook which did not contain a provision limiting the reasons for discharge to "just cause." The court declined, however, to decide whether a handbook which
did contain such a provision would have contractual force. Although some decisions after Banas suggested that an employee handbook could not have contractual force, subsequent opinions acknowledged that handbooks could create claims for wrongful discharge. The superior court's analysis in its most recent handbook cases (prior to the supreme court decisions) concentrated on whether the language of a handbook would cause a "reasonable employee" to believe that the employment at will relationship had been modified.

Finally, during this period the superior court examined the question of whether an employee could assert a promissory estoppel claim based upon oral representations of an employer. In Paul v. Lankenau Hospital, the court concluded that despite the absence of a guarantee that the employee would be fired only for just cause, the employee could pursue a promissory estoppel claim based upon an implied promise that he would not be dismissed for exercising permission given him by the employer. The court in Paul also held that termination from employment could give rise to a defamation claim.

This review of the superior court's decisions in common law employment cases between Geary and the next supreme court cases reveals that it fashioned a wrongful discharge jurisprudence of which judicial restraint is a preeminent characteristic. Although it recognized the specific intent to harm tort, the public policy violation tort, and the employee handbook contract claim, it construed these theories narrowly so that few plaintiffs were able to state a claim. The court's acceptance of promissory estoppel and defamation claims in Paul may have signaled a departure from the conservatism with which it had previously proceeded in the wrongful discharge context. The superior court's role as the primary architect of Pennsylvania's wrongful discharge doctrines ended, however, with the supreme court's sudden reemergence in the field.

II. THE PENNSYLVANIA SUPREME COURT'S TRILOGY OF EMPLOYMENT DECISIONS


The majority opinion in Clay v. Advanced Computer Applications, Inc. addressed a narrow issue with respect to the application of the public policy violation tort: whether employees discharged as a result of sex discrimination can state a cause of action for wrongful discharge when they have not exhausted administrative remedies under the Pennsylvania Human Relations Act (PHRA). Although most of the opinion focuses on the intent of the legislature as expressed in the PHRA's administrative exhaustion requirements, the Clay decision also provides insight into the attitudes of the members of the court toward the public policy violation tort.

The plaintiffs in Clay, spouses who had worked for the same employer, alleged that they had both been discharged after the woman rejected sexual advances by a male management-level employee. Rather than filing sexual discrimination charges with the Pennsylvania Human Relations Commission (PHRC), as required by the PHRA, the
plaintiffs brought suit under a common law theory that their discharge violated public policy. After examining the PHRA and prior judicial interpretations of the legislative intent embodied in that statute, the majority held that the plaintiffs could not circumvent the administrative requirements of the statute by pursuing a common law remedy for discrimination and dismissed the plaintiffs' suit.

Justice Flaherty's majority opinion in Clay did not by any means represent the views of the entire court. Justices Stout and McDermott did not participate in the decision of the case. Of the remaining four justices, three expressed disagreement with some of Justice Flaherty's pronouncements about causes of action for wrongful discharge under the common law.

The majority opinion acknowledged that a common law cause of action had been recognized in Pennsylvania where dismissals of employees at will threatened clear mandates of public policy. Justice Nix, concurring in judgment only, disagreed that a common law cause of action exists for wrongful discharge. Rather, he characterized the language of Geary upon which the superior court had relied to recognize the public policy tort as "gratuitous dicta."

Justice Nix agreed with the majority that the case should be dismissed because, in his opinion, "recognizing a wrongful discharge action would be inimical to the continued existence of at-will employment."

Justice Zappala, joined by Justice Larsen, wrote separately to express his concern about a statement in the majority opinion which suggested that dismissals for reasons of sex discrimination are not actionable under the common law. In contrast to Justice Nix, they described Geary as the "seminal case" recognizing a wrongful discharge exception to employment at will. They further indicated that the wrongful discharge cause of action might continue to evolve and that a public policy violation claim for sex discrimination might be accepted in the future as the law developed.

In summary, Clay made little headway in the emergence of a supreme court jurisprudence of common law actions for wrongful discharge. Its narrow holding was that a discharged employee cannot bring a public policy violation suit for discrimination which has a remedy under the PHRA. The decision revealed that at least four of the seven members of the Court recognized a cause of action for discharges violating public policy. Justice Nix, however, denied that a cause of action for discharges violating public policy exists in Pennsylvania. Remarkably, Justice Nix, the only current member of the supreme court who had taken part in the Geary case, dissented without opinion in Geary. Because the majority in Geary had affirmed the nonsuit of the plaintiff's claims, Justice Nix's dissent in that case seemed to mean that he disagreed with the nonsuit and thus recognized the validity of Mr. Geary's causes of action. Although at the time it was rendered, Justice Nix's opinion in Clay appeared as nothing more than an interesting footnote in the history of wrongful discharge law in Pennsylvania, it came to play a surprisingly prominent role in a subsequent supreme court decision.
B. Claims Premised Upon Employee Handbooks: Morosetti v. La. Land and Exploration Co.

In Morosetti v. La. Land and Exploration Co., the Pennsylvania Supreme Court confronted its first claim that an imputed contract arose from an employer policy communicated to employees. Although Morosetti involved a claim for severance benefits and not wrongful discharge, it elucidated the supreme court's views regarding the contractual effect of employee handbooks.

In Morosetti, the plaintiff employees were presented with a choice between new jobs or severance pay when the company employing them was sold. Plaintiffs elected to accept jobs with the purchasing company but nevertheless brought suit for the severance pay. In his opinion for the majority, Justice McDermott found that the only factual basis for the employees' claim for severance benefits was a policy manual maintained by the personnel manager of the selling company that was not distributed to the employees, and the employees' belief that a policy on severance pay existed because of the past periodic payment of severance by management.

In holding that the employees had no contract entitling them to severance benefits, the majority turned to "basic contract law," which dictates that an offer must be "intentional, definite in its terms, and communicated," in order to form the basis for an agreement. The court found it persuasive that the company did not tell employees about its severance policy, and that all the employees did not share the same expectations regarding their entitlement to the benefits.

Most significantly for wrongful discharge plaintiffs in Pennsylvania, the court's opinion seemed to turn on the issue of the employer's intent in promulgating a handbook. The majority opinion stated that "[a] handbook distributed to employees as inducement for employment may be an offer and its acceptance a contract." However, the court qualified this statement by indicating that employers need not be bound by their own policy "unless they communicate that policy as part of a definite offer of employment." In support of that proposition, the Court cited Richardson v. Charles Coe Memorial Hosp., a decision in which the superior court had rejected an employee handbook claim for wrongful discharge.

Justice Zappala filed a short concurring opinion in addition to joining that of the majority. He distinguished the Morosetti severance pay policy, which had not been distributed to employees, from employee handbooks which had been disseminated. Because Morosetti concerned uncommunicated policies of the employer, Justice Zappala characterized the majority's statement regarding the potential contractual effect of a handbook as "dicta" and "of no precedential value."

The dissent of Justice Larsen began by setting out the facts of the case in much more detail than had the majority. On the same day that the closing of the plant was announced, the selling company distributed a memorandum to the employees stating that a formula for severance payment would be communicated by June 1, 1984. The purchasing company began to hire former em-
ployees of the selling company on May 27, 1984. After receiving a list from the purchasing company of all former employees whom it did not hire, the selling company distributed a memorandum on June 1, 1984 indicating that severance payments would be made only to persons who had not been rehired or made an offer of employment by that date. Using these facts, Justice Larsen posited the issue before the court as whether the "employee handbook" containing the severance payment policy created an enforceable contractual obligation on behalf of former "at will" employees.

He endorsed what he characterized as the "preferred position" regarding employee handbooks: when an employer by written policy offers employees at will a benefit, the employer can unilaterally alter or eliminate the policy only until the event triggering the vesting of the benefit has occurred. In support of this proposition, Justice Larsen cited two opinions which had construed handbooks as containing limits on an employer's right to dismiss employees at will.

Justice Larsen further disagreed with the majority's finding that there had been no "meeting of the minds" in this case. He pointed out that contracts can be established by conduct and oral words, as well as writings. Unlike the majority, Justice Larsen found enough evidence to support a contract for the severance benefits, relying on the policy in the manual, the company's past practice of paying severance to other employees, the employer/employee relationship which suggested that the benefits were not gratuities, and the fact that the employer had enjoyed a loyal workforce which had continued to serve it.

Despite his dissent, Justice Larsen and the *Morosetti* majority were not very far apart in their analyses. The basis of their disagreement was their respective evaluations of whether the evidence adduced by the plaintiffs, which did not include a distribution directly to the employees of the policy at issue, was sufficient to constitute an offer communicated by the employer. The most important feature of *Morosetti* was that all members of the court, with the exception of Justice Zappala, appeared willing to acknowledge that an employee handbook could have contractual effect. *Morosetti* implied that subsequent decisions concerning employee handbooks would address the circumstances giving rise to valid claims, not the question of whether such claims exist.

C. The Current "Last Word" on Wrongful Discharge: Paul v. Lankenau Hospital

In a decision rendered on February 1, 1990, the Pennsylvania Supreme Court directly considered the viability of a common law wrongful discharge theory for the first time since *Geary*. In *Paul v. Lankenau Hospital*, the court was faced with the question of whether a discharged employee at-will could bring claims of promissory estoppel and defamation against his former employer for injuries suffered as a result of his termination.

Dr. Paul, a Yugoslavian emigre, had been employed by Lankenau Hospital from 1962 until 1980. On numerous occasions throughout his tenure, Dr. Paul removed
hospital equipment, most of which had been discarded, which he either sold or sent to Yugoslavia. The hospital did not contest that Dr. Paul had been given permission to take these items, with the exception of five refrigerators, the last of the items removed. The ensuing disagreement between Dr. Paul and the hospital, over whether he had received permission to take the refrigerators, resulted in Dr. Paul involuntarily signing a letter of resignation.

Dr. Paul brought suit against the hospital for wrongful discharge. Included in the nine counts of Dr. Paul’s complaint were claims that the hospital was estopped from discharging him for taking the refrigerators, and that the discharge was defamatory. The trial court permitted only Dr. Paul’s estoppel claim to go to the jury. In response to special interrogatories, the jury found that Dr. Paul had permission from the supervisor of the supply room to take the refrigerators, that Dr. Paul reasonably relied upon that permission, that the hospital had not acted reasonably in determining that Dr. Paul had taken the equipment without permission, and that Dr. Paul had not resigned voluntarily. The jury followed its liability decision with a damage award, which was partially remitted by the trial judge.

Both parties appealed to the superior court. After a panel of that court affirmed the judgment below, the hospital successfully sought reargument. The superior court en banc affirmed the decision on the estoppel count, as well as the nonsuit of seven of Dr. Paul’s other claims. The superior court further determined that Dr. Paul’s defamation claim had been improperly dismissed, and that he should have had an opportunity to show the jury that his dismissal, which was based upon an untrue allegation of theft, supported the cause of action. The supreme court granted allocatur to consider the hospital’s arguments that Dr. Paul could not state claims for promissory estoppel and defamation, while it denied Dr. Paul’s allocatur petition with respect to his nonsuited claims.

Justice Papadakos’ majority opinion began by acknowledging the argument that the court’s earlier decision in Geary represented a breakthrough for employees in the recognition of limits to the doctrine of employment at will. He took pains, however, to indicate that this view of Geary was unwarranted. While conceding that Geary held that some exceptions to employment-at-will might exist, particularly when public policies are implicated, Justice Papadakos observed that the court had not comprehensively defined those limits. The opinion approvingly cited language from Geary which reaffirmed the employment-at-will presumption, and noted that the Geary court had answered in the negative the "central question" of "whether the time has come to impose judicial restraints on an employer’s power of discharge".

Justice Papadakos further commented that Geary had been reaffirmed in Clay. He quoted that portion of Clay in which the majority had stated that exceptions to the rule of employment at will had been recognized in "only the most limited of circumstances," such as public policy violations. Most surprisingly, Justice Papadakos also quoted Justice Nix’s statement in Clay that Geary had not recognized any cause of action for wrongful discharge.
Having reviewed Geary and Clay, the court stated that the analysis of those two cases was dispositive in the case before it. The court concluded that "[t]he doctrine of equitable estoppel is not an exception to the employment-at-will doctrine. An employee may be discharged with or without cause, and our law does not prohibit firing an employee for relying on an employer's promise." Nevertheless, neither the majority nor the concurrence reached the merits of the defamation issue. It concluded that Dr. Paul had not properly preserved the issue, since he made only a "boilerplate" assertion of error in his post-trial filing, which failed to satisfy the requirements of Pa. R. Civ. P. 227.1. In a concurring opinion, Justice Zappala opined that Dr. Paul had adequately preserved the defamation issue but that the nonsuit of the claim by the trial court should be affirmed because Dr. Paul's evidence did not show a communication of the allegedly defamatory statement.

Paul, then, appears to resolve the issue of whether an employee can bring a promissory estoppel claim for wrongful discharge based upon oral representations. It clearly vacates the superior court's opinion on the defamation issue, without endorsing or rejecting that discussion. Paul is equally significant, however, for its repercussions on other wrongful discharge theories, which are discussed in the next section.

III. WRONGFUL DISCHARGE IN PENNSYLVANIA AFTER PAUL

A. The Present and Future of the Public Policy Violation Tort

Clay indicated, by a four-to-one decision of the court, that the public policy violation tort is actionable in Pennsylvania. In so doing, it confirmed the conclusion that had been reached by the superior court after Geary. Despite Justice Nix's contrary opinion in Clay, the superior court continued to recognize the public policy tort. In Field v. Phila. Elec. Co., the superior court relied upon Clay to find that a public policy violation claim had been pled, and further that such actions had been recognized in Geary.

By quoting Justice Nix's opinion in Clay as part of its reasoning in Paul, however, the supreme court casts some doubt upon the viability of the public policy tort. The court's reliance in Paul on Justice Nix's Clay opinion appears implicitly to endorse it. Moreover, the positions on this issue of Justice Cappy, who was elected to the Court after the Paul decision, and Justice Montemuro, who was appointed after Justice McDermott's death, are still unknown.

Nevertheless, a repudiation of the public policy theory by the supreme court seems unlikely. Doing so would represent a retreat from the very recent decision in Clay, in which Justices Flaherty and Larsen both paid homage to Geary as creating the cause of action. The most plausible explanation for the citation in Paul to Justice Nix's opinion regarding the public policy tort is that Justice Nix, who joined the opinion of the
majority in *Paul*, wished to have his view acknowledged. Under these circumstances, advocates should not neglect to make public policy violation claims in anticipation of a possible reversal of *Clay*.\(^2\)

**B. The Present and Future of the Employee Handbook Claim**

*Morosetti* appears to do for employee handbook claims what *Clay* did for public policy violation claims: a majority of the supreme court, in *dictum*, indicated that contract claims based upon employee handbooks can be actionable.\(^9\) Justice Larsen left no doubt that he will recognize an employee handbook claim for wrongful discharge.\(^4\)

As noted above, however, Justice Zappala explicitly declined to endorse the majority’s pronouncement about the contractual effect of an employee handbook. In so doing, Justice Zappala at the least reserved his comment on the issue.\(^9\) In addition, Justice Zappala’s opinion serves as a reminder that *Morosetti* did not conclusively resolve the issue of whether the court will permit a cause of action to be stated for wrongful discharge based upon an employee handbook, since *Morosetti* dealt with severance benefits and did not rely upon an employee handbook.

The status of the employee handbook, like that of the public policy tort, must be reexamined in light of *Paul*. While employee handbooks are not mentioned in *Paul*, the decision did deal with promissory estoppel—the underlying contract theory upon which several courts have premised employee handbook claims.\(^6\) The opinions of the superior court in *Paul* and *Banas* illustrate this relationship between the two theories.

In *Banas v. Matthews Int’l Corp.*,\(^7\) the employee handbook claim, rejected by the *en banc* superior court, had been framed as a promissory estoppel theory. In that case, the plaintiff argued that he was wrongfully discharged for doing what he had been given permission to do: to make a gravestone for himself in conformity with the policy contained in his employee handbook.\(^8\) Dr. Paul, of course, made a similar claim successfully in the superior court—that he had been fired for removing hospital equipment which he had orally been given permission to take. Both the concurrence and the dissent of the superior court in *Paul* rejected attempts by the majority to distinguish *Banas* and stated that *Banas* had effectively been overruled.\(^9\) Yet because the legal theories of *Banas* and *Paul* are virtually indistinguishable, the supreme court’s conclusion in *Paul* that the plaintiff could not assert a cause of action for promissory estoppel must be construed as approving the result reached in *Banas*.\(^10\) No meaningful distinction can be drawn between promises arising orally or through a course of conduct and promises written in employee handbooks. The irrelevance of any such distinction is particularly clear in light of the court’s categorical rejection of promissory estoppel claims in *Paul*.\(^10\)

Despite the demise of the promissory estoppel theory, there are two doctrinal paths around *Paul* that preserve the viability of employee handbook claims. First, there is a difference between promissory estoppel claims based upon a specific promise not to
discharge for particular reason,\textsuperscript{102} and promissory estoppel claims resting on a general promise not to terminate an employee except for "just cause." In \textit{Banas}, for instance, the majority opinion indicated that the latter form of promissory estoppel claim might state a claim for violating an employee handbook, despite the court's rejection of the \textit{Paul} variety of promissory estoppel.\textsuperscript{103} Even though the supreme court used unequivocal language in \textit{Paul} to reject promissory estoppel claims in employment, the court's own precedent creates an exception for promissory estoppel claims for employment of a certain duration.\textsuperscript{104} Thus, it is reasonable to expect that the supreme court will permit a plaintiff to prevail on a promissory estoppel theory if the handbook contained a "just cause" provision.

Second, employee handbook claims have routinely been accepted under an alternative contract theory; namely that of unilateral contract. This doctrine holds that a contract has been created when the terms of an offer provide for acceptance by performance and performance has been rendered.\textsuperscript{105} In her dissent in \textit{Banas}, Judge Beck suggested that a unilateral contract is created when the employer's offer of conditions of employment in the form of an employee handbook is accepted by the employee by beginning (or continuing) to work for the employer.\textsuperscript{106} The majority of states which have acknowledged the employee handbook claim have relied upon the unilateral contract analysis.\textsuperscript{107}

For the Pennsylvania Supreme Court to find that no wrongful discharge claim is created by an employee handbook, it must decide against the enormous weight of authority in other states which accept such a cause of action almost without exception.\textsuperscript{108} Given certain signs of disfavor toward wrongful discharge causes of action appearing in \textit{Paul}, the court may, in fact, be willing to take such a singular position. But, as \textit{Morosetti} can be reconciled with \textit{Paul} under the alternate contract theories upon which an employee handbook claim can be based, the employee handbook claim continues to be viable.\textsuperscript{109} The supreme court is expected to resolve this issue if an opportunity is presented.\textsuperscript{110}

C. \textit{The Repercussions of the Paul Decision}

The supreme court set out the primary holding of \textit{Paul} in clear and unequivocal terms: "[t]he doctrine of equitable estoppel is not an exception to the employment-at-will doctrine."\textsuperscript{111} This holding is important because it conflicts with prior decisions permitting the assertion of contract claims by employees without a formal written contract. More significant, however, is the lack of receptivity to wrongful discharge claims communicated by the four justices joining in the opinion.

Simply put, the \textit{Paul} opinion expresses unwillingness by four members of the court to favorably receive wrongful discharge actions.\textsuperscript{112} The court's narrow reading of \textit{Geary} greatly contributes to this perception, by implicitly repudiating \textit{Geary}'s role as a landmark wrongful discharge case. As discussed above, an examination of \textit{Geary} reveals that it has played a pivotal role within the context of the development of the
public policy tort in Pennsylvania and other states. The court’s reading of *Geary* is also overbroad. The court concluded that *Geary* is dispositive on the question of whether an employee can be fired for relying upon an employer’s promise. While the opinion presented only the theories of specific intent to harm and the public policy tort, it did not address any contract cause of action, nor did it broadly repudiate theories not before the court. Contrary to the court’s reasoning, the result in *Paul* was not required by *Geary*.

The court’s inhospitality to wrongful discharge actions is also conveyed through its manner of disposing of the defamation claim in *Paul*. Rather than reaching the merits of the claim, the court vacated the superior court’s decision on the ground that the issue had not been properly preserved. The court characterized Dr. Paul’s post-trial submission of error as “boilerplate.” The court’s unbending waiver analysis is particularly remarkable because waiver was not among the employer’s issues in its allocutus petition, nor was it argued by the employer in its briefs. By this disposition, the court undermined the precedential authority of the superior court’s opinion without reaching the merits.114 Had it reached the merits of Dr. Paul’s claim, the court would have been forced to acknowledge its prior holding that an employer can defame a former employee in a communication regarding the reasons for the employee’s separation.115

The most disturbing aspect of *Paul* is the court’s manner of resolving the promissory estoppel issue. The perfunctory rejection of that claim by incantation of *Geary* is not, however, the only weakness in the court’s analysis. The opinion is also wholly silent on the inconsistency between its holding and its prior decisions that recognized promissory estoppel actions brought by employees. In *Berliner v. Bee Em Manufacturing*,117 the court held that employees who were led to believe that they would hold their jobs as salesmen through the next sales season could prevail by establishing the elements of promissory estoppel. Earlier, the court had affirmed the conclusion of the superior court that an employment relationship could guarantee employment for a “reasonable” time if the employee supplied “sufficient additional consideration” over and above his or her services as an employee.118 The *Paul* court did not attempt to reconcile either decision with its broad holding.

Finally, the court did not grapple with the implications of its decision that the employment at will rule bars a contract claim (promissory estoppel). From the beginning, the court conceived of the employment at will doctrine as a presumption to be used when explicit contractual terms were absent. This presumption could be rebutted by a demonstration of different contractual terms by the parties. By categorically rejecting the promissory estoppel claim, the court, in effect, prohibits the rebuttal of the presumption by an aggrieved employee. The court has transformed the presumption into an immutable principle and, in so doing, has lost sight of the original understanding of the presumption of employment at will.
The Pennsylvania Supreme Court’s sudden involvement in wrongful discharge issues is notable because of its long absence from that field of state law. Its trilogy of employment-related decisions, however, is far from the last word on these issues, given the important questions which remain. For millions of Pennsylvania workers who are not covered by collective bargaining agreements, the supreme court’s future wrongful discharge decisions will determine whether employees will be entirely at the mercy of their employers’ termination decisions.
1. A "presumption" is a legal inference in favor of a particular fact, which can be rebutted by evidence to the contrary. BLACK'S LAW DICTIONARY 1185 (6th ed. 1990).

2. See, e.g., Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) (quoting Geary v. United States Steel, 319 A.2d 174, 176 (Pa. 1974), for the proposition that "[a]bsent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason").


4. The presumption of employment at will is also inapplicable if the employee is dismissed from employment in a manner that violates constitutional or statutory law. See, e.g., Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (public employees may not be dismissed for exercising free speech rights protected by the First Amendment to the United States Constitution); 42 U.S.C. §2000e-2(a)(1) (Title VII of the Civil Rights Act of 1964, prohibiting an employer from discharging any individual because of his or her race, color, religion, sex or national origin).

5. A "collective bargaining agreement" is a contract between an employer and a labor union which regulates the terms and conditions of employment. BLACK'S LAW DICTIONARY, supra note 1, at 263.


7. See, e.g., Henry v. Pittsburgh & Lake Erie R.R., 21 A. 157, 157 (1891) (holding that "an individual ... may discharge an employee with or without cause, at pleasure, unless restrained by some contract . . . ").

8. The concept of "tort" has eluded easy definition. One authoritative treatise has made the following attempt: "So far as there is one central idea, it would seem that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." W. PAGE KEETON ET AL., PROSSER AND KEeton ON THE LAW OF TORTS §1 (5th ed. 1984).

9. A "contract" is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS §1 (1981).

10. The three basic common law doctrines for wrongful discharge allow for recovery where: (1) an employer dismisses an employee in violation of promises made orally or through a course of performance or in employee policies or handbooks; (2) the discharge violates an identifiable public policy ("public policy tort"); or (3) the termination breaches a covenant of good faith and fair dealing implied in all contracts as a matter of law. Employees have also recovered damages for terminations under the tort theories of intentional interference with contractual relations, intentional infliction of emotional distress, fraudulent misrepresentation, defamation, and invasion of privacy. 1 H. Perritt, supra note 3, §§ 1.2, 5.1 (3d ed. 1992).

11. Prosser and Keeton note that "[n]ew and nameless torts are being recognized constantly." They also meticulously trace the development of "products liability" of those who supply goods and products which cause harm to purchasers, users and bystanders. KEeton et. al., supra note 8, §§ 1 & 95-104A.


14. The doctrine of "promissory estoppel" has been explained as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS §90 (1981).


17. 21 A. 157 (Pa. 1891).

18. See id. at 157.

19. Id. (emphasis added).


22. Id. at 176.

23. See id. at 175.

24. See id. at 176.

25. Id.

26. See id. at 177 (citing Sommer v. Wilt, 4 S. & R. 19 (1818) (abuse of process), and Wheatley v. Baugh, 25 Pa. 528 (1855) (deprivation of water rights)).

27. Id.

28. Id. at 178.

29. See id. at 178-79.

30. See id. at 180.

31. Id. at 180 n.16 (discussing Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. App. 1959) and Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973)).

32. See id. at 180.

33. Id.

34. Id.
35. *Id.* at 182.
36. *Id.* at 185.


52. See id. at 1158 ("[Dr. Paul's] termination could have served as an injury to reputation and could have been subject to a defamatory construction.").


54. 43 PA CONS. STAT. § 951 et seq.

55. The PHRA requires that a charge of discrimination be filed with the PHRC for investigation as a prerequisite to a civil action for discrimination based upon the Act. See 43 PA. CONS. STAT. §962(b) & (c).

56. See Clay, 559 A.2d at 921.

57. See id. at 918.

58. See id. at 922.

59. Id. at 923.

60. Id.

61. See id.

62. Id. at 923-24.

63. See id. at 924.

64. 564 A.2d 151 (Pa. 1989).

65. The court had permitted an appeal in a prior employee handbook case where the employee claimed that he had been discharged in violation of the company's manual. Reilly, 532 A.2d at 1212 (Pa. Super. 1987), allocatur granted, 549 A.2d 137 (Pa. 1988). However, the parties settled that case prior to decision.

66. See Morosetti, 564 A.2d at 152.

67. See id.

68. Id. (footnotes omitted).

69. See id. at 152-53.

70. Id. at 152.
71. Id. at 153 (emphasis added).


73. Morosetti, 564 A.2d at 153.

74. See id. at 154.

75. See id. at 155.


78. See Morosetti, 564 A.2d at 156. Justice Larsen also rejected the majority's suggestion that because of the re-employment, there had been no severance. He distinguished the predecessor and successor employers as completely separate entities, and noted that the successor had altered the benefits the employees had been promised prior to the change in employment. See id. at 156.


80. See id. at 346-47.

81. See id. at 347 & n.2.

82. See id.

83. Virtually all cases heard by the Pennsylvania Supreme Court are before the court at its discretion, rather than by right. Traditionally, a discretionary appeal was called "allocatur," although the nomenclature now is "allowance of appeal." 42 Pa. C.S.A. §724(a); Pa. R. App. P. 1112(a).

84. See Paul, 569 A.2d at 347-48.

85. Only four Justices participated in the decision, Justices Larsen and McDermott having recused themselves at oral argument. Justice Cappy, who was elected to the Court in late 1989, was not seated at the time of oral argument.

86. Paul, 569 A.2d at 348.

87. See id.

88. Id.

89. The term "boilerplate" is "used to describe standard language in a legal document that is identical in instruments of a like nature." BLACK'S LAW DICTIONARY, supra note 1, at 175. The term generally means that the document in question used a generic formulation rather than a specific description of the legal issue before the court.

90. Paul, 569 A.2d at 349.

92. Since Paul was decided, the superior court has not intimated that the public policy violation cause of action no longer exists. To the contrary, its most recent opinion on the subject indicates that "[t]he public policy exception to the at-will doctrine of employment has been consistently recognized in Pennsylvania." Rutherford v. Presbyterian Univ. Hosp., 612 A.2d 500, 506 n.4 (Pa. Super. 1992). But despite this acknowledgment of the viability of the doctrine, the superior court has still rejected every claim that has come before it as not citing an appropriate public policy which would give rise to a cause of action. Beach v. Burns Int'l Sec. Servs., 593 A.2d 1285 (Pa. Super. 1991) (employee discharged for refusing to sign waiver of jury trial presented to him at orientation); Burkholder v. Hutchison, 589 A.2d 721 (Pa. Super. 1991) (public policy could not be implicated by free speech rights of third person, i.e., employee's husband); Booth v. McDonnell Douglas Truck Servs., 585 A.2d 24 (Pa. Super. 1991), allocatur denied, 600 A.2d 319 (Pa. 1991) (employee fired to prevent him from collecting sales commissions); Hershberger v. Jersey Shore Steel Co., 575 A.2d 944 (Pa. Super. 1991) (no clear mandate of public policy violated by discharge in reliance on drug screen not confirmed by alternative scientific screening).

However, despite continuing to recognize the public policy violation tort, the superior court has concluded that Clay and Paul have brought about the demise of the "specific intent to harm" theory as an independent cause of action. The court has held that a complaint which purports to allege a discharge with specific intent to harm will not state a cause of action unless it pleads a violation of public policy. Rutherford, 612 A.2d at 505-6; Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1026-27 (Pa. Super. 1991), allocatur denied, 600 A.2d 539 (Pa. 1991).

The United States Court of Appeals for the Third Circuit has been even more definitive than the superior court in confirming the continued existence of the public policy exception. Noting that Clay and Paul "cast some doubt" on its previous interpretations of Geary to have created a public policy exception, the court nevertheless concluded that it was bound by its previous holdings, in the absence of a clear statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in Pennsylvania law. Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1343 (3d Cir. 1990), cert. denied, 111 S.Ct. 1597 (1991). The Third Circuit recently reiterated that no such clear statement of evidence to the contrary has changed its interpretation of Geary. Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 617 (3d Cir. 1992).

93. Morosetti, 564 A.2d at 152.

94. See id. at 155 (Larsen, J., dissenting).

95. The motivation for Justice Zappala's concurrence is unclear. He may have been acting consistently with his concurrence in Clay, where he took issue with what he perceived as the majority's unnecessary statement about whether a public policy preventing sexually discriminatory discharges could arise under the Equal Rights Amendment. On the other hand, Justice Zappala may have implicitly signalled his disagreement with the dicta of the majority. His concurrence in Paul is worth noting because, in contrast to Clay, Justice Zappala addresses an issue which could be avoided. Instead of joining his colleagues' disposition of the defamation issue on waiver grounds, and sidestepping the issue, Justice Zappala indicated that the claim failed on the merits.


98. See id. at 647.

100. Two superior court cases decided subsequent to Paul have apparently reached this conclusion, citing Paul as prohibiting promissory estoppel claims based upon language in handbooks which did not generally promise not to dismiss the employee except for just cause. See Ruzicki v. Catholic Cemeteries Assoc., 610 A.2d 495, 498 (Pa. Super. 1992); Vincent v. Fuller Co., 582 A.2d 1367 (Pa. Super. 1990), allocatur granted, 592 A.2d 1304 (Pa. 1991).

101. Paul, 569 A2d. at 348 ("The doctrine of equitable estoppel is not an exception to the employment at-will doctrine.")

102. This was true in Paul, where the plaintiff alleged that the hospital was prevented from dismissing him only for exercising the permission he had received from the storeroom superior.


There are only two viable cases in courts of last resort which have refused to find employee handbooks enforceable under certain circumstances. See Heideck v. Kent Gen. Hosp., 446 A.2d 1095 (Del. 1982); Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988).

109. One recent superior court decision unequivocally held that an employee handbook will be construed to be an enforceable contract if a reasonable employee would interpret it as evidencing the employer's intent to supplant the presumption of an at-will relationship. See Ruzicki, 610 A.2d at 497. But as in the public policy violation area, the court has routinely found that the cases before it did not raise legally sufficient employee handbook claims. See Rutherford, 612 A.2d at 504 (no claim where manual was never distributed to the employees and contained a disclaimer that it was not intended as a legal contract); Ruzicki, 610 A.2d at 498 (no cause of action even though employee was not afforded progressive discipline as set forth in the handbook, where handbook contained
disclaimer); Vincent, 582 A.2d 1370-71 (Pa. Super. 1990) (no evidence that policy was part of definite offer at time of hire or later caused plaintiff to continue employment); Curran v. Children's Servs. Center, 578 A.2d 8, 11 (Pa. Super. 1990), allocatur denied, 585 A.2d 468 (Pa. 1991) (no claim where handbook gave protections to permanent employees, but plaintiff was a temporary employee at time of termination).

110. The supreme court had granted allocatur in such a case prior to deciding Morosetti, but that case was settled prior to decision. See supra note 58 and accompanying text.

111. Paul, 569 A.2d at 348.

112. Indeed, the court's aversion to wrongful discharge was foreshadowed by its refusal to grant Dr. Paul's petition for allocatur on his nonsuited claims while granting his employer's petition. See Paul, 553 A.2d 969 (Pa. 1988) (granting the employer's petition); 554 A.2d 510 (Pa. 1988) (denying the plaintiff's petition).

113. See id.

114. Paul, 569 A.2d at 349.

115. See id.


117. 119 A.2d at 66 (Pa. 1956).


119. It is notable that the "additional consideration" theory has fared best of all wrongful discharge theories in superior court since the supreme court's three decisions were rendered. In Scullion v. Emeco Indus., Inc., 580 A.2d 1356 (Pa. Super. 1990), allocatur denied, 592 A.2d 45 (Pa. 1991), the court affirmed a jury verdict on the ground that the plaintiff's evidence of additional consideration was sufficient to rebut the at-will presumption. The plaintiff's evidence consisted of his refusing an increased salary from his previous employer, selling his house in California, moving his family to Pennsylvania, purchasing a building lot, and receiving generous retirement benefits. See id. at 1359. The jury's verdict was affirmed over a dissent which argued that the supreme court's holding in Paul "is indicative of a decided preference to leave this matter in the hands of the Legislature and not the courts." Id. at 1362 n.1 (Olszewski, dissenting).

In Cashdollar v. Mercy Hosp., 595 A.2d 70 (Pa. Super. 1991), the superior court again concluded that the jury verdict in favor of the plaintiff was supported by sufficient evidence of additional consideration. In that case, the evidence of additional consideration consisted of the employee's giving up secure, well-paying employment, uprooting his pregnant wife and young child to move from Virginia to Pittsburgh, selling his home, and being the target of the employer's persistent efforts to hire him. See id. at 73-4 and n.2.