EMPLOYER AND EMPLOYEE—EMPLOYEE AT WILL—DISCHARGE OF EMPLOYEE AT WILL ACTIONABLE UNDER PUBLIC POLICY EXCEPTION—*Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

Although recent court decisions have modified the nineteenth century principle that an employer's right to discharge was absolute,[1] employees at will still remain vulnerable to discharges for any or no reason.[2] Employees have been protected from such arbitrary discharges in areas where labor unionization[3] and statutory mandates[4] have provided guidelines which limit an employer's plenary power to dismiss. In addition, a cause of action for wrongful discharge which permits an injured party to recover damages by demonstrating a breach of contract or tort duty[5] has been recognized in various

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[1] Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-19 (1967) [hereinafter cited as Blades]. More than just judicial modification of the doctrine has taken place; statutory reformation and movements in labor organizations have contributed to the doctrine's demise. *See generally* Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter cited as *Protecting Employees*].

[2] Employment at will is a common law rule which provided "that an employer, unless otherwise limited by an express term in the employment agreement, could discharge an employee for any reason whatsoever without legal liability." Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L. J. 1435, 1435 (1975) [hereinafter cited as *Abusive Discharge*]. New Jersey courts have generally stated that where no definite term is indicated in a contract of employment, the contract is deemed to be at will and subject to termination with or without cause. Hogan v. Bergen Brunswig Corp., 153 N.J. Super. 37, 378 A.2d 1164 (App. Div. 1977).

A well recognized pronouncement of the at will rule was made in the nineteenth century by a Tennessee court which refused to intervene whether the termination had been "for good cause, for no cause or even for cause morally wrong." Payne v. Western Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Walters, 132 Tenn. 527, 179 S.W. 134 (1915).

[3] *See* Blades, *supra* note 1, at 1410. During the twentieth century there has been an evolution of collective bargaining agreements which provide for "just cause" discharges and use of internal grievance committees to settle disputes. *Abusive Discharge*, *supra* note 2, at 1448-50.

[4] *See Abusive Discharge*, *supra* note 2, at 1446-97. Federal and state statutes can operate to limit an employer's discretion in his or her business. *See, e.g.*, National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-68 (1979); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1979); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1979). State codes provide similar protection for employees. *See, e.g.*, CAL. LAB. CODE § 1420.1(a) (West Cum. Supp. 1980) (age discrimination); N.J. STAT. ANN. § 34:15-39 (West Cum. Supp. 1980-1981) (workers' compensation); PA. STAT. ANN. tit. 43, § 955 (Purdon Cum. Supp. 1980-1981) (civil rights).

[5] *See Protecting Employees*, *supra* note 1, at 1817. An abusive or retaliatory discharge gives rise to an action in tort based on a breach of the duty not to terminate in bad faith. *Id.* This duty rises from the contractual relationship of the parties. *Id.*

The breach of contract cause of action occurs when the duty to terminate only in good faith has been violated. *Id.* This duty is a "higher standard that might conceivably be extended to a tort duty or implied contract obligation to discharge only for 'just cause' as in collective bargaining agreements." *Id.* at 1840.

jurisdictions.[6] Persons suing under these theories rely on public policy considerations[7] to prove their employer's alleged wrongful actions. The New Jersey supreme court, however, has upheld the common law doctrine pertaining to discharge of at will employees. Nevertheless, the court offered plaintiffs a potential right to recover if a clear mandate of public policy has been violated.[8] In a case representative of the trend concerning wrongful discharge recovery, *Pierce v. Ortho Pharmaceutical Corp.*,[9] the Supreme Court of New Jersey reinstated the trial court's summary judgment and concluded that the plaintiff had failed to state a claim upon which relief could be granted.[10]

Dr. Grace Pierce, a medical doctor, began working for Ortho Pharmaceutical Corporation in 1971[11] under no fixed contractual terms—an employee at will.[12] She became Director of Medical Research/Therapeutics in March of 1973[13] and remained in that position until her departure from Ortho in June of 1975.[14] The events which induced Dr. Pierce's resignation[15] caused her to file suit for wrongful discharge.

In the early months of 1975, Dr. Pierce was working on the development of loperamide,[16] a liquid drug to be used by infants,

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[6] Jurisdictions which have recognized an action for wrongful discharge include: California, Colorado, Massachusetts, New Hampshire, Oregon, Pennsylvania, West Virginia. *See* note 97 *infra*.

[7] *See* Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 786-99 [hereinafter cited as *"Blows the Whistle"*].

[8] Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

[9] 84 N.J. 58, 417 A.2d 505 (1980) (6-1 decision) (Pashman, J., dissenting).

[10] *Id.* at 65, 417 A.2d at 508.

[11] *Id.* at 62, 417 A.2d at 506. "Ortho specializes in the development and manufacture of therapeutic and reproductive drugs." *Id.* Dr. Pierce started as an Associate Director of Medical Research. *Id.*

[12] *Id.* Except for a secrecy agreement, no contract was signed by Dr. Pierce, nor was her employment for a term of definite duration. *Id.*

[13] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 337, 399 A.2d 1023, 1024 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980). The therapeutics division is one of three sections of the Medical Research Department. *Id.* "Her primary responsibilities were to oversee development of therapeutic drugs and to establish procedures for testing those drugs for safety, effectiveness and marketability." 84 N.J. at 62, 417 A.2d at 506.

[14] 84 N.J. at 63, 417 A.2d at 507. In her letter of resignation, Dr. Pierce stated, "I am now or soon will be demoted." *Id.* at 64, 417 A.2d at 507. For a discussion of coerced resignations as "constructive discharges" for the purposes of a wrongful dismissal cause of action, see Blades, *supra* note 1, at 1406.

[15] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024-25 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980).

[16] 84 N.J. at 62, 417 A.2d at 506. Dr. Pierce was the sole medical doctor on the project team responsible for developing loperamide, a liquid drug for treatment of acute and chronic diarrhea in infants, children, and elderly persons. *Id.*, 417 A.2d at 506-07.

children, older persons, and those who could not take solid medication.[17] The formula contained a high level of saccharin[18] and the project team determined it to be "unsuitable for use in the United States."[19] By late March, however, they decided to continue with the development of the drug.[20] Dr. Pierce strongly opposed this course of action from both a medical and ethical standpoint[21] and met with her immediate supervisor[22] to inform him of her disagreement. Shortly thereafter she was removed from the loperamide

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[17] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 337, 399 A.2d 1023, 1024 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980).

[18] 84 N.J. at 62, 417 A.2d at 507. The supreme court recognized that

> Although the concentration was consistent with the formula for loperamide marketed in Europe, the project team agreed that the formula was unsuitable for use in the United States. An alternative formulation containing less saccharin might have been developed within approximately three months.

Id.

The appellate court was more specific in its description of the saccharin content of loperamide. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979). The opinion stated that the "high concentration of saccharin [was] apparently 44 times higher than that which is permitted by the Food and Drug Administration in 12 ounces of an artifically sweetened soft drink." *Id.* at 337, 399 A.2d at 1024.

[19] 84 N.J. at 62, 417 A.2d at 507. The project team unanimously made this decision at a meeting on March 6, 1975. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 337, 399 A.2d 1023, 1024 (App. Div. 1979).

[20] 84 N.J. at 62, 417 A.2d at 507. Dr. Pierce opposed the team's decision. *Id.* The team had received a directive from the marketing division of Ortho and "it finally acceded to the demands of management." Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979).

The ramifications of continuing the project were perceived differently by the supreme and the appellate courts. 84 N.J. at 74, 417 A.2d at 513; Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979). The appellate court interpreted the decision to proceed with the development of the drug to mean proceeding with clinical testing. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979). The supreme court noted that no such testing could begin without the approval of the Food and Drug Administration (FDA). 84 N.J. at 62, 417 A.2d at 507. Ortho would have to file for an investigational new drug application (IND). *Id.* The court noted that FDA approval of new drugs is required before clinical testing of humans. *Id;* 21 U.S.C. § 335 (1972); 21 C.F.R. §§ 310.3-310.5 (1980).

[21] 84 N.J. at 62, 417 A.2d at 507. "[A]s the only medical member on the team and [because it was] her responsibility for recommending the drug for clinical use, [Dr. Pierce] maintained her opposition to the high saccharin formula, especially in light of indications that an alternative formula would soon be available." Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979).

The controversy over the possible carcinogenic attributes of saccharin caused Dr. Pierce to refuse to submit the drug to clinical testing. *Id.* She felt the Hippocratic Oath required her refusal. *Id.*

[22] 84 N.J. at 63, 417 A.2d at 507.

project.[23] At a meeting with her supervisor the next month,[24] Dr. Pierce received criticism of her professional performance[25] and felt that she was being demoted because of her opposition to continuing research on the loperamide formula.[26] Unable to work under the circumstances, she submitted a letter of resignation which Ortho accepted.[27] Dr. Pierce then filed suit against Ortho to recover damages resulting from the alleged constructive discharge.[28]

Ortho moved for summary judgment on two theories.[29] The corporation first asserted that the wrongful discharge action should be barred because Dr. Pierce resigned.[30] The trial court denied this part of the motion on the ground that there was a question of fact as to whether Ortho had induced her resignation.[31] Summary judgment was granted, however, on the alternative ground that Dr. Pierce, as an employee at will, could be "terminated at the will of . . . [the] employer . . . with or without justification, in the absence of a

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[23] *Id.* Dr. Pasquale, her immediate supervisor, directed Dr. Pierce to choose other projects. *Id.* After further discussions with him, however, Dr. Pierce "was certain [that] the offer to work on other projects was not genuine and the intent was that she resign." Brief for Plaintiff-Appellant at 13, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). Furthermore, Dr. Pierce's refusal to work on the project was on that specific formula, not on loperamide in general. *Id.* at 6.

[24] 84 N.J. at 63, 417 A.2d at 507. Dr. Pierce had taken a vacation in Finland and met with Dr. Pasquale after she returned on June 16, 1975; she did not, at that time, choose another project. *Id.*

[25] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024-25 (App. Div. 1979).

[26] *Id.* The appellate court stated:

> He advised her that notice of this demotion would be posted. She was also told that she was considered nonpromotable, irresponsible and lacking in judgment and that she had exhibited unacceptable productivity, inability to work with marketing people and failure to behave as a Director.

Id.

[27] 84 N.J. at 63, 417 A.2d at 507. Part of the letter of resignation read:

> Upon learning in our meeting, June 16, 1975, that you believe I have not 'acted as a director,' have displayed inadequacies as to my competence, responsibility, productivity, inability to relate to the Marketing Personnel, that you, and reportedly Dr. George Braun and Mr. Verne Williman consider me to be non-promotable and that I am now or soon will be demoted, I find it impossible to continue my employment at Ortho.

Id. at 63-64, 417 A.2d at 507 (quoting letter).

[28] 84 N.J. at 64, 417 A.2d at 508. The complaint, based on principles of contract and tort law, alleged, *inter alia*, damage to professional reputation, interruption of career, monetary loss, physical and mental distress and breach of contract and tort duties. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d at 1025 (App. Div. 1979).

[29] 84 N.J. at 64, 417 A.2d at 508.

[30] *Id.*

[31] *Id.* This determination was not challenged on appeal. Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1025 (App. Div. 1979).

contractual or statutory provision to the contrary."[32] The appellate division reversed and remanded for a trial on the merits before deciding if a violation of public policy warranted a judicial exception to the common law rule.[33]

The Supreme Court of New Jersey in *Pierce*[34] reversed the appellate division and reinstated the summary judgment granted to defendant Ortho by the trial court.[35] In discussing the propriety of summary judgment, the court found that even by reading all the allegations most favorably to Dr. Pierce, she had failed to allege facts that would sustain an action for damages for termination of her employment.[36] The majority acknowledged the significant policy considerations presented but stated that the record before it was

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[32] *Id.* at 339, 399 A.2d at 1025. The trial court stated:

> The general rule is that an employment at will may be terminated at the will of either employer or employee, with or without justification, in the absence of a contractual or statutory provision to the contrary. New Jersey courts have consistently adhered to this rule. They hold that no cause of action lies where an employee for an indefinite term is discharged, whether or not there was justification for such discharge.
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> Thus even if the facts could be construed to indicate that the plaintiff was constructively discharged, the defendant nevertheless had the right to terminate her employment for any reason whatsoever.

Transcript of decision of motion January 6, 1978, Pierce v. Ortho Pharmaceutical Corp., Superior Court of New Jersey (Law Div. Somerset County), at 7-8.

[33] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 340-42, 399 A.2d 1023, 1025-27 (App. Div. 1979). The appellate court cited to jurisdictions which acknowledge an exception to the at will employment rule. *Id.* at 340-41, 399 A.2d at 1026. The court, recognizing that this would be a departure from the well settled law in New Jersey, took care to protect the employer's interests by suggesting that if such an exception were to be adopted, "it must be tightly circumscribed so as to apply only in cases involving truly significant matters of . . . public policy." *Id.* at 342, 399 A.2d at 1026. The court firmly stated that the exception must be developed on a case by case basis. *Id.*

[34] 84 N.J. 58, 417 A.2d 505 (1980).

[35] *Id.* at 65, 417 A.2d at 508. The court acknowledged that the trial court had properly denied summary judgment on the theory that "resignation bars an action for wrongful discharge." *Id.* *See* note 14 *supra*. In granting summary judgment on the at will theory the majority refused to defer a decision because all relevant facts were before the court. 84 N.J. at 65, 417 A.2d at 508.

[36] *Id.* N.J. Ct. R. 4:46-2 provides in part:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Id.

sufficient to provide for a determination of the case.[37] After reviewing significant societal trends and case law from other jurisdictions[38] the court took the opportunity to enunciate a public policy limitation on an employer's absolute right to discharge and simultaneously recognized a need to limit the scope of such an exception in order to protect employers.[39] The court formulated its standard, holding "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."[40]

Justice Pollock, writing for the majority, concluded that Dr. Pierce did not meet the clear mandate requirement and summarily dismissed her claim.[41] In discussing the cause of action, the court stated that a plaintiff suing for wrongful discharge may base his or her complaint on contract or tort principles.[42] According to the court, the action in contract is founded upon a "breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy."[43] The tort action "may be based on the duty of an employer not to discharge an employee who refused to perform an act that is a violation of a clear mandate of public policy."[44]

The motion for summary judgment could have been granted only if there were no genuine issues of material fact.[45] Assessing the cir-

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[37] 84 N.J. at 65, 417 A.2d at 508. Citing Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969), the court acknowledged that caution should be exercised in cases involving policy considerations. 84 N.J. at 65, 417 A.2d at 508. In *Jackson*, the plaintiff had contracted hepatitis from a blood transfusion and sued the hospital and blood banks involved. Jackson v. Muhlenberg Hosp., 53 N.J. 138, 139, 249 A.2d 65, 66 (1969). On appeal, after motions for summary judgment had been granted as to theories of strict liability and implied warranty, the court remanded so that "a complete record" could be made at trial. *Id.* The court stated that, "'[a] [m]aximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case.'" *Id.* at 142, 249 A.2d 65, 67 (1969) (quoting Public Serv. Comm'n v. Wycoff Co., 377 U.S. 237, 243 (1952)). For an interesting analysis of *Jackson*, see Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey*, 2 SETON HALL L. REV. 47 (1970).

The court feared, however, that excessive caution would undermine the principles of Judson v. People's Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954), the premier New Jersey case on summary judgment, which calls for "piercing the allegations of the pleadings to determine whether there are issues requiring disposition at trial." 84 N.J. at 65, 417 A.2d at 508. As such, the majority found the record before it to be adequate for a determination on the merits. *Id.*

[38] 84 N.J. at 67-70, 417 A.2d at 509-11.

[39] *Id.* at 71, 417 A.2d at 511.

[40] *Id.* at 72, 417 A.2d at 512. As possible declarations of public policy, the court included legislation, administrative regulations, rules and decisions, and judicial decisions. *Id.*

[41] *Id.* at 61, 417 A.2d at 506.

[42] *Id.* at 72, 417 A.2d at 512.

[43] *Id.* For an in-depth discussion of the implied contractual provision, see *Protecting Employees, supra* note 1, at 1836-44.

[44] 84 N.J. at 72, 417 A.2d at 512. Some commentators have espoused the virtue of a tort action over a contract action. *See, e.g.*, Blades, *supra* note 1, at 1421-24.

[45] N.J. Ct. R. 4:46-2.

cumstances surrounding Dr. Pierce's departure, the court found the material facts "uncontroverted."[46] Viewing the allegations most favorably to Dr. Pierce, the court would only recognize "a difference in medical opinions."[47] Because she did not specifically allege a contravention of a clear mandate of public policy, the majority concluded that she had failed to state a claim upon which relief could be granted.[48] Consequently, the summary judgment of the trial court was reinstated.[49]

In denying a cause of action to Dr. Pierce, the court expressed concern about the chaos which might occur if each doctor engaged in research were permitted to decide, as a matter of individual conscience, whether a project should be continued.[50] The majority differentiated between conduct based on personal morals and conduct based on ethics,[51] and held that the Hippocratic Oath, upon which Dr.

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[46] 84 N.J. at 73, 417 A.2d at 513. The court commented on the lack of allegations by Dr. Pierce that saccharin was harmful or that Ortho's procedures were unethical. *Id.* at 74, 417 A.2d at 513.

[47] *Id.* at 75, 417 A.2d at 513. Dr. Pierce's position was perceived by the court as a contention that Ortho had to accept her opinion. *Id.* "Dr. Pierce contends, in effect, that Ortho should have stopped research on loperamide because of her opinion about the controversial nature of the drug." *Id.*, 417 A.2d at 513-14.

[48] *Id.* at 76, 417 A.2d at 514.

[49] *Id.*

[50] *Id.* at 75, 417 A.2d at 514. *But see id.* at 84, 417 A.2d at 519 (Pashman, J., dissenting).

[51] *Id.* at 75, 417 A.2d at 514. The court stated:

> An employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals. An employee at will who refuses to work for an employer in answer to a call of conscience should recognize that other employees and their employer might heed a different call. However, nothing in this opinion shall be construed to restrict the right of an employee at will to refuse to work on a project that he or she believes is unethical.

Id.

While the attempt by the court to distinguish between conduct compelled by ethical considerations and an action motivated by an individual's personal morality is understandable, the proposed demarcation is not so easily drawn. As the language of the opinion states, an employer may "refuse to work on a project that he or she *believes* is unethical." *Id.* (emphasis added). It would be extremely difficult to sever personal interpretations from any oath or code of ethics in a profession. Indeed, the court, by its own language, granted latitude to an employee in guiding his or her actions by use of the subjective "believes." Surely a plaintiff, bringing personal experiences and values into each decision will slip into this gray area between morality and ethics where no ethical question is resolved absent moral considerations.

Certainly the court did not mean that ethics could exist in a vacuum. Yet the majority did not permit Dr. Pierce's personal interpretation of her ethical obligations to satisfy the clear mandate requirement. This response may be partially explained by the alleged facts of the case, *e.g.*, saccharin was controversial, but not necessarily harmful, *id.* at 75, 417 A.2d at 514; an IND was not yet filed with the FDA, and Dr. Pierce did not allege that the filing was unethical. *Id.* at 74, 417 A.2d at 513.

Pierce had relied as evidence of societal policy, did not contain a clear mandate of public policy.[52] It also found "[a]s a matter of law, there [was] no public policy against conducting research on drugs that may be controversial, but potentially beneficial to mankind, particularly where continuation of the research [was] subject to approval by the FDA [Food and Drug Administration]."[53] Noting the public interest in the development of drugs, the court found no reason to halt research unless it violated a clear public policy mandate.[54] According to the court, Ortho was entitled to use its best judgment in deciding whether to continue the project.[55] Dr. Pierce failed to demonstrate a public policy declaration to sufficiently counter that business interest.[56]

The balancing of employer and employee interests was fundamental to the court's reasoning.[57] Cognizant of both the history behind the at will rule and the economic and social considerations present in the twentieth century,[58] the court stressed the need for employees to be assured that their employment will not be terminated if they exercise their legal rights.[59] The court found it equally important that employers maintain the ability to run their businesses as they wish within the confines of public policy without fear of reprisal.[60]

The court chose to ignore the relevant distinction between research on a drug as performed by lay persons and that same research performed by a medical doctor (in fact, the only medical doctor on the team). Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 338, 399 A.2d 1023, 1024 (App. Div. 1979). The standard to which Grace Pierce, a professional, was held is higher than that imposed upon technicians or research assistants. As such, the ethical nature of the project itself would be subject to varying interpretations and, as Dr. Pierce alleged in her complaint,

> [the] course of action and behavior . . . was impossible for Plaintiff to follow because of the Hippocratic Oath she had taken [and] because of ethical standards by which she was governed as a physician . . . for the protection of the public in the field of health and human well-being, which schemes Plaintiff *believed* she should honor.

84 N.J. at 64, 417 A.2d at 508 (quoting complaint) (emphasis added).

[52] 84 N.J. at 74, 417 A.2d at 513.

[53] *Id.* at 76, 417 A.2d at 514. The majority concluded that "[t]o hold otherwise would seriously impair the ability of drug manufacturers to develop new drugs according to their best judgment." *Id.*

[54] *Id.* Although "[r]esearch on new drugs may involve questions of safety . . . [it] is [adequately] controlled by regulation through the FDA, liability in tort, and corporate responsibility." *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 71, 417 A.2d at 511.

[58] *See, e.g.*, Blades, *supra* note 1, at 1416-19; *Abusive Discharge, supra* note 2, at 1438-46.

[59] 84 N.J. at 73, 417 A.2d at 512.

[60] *Id.* at 71, 417 A.2d at 511. The court explained that by recognizing these two interests the public's interest in employment stability would be served. *Id.* at 73, 417 A.2d at 512.

The *Pierce* case presented special factors to be considered in the balancing process because Dr. Pierce was a professional. In addition to complying with federal and state laws, she was compelled to abide by the code of ethics of her profession.[61] While the court conceded that "[i]n certain instances, a professional code of ethics may contain an expression of public policy,"[62] it explained, "not all such sources express a clear mandate of public policy."[63] Without an expression of policy, an employee at will could be discharged with or without cause.[64]

The dissent, while agreeing with the majority's ruling which endorsed the at will employment exception in cases where public policy is clearly implicated, found that "the majority's application of this principle defie[d] logical explanation and disregard[ed] established judicial doctrine on the propriety of summary judgment."[65] Justice Pashman stated that several recognized codes of medical ethics, which include the American Medical Association's guidelines, the Declaration of Helsinki, and the Nuremburg Code, address a doctor's participation in clinical experimentation[66] and would be sufficient to meet the standard set out by the majority.[67] By reading the allegations most favorably to the plaintiff, the dissent found an issue of material fact as to whether the continued investigation of loperamide created an unnecessary risk.[68] If answered affirmatively this would

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[61] *Id.* at 71, 417 A.2d at 512. Medical ethics finds its foundation in the Hippocratic Oath; Dr. Pierce relied on the section of the oath which reads: "'I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone.'" *Id.* at 74, 417 A.2d at 513. *See generally* Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts*, 28 VAND. L. REV. 805 (1975) [hereinafter cited as *Professional Employees*].

[62] 84 N.J. at 72, 417 A.2d at 512.

[63] *Id.* The court stated that when "a code of ethics [is] designed to serve only the interests of a profession or an administrative regulation concerned with technical matters [it] probably would not be sufficient." *Id.*

[64] *Id.* at 72, 417 A.2d at 512.

[65] *Id.* at 77, 417 A.2d at 514 (Pashman, J., dissenting). Justice Pashman, the sole dissenter, read the courts ruling to say "a professional employee may not be discharged for refusing to violate a clearly recognized legal or ethical obligation imposed on members of his profession." *Id.* at 76-77, 417 A.2d at 514 (Pashman, J., dissenting).

[66] *Id.* at 77-80, 417 A.2d at 515-17 (Pashman, J., dissenting). The majority found that Dr. Pierce had not relied on any of these standards. *Id.* at 74, 417 A.2d at 513. Yet the court quotes plaintiff's complaint which includes a reference to "ethical standards by which she was governed as a physician." *Id.* at 64, 417 A.2d at 508 (quoting complaint). Justice Pashman commented on this inconsistency. *Id.* at 83, 417 A.2d at 518 (Pashman, J., dissenting). *See* note 67 *infra*.

[67] 84 N.J. at 80, 417 A.2d at 517 (Pashman, J., dissenting). Justice Pashman believed that the plaintiff should be given "the opportunity to prove at trial that she was discharged for her refusal to violate one or more of these ethical standards." *Id.* (Pashman, J., dissenting).

[68] *Id.* at 81, 417 A.2d at 517 (Pashman, J., dissenting). Remarking that development of a safer formulation of loperamide was imminent, Justice Pashman sardonically indicated that Ortho's behavior was "a purely profit-motivated exercise in 'corporate responsibility.'" *Id.* (Pashman, J., dissenting).

have provided a reason for Dr. Pierce's refusal to work on the project and a cause for her to have invoked the codes of ethics, as well as relevant statutory provisions, to prove a public policy violation.[69]

The majority's holding, as viewed by Justice Pashman, "effectively denie[d] plaintiff a meaningful day in court."[70] By dismissing Dr. Pierce's claim the court precluded her from proving her case under this newly promulgated cause of action despite her inability to foresee what the required standard of proof would be.[71] Furthermore, Justice Pashman found the majority's conclusion that Dr. Pierce " 'did not rely on or allege violation of any other standards' besides the Hippocratic Oath"[72] to be both contradictory and unfair.[73]

Addressing other aspects of the majority's opinion and Dr. Pierce's tort claim, the dissent stressed that Dr. Pierce's refusal to continue working on loperamide did not halt the project.[74] Justice Pashman characterized her actions as a proper exercise of professional judgment and accepted her contention that neither a refusal to work on the project nor a statement characterizing the clinical program as unethical provided grounds for her termination.[75] Moreover, he indicated that the majority's vision of resulting "chaos" and unbridled veto power by doctors protected from abusive discharges was "ill-conceived."[76] The dissent also advanced the argument that the majority's reliance on the approval by the Food and Drug Administration[77] of the experimentation was inappropriate where it "eliminate[d] the need for active, ethical professionals within the

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[69] *Id.* at 82, 417 A.2d at 518 (Pashman, J., dissenting). Dr. Pierce could have relied on the codes of ethics, *see* text accompanying note 66 *supra*, and the legislative prohibition against gross malpractice. N.J. STAT. ANN. § 45:19-16(h) (West Cum. Supp. 1979-1980).

[70] 84 N.J. at 84, 417 A.2d at 519 (Pashman, J., dissenting).

[71] *Id.* at 83, 417 A.2d at 518 (Pashman, J., dissenting). "Nothing is more unfair than stating a novel principle of law for the first time on an appeal, but denying the plaintiff who sought relief under some new standard an opportunity to conform his proof to the specific requirements actually adopted." *Id.* (Pashman, J., dissenting).

[72] *Id.* at 83, 417 A.2d at 518 (Pashman, J., dissenting).

[73] *Id.* The majority opinion quoted a portion of the plaintiff's complaint where she generally alleged violations of other ethical standards. *Id.* at 64, 417 A.2d at 508. Because of this Justice Pashman remarked, "the majority's stated reason for upholding summary judgment contradicts its own description of plaintiff's claims." *Id.* at 83, 417 A.2d at 518 (Pashman, J., dissenting).

Justice Pashman also voiced concern at the claim's dismissal because Dr. Pierce had failed to specifically allege other standards and concluded that "this rationale would reject a possibly valid claim for a formal defect in pleading—a result our courts have long eschewed." *Id.*

[74] *Id.* at 84, 417 A.2d at 519 (Pashman, J., dissenting). Dr. Pierce did not have the power to discontinue the project and did nothing to impede its development. *Id.*

[75] *Id.*

[76] *Id.* By simply reassigning personnel, the project could have been continued. *Id.*

[77] *See* note 20 *supra*.

drug industry."[78] Justice Pashman expressed concern with the majority's position that Dr. Pierce had prematurely expressed her opposition to the project.[79] Interpreting this to mean "that a professional employee may not express a refusal to engage in illegal or clearly unethical conduct until his actual participation and the resulting harm is imminent,"[80] Justice Pashman disagreed and perceived no reason to defer an objection once the unethical nature was apparent. To wait until the proposed conduct was imminent, he said, would be "both unnecessary and self-defeating."[81] For those reasons, the dissent would have affirmed the denial of summary judgment on Dr. Pierce's tort claim.[82]

In discussing Dr. Pierce's assertion of a contract claim, the dissent questioned the inconsistency of formulating a remedy for breach of an implied provison but denying a remedy for failure to allege an express contractual provision.[83] Justice Pashman noted the relationship between Dr. Pierce and Ortho created "implied contractual terms"[84] which would provide her with a "privilege to express her ethical views despite the absence of any pertinent writing."[85] Recognizing an issue as to the existence of contractual obligations, the dissent advocated affirmation of the denial of summary judgment on this claim as well.[86] Finally, Justice Pashman observed that Dr. Pierce should not have been denied the chance "to vindicate her professional conscience"[87] under the newly promulgated rule.

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[78] 84 N.J. at 84-85, 417 A.2d at 519 (Pashman, J., dissenting). This reliance was "[i]n apparent ignorance of the past failures of official regulation to safeguard against phrarmaceutical horrors." *Id.* at 84, 417 A.2d at 519 (Pashman, J., dissenting) (footnote omitted). Justice Pashman also noted that there was nothing in the record to show the FDA would know of an alternative formula before allowing the use of the Ortho formulation. *Id.* at 85, 417 A.2d at 519 (Pashman, J., dissenting).

[79] *Id.* at 85, 417 A.2d at 519.

[80] *Id.*

[81] *Id.* at 86, 417 A.2d at 520 (Pashman, J., dissenting). The majority refuted this contention. *Id.* at 74, 417 A.2d at 513.

[82] *Id.* at 86, 417 A.2d at 520 (Pashman, J., dissenting).

[83] *Id.* Although the court had fashioned a remedy under both contract and tort principles, *id.* at 72, 417 A.2d at 512, Justice Pashman remarked that "[t]he majority dismisse[d] the contract claim by presuming that plaintiff was an employee at will." *Id.* at 86-87, 417 A.2d at 520 (Pashman, J., dissenting).

[84] *Id.* at 87, 417 A.2d at 520 (Pashman, J., dissenting). "According to those terms, the drug company should not fire the doctor for the good faith exercise of her informed judgment on matters of professional ethics." *Id.* For a discussion of implied contractual terms, see *Protecting Employees, supra* note 1.

[85] 84 N.J. at 87, 417 A.2d at 520 (Pashman, J., dissenting). Justice Pashman remarked: "The lack of a written employment agreement makes the absence of 'any specific contractual provision' unremarkable." *Id.*

[86] *Id.*

[87] *Id.* at 88, 417 A.2d at 521 (Pashman, J., dissenting).

The supreme court, in this ruling, recognized that economic and social conditions of the twentieth century required further modification of the general rule affording employers the absolute right of discharge.[88] The restrictive approach taken by the court, however, evidenced a reluctance to tamper with the common law interpretation of the employment relationship.[89] Prior to the *Pierce* case, New Jersey law had followed the common law tradition of the right to terminate employment by either party at will.[90] This right had gained acceptance in the nineteenth century when the prevalent *laissez-faire* atmosphere encouraged the rapid growth of industry and gave employers almost unlimited freedom in running their businesses.[91] The attitudes which shaped this policy had so permeated American society that the United States Supreme Court, in the early 1900's, briefly afforded the at will rule constitutional protection.[92] The rule has since lost that dimension[93] and certain factions of employees now enjoy at least partial protection through labor unions or by statutory requirements which prohibit abusive dismissals.[94] For large numbers of employees who do not fall within these areas, the decision in *Pierce* represents some assurance that they will not be left without a remedy if, when discharged, they had been acting in accordance with express public policy.[95]

The extent of this newly granted protection, however, is uncertain. One serious problem concerns the definition of "clear mandate of public policy." While the court stated that "[t]he sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions," it acknowledged that "[a]bsent legislation, the judiciary must define the cause of action [for wrongful discharge] in case-by-case determinations."[96] Varying interpretations

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[88] *See* notes 1-4 *supra* and accompanying text.

[89] *See Abusive Discharge*, *supra* note 2, at 1454.

[90] 84 N.J. at 65-66, 417 A.2d at 509. Case law has held that when the term of employment is not governed by contract, an employer or employee may terminate the relationship with or without cause. *Id. See, e.g.*, English v. College of Medicine and Dentistry, 73 N.J. 20, 372 A.2d 295 (1977); Schlenk v. Lehigh R.R., 1 N.J. 131, 135, 62 A.2d 380, 381 (1948). *See also* Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958).

[91] 84 N.J. at 66, 417 A.2d at 509.

[92] *Id.* The United States Supreme Court in Adair v. United States, 208 U.S. 161 (1907) and Coppage v. Kansas, 236 U.S. 1 (1914) held that federal statutes which prohibited employers from preventing unionization were unconstitutional. *See* note 93 *infra* and accompanying text.

[93] 84 N.J. at 66, 417 A.2d at 509. "As a corollary of the development of legislation, administrative regulation, and judicial decisions, the rule has since lost its constitutional protection. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)." *Id.*

[94] *See* notes 3-4 *supra*.

[95] *See* notes 42-44 *supra* and accompanying text.

[96] 84 N.J. at 72, 417 A.2d at 512.

of the definition of public policy hinder the formation of a clear delineation of the concept.[97]

The disparate interpretations concerning the point at which courts should intervene in the employment relationship in order to protect a societal interest are indicative of the difficulties inherent in defining the parameters of public policy.[98] Generally, cases recognizing public policy fall into one of three categories, depending upon the jurisdiction. The first approach, adopted by a few courts, revamps the entire relationship by imposing on the employer a duty to terminate only in good faith.[99] This dramatic alteration of the common law rule grants the employee greater protection from discharges than ever

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[97] 84 N.J. at 67-71, 417 A.2d at 509-11. The court extensively cited case law from other jurisdictions as examples of public policy limitations. *Id.* Courts have permitted recovery under this theory where discharges resulted from serving on a jury, *see, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, 255 Pa. Super. Ct. 28, 386 A.2d 119 (Super. Ct. 1978); *but see* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); and for filing workers compensation claims, *see, e.g.*, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (App. Div. 1980); *but see* Martin v. Tapley, 360 So.2d 708 (Ala. 1978). Furthermore, courts have granted relief for violations of statutory guarantees, *see, e.g.*, Tameny v. Atlantic Richfield, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), *aff'd*, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978).

Decisions recognizing a breach of an implied contractual term of good faith termination include Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) and Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

The *Pierce* court also cited to cases where the public policy violation alleged was not recognized. 84 N.J. at 70, 417 A.2d at 511. *See, e.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (Ct. App. 1979); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

See also 72 C.J.S. 2d *Policy* 208-22 (1951).

[98] "[T]he question is one of whether the public policy at stake is of sufficient importance to warrant a public policy exception to the doctrine of termination at will." *"Blows the Whistle" supra* note 7, at 801.

Some states, notably Alabama and Florida, have refused to recognize the exception. 84 N.J. at 70, 417 A.2d at 517.

[99] Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) and Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) are examples of this pattern. In *Monge*, a woman who was allegedly discharged for refusing the advances of her foreman was granted relief. The New Hampshire court perceived a public as well as private interest. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.

Id.

The *Fortune* court found that the employer had terminated the plaintiff in bad faith and granted relief based on a breach of an implied covenant of good faith in a salesman's contract. Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977).

previously recognized,[100] but, according to the courts applying the concept, it does not intrude on the employer's legitimate rights.[101]

The second view upon which courts rely requires a showing of "substantial"[102] or "fundamental"[103] considerations of public policy, usually based on statutes, before an interference in the employment relationship will be permitted.[104] By demonstrating strong indications of public policy, a plaintiff may present a sufficient interest so that the courts can and will adequately balance the interests of the parties involved.[105] This standard of public policy is more broad than that taken by courts advocating the third approach which, like the New Jersey supreme court, adopted the narrow requirement of "clear mandate of public policy."[106]

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[100] *See Abusive Discharge, supra* note 2, at 1435; *Professional Employees, supra* note 4, at 828.

[101] This concept was expressed by the New Hampshire supreme court in Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551-52 (1974). "Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably." *Id.*

The court in Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977) stated that the employer's "right to make decisions in its own interest is not, in our view, unduly hampered by a requirement of adherence to this standard [of good faith]." *Id. See also Abusive Discharge, supra* note 2, at 1453-54.

[102] As the court stated in Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978):

> 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 discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.

Id. at 271. Plaintiff had alleged retaliatory discharge for his efforts to require his employer to comply with state and federal consumer protection laws.

[103] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The California Supreme Court stated "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Id.* at 168, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840. The discharge allegedly occurred because the plaintiff refused to participate in an illegal price-fixing scheme.

[104] *See, e.g.*, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), *aff'd*, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963) (improper discharge of plaintiff based upon his refusal to commit perjury specifically enjoined by statute); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee discharged for complying with jury duty may collect damages).

[105] *See* notes 103-04 *supra*. *See also* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (retaliatory discharge for filing worker's compensation claim unlawful).

[106] Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (efforts to correct misleading information given by corporation to public insufficient to support action); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (no clear mandate in reporting defective product). *See also* Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (Ct. App. 1979); Martin v. Platt, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

The use of the narrow standard has yielded results similar to *Pierce* in other jurisdictions.[107] In Pennsylvania, for instance, the supreme court required the demonstration of a clear violation of public policy before a claim could proceed.[108] In *Geary v. United States Steel Corp.*,[109] a salesman who brought a product's defective and dangerous nature to the attention of his superiors was discharged. Although he argued that "he was acting in the best interests of the general public as well as of his employer,"[110] Geary was not permitted to maintain an action. The court, carefully guarding the employer's interest in the free exercise of business judgment, found "that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house."[111]

Apparently persuaded by the *Geary* court's reasoning that a vigilant employee's concern for societal safety was not warranted by a clear mandate, the *Pierce* court found no reason to make an exception to the at will rule.[112] There had been no sufficient demonstration of an alleged public policy violation.[113] Although different sources of public policy were listed,[114] the court remarked that, absent legislation, case-by-case determinations would be necessary for its definition. This leaves open the question of when, if ever, a complainant who does not have a previously recognized or an express declaration of public policy, preferably a statute, relating to his or her behavior will be allowed to maintain an action.[115] A claim, imputing a policy worthy of protection which had not yet been recognized as a clear mandate, could easily be dismissed under the *Pierce* rationale. The supreme court's poorly defined standard of clear mandate does little for a court that wishes to declare a "new" public policy.[116] Other

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[107] *See* note 106 *supra* and accompanying text.

[108] Geary v. United States Steel Corp., 456 Pa. 171, 184-85, 319 A.2d 174, 180 (1974). The court stated that:

> Where the complaint itself discloses a plausible and legitimate reason for terminating an at will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge.

Id.

[109] 456 Pa. 171, 319 A.2d 174 (1979).

[110] *Id.* at 181, 319 A.2d at 178-79.

[111] *Id.* at 180, 319 A.2d at 178. The court, referring to Geary's status as a salesman, said a different result might have been obtained had he been an expert. *Id.*

[112] The Pennsylvania Supreme Court was sharply divided (4-3) in *Geary*. The dissent stated "[t]here is no doubt that strong public policies . . . have been offended by Geary's discharge." *Id.* at 187, 319 A.2d at 181 (Roberts, J., dissenting).

[113] 84 N.J. at 76, 417 A.2d at 514.

[114] *See* note 40 *supra*.

[115] *See* note 108 *supra*.

[116] *See* notes 97-98 *supra* and accompanying text.

than the negative implication of the instant facts, a trial court has basically no guidance for defining the standard.[117]

Although its decision was reversed, the appellate division[118] formulated the basic standard which the supreme court adopted. The lower court was aware of ensuing problems concerning the definition of public policy,[119] and stated that if an exception to the at will rule were "to be established at all, its development must be on a case-to-case basis."[120] In remanding the case to the trial court, the appellate judges ordered a plenary hearing so that factual and legal considerations could be developed and adequately weighed before deciding if a significant public policy had been violated.[121] Based on the necessity for a full record, the appellate court denied Ortho's motion for summary judgment.[122]

The supreme court, in reversing that determination, rejected the appellate division's suggestion for a plenary hearing in each case.[123] According to the *Pierce* decision, if a plaintiff has failed to show a violation of an express public policy, his or her claim is, as a matter of law, summarily dismissed.[124] The trial court's application of this legal standard, however, is limited by the "clear mandate" language of the opinion.[125] Had the supreme court adopted the appellate court's rationale for a plenary hearing in each case, discharged employees would be assured a forum in which to fully present factual and legal contentions, preventing determinations of the public policy standard on the pleadings alone.[126] Thus, the high threshhold established in *Pierce* would not be a bar to employees who could not demonstrate a concise, express mandate. Trial courts should, perhaps, read the "case-by-case determination" exception broadly and afford the plenary hearing sanctioned by the appellate division to plaintiffs in wrongful discharge actions.

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[117] This could conceivably undermine the public policy exception for, while no claim could proceed at trial without the required clear mandate, such a mandate would not exist absent its determination at trial. *See, e.g., "Blows the Whistle," supra* note 7, at 803.

[118] Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 399 A.2d 1023 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980).

[119] *Id.* at 342, 399 A.2d at 1026.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 343, 399 A.2d at 1027.

[123] 84 N.J. 58, 417 A.2d 505 (1980).

[124] *See* notes 40-41 *supra* and accompanying text.

[125] *See* note 40 *supra*.

[126] Such a hearing would provide that "the proofs and public policy considerations involved [would] be fully developed and taken into account in the final determination." Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 342, 399 A.2d 1023, 1026 (App. Div. 1979), *rev'd*, 84 N.J. 58, 417 A.2d 505 (1980).

Realistically, however, the supreme court's application of the exception in *Pierce* will serve to deter any broad interpretation of the holding.[127] The adoption of the *Pierce* standard in a balancing situation will generally weigh heavily in favor of an employer who, upon suit for wrongful discharge, will move for summary judgment and leave the plaintiff with the difficult task of proving the nebulous and vague requirement of clear mandate.[128] In setting a narrow and ill-defined standard as the threshhold for the cause of action the court may have limited the protection it hoped to give employees. In its attempt to eliminate frivolous law suits by requiring a showing of a clear mandate,[129] the court may have precluded more claims than it intended.[130] Employees who wish to demonstrate that their discharges were in violation of a clear mandate of public policy would do well to buttress their arguments by specifically alleging any recognized facet of policy which might support their behavior.[131]

The employee's best chance for success in a wrongful discharge action is where some statutory expression exists relating to his or her action.[132] Perhaps the most effective means of protecting employees, especially those in the professional sector,[133] is through legislation.[134] Problems arise with such a suggestion, however, because, while it is difficult and impractical to specify all situations which warrant coverage,[135] broadly worded statutes are subject to narrow interpretations by the courts.[136] Considering the unique status of the profes-

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[127] *See* notes 62-64 *supra* and accompanying text.

[128] 84 N.J. at 73, 417 A.2d at 512. *See* note 130 *infra*. *See also* Vernon, *Termination at Will: The Employer's Right to Fire*, 6 Employee Rel. L.J. 25, 39 (1980).

[129] 84 N.J. at 73, 417 A.2d at 512. *See also* Blades, *supra* note 1, at 1428.

[130] This is not to say that the burden should not be on the plaintiff to show the alleged violation. *See* Blades, *supra* note 1, at 1427-31; *Professional Employees, supra* note 61, at 832-35.

[131] *See* notes 40 & 97 *supra* and accompanying text.

[132] *See* note 97 *supra* and accompanying text. *See, e.g., Protecting Employees, supra* note 1, at 1837. *Cf.* "Blows the Whistle" *supra* note 7, at 784 for a discussion of the problems of relying on statutory mandates.

[133] *See Professional Employees, supra* note 61.

> Because of their immense effects on the daily lives of the public, professionals are subjected to a high standard of ethical conduct. A professional is impressed with a public trust and responsibility, a position in which he is guided not only by this own conscience, but also by criminal statutes, state licensing statutes, the regulations of many federal agencies and his professional code of ethics.

Id. at 805-06.

[134] *See* Blades, *supra* note 1, at 1432; *Protecting Employees, supra* note 1, at 1837; *Professional Employees, supra* note 61, at 839.

[135] *See Abusive Discharge, supra* note 2, at 1446 (statutes serve to create patchwork scheme of protection).

[136] *See, e.g., "Blows the Whistle," supra* note 7, at 785 n.61; *Protecting Employees, supra* note 1, at 1839 n.123.

sional in society,[137] however, it would be appropriate, as well as beneficial, for a state to enact laws which prohibited employer coercion of professional employees, especially in areas of ethical concerns.[138]

A statute guarding free discussion of ethical questions which would meet the clear mandate standard, could be reasonably limited to maintain protection of an employer's legitimate interest.[139] Simultaneously, courts would be free to determine at trial[140] if the alleged dispute was substantial enough to warrant the application of the public policy exception and thus grant a remedy for the discharged employee.[141] The purpose of such a statute would not be to undermine or circumvent the clear mandate standard enunciated in *Pierce*, but rather to prevent that high threshhold from precluding legitimately aggrieved plaintiffs from maintaining a cause of action,[142] especially in an area where the public interest is clearly implicated.[143] Surely the courts, with complete factual records before them, will have the ability to judge the merits of a claim and adequately balance the interests of employers and employees.[144]

While the recognition of a public policy exception to the at will doctrine reflects an apparent willingness of the judiciary to adapt New Jersey common law to current needs,[145] the restrictive definition of the exception will probably operate to give employees little protection from abusive discharge. With the passage of appropriate legislation discharged employees can use legitimate policy arguments to

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[137] *See* note 133 *supra*. Justice Pashman, in his dissent, noted "the need for ethically autonomous professionals within the pharmaceutical industry." 84 N.J. at 85, 417 A.2d at 519 (Pashman, J., dissenting). One commentator has said "[i]t is difficult to imagine a stronger public policy than that of regulating professional occupations and preserving ethical conduct." *Professional Employees*, *supra* note 61, at 840.

[138] *See* Blades, *supra* note 1, at 1432.

Examples of this type of legislation are:

> Proposal: No professional employee shall be discharged primarily for raising and discussing ethical issues regarding his employment.
>
> Proposal: No professional employee shall be discharged primarily for the refusal to obey the order of a superior or employer when this refusal was the only feasible means to prevent either a violation of a criminal statute or a breach of his professional ethics.

Professional Employees, *supra* note 61, at 829.

[139] *See* Blades, *supra* note 1, at 1418-19; *Abusive Discharge*, *supra* note 2, at 1453; *Professional Employees*, *supra* note 61, at 829-30.

[140] Summary judgment will not be granted where a clear mandate is shown. 84 N.J. at 73, 417 A.2d at 513.

[141] *Id.* at 72, 417 A.2d at 512. "We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Id.*

[142] *Id.* at 73, 417 A.2d at 513.

[143] *See* note 134 *supra* and accompanying text.

[144] *See* notes 38-40 *supra* and accompanying text.

[145] 84 N.J. at 71, 417 A.2d at 511.

avoid summary dismissal thereby making the exception viable. Meanwhile, employees at will can lament the court's rejection of the duty to terminate only in good faith [146] and, if wrongfully discharged, strive to meet the standard the *Pierce* court has enunciated.

Nancy Costello

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[146] *See* notes 99-101 *supra* and accompanying text. *See also Protecting Employees*, *supra* note 1, at 1838:

> The implication of a duty to terminate only in good faith . . . is perhaps the most appealing avenue for judicial development in the at will area because it is consistent with a recognition that at will terminations do not necessarily reflect the parties' intentions or best interests with respect to job security. Because employers and employees do not have the opportunity to engage in informed bargaining, courts . . . [should] simply supply a reasonable term.

Id.