

**THE INCONVENIENT WORKER—CAN  
MISSISSIPPI’S PUBLIC POLICY  
EXCEPTIONS TO THE EMPLOYMENT-AT-  
WILL DOCTRINE BE EXPANDED TO  
ENCOMPASS THE EXERCISE OF  
WORKERS’ COMPENSATION RIGHTS?**

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INTRODUCTION

Mississippi is currently one of only two states that fail to recognize a cause of action for the retaliatory discharge of an at-will employee solely for exercising his or her rights under its workers’ compensation laws.<sup>1</sup> In contrast, the great majority of states—either by statute, judicial decision, or both—have afforded a worker protection from the harsh application of the employment-at-will doctrine by recognizing an important public policy exception for the exercise of workers’ compensation rights.<sup>2</sup> This

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<sup>1</sup> See *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *infra* Part III. Georgia is the only other state that does not recognize a cause of action for retaliatory discharge when an employee is terminated for exercising workers’ compensation rights in an at-will employment setting. See *Evans v. Bibb Co.*, 342 S.E.2d 484 (Ga. Ct. App. 1986) (refusing to acknowledge retaliatory discharge for filing workers’ compensation claim as public policy exception to GA. CODE ANN. § 34-7-1 (2008), which provides that “[a]n indefinite hiring may be terminated at will by either party”); see also *Robins Fed. Credit Union v. Brand*, 507 S.E.2d 185 (Ga. Ct. App. 1998) (same).

<sup>2</sup> LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 104.07 (Matthew Bender rev. ed. 2011) (listing jurisdictions recognizing retaliatory discharge); see also

Comment examines why Mississippi is again behind the times of contemporary American jurisprudence and explores whether Mississippi's narrow public policy exceptions to the common law employment-at-will doctrine could be expanded to include retaliatory discharge in the context of the Mississippi Workers' Compensation Act.<sup>3</sup>

First, this Comment is focused solely on at-will employees, as opposed to employment contracts for a fixed term.<sup>4</sup> Thus, a brief review of Mississippi's at-will-employment doctrine will be provided.<sup>5</sup> This will be followed by analysis of court decisions hinting at a departure from the doctrine and paving the way for the Mississippi Supreme Court's decision in *McArn v. Allied Bruce-Terminix Co.*,<sup>6</sup> which provides two narrow exceptions to the at-will rule, neither of which has yet to be expanded.<sup>7</sup> Next, this Comment will discuss the Mississippi Supreme Court's decision in *Kelly v. Mississippi Valley Gas Co.*,<sup>8</sup> which first refused to allow a private cause of action for wrongful discharge for filing a workers'

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Theresa Ludwig Kruk, Annotation, *Recovery for Discharge From Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R. 4TH 1221 (1984 & Supp. 2006) (same). The landmark case of *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), was the first to allow the tort of retaliatory discharge for filing a workers' compensation claim, which Professor Larson noted as "odd that such a decision was so long in coming." LARSON, *supra*, § 104.07, at 104-57.

<sup>3</sup> Mississippi Workmen's Compensation Law, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -129 (2011)). In 1948, Mississippi became the last state to adopt a comprehensive workers' compensation law. See generally John C. Satterfield, *An Introduction to the Mississippi Workmen's Compensation Act*, 20 MISS. L.J. 27 (1948). The Act contains no remedy for retaliatory discharge and further states that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . ." MISS. CODE ANN. § 71-3-9 (2011).

<sup>4</sup> For a discussion on a retaliatory discharge action under contracts for a fixed term, see generally Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 BYU J. PUB. L. 193, 210-11 (2010).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> 626 So. 2d 603 (Miss. 1993).

<sup>7</sup> See *infra* Part II. For a recent-decision analysis of the *McArn* opinion, see Debbie Ho, Recent Decision, 64 MISS. L.J. 257, 267-73 (1994) (discussing *McArn*'s exceptions and future ramifications).

<sup>8</sup> 397 So. 2d 874 (Miss. 1981).

compensation claim,<sup>9</sup> as well as other cases in both federal and state courts which have since revisited the issue.<sup>10</sup> Finally, an in-depth analysis will be provided on whether current Mississippi law would recognize a retaliatory discharge cause of action through methods of statutory interpretation, expanding the current public policy exceptions to at-will employment provided in *McArn*, and reference to similar federal laws; or, in the alternative, whether legislative action is needed to rectify the effect of outdated decisions inconsistent with the overwhelming trend in other jurisdictions.<sup>11</sup>

### I. MISSISSIPPI EMPLOYMENT-AT-WILL DOCTRINE

Contracts of employment for fixed terms provide workers with certain rights not available to those considered to be at-will.<sup>12</sup> For example, in addition to any express provisions creating contractual rights, contracts for fixed terms carry an implied covenant of good faith and fair dealing.<sup>13</sup> Thus, under a contract for a fixed term, in addition to any breach of contract claim that may arise, an employee may assert a retaliatory discharge claim in the event he or she is fired for “bad cause.”<sup>14</sup> Most contracts for

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<sup>9</sup> *Id.* at 876-77. See Bob Baker, Recent Decision, 51 MISS. L.J. 575 (1981), for an in-depth analysis of the *Kelly* opinion and the court’s reasoning that the legislative department, not the judiciary, should provide a wrongful discharge remedy.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See discussion *infra* Part IV.

<sup>12</sup> See generally LEX K. LARSON, UNJUST DISMISSAL § 10.25 (2011) (discussing employment at-will doctrine and exceptions in Mississippi).

<sup>13</sup> See, e.g., *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 987 (Miss. 2004) (en banc) (“Every contract contains an implied covenant of good faith and fair dealing in performance and enforcement.” (citing *Morris v. Macione*, 546 So. 2d 969, 971 (Miss. 1989))). A breach of this good-faith covenant is “bad faith,” which can be “characterized by some conduct which violates standards of decency, fairness or reasonableness.” *Id.* (quoting *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992)). Moreover, “[b]ad faith . . . requires a showing of more than bad judgment or negligence; rather, ‘bad faith’ implies some conscious wrongdoing ‘because of dishonest purpose or moral obliquity.’” *Id.* (quoting *Bailey v. Bailey*, 724 So. 2d 335, 338 (Miss. 1998) (en banc)).

<sup>14</sup> E.g., LARSON, *supra* note 12, § 10.25. Of course, a prerequisite to any breach of contract or retaliatory discharge is that the agreement meets all the necessary elements of a contract for employment. These include (1) the parties’ consent, (2) consideration for services rendered, and (3) employer authority over the employee. *Walls v. N. Miss. Med. Ctr.*, 568 So. 2d 712, 715 (Miss. 1990) (en banc) (quoting *Barragan v. Workers’ Comp. Appeals Bd.*, 240 Cal. Rptr. 811 (Cal. Ct. App. 1987)).

fixed terms must be in writing, providing the specific duration of the contract or that the employee may only be terminated for good cause.<sup>15</sup> Moreover, under the statute of frauds, any employment agreement for fifteen months or longer must be in writing to be an enforceable contract.<sup>16</sup> If not in writing, the employment will usually be considered at-will.<sup>17</sup> Even contracts deemed to be for a “lifetime” or “permanent” in nature will typically be construed as at-will employment.<sup>18</sup> However, there are exceptions where at-will employment may evolve into a contract that provides actionable rights to the employee, such as if the employee provides additional consideration in furtherance of labor for pay, the contract contains clauses expressing the employment is terminable only for good cause, or the employment contract incorporates employee-handbook provisions.<sup>19</sup> Under the latter exception, however, a disclaimer within the employee handbook or manual reinstating an at-will employment agreement often will override any asserted exception to the at-will doctrine.<sup>20</sup>

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(noting Mississippi still adheres to common law rules governing validity of employment contracts).

<sup>15</sup> See LARSON, *supra* note 12, § 10.25.

<sup>16</sup> MISS. CODE ANN. § 15-3-1 (2003). However, an employee may plead equitable estoppel against his employer to overcome any statute of frauds defense to the employment contract. See *Bowers Window & Door Co. v. Dearman*, 549 So. 2d 1309, 1314 (Miss. 1989) (stating equitable estoppel requires change of position and detrimental reliance); see also Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997) (discussing use of promissory, as opposed to equitable, estoppel to defeat at-will status).

<sup>17</sup> LARSON, *supra* note 12, § 10.25.

<sup>18</sup> *Id.* (citing *Rosen v. Gulf Shores, Inc.*, 610 So. 2d 366 (Miss. 1992)).

<sup>19</sup> *Id.* Examples of additional consideration may include relocating for an employment agreement considered to be “permanent” or promising not to prosecute a lawsuit against the employer. *Id.* (citing *Rosen*, 610 So. 2d 366). Alternatively, employee handbooks or manuals have often been used by plaintiffs’ lawyers in support of a retaliatory discharge or breach of contract action, but with various levels of success. *Id.* (citing cases). For instance, even when there is no express provision integrating the handbook with the employment contract, one court held that a handbook can become part of the contract if it is distributed to all employees. *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992). *But see* *Brown v. Inter-City Fed. Bank for Sav.*, 738 So. 2d 262, 264 (Miss. Ct. App. 1999) (vague or ambiguous language in handbook cannot alter at-will status of employee).

<sup>20</sup> *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987) (interpreting language such as “[e]mployment rights not implied” and that company could

Thus, absent either a contract for a fixed term or some above mentioned modification, the typical employment contract is considered to be at-will. Since 1858,<sup>21</sup> Mississippi has adhered to the common law employment-at-will doctrine that provides “an employee may quit or be terminated . . . for good reason, bad reason, or no reason at all.”<sup>22</sup> This language indicates there is no covenant of good faith and fair dealing read into at-will employment contracts.<sup>23</sup> Despite both judicial and legislative developments in national labor laws during the Great Depression and over the twentieth century,<sup>24</sup> Mississippi case law has remained relatively unchanged—“that a contract for employment for an indefinite period may be terminated . . . [by] either party.”<sup>25</sup> In the 1981 opinion *Kelly v. Mississippi Valley Gas Co.*, discussed

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“terminate [employee] at any time” as a failure to waive employer’s rights to unilateral termination). However, absent any express disclaimer to the contrary, certain employment provisions will become part of the contract. *See Bobbitt*, 603 So. 2d at 361-62.

<sup>21</sup> The Mississippi Supreme Court first adopted the at-will doctrine in *Butler v. Smith & Tharpe*, 35 Miss. 457, 464 (1858). *See also* Weyman Williams McCranie, Jr., Comment, *The Unfairness of Federal Preemption of State Law Exceptions to the Employment-at-Will Rule and the Need for a Uniform National Remedy for Wrongful Discharge*, 55 Miss. L.J. 517, 522 n.22 (1985) (discussing history of at-will doctrine in Mississippi).

<sup>22</sup> *E.g.*, *Slatery v. Ne. Miss. Contract Procurement, Inc.*, 747 So. 2d 257, 259 (Miss. 1999) (citing *Brown*, 738 So. 2d at 264; *Bobbitt*, 603 So. 2d 356).

<sup>23</sup> *See* *Hawkins v. Toro Co.*, No. 1:94CV25-B-D, 1995 U.S. Dist. LEXIS 21677, at \*16 (N.D. Miss. Jan. 30, 1995); *Young v. N. Miss. Med. Ctr.*, 783 So. 2d 661, 663 (Miss. 2001). *But see* *Empiregas, Inc. v. Bain*, 599 So. 2d 971, 976 (Miss. 1992) (holding that when employer terminates in bad faith, non-compete clause may not be enforced).

<sup>24</sup> *See, e.g.*, National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (2006)) (protecting laborers’ right to unionize and upheld as constitutional in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)) (providing cause of action for discharge in retaliation for exercising rights under statute); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602 (codified at 29 U.S.C. § 623(a) (2006)) (providing remedy for wrongful discharge based on age); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 11(c), 84 Stat. 1590 (codified at 29 U.S.C. § 660(c) (2006)) (providing remedies against employer who terminates employee for reporting violations under statute); Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, §703(a), 78 Stat. 241 (codified at 42 U.S.C. § 2000e-2(a) (2006)) (prohibiting discrimination based on race, color, religion, national origin, or sex).

<sup>25</sup> *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 606 (Miss. 1993) (quoting *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 874 (Miss. 1981)); *see infra* Parts II, III.

in Part III, when presented with an opportunity to carve an exception to at-will termination for a worker who files a good faith workers' compensation claim, the Mississippi Supreme Court refused to expand the at-will doctrine, stating the reasoning for the rule as follows:

Any other theory than this would subject incautious persons—a class, it may be remarked, which includes a majority of mankind—into lifelong servitudes, and greatly fetter and embarrass the commerce of the world. Indeed, it may be said that any other theory is a moral and practical impossibility, and, if indulged in by the courts, could not be enforced in the ordinary concerns of life.<sup>26</sup>

This line of reasoning has been the subject of many attacks by scholarly commentators as failing to conform to modern realities of the workplace, and refusing to take into account the unforgiving effects the rule has on an employee who often times is left at the mercy of an employer.<sup>27</sup> Nevertheless, notwithstanding two narrow exceptions, the common law employment-at-will doctrine remains in force in Mississippi.<sup>28</sup>

## II. MCARN—EXCEPTIONS TO EMPLOYMENT-AT-WILL

Throughout the next decade after the *Kelly* decision, the Mississippi Supreme Court expressed a willingness to venture

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<sup>26</sup> *Kelly*, 397 So. 2d at 875 (quoting *Rape v. Mobile & O.R. Co.*, 100 So. 585, 587 (Miss. 1924) (en banc)). The court's reliance on the outdated *Rape* opinion seems perplexing, given that after *Rape* was decided a national movement promoting workers' rights followed. See *supra* note 24. Thus, the notion that “[a]ny other theory” is a “practical impossibility” and “could not be enforced” appears to be a smokescreen for judicial hesitancy to depart from longstanding precedent. See *Kelly*, 397 So. 2d at 875 (quoting *Rape*, 100 So. at 887). Moreover, *Rape* was decided well before the Mississippi Workers' Compensation Act was enacted, which was a central issue in *Kelly*. See MISS. CODE ANN. §§ 71-3-1 to -129 (2011).

<sup>27</sup> See generally Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75 (1995) (arguing common law premise of termination at-will fails in modern employment setting); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) (discussing ramifications of at-will employment on employees); see also Baker, *supra* note 9, at 580-81 & 581 n.35; Ho, *supra* note 7, at 259 n.13.

<sup>28</sup> See *infra* Part II.

from the “harsh rule” of the at-will doctrine. In *Shaw v. Burchfield*,<sup>29</sup> recognizing the recent criticism directed at the doctrine,<sup>30</sup> the court appeared to sympathize with employees, noting they are often in a more vulnerable position than their employers within an at-will employment setting.<sup>31</sup> Despite a finding that the employment contract in dispute expressly disclaimed any modification of at-will status, the court suggested that given the right set of facts, it “might well be charged to reconsider the at will termination rule.”<sup>32</sup> In the 1987 case of *Perry v. Sears, Roebuck & Co.*,<sup>33</sup> the court again indicated a possible departure from precedent.<sup>34</sup> The court observed that other jurisdictions which allow public policy exceptions to the at-will doctrine have based their decisions “on the employee’s (1) refusal to commit an unlawful act, (2) performance of an important public obligation or (3) exercise of a statutory right or privilege.”<sup>35</sup> That same year, in what the Mississippi Supreme

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<sup>29</sup> 481 So. 2d 247 (Miss. 1985). The employee, an agent who had been under contract with several Farm Bureau Insurance Companies, was terminated after twenty-six years of service, was given only ten-days notice, and provided no reason for the termination. *Id.* at 249. The employee sued under a breach of contract claim, alleging that the employer had modified his at-will status via an informal policy of only terminating employees “for cause.” *Id.* at 251, 253.

<sup>30</sup> The court cited a list of academic articles attacking the at-will doctrine as no longer consistent with modern employment expectations. *Id.* at 253-54 n.1.

<sup>31</sup> *Id.* at 254 (“[W]e may not remain insensitive to the fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job.”).

<sup>32</sup> *Id.* The court said that such a situation might arise if there were no express employment contract and the employer calls upon the state to determine appropriate grounds for termination. *Id.*

<sup>33</sup> 508 So. 2d 1086 (Miss. 1987).

<sup>34</sup> *Id.* at 1089 (acknowledging that Mississippi was in the minority of states that do not provide a public policy exception to the at-will termination rule). However, in affirming the dismissal of the employee’s wrongful discharge claim, the *Perry* court refused to adopt the theory that at-will employment carries with it an implied covenant of good faith and fair dealing, a breach of which would give rise to a wrongful discharge claim. *Id.* *But see id.* at 1090 (Robertson, J., concurring) (expressing willingness to imply covenant of good faith into employment contracts).

<sup>35</sup> *Id.* at 1089 (majority opinion) (citation omitted). It is noteworthy that the court mentions an employee’s exercise of statutory rights as a public policy exception found in other jurisdictions. A classic example of this exception is the exercise of rights

Court later called a “prophetic *Erie*-guess,”<sup>36</sup> a federal district court became the first court applying Mississippi law to recognize an exception to the at-will doctrine.<sup>37</sup> The federal court in *Laws v. Aetna Finance Co.*, basing its reasoning on both *Shaw* and *Perry*,<sup>38</sup> held that under Mississippi law, an employee who alleges his termination was motivated by refusing to engage in illegal acts on behalf of his employer may bring a wrongful discharge claim.<sup>39</sup>

Six years later, the Mississippi Supreme Court affirmed that *Erie*-guess in implementing two narrow public policy exceptions to the employment-at-will doctrine.<sup>40</sup> In *McArn v. Allied Bruce-Terminix Co.*, the employee alleged he was fired for notifying the State Agricultural Department that his employer was falsifying chemical reports and lying to customers regarding their termite treatment—both crimes under Mississippi law.<sup>41</sup> After reviewing a line of cases which suggested some departure from the at-will

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created under applicable workers’ compensation laws, a public policy exception recognized by forty-eight states. *See supra* note 2 and accompanying text.

<sup>36</sup> *DeCarlo v. Bonus Stores, Inc.*, 989 So. 2d 351, 355 (Miss. 2008) (en banc) (emphasis added), *answering certified questions from* 512 F.3d 173 (5th Cir. 2007).

<sup>37</sup> *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 348 (N.D. Miss. 1987). Judge Davidson of the Northern District cited the *Kelly* opinion for the proposition that although the Mississippi Supreme Court would be hesitant to expand statutorily created law, i.e., the Mississippi Workers’ Compensation Act, the employment-at-will doctrine is judicially created and, thus, may be modified by case law. *Id.* at 345-46.

<sup>38</sup> *Id.* at 346 (citing *Perry*, 508 So. 2d 1086; *Shaw v. Burchfield*, 481 So. 2d 247 (Miss. 1985)). Judge Davidson reasoned that both the *Shaw* and *Perry* decisions might be sending a “signal that the Mississippi court is leaving the possibility of amending the termination at will rule open for a suitable case in which to modify the harsh and unequivocal nature of the rule.” *Id.*

<sup>39</sup> *Id.* at 346-47. The court held that as the employee alleged he was fired for refusing to violate federal and state lending law, his wrongful discharge claim fell within the newly created public policy exception. *Id.* at 349.

<sup>40</sup> *See McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993). It is interesting to note that following the *Laws* decision, yet just one year before *McArn*, the Mississippi Supreme Court touched on the issue of at-will-employment again, but did not mention the *Laws* exception for refusing to participate in illegal acts. *See Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 357 (Miss. 1992) (holding that, absent express language to the contrary, employee manual setting forth termination procedures becomes part of employment contract).

<sup>41</sup> *McArn*, 626 So. 2d at 605-06. The crimes alleged were violations of MISS. CODE ANN. § 97-19-39, which makes receiving money under false pretenses a felony, and MISS. CODE ANN. § 69-23-19 (repealed 1997), which makes violating state pest control regulations a misdemeanor. *McArn*, 626 So. 2d at 606.

doctrine may be necessary, the court found that the employee had stated a recognizable cause of action.<sup>42</sup> The court held that as a matter of public policy, employees terminated for (1) refusing to participate in illegal acts of the employer or (2) reporting illegal acts of the employer may assert a wrongful discharge claim despite any at-will employment status.<sup>43</sup>

However, since *McArn*, both state and federal courts have been hesitant to expand its two “narrow” exceptions. For instance, although it has often been cited that every “contract[] contain[s] an implied covenant of good faith and fair dealing” in performance,<sup>44</sup> the Mississippi Supreme Court has repeatedly refused to read this covenant into employment-at-will contracts,<sup>45</sup> as the validity of at-will terminations are “not to be viewed through a good faith lens.”<sup>46</sup> These holdings continue to bar any

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<sup>42</sup> *McArn*, 626 So. 2d at 606-07. The court “[left] for another day” the issue of whether punitive damages would be available in such a cause of action. *Id.* at 608. That day came in *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 543-44 (Miss. 1996) (holding that violations of the *McArn* exceptions constitute independent torts for which punitive damages are recoverable, subject to purview of trial court).

<sup>43</sup> *McArn*, 626 So. 2d at 607. The court seemed to emphasize, however, that the two “narrow exceptions” to the at-will doctrine should be “limited” in their extent. *Id.* For a discussion on how *McArn* will impact future jurisprudence within Mississippi, see Ho, *supra* note 7, at 269-73 (implying correctly that *McArn* may have no effect on the *Kelly* decision, as *Kelly* involved an employee’s exercise of statutory rights, as opposed to illegal activities).

<sup>44</sup> *E.g.*, *Morris v. Macione*, 546 So. 2d 969, 971 (Miss. 1989) (citations omitted). For a definition of what may constitute a breach of good faith, i.e., bad faith, see *supra* note 13 and accompanying text.

<sup>45</sup> See *Young v. N. Miss. Med. Ctr.*, 783 So. 2d 661, 663 (Miss. 2001); *Hartle v. Packard Elec.*, 626 So. 2d 106, 110 (Miss. 1993); see also *Hawkins v. Toro Co.*, No. 1:94CV25-B-D, 1995 U.S. Dist. LEXIS 21677, at \*16 (N.D. Miss. Jan. 30, 1995) (“[A]t-will employment relationships are not governed by an implied covenant of good faith and fair dealing.” (quoting *Hartle*, 626 So. 2d at 110)).

<sup>46</sup> *Kayoma v. Delta Health Ctr.*, No. 4:05CV257-EMB, 2006 U.S. Dist. LEXIS 85408, at \*7-8 (N.D. Miss. Nov. 22, 2006) (recognizing that to read an implied covenant of good faith into at-will contracts would abrogate common law precedent that employer may terminate for “good, bad, or no reason” (citing *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 986 (Miss. 2004) (en banc))); see also *Miranda v. Wesley Health Sys., LLC*, 949 So. 2d 63, 68 (Miss. Ct. App. 2006) (en banc) (same).

tort action for wrongful discharge based on such an implied covenant of good faith in an at-will employment setting.<sup>47</sup>

Similarly, a line of federal cases emerging post-*McArn* has given its holding a plain meaning interpretation—that the exceptions recognized apply only to illegal acts that amount to crimes under state or federal law.<sup>48</sup> Although many arguments have been made urging courts to interpret “illegal acts” in a broader sense,<sup>49</sup> or that new public policy considerations should be recognized,<sup>50</sup> none have been successful. For example, the *McArn* exceptions do not expand to include civil violations of an employer,<sup>51</sup> violations of state or federal environmental law,<sup>52</sup> or

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<sup>47</sup> *Young*, 783 So. 2d at 663-64 (affirming circuit court dismissal of claim for wrongful discharge based on good faith covenant as failing to state a claim upon which relief may be granted).

<sup>48</sup> Although the *McArn* opinion references “illegal acts,” and did not expressly limit the exceptions to criminal acts, other decisions have nonetheless interpreted its holding as applicable only to activities that “involve criminal illegality.” See *Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 404 n.4 (5th Cir. 2005) (quoting *Howell v. Operations Mgmt. Int’l Inc.*, 77 F. App’x 248, 251-52 (5th Cir. 2003) (per curiam)). This reasoning appears to derive from not only the facts of *McArn*, which did involve criminal activity, *see supra* note 41, but also from the court’s statement of the issue on appeal within its opinion, which was phrased “participate in criminal activity.” *McArn*, 626 So. 2d at 604.

<sup>49</sup> See *Howell*, 77 F. App’x at 251-252 (finding illegal acts do not include OSHA violations); *Bruno v. RIH Acquisitions MS I, LLC*, 530 F. Supp. 2d 819, 824-25 (N.D. Miss. 2008) (stating violation of environmental laws, without criminal sanctions, do not fall within *McArn*’s parameters).

<sup>50</sup> See *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25 (Miss. 2003) (en banc) (holding no public policy exception for employee discharged for exercising workers’ compensation rights); discussion *infra* Part III; *see also* *Medina v. Mims Oil Co.*, No. 4:04CV236-P-B, 2005 U.S. Dist. LEXIS 46994, at \*3 (N.D. Miss. July 8, 2005) (refusing to create new public policy exception where employee terminated to prevent recovery of employer-provided health benefits).

<sup>51</sup> See *Bruno*, 530 F. Supp. 2d at 824. The plaintiff in *Bruno* alleged his employer ordered him to dispose of a bucket of grease into a lake, which could result in civil sanctions. *Id.* Although the grease was in fact dumped in the lake, which the court acknowledged may also result in criminal fines, the court nonetheless found plaintiff’s wrongful discharge claim without merit as the act was not reported to authorities nor did plaintiff’s “weak opposition” to the dumping amount to “refusing to participate in an illegal act.” *Id.* (citing *McArn*, 626 So. 2d at 607). The Mississippi Court of Appeals is the highest Mississippi state court to imply that civil violations do not fall within *McArn*’s public policy exceptions. See *Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So. 2d 357, 360 (Miss. Ct. App. 2004) (noting that a prerequisite of *McArn*’s exceptions is that “the acts complained of warrant the imposition of criminal penalties, as opposed to mere civil penalties” (citing *Howell v. Operation Mgmt. Int’l Inc.*, 161 F. Supp. 2d 713, 719 (N.D. Miss. 2001))).

regulatory violations, such as filing a complaint with the Occupational Safety and Health Administration (OSHA).<sup>53</sup> Firing an employee so they will not be eligible for employer-provided health benefits appears to be permissible under Mississippi law as well.<sup>54</sup> Reporting alleged criminal activity of the employer which does not actually amount to a crime also will not suffice, as it is immaterial if the employee reasonably believed the activity to be

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<sup>52</sup> *Bruno*, 530 F. Supp. at 824. The disposal of the grease in the lake violated both state and federal environmental laws, something the court distinguished from criminal penalties. *Id.*; see also *Howell*, 77 F. App'x at 251 n.4 (noting although plaintiff's alleged discharge for reporting environmental regulations was procedurally barred on appeal, it still would not fall within *McArn*'s exceptions).

<sup>53</sup> *Howell*, 77 F. App'x at 251-52. The employee in *Howell* filed several complaints with OSHA regarding safety violations occurring at his employer's water treatment plant. *Id.* at 249. After investigation, OSHA found no regulations were violated. *Id.* The employee was suspended without pay and later filed a wrongful discharge claim, alleging that his termination for reporting alleged OSHA violations was in violation of state public policy. *Id.* The Fifth Circuit affirmed the dismissal of the complaint, holding that *McArn*'s exceptions do not expand to include regulatory violations that do not amount to criminal acts. *Id.* at 252. It should be noted that part of the court's reluctance to carve out an exception for OSHA complaints stems from federal law that OSHA itself may already take action against an employer who terminates employees for reporting violations, thus rendering state law unnecessary. See 29 U.S.C. § 660(c) (2006); *Howell*, 77 F. App'x at 252 (citing § 660(c)).

<sup>54</sup> *Medina*, 2005 U.S. Dist. LEXIS 46994, at \*3. In a short, yet somewhat surprising opinion, the court held that the plaintiff failed to state a claim for wrongful termination on the basis that she was fired to preclude her from recovering health benefits under an employer-provided plan. *Id.* The court stated that it does not have authority to make new law in Mississippi, and that it should be left up to the Mississippi legislature to provide such a public policy exception to the at-will doctrine. *Id.* This reasoning is inconsistent with the Northern District of Mississippi's opinion in *Laws v. Aetna Finance Co.*, 667 F. Supp. 342 (N.D. Miss. 1987), which recognized a public policy exception to Mississippi law six years prior to the Mississippi Supreme Court's exceptions in *McArn*. *Laws*, 667 F. Supp. at 348-49. The court in *Laws* had no similar concerns for creating Mississippi law, as "the terminable at will doctrine is a judicially created one and can thus be modified by the judiciary." *Id.* at 345. Moreover, the notion that an employee may be discharged to preclude recovery of employer-provided health benefits is strikingly analogous to the scenario that an employee may be discharged for exercising workers' compensation rights. Although not mentioned in the *Medina* opinion, it is plausible that the language in *Kelly v. Mississippi Valley Gas Co.*, leaving any workers' compensation exception up to the legislature, had an influence on *Medina*'s holding. See *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 877 (Miss. 1981); discussion *infra* Part III.

illegal.<sup>55</sup> If the acts reported are not criminal in nature, then no wrongful discharge cause of action will be recognized.<sup>56</sup>

Given a recent chance to materially expand the at-will exceptions, the Mississippi Supreme Court, on certification from the United States Court of Appeals for the Fifth Circuit, stopped short of creating any new public policy that may give rise to a wrongful discharge claim.<sup>57</sup> In *DeCarlo v. Bonus Stores, Inc.*,<sup>58</sup> the court held that discharge in retaliation for reporting a co-employee's illegal acts, which relate to the employer's business, is actionable under *McArn*.<sup>59</sup> However, the court reiterated that it was not expanding existing law but simply clarifying existing precedent.<sup>60</sup> The court also refused to impose individual liability for wrongful discharge other than that liability imposed on the employer.<sup>61</sup> Thus, eighteen years after their inception, *McArn*'s narrow exceptions remain undisturbed. In fact, adding insult to plaintiffs' injuries, there has been relatively little dicta by any courts expressing a willingness to expand *McArn*, signaling to future employees an uphill battle awaits absent any allegations of criminal activity on behalf of the employer.<sup>62</sup>

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<sup>55</sup> See *Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 404 (5th Cir. 2005) (holding that *McArn* requires more than "reasonabl[e] belie[f]" that employer activities are illegal); *Drake v. Advance Constr. Serv., Inc.*, 117 F.3d 203, 203-04 (5th Cir. 1997) (noting that the employer's acts, albeit "unprofessional or immoral," did not amount to criminal activity (quoting *Drake v. Advance Constr. Servs., Inc.*, No. 1:95CV177-JAD, 1996 U.S. Dist. LEXIS 21435, at \*4 (S.D. Miss. Aug. 23, 1996))).

<sup>56</sup> See, e.g., *Wheeler*, 415 F.3d at 404.

<sup>57</sup> See *DeCarlo v. Bonus Stores, Inc.*, 989 So. 2d 351, 353-54 (Miss. 2008) (en banc), *answering certified questions from* 512 F.3d 173 (5th Cir. 2007).

<sup>58</sup> 989 So. 2d 351.

<sup>59</sup> *Id.* at 357. The employee reported to a superior co-employee possible illegal conduct of both his employer and another co-employee. *Id.* at 352.

<sup>60</sup> *Id.* at 358. The court based its reasoning on its prior decision in *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996), which also held that employees who report illegal acts of co-employees could bring a wrongful discharge claim. *DeCarlo*, 989 So. 2d at 355-58.

<sup>61</sup> *DeCarlo*, 989 So. 2d at 358-59. The employee also sued the co-employee whom he reported the activities to, alleging the co-employee was in part responsible for his termination. *Id.* at 352. The court found "nothing in *McArn* or its progeny" which would support individual liability in a wrongful discharge action. *Id.* at 358.

<sup>62</sup> See *Senter v. Cingular Wireless, LLC*, No. 1:05CV100, 2006 U.S. Dist. LEXIS 25627, at \*7-11 (N.D. Miss. Feb. 10, 2006). The employee in *Senter* reported alleged trespassing by suspicious customers on the premises to police, who did not make any arrests, and alleged she was terminated as a result. *Id.* at \*2. Although the court stated

### III. NO PUBLIC POLICY EXCEPTION FOR EXERCISE OF WORKERS' COMPENSATION RIGHTS

Throughout the development of a possible departure from the strict at-will employment rule—eventually leading to *McArn*'s narrow exceptions—Mississippi courts have remained steadfast in holding that an employee who is terminated for exercising his or her rights under the Mississippi Workers' Compensation Act may not state a claim for wrongful discharge.<sup>63</sup> In the seminal case of *Kelly v. Mississippi Valley Gas Co.*,<sup>64</sup> an employee suffered a work related injury for which he filed a good-faith claim with the Mississippi Workmen's Compensation Commission.<sup>65</sup> The employee alleged that after filing the claim, he was threatened by his employer to either dismiss the claim or face termination as a consequence.<sup>66</sup> Refusing to withdraw the claim, the employee was terminated and subsequently brought an action for wrongful discharge against the employer.<sup>67</sup> The employee urged the court to adopt a public policy exception to the at-will doctrine that would allow a cause of action for retaliatory discharge in the event an

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the employee's claim did not fall within *McArn* because she had not reported actual criminal activity, it implied that had the conduct of the customer in fact turned out to be illegal, the "Mississippi Supreme Court might well conclude that the public policy concerns raised by *McArn* justified extending the doctrine to such a situation." *Id.* at \*8. For a discussion on how *McArn* may affect future plaintiffs, see Ho, *supra* note 7, at 269-73.

<sup>63</sup> See *infra* notes 74-82 and accompanying text.

<sup>64</sup> 397 So. 2d 874 (Miss. 1981). One year prior to *Kelly*, the Fifth Circuit was first presented with the issue of retaliatory discharge in the context of exercising rights under the Mississippi Workers' Compensation Act. See *Green v. Amerada-Hess Corp.*, 612 F.2d 212 (5th Cir. 1980). After a survey revealing a jurisdictional split on the issue, the Fifth Circuit reasoned that Mississippi would likely follow the lead of states in close proximity, which at the time did not recognize a cause of action. *Id.* at 214-15 (citing cases from Alabama, North Carolina, and Florida). Notably, all of the holdings relied upon by the Fifth Circuit are no longer good law and have been overruled by statute. See ALA. CODE § 25-5-11.1 (LexisNexis 2007) (recognizing retaliatory discharge in context of workers' compensation rights in Alabama); FLA. STAT. ANN. § 440.205 (West 2002); N.C. GEN. STAT. § 95-240 (2009).

<sup>65</sup> *Kelly*, 397 So. 2d at 874. The plaintiff was J.C. Kelly, an employee of defendant Mississippi Valley Gas Company. *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

employee is fired solely for filing a good-faith workers' compensation claim.<sup>68</sup>

While acknowledging that many states have similar public policy exceptions, the court pointed out that in the majority of those jurisdictions, applicable statutory provisions sanction discharge for the exercise of workers' compensation rights.<sup>69</sup> Since the Mississippi Workers' Compensation Act does not expressly specify a remedy for retaliatory discharge,<sup>70</sup> the court reasoned that any such modification is better left for the legislature.<sup>71</sup> Although conceding that the plaintiff's argument had "considerable appeal," in a self-described exercise of judicial restraint, the court emphasized that any public-policy exception to the at-will doctrine or any amendments to the Workers' Compensation Act must come exclusively from the legislative branch.<sup>72</sup> Providing apparent guidance, the court cited a Texas

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<sup>68</sup> *Id.* At the time of *Kelly*, as *McArn*'s exceptions were still over a decade away, Mississippi rigidly followed the common law rule that at-will employment means there may be "good reason, a wrong reason, or no reason for terminating the employment contract." *Id.* at 875 (citations omitted); see *supra* note 22 and accompanying text.

<sup>69</sup> *Kelly*, 397 So. 2d at 875 & n.1; see also *Leach v. Lauhoff Grain Co.*, 366 N.E.2d 1145, 1147 (Ill. App. Ct. 1977) (finding public policy established by 1975 amendment made it unlawful for employer to discharge for exercising rights under statute); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (holding threat of discharge is "device" under workmen's compensation laws, which prohibit any "device" used by employer to abrogate liability).

<sup>70</sup> *Kelly*, 397 So. 2d at 875; see also MISS. CODE ANN. § 71-3-9 (2011) ("The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . .").

<sup>71</sup> *Kelly*, 397 So. 2d at 876-77 ("The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature." (quoting *Hamner v. Yazoo Delta Lumber Co.*, 56 So. 466, 490 (Miss. 1911))).

<sup>72</sup> *Id.* The court stressed that separation of powers mandated by the Mississippi Constitution cautioned judicial restraint against modifying a seemingly unambiguous statute on public policy grounds. See MISS. CONST., art. I, § 1. This reasoning is inconsistent with other jurisdictions that have judicially recognized wrongful discharge for exercising workers' compensation rights despite no express statutory provision. See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) (deciding case with events that occurred before a 1975 amendment expressly allowed cause of action). The court in *Kelsay* stated that allowing an employer to discharge an employee solely for filing a workers' compensation claim:

effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to

statute as a plausible framework from which any future amendments could be derived.<sup>73</sup>

Since the *Kelly* decision in 1981, notwithstanding *McArn*'s developments to the at-will doctrine, there has been relatively little case law revisiting this issue. The holdings in these few cases have been similar—until the legislature acts, *Kelly* remains the law in Mississippi.<sup>74</sup> Federal courts—despite one previous successful “*Erie-guess*” construing the Mississippi employment at-will doctrine<sup>75</sup>—have been hesitant to create any new public policy for exercising workers’ compensation rights, instead acquiescing to state courts for any changes in the law.<sup>76</sup> The Mississippi

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the public policy as expressed in the Workmen’s Compensation Act. We cannot believe that the legislature, even in the absence of an explicit proscription against retaliatory discharge, intended such a result.

*Id.* at 357.

<sup>73</sup> *Kelly*, 397 So. 2d at 877 n.2. The Texas statute provided in pertinent part:

Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen’s Compensation Act, or has testified or is about to testify in any such proceeding.

Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

*Id.* (quoting TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (West Supp. 1978) (repealed 1993), recodified at TEX. LAB. CODE ANN. § 451.001 (West 2006)).

<sup>74</sup> See, e.g., *Washington v. Woodland Vill. Nursing Home*, 25 So. 3d 341, 358 (Miss. Ct. App. 2009) (en banc) (“While *McArn* is authority for the judiciary’s power to modify the common law, Mississippi’s Workers’ Compensation Law is a legislative creation . . .” (citing MISS. CODE ANN. § 71-3-1 (2000))).

<sup>75</sup> See *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (allowing wrongful discharge action if employee is terminated for refusing to participate in illegal acts on behalf of employer); *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993) (recognizing exception in *Laws* as actionable under Mississippi law); *supra* notes 37-43 and accompanying text.

<sup>76</sup> *Pipkin v. Piper Impact, Inc.*, 70 F. App’x 760 (5th Cir. 2003) (per curiam). The plaintiff in *Pipkin* sought a retaliatory discharge claim for termination allegedly stemming from filing a claim under the Mississippi Workers’ Compensation Act. *Id.* at 761-62. Refusing to certify the question, the Fifth Circuit, relying on *Kelly*, dismissed his cause of action, stating that Mississippi has “indicated that it was within the

Supreme Court's most recent decision on point came in 2003, in the brief opinion of *Buchanan v. Ameristar Casino Vicksburg, Inc.*<sup>77</sup> Under similar facts as *Kelly*, the *Buchanan* court again refused to adopt a public policy exception allowing a cause of action for an employee terminated for filing a workers' compensation claim.<sup>78</sup> The court held that since the employee had not alleged termination for either refusing to participate in illegal acts or for reporting illegal acts of the employer, the employee did not state a cause of action as recognized under *McArn*.<sup>79</sup> It is notable that the two justices dissenting in *Buchanan*, who would have expressly overruled *Kelly* on the ground that it is inconsistent with the purposes of the Workers' Compensation Act, have since been replaced on the court.<sup>80</sup> Moreover, attempts by plaintiff's counsel to circumvent *Kelly*, such as arguing that termination after a settlement constitutes a "change in condition" or "mistake in determination of fact,"<sup>81</sup> which would warrant the

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province of the legislature, and not the courts, to create a cause of action for retaliatory discharge." *Id.* at 763-64 & n.3 (citing *Kelly*, 397 So. 2d at 876-77).

<sup>77</sup> 852 So. 2d 25 (Miss. 2003) (en banc). Justice Graves delivered the opinion for the court. *Id.* at 25.

<sup>78</sup> *Id.* at 27.

<sup>79</sup> *Id.* The employee in *Buchanan* merely alleged she was terminated in response to filing a workers' compensation claim, and attempts to modify her at-will status were unsuccessful. *Id.* at 26-27.

<sup>80</sup> Presiding Justice McRae wrote the dissent, joined by Justice Easley, *see id.* at 27-28 (McRae, P.J., dissenting), and argued that "when employees are forced by statute to give up their right to sue for work-related injuries, they should not also be expected to give up any right to private action for retaliatory termination due to their filing of a claim under the Act." *Id.* at 28. Justice McRae, well known for his plaintiff advocacy, was defeated in his reelection bid in 2003 to current Presiding Justice Dickinson, who received significant campaign funding from various pro-business Republican groups, including the U.S. Chamber of Commerce. Jerry Mitchell, *McRae's Fiery Tenure Ends with No Regrets*, CLARION-LEDGER, Jan. 5, 2004, at 1A. Justice Easley subsequently lost his reelection bid in 2008 to current Justice Chandler. Vicksburg Post, Editorial, *Court Elections Anything but Routine*, HATTIESBURG AM., Nov. 17, 2008, at Opinion. With the departure of these two justices, the outlook for any retaliatory discharge action coming from the courts appears cloudy at best. Alternative arguments to persuade the current court will likely have to be utilized, and this author suggests a few. *See infra* Part IV.

<sup>81</sup> MISS. CODE ANN. § 71-3-53 (2011). A settlement under the Workers' Compensation Act may be reopened for further review within one year of the date of the last payment of compensation, or rejection of such, provided there has been some change in conditions or mistake in determination of fact regarding the settlement. *Id.*;

reopening of a previous settlement, have since been rejected as well.<sup>82</sup>

#### IV. POSSIBLE SOLUTIONS TO CURRENT MISSISSIPPI LAW UPHOLDING RETALIATORY DISCHARGE

The Mississippi Supreme Court's emphasis in *Kelly* that any remedy within the Workers' Compensation Act for retaliatory discharge must come from the legislature did not go unnoticed.<sup>83</sup> Almost immediately after the opinion, an effort was made to introduce legislation that would have overruled its decision.<sup>84</sup> Despite the court's guidance on what would likely have been acceptable legislation, the effort was unsuccessful<sup>85</sup> and left employers free to terminate for the sole reason that an injured employee has claimed workers' compensation benefits.<sup>86</sup> Recent attempts to amend the Act to expressly recognize a cause of action have been met with similar fate, succumbing to both strong lobbying and partisan politics.<sup>87</sup> Thus, it remains questionable

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*see also* John R. Bradley, *Time Limitations Which Bar Claims in Mississippi Workers' Compensation: A Re-Examination*, 62 MISS. L.J. 511, 571-606 (1993) (discussing one year statute of limitations for reopening of workers' compensation claims).

<sup>82</sup> *See* *Sims v. Ashley Furniture Indus.*, 964 So. 2d 625, 628 (Miss. Ct. App. 2007). The employee in *Sims* argued that the settlement was entered in bad faith on the part of his employer and he would not have agreed to the settlement had he known his job was in jeopardy. *Id.* at 626-27. The court of appeals disagreed, indicating that termination could not be viewed as a mistake to warrant reopening since the worker could show no reasonable expectation of continued employment after the settlement. *Id.* at 627-28.

<sup>83</sup> *See supra* notes 70-73 and accompanying text.

<sup>84</sup> Shortly after *Kelly* was handed down in February of 1981, the legislature, already in session, made an effort to suspend rules time-barring the introduction of a bill that would have made it unlawful for an employer to terminate an employee for making a good faith claim under the Mississippi Workers' Compensation Act. *See* H.R. 89, 1981 Leg., Reg. Sess. (Miss. 1981); S. Res. 549, 1981 Leg., Reg. Sess. (Miss. 1981); Baker, *supra* note 9, at 598 n.134.

<sup>85</sup> Baker, *supra* note 9, at 598 n.134.

<sup>86</sup> *See supra* notes 63-70 and accompanying text.

<sup>87</sup> *See* H.R. 1076, 2011 Leg., Reg. Sess. (Miss. 2011) (died in committee); H.R. 225, 2011 Leg., Reg. Sess. (Miss. 2011) (died on calendar). One of the bills introduced provided in pertinent part:

No employer may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, employed counsel to represent him in a claim, instituted, or caused to be instituted, in

whether the legislature has the capacity to ensure that laws protecting the enforcement of its own creation (the Workers' Compensation Act) are enacted.<sup>88</sup> Absent legislative action, responsibility for an exception to the at-will doctrine for the exercise of workers' compensation rights will ultimately rest with the judiciary.<sup>89</sup> Any court-provided remedy will likely derive its reasoning from a combination of statutory interpretation, analogy to other statutes, and recognition of judicially enforceable public policy.<sup>90</sup>

Mississippi courts adhere to the principle that the legislature, and not the judiciary, should make any changes to a statute's meaning.<sup>91</sup> If the statute is unambiguous, the court will refrain from engaging in any sort of statutory construction at all.<sup>92</sup>

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good faith, any proceeding under the Workers' Compensation Law or has testified or is about to testify in any such proceeding.

Miss. H.R. 1076, § 1; *see also* Miss. H.R. 225, § 1 (substantively similar). Legislation has been sponsored in part due to plaintiffs' attorneys who urge that a potential wrongful discharge action would be available to a number of clients. Telephone Interview with John Mayo, Representative, Miss. House Dist. 25 (Feb. 5, 2011) (sponsor of H.R. 225). However, lobbying by business interest groups, such as the Mississippi Manufacturer's Association, present strong opposition to any legislation introduced. Telephone Interview with Percy Watson, Representative, Miss. House Dist. 103 (Feb. 4, 2011) (sponsor of H.R. 1076). Moreover, similar bills that have made it through the House have been defeated in the predominately Republican Senate. *Id.*

<sup>88</sup> The Mississippi Workers' Compensation Act vests a statutory right with employees to receive compensation for at-work injuries, and creates a duty with employers to provide such compensation. *See* MISS. CODE ANN. §§ 71-3-5, -7 (2011). Not providing a private remedy for retaliatory discharge allows employers to circumvent this statutory duty by threatening to terminate an employee who has a potential claim under the Act, thus forcing the employee to choose between compensation or retaining his employment. *See* *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978) (upholding retaliatory discharge would allow employers to subordinate statutory rights of employees); *Baker*, *supra* note 9, at 597 & n.130.

<sup>89</sup> *See* 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 55:3, at 452-54 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2008). The judiciary may take into account public policy considerations when engaging in statutory interpretation, and should adopt a construction that promotes what the legislature sought to enforce when enacting the statute. *Id.* § 56:1, at 483-89.

<sup>90</sup> *See* LARSON, *supra* note 2, § 104.07, at 104-80 to -83.

<sup>91</sup> *See* *Carlisle v. Allen*, 40 So. 3d 1252, 1257 (Miss. 2010) (en banc).

<sup>92</sup> *See* *Dialysis Solution, LLC v. Miss. State Dep't of Health*, 31 So. 3d 1204, 1212 (Miss. 2010) ("When the language used by the Legislature is plain and unambiguous and the statute conveys a clear and definite meaning . . . the Court will have no occasion to resort to the rules of statutory interpretation." (quoting *Bellsouth*

While courts have the power to modify judicially created common law, only the legislature may alter the language of its enactments, such as the Workers' Compensation Act.<sup>93</sup> However, if the statute is susceptible to more than one reasonable interpretation, the statute should be given a construction which will best effectuate its purpose, rather than one which would defeat it.<sup>94</sup>

With these principles in mind, a plausible argument could be made that interpreting the Workers' Compensation Act to allow a wrongful discharge cause of action would not be judicial intervention in legislative affairs,<sup>95</sup> but simply construing its language to effectuate the legislative intent.<sup>96</sup> The courts have found that the legislature intended the Act be given a liberal construction and that "[d]oubtful cases must be compensated."<sup>97</sup> The Act is to be viewed as a whole without isolating any particular provision apart from the rest.<sup>98</sup> A statutory contract is created, vesting employees with a right to receive compensation and

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Telecomms., Inc. v. Miss. Pub. Serv. Comm'n, 18 So. 3d 199, 203 (Miss. 2009)). Courts will apply the plain meaning of a statute unless to do so would be inconsistent with the obvious intent of the legislature. *Id.*

<sup>93</sup> See, e.g., *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993) (altering common law employment at-will doctrine); *Washington v. Woodland Vill. Nursing Home*, 25 So. 3d 341, 358 (Miss. Ct. App. 2009) (en banc) (finding Workers' Compensation Act is legislative creation, which the legislature alone has power to modify).

<sup>94</sup> *Delta Reg'l Med. Ctr. v. Green*, 43 So. 3d 1099, 1103 (Miss. 2010).

<sup>95</sup> As noted previously, the court in *Kelly* was concerned with exercising judicial restraint and preserving the separation of powers. See *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 877 (Miss. 1981); *supra* notes 71-72 and accompanying text.

<sup>96</sup> See *infra* notes 106-24 and accompanying text.

<sup>97</sup> E.g., *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 889 (Miss. 1980) ("[The Act] should be construed fairly to further its humanitarian aims. Doubtful cases must be compensated." (citations omitted)); *Total Transp., Inc. of Miss. v. Shores*, 968 So. 2d 400, 410 (Miss. 2007) (Diaz, P.J., dissenting) (same); see also *Baker*, *supra* note 9, at 586-87 n.69, 593-94 n.103 (discussing judicial interpretation of legislative intent behind Act).

<sup>98</sup> See *Crowe v. Brasfield & Gorrie Gen. Contr., Inc.*, 688 So. 2d 752, 755 (Miss. 1996) (en banc) ("[T]he intent of the legislature must be determined by the total language of the statute and not from a segment considered apart from the remainder." (quoting *Doubleday v. Boyd Constr. Co.*, 418 So. 2d 823, 826 (Miss. 1982) (en banc)) (internal quotation marks omitted)).

placing a duty on employers to provide it.<sup>99</sup> In consideration, the employee forgoes any action in tort against the employer while ensuring a minimal recovery for his injuries.<sup>100</sup> The Mississippi Supreme Court has recognized the strong public interest behind the Act, stating: “The entire system was designed to insure that those injured as a result of their employment would not be reduced to a penniless state and thereby become dependent on some form of governmental public assistance.”<sup>101</sup>

It is true that proposed amendments to the Act expressly providing a cause of action have to date been unsuccessful.<sup>102</sup> There are, however, many alternative reasons, aside from disagreement over the content, as to why legislation has failed to come to fruition, such as log-rolling, time constraints, and strong

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<sup>99</sup> See MISS. CODE ANN. § 71-3-3 (2011) (definitions section); MISS. CODE ANN. § 71-3-7 (2011) (liability for payment of compensation); MISS. CODE ANN. § 71-3-9 (2011) (exclusive liability provision).

<sup>100</sup> See § 71-3-9 (“The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . .”). The statute expressly eliminates any common law defenses of the employer, such as master servant, assumption of risk, and contributory negligence. *Id.* Statutory caps on recovery preclude employers from incurring excessive liability. See MISS. CODE ANN. § 71-3-13 (2010). The Mississippi Supreme Court has summed up the give-and-take rationale behind the Act, stating:

This type of legislation is generally viewed as a compromise between the interest of labor and business. Because of the exclusive nature of the remedy labor surrenders the right to assert a common law tort action along with the attendant possibility of achieving punitive damages. In exchange it receives assurance that an award is forthcoming. Industry surrenders its three major common law defenses: contributory negligence, assumption of risk, and the fellow servant rule. In exchange it receives the knowledge that there will be no outrageously large judgments awarded to injured employees.

*Franklin Corp. v. Tedford*, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting *Miller v. McRae’s, Inc.*, 444 So. 2d 368, 370 (Miss. 1984) (footnote omitted)) (internal quotation marks omitted).

<sup>101</sup> *Franklin Corp.*, 18 So. 3d at 220 (quoting *Miller*, 444 So. 2d at 370) (internal quotation marks omitted). Failing to allow a remedy for retaliatory discharge seems contrary to this rationale, as doing so potentially shifts the financial responsibility for workplace injuries from the employer to the public. See *infra* notes 144-48 and accompanying text.

<sup>102</sup> See *supra* notes 84-87 and accompanying text.

lobbying efforts.<sup>103</sup> To allow complete circumvention of such an important piece of legislation clearly defies any rational intent behind the Act.<sup>104</sup> Alternatively, several methods of statutory interpretation could be used to ensure employer compliance with the Act and thus promote what the legislature initially sought to achieve—a compromise between labor and business interests in the state of Mississippi.<sup>105</sup>

First, despite the majority's position in *Kelly*, the court has otherwise found the exclusive liability provision of the Act susceptible to more than one reasonable interpretation.<sup>106</sup> For instance, an employee may maintain an action against his employer for certain intentional torts,<sup>107</sup> so long as the employer

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<sup>103</sup> *E.g.*, *Murphy v. City of Topeka-Shawnee Cnty. Dep't of Labor Servs.*, 630 P.2d 186, 192-93 (Kan. Ct. App. 1981). Recognizing retaliatory discharge for workers' compensation despite legislative inaction, the Kansas Court of Appeals noted: "For the legislature to fail to act on a matter is clearly not the same as for it to take positive action to exclude jurisdiction." *Id.* at 193. Professor Larson, agreeing with the decision, also observed that "there are many reasons besides rejection on the merits that may account for the nonpassage of a piece of legislation." LARSON, *supra* note 2, § 104.07, at 104-66; *see also supra* notes 84, 87 and accompanying text.

<sup>104</sup> *See Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973) (noting public policy of Indiana's workmen's compensation laws would be jeopardized if employee subjected to reprisal for exercising statutory rights); Baker, *supra* note 9, at 598 (failure to provide for retaliatory discharge "opens the door to coercion, duress, and other unconscionable acts. Additionally, it completely subordinates the legal right of the employee to obtain compensation . . ." (footnotes omitted)).

<sup>105</sup> For a discussion on legislative intent behind the enactment of the Mississippi Workers' Compensation Act, *see supra* note 100 and accompanying text, and *see generally* Satterfield, *supra* note 3.

<sup>106</sup> *See supra* note 100 and accompanying text (discussing exclusive liability provision). Based on the Act's requirement that injuries must be "accidental" to be compensable, *see* MISS. CODE ANN. § 71-3-3 (2011), courts have found that certain intentional torts fall outside the scope of the exclusivity provision, thus allowing a common law tort action against the employer. *See Franklin Corp.*, 18 So. 3d at 221.

<sup>107</sup> *Franklin Corp.*, 18 So. 3d at 221. An employee may maintain an action in tort against his employer for an injury caused by the employer's willful and malicious acts, or for the same acts of a co-employee within the scope of employment and in furtherance of his employer's business. *See Windfield v. Groen Div., Dover Corp.*, 740 F. Supp. 1230, 1236 (S.D. Miss. 1990) (fraud); *Lee v. Golden Triangle Planning & Dev. Dist., Inc.*, 797 So. 2d 845, 851-52 (Miss. 2001) (intentional infliction of emotional distress); *Speed v. Scott*, 787 So. 2d 626, 631 (Miss. 2001) (*en banc*) (defamation); *Levens v. Campbell*, 733 So. 2d 753, 761 (Miss. 1999) (conspiracy); *Royal Oil Co. v. Wells*, 500 So. 2d 439, 442 (Miss. 1986) (malicious prosecution); *Miller v. McRae's, Inc.*, 444 So. 2d 368, 371 (Miss. 1984) (false imprisonment).

acted with the “actual intent to injure the employee.”<sup>108</sup> The court’s reasoning is that public policy recognizes some conduct as “so shockingly outrageous” that tort immunity should not be afforded.<sup>109</sup> Yet, when passing on the merits of retaliatory discharge—an intentional tort itself when recognized—the *Kelly* court retreated, clinging to the notion that since no explicit remedy is provided for in the Act, none could be implied.<sup>110</sup> The reasoning of the court is inconsistent, given that the Act likewise does not expressly provide a remedy for any intentional torts.<sup>111</sup> Moreover, damages in the context of retaliatory discharge are similar to most other intentional torts not involving a physical injury: lost wages, mental anguish, harm to reputation, and potential punitive damages.<sup>112</sup> Therefore, since the exclusive liability provision is subject to more than one interpretation and should be given a construction which would effectuate its purpose, not defeat it, a court could conceivably construe the provision as permitting the intentional tort of retaliatory discharge.<sup>113</sup>

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<sup>108</sup> *Franklin Corp.*, 18 So. 3d at 232 (quoting *Peaster v. David New Drilling Co.*, 642 So. 2d 344, 349 (Miss. 1994)) (internal quotation marks omitted). The employer’s willful and malicious act must have been “designed to bring about the injury.” *Id.* at 232 (quoting *Peaster*, 642 So. 2d at 349-50). Following the majority of jurisdictions, the court has rejected the “substantially certain” test used at common law, as well any reckless conduct or gross negligence, emphasizing that absent an actual intent to injure the employee, the Workers’ Compensation Act will be the exclusive remedy. *Id.* (quoting *Peaster*, 642 So. 2d at 348).

<sup>109</sup> *Id.* at 221 (“This limitation on the Act’s exclusivity ‘reflects the public policy that certain courses of conduct (intentional torts) are so shockingly outrageous and beyond the bounds of civilized conduct that the person responsible should not be rewarded with tort immunity.’” (quoting JOHN R. BRADLEY & LINDA A THOMPSON, MISSISSIPPI WORKERS’ COMPENSATION § 11:8 (2007)) (internal quotation marks omitted)).

<sup>110</sup> See *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 876-77 (Miss. 1981); *supra* notes 69-71 and accompanying text.

<sup>111</sup> See *supra* note 106 and accompanying text.

<sup>112</sup> Given that “actual intent to injure” may be inferred from the circumstances, see *Franklin Corp.*, 18 So. 3d at 239, it is here suggested that an employer who terminates an employee solely for filing a good faith claim under the Act may indeed possess this requisite intent. The employee suffers injury to their liberty to exercise a statutory right, harm to reputation as one who has been terminated from employment, economic loss from lost wages, and mental anguish and humiliation from termination; and the employee would potentially be entitled to any punitive damages that would suffice to deter the employer from future conduct.

<sup>113</sup> See *supra* notes 94, 96-101 and accompanying text. However, given the court’s extremely narrow interpretation of “actual intent to injure,” see *supra* note 109, this

Second, strong authority also exists for the power of the judiciary to imply a right of action into a statute.<sup>114</sup> This is especially pertinent in the context where a statute imposes a right and a corresponding duty, but is silent as to any means of enforcing this right.<sup>115</sup> If the public interest will be affected, the courts should reject any narrow construction which would jeopardize what the legislature sought to promote.<sup>116</sup> Any implied remedy is typically exclusively available only to those classes of persons whom the law was designed to benefit.<sup>117</sup>

In the jurisdictions which have judicially created a cause of action for wrongful discharge in the absence of express legislation, the observation has been that not implying a remedy would allow the employer to evade a primary purpose of the workers' compensation laws—providing compensation to injured employees.<sup>118</sup> In fact, the cause of action itself appears to have

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argument would likely have to be raised in the most egregious of circumstances to have any appeal.

<sup>114</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 38 (Proposed Final Draft No. 1, 2005) (noting courts may imply private right of action when none is expressed to effectuate legislative purpose behind statute); SUTHERLAND, *supra* note 89, § 55:3, at 452-54 (same).

<sup>115</sup> SUTHERLAND, *supra* note 89, § 55:3, at 453-54 (“If a statute which creates a right does not indicate expressly the remedy, one is usually implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law.” (footnote omitted)). However, no remedy should be implied if the statute’s language is unambiguous. *Id.* § 55:3, at 455-56.

<sup>116</sup> *Id.* § 56:1, at 486-89. Courts should especially reject any narrow interpretation of a statute if such interpretation would discourage rather than encourage what the legislation specifically is designed to enforce. *Id.*

<sup>117</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 38 (Proposed Final Draft No. 1, 2005); see also Baker, *supra* note 9, at 587 n.70. Of course, at-will employees would fall under the class of persons whom the Mississippi Workers’ Compensation Act was designed to benefit. See MISS. CODE ANN. § 71-3-1 (2011) (stating the purpose of the Act); Satterfield, *supra* note 3, at 27-36 (discussing Act’s intended beneficiaries).

<sup>118</sup> See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978). The court in *Kelsay* was concerned that not recognizing an action for retaliatory discharge would leave the employee without any common law or statutory remedy. *Id.* Such a result “effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to the public policy as expressed in the Workmen’s Compensation Act.” *Id.*; see also LARSON, *supra* note 2, § 104.07, at 104-57 n.1 (listing jurisdictions that recognize cause of action by judicial decision).

evolved in part from this line of reasoning.<sup>119</sup> The first court to recognize retaliatory discharge in the context of workers' compensation cases did so by implication, stating that "[i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined."<sup>120</sup> This view has become prevalent, with a leading treatise noting that if the applicable act contains strong public policy which would be diluted by allowing employers to use the threat of discharge, then typically a cause of action should be allowed.<sup>121</sup> Given this authority, why Mississippi remains steadfast in its position that any remedy must come from the legislature remains a mystery.<sup>122</sup> Regardless of legislative silence on the issue, the courts possess the power to rectify the inability of the Act to enforce itself.<sup>123</sup> Failure to do so essentially makes the Mississippi Workers' Compensation Act a lame duck in the eyes of

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<sup>119</sup> See *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 427-28 (Ind. 1973). Around this same time, Texas became the first state to adopt a comprehensive statutory scheme addressing the issue. See *supra* note 73.

<sup>120</sup> *Frampton*, 297 N.E.2d at 427. In a landmark case, the Indiana Supreme Court, with no direct authority to rely on, considered it strong public policy that compensation should be available to injured workers. *Id.* at 427-28. The court said that "[u]pholding retaliatory discharge [would] open[] the door to coercion and other duress-provoking acts." *Id.* at 248. Determining that the threat of discharge is a "device" contemplated by the statute, the court implied a right of action for retaliatory discharge. *Id.* (citation omitted); see *supra* notes 2, 69.

<sup>121</sup> LARSON, *supra* note 2, § 104.07, at 104-81 ("[A]n exception will be carved out of employment at will when there is strong public policy actually embodied in a specific statute, which policy would be undermined and thwarted if an employer could use the threat of discharge to bully its employees out of exercising their rights under that policy.").

<sup>122</sup> See *supra* notes 71-72, 74 and accompanying text. A possible explanation for the judicial deference is the statutory interpretation canon that no legislative action taken on an issue demonstrates acquiescence or indifference towards that particular issue. Moreover, if this legislative silence occurs after a judicial decision interpreting the legislation, it is often argued that this is indication of legislative approval of the judicial interpretation. See OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 644 (4th ed. 2008). Indeed, at least one federal court passing on retaliatory discharge under Mississippi law has based its reasoning in part on these principles. See *Pipkin v. Piper Impact, Inc.*, 70 F. App'x 760, 763 (5th Cir. 2003) (per curiam) (finding that until state courts or legislature acts, *Kelly* remains law in Mississippi).

<sup>123</sup> See *supra* notes 114-17 and accompanying text.

certain employers who face no consequence for not complying with what was intended to be a statutory compromise.<sup>124</sup>

Notwithstanding any statutory construction approach, Mississippi courts—with the authority to modify the common law<sup>125</sup>—could alternatively adopt a public policy exception to the at-will doctrine for the exercise of workers' compensation rights by simply expanding the current exceptions recognized in *McArn*.<sup>126</sup> Contrary to the position taken in *Kelly*,<sup>127</sup> later dicta from the Mississippi Supreme Court indicates that the workers' compensation laws may indeed provide the requisite public policy from which to carve an exception.<sup>128</sup> For instance, in *Perry v. Sears, Roebuck & Co.*, the court observed that public policy exceptions in other jurisdictions are typically “based on the employee’s (1) refusal to commit an unlawful act, (2) performance of an important public obligation or (3) *exercise of a statutory right or privilege*.”<sup>129</sup> The court cited a leading case for the proposition that “sources of public policy include legislation[;] administrative

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<sup>124</sup> See *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 28 (Miss. 2003) (McRae, P.J., dissenting). Justice McRae noted that upholding retaliatory discharge allows employers to circumvent their statutory obligation to compensate employees created under Mississippi Workers' Compensation Act. *Id.*; see *supra* note 80.

<sup>125</sup> See *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 345 (N.D. Miss. 1987) (finding terminable at-will doctrine judicially created and can thus be modified by judiciary); *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993); see also *supra* notes 41-43. The common law may also be modified or repealed by statute. See, e.g., *Hemingway v. Scales*, 42 Miss. 1 (1868).

<sup>126</sup> See *supra* notes 40-56 and accompanying text.

<sup>127</sup> *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 877 (Miss. 1981) (stating that any amendments to the Workers' Compensation Act or public policy determinations of law should be “vested exclusively in the Legislature”).

<sup>128</sup> See *Franklin Corp. v. Tedford*, 18 So. 3d 215, 221 (Miss. 2009) (en banc) (indicating Act's exclusive liability provision has certain exceptions for intentional torts founded on public policy); see also *supra* note 106 and accompanying text.

<sup>129</sup> 508 So. 2d 1086, 1089 (Miss. 1987) (citing Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983)) (emphasis added); see also McCranie, *supra* note 21, at 520-21 (exceptions to at-will employment recognized for refusal to violate criminal statute, performing public obligation, exercising statutory right, and general public policy). An exception based on exercising a statutory right has arisen most frequently in the context of workers' compensation. McCranie, *supra* note 21, at 520-21 n.20.

rules, regulations or decisions[;] and judicial decisions.”<sup>130</sup> Furthermore, since *Kelly* was decided, later court decisions have recognized the “harsh effects” of the at-will doctrine,<sup>131</sup> with *McArn* demonstrating that there are at least some instances in which a departure is warranted.<sup>132</sup> Thus, any exception for retaliatory discharge will likely be contingent upon a finding of some public policy that the court feels compelled to promote.<sup>133</sup>

Conceding that retaliatory discharge is by no means a “criminal act” as contemplated by *McArn*’s narrow exceptions,<sup>134</sup> restricting any recognized public policy to this scope ignores sound reasoning by the majority of jurisdictions and leading scholars.<sup>135</sup> Professor Lex Larson points out that if a jurisdiction is to permit any exception to employment-at-will, “the compensation claim cases would be the clearest possible application, since the public policy involved is not only expressly enunciated in a statute but also touches the health, safety, and welfare of all who work for a

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<sup>130</sup> *Perry*, 508 So. 2d at 1089-90 (quoting *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980)). Given that the Workers’ Compensation Act is a legislative creation enforced by a state administrative agency, it would seem plausible to conclude that it could be a viable source for public policy under this line of reasoning.

<sup>131</sup> See *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992) (expressing “growing unease” with the “harshness” of at-will employment rule); *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985) (sympathizing that employers have superior bargaining position in at-will employment settings); see also *supra* notes 29-39 and accompanying text.

<sup>132</sup> See *supra* Part II. However, these developments to the at-will doctrine did not appear to be a factor the most recent time the court was presented with an opportunity to overrule *Kelly*. See *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26-27 (Miss. 2003) (en banc); *supra* notes 77-80.

<sup>133</sup> See LARSON, *supra* note 2, § 104.07, at 104-80. Professor Larson notes that the jurisdictions which have yet to confront the issue of retaliatory discharge through the judiciary will ultimately have to resort to public policy analogies, as opposed to creating a cause of action based solely on the plain language of the applicable statute. *Id.*

<sup>134</sup> See *Buchanan*, 852 So. 2d at 27 (finding that since employee did not allege any criminal violations, termination solely for filing workers’ compensation claim not actionable under *McArn*). While Mississippi’s Act makes no mention of retaliatory discharge, a small minority of other state statutory schemes expressly make it a crime to terminate any employee for exercising rights under the applicable laws. See, e.g., ARK. CODE ANN. § 11-9-107 (2002) (potential felony); see also LARSON, *supra* note 2, § 104.07, at 104-65 n.40.

<sup>135</sup> See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973); LARSON, *supra* note 2, § 104.07, at 104-57 to -68.

living.”<sup>136</sup> Given that the *Kelly* court managed to find no such public policy embedded in the Mississippi Workers’ Compensation Act,<sup>137</sup> a plausible argument could still be made that the policy behind the Act has evolved since *Kelly* was decided in 1981.<sup>138</sup> Moreover, expanding *McArn*’s holding to encompass retaliatory discharge in workers’ compensation would not only be a proper exercise of judicial power, but would demonstrate that Mississippi jurisprudence is capable of adapting to changing needs and values within the contemporary employment setting.<sup>139</sup>

First, there is authority for the proposition that a statute’s interpretation should not be confined to what the legislature initially contemplated when enacting it, but should reflect the statute’s purpose in the context of the changing needs of society.<sup>140</sup> It is unlikely that the Mississippi legislature considered the need to include retaliatory discharge when drafting the Workers’ Compensation Act, as the first comprehensive amendment to any state’s statutory scheme allowing retaliatory discharge came well after the initial enactment of its workers’ compensation laws.<sup>141</sup>

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<sup>136</sup> LARSON, *supra* note 2, § 104.07, at 104-83.

<sup>137</sup> See *supra* note 70 and accompanying text.

<sup>138</sup> See *infra* notes 140-48 and accompanying text.

<sup>139</sup> See *supra* notes 106, 114-17, 121, 125 and accompanying text (discussing court’s authority to recognize retaliatory discharge). The common law at-will doctrine has been severely criticized for its failure to conform to modern reality, with one court colorfully describing:

Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and the duty of amending it to reflect social and economic changes.

*Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 347 (N.D. Miss. 1987) (quoting *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring)).

<sup>140</sup> See 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45.9, at 60-61 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (stating that words of a statute should be interpreted as “relating the statutory concept, spirit, purpose, or policy to changing needs of society” (footnote omitted)). Sutherland acknowledges that while the term “public policy” is an indefinite concept, it should “manifest[] the values, norms and ideals of a society.” SUTHERLAND, *supra* note 89, § 56:1, at 489-90.

<sup>141</sup> See LARSON, *supra* note 2, § 104.07, at 104-59. Texas, having originally enacted a workers’ compensation law in 1913, see Act of Apr. 13, 1913, ch. 179, 1913 Tex. Gen.

Second, since *Kelly's* refusal to recognize retaliatory discharge, the number of contested workers' compensation claims has risen over fourteen percentage points, from 9.57% in 1981 to 23.63% in 2009.<sup>142</sup> This suggests that employers are perhaps becoming more apprehensive towards employees exercising their statutory rights, and gives all the more reason to suspect that threats of discharge are more commonplace than one might initially suppose.<sup>143</sup>

Finally, upholding retaliatory discharge potentially shifts the financial burden of workplace injuries from the employer to the

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Laws 429, appears to be the first state to address the issue of retaliatory discharge with a complete statutory amendment, although the original amendment has since been repealed and recodified. *See* Act of May 7, 1971, ch. 115, 1971 Tex. Gen. Laws 884 (codified as amended at TEX. REV. CIV. STAT. ANN. art. 8307c, § 1 (repealed 1993), *recodified at* TEX. LAB. CODE ANN. § 451.001 (West 2006)). For a history of the 1948 enactment of the Mississippi Workers' Compensation Act, see generally Satterfield, *supra* note 3. As little to no legislative history exists regarding whether retaliatory discharge was contemplated by the Mississippi legislature, the courts' interpretation that no cause of action exists because none is expressed may be counterintuitive, because such a ruling itself could equally amount to an interpretation that the statute is inapplicable. *See* SUTHERLAND, *supra* note 140, § 45:9, at 59-60. Based on this latter interpretation, since the statute would be inapplicable, the courts could recognize retaliatory discharge by simply expanding the common law exceptions based on public policy.

<sup>142</sup> *See Annual Report Cumulative Information Tables*, MISS. WORKERS' COMP. COMM'N, [http://www.mwcc.state.ms.us/info/\\_annreportcumu.asp](http://www.mwcc.state.ms.us/info/_annreportcumu.asp) (last visited Mar. 6, 2012) ("Total Claims by Year"). Moreover, the number of "lost time" cases filed per year since *Kelly* has actually gone down, from 14,456 in 1981 to 11,090 in 2009. *Id.* This statistic rebuts any assertion that employers are becoming more apprehensive due to an increasing number of suspect claims. Quite the contrary, it potentially shows that employees who may be threatened with discharge are simply forgoing benefits and electing to retain employment instead.

<sup>143</sup> Although no specific data exists on the effect upholding retaliatory discharge has within the employment at-will setting, none should be needed for the courts to rely on this principle. If Mississippi follows the lead of most jurisdictions, employers would be imposed with very minimal standards for termination. First, the employee usually must have filed a claim in "good faith," or the cause of action does not exist. *See* LARSON, *supra* note 2, § 104.07, at 104-57 to -64. Thus, any fraudulent attempts to exploit compensation would not be protected. Second, most jurisdictions require the employee be terminated "solely" for exercising workers' compensation rights, a very high standard which will not be met if the employer has some other good faith reason to terminate. *Id.* § 104.07, at 104-66 to -78.

public.<sup>144</sup> Most workers' compensation benefits are funded by the employer, who must either qualify as a self-insurer or purchase private insurance.<sup>145</sup> An injured worker who is threatened with termination faces two options. He may elect to remain employed and forgo a claim under the Workers' Compensation Act in turn potentially relying on government assistance programs, such as Medicaid, to redress his injuries; or the worker may choose termination. In the latter scenario, although receiving due compensation, the employee oftentimes must resort to Social Security Disability or unemployment benefits for support during the interim period after recovery but before reemployment.<sup>146</sup> This predicament, however, is contradictory to the Act's fundamental design to ensure injured workers do not become "dependent on some form of governmental public assistance,"<sup>147</sup> and appears to provide the courts with a plausible source of public policy.<sup>148</sup>

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<sup>144</sup> Compensation for lost wages and medical benefits paid in 2009 totaled over \$300 million. See MISS. WORKERS' COMP. COMM'N, *supra* note 142 ("Total Compensation and Medical").

<sup>145</sup> Private insurers footed 57.88% of the bill in 2009, totaling over \$184 million. *Id.* Self-insured employers covered the rest, paying over \$134 million in compensation and medicals in 2009. *Id.*

<sup>146</sup> To be eligible for unemployment benefits the person must be unemployed "through no fault of their own." MISS. CODE ANN. § 71-5-3 (2011). A whole new debate, better left for another day, arises when one considers whether an employee discharged solely for exercising workers' compensation rights satisfies this standard.

<sup>147</sup> See *Franklin Corp. v. Tedford*, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting *Miller v. McRae's, Inc.*, 444 So. 2d 368, 370 (Miss. 1984)); *supra* note 101. One commentator has suggested that a state court with a presumption of terminable-at-will employment can and should alter such a presumption to favor economic stability. See John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467, 481 (1980).

<sup>148</sup> The public policy behind unemployment benefits is expressed in section 71-5-3, which emphasizes the legislature's concern with the economic effect involuntary unemployment has on workers as well as the promotion of a stable employment setting:

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people in this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family. . . . This can be provided by encouraging employers to

Aside from any statutory construction or public policy approach, courts could also recognize retaliatory discharge by analogy and reference to federal laws that similarly serve to compensate workplace injuries.<sup>149</sup> For instance, the Longshore and Harbor Workers' Compensation Act (LHWCA),<sup>150</sup> which applies to land-based maritime workers, makes it unlawful for an employer to discharge or discriminate against an employee for claiming compensation under the Act.<sup>151</sup> Since Congress apparently felt the ramifications of retaliatory discharge warrant an express provision prohibiting it, Mississippi courts could potentially use the LHWCA as a statutory reference to derive public policy.<sup>152</sup> However, as courts have premised their refusal to recognize a cause of action on the lack of a similar provision in the Mississippi Workers' Compensation Act, perhaps this assertion is better directed towards the legislature.<sup>153</sup>

A stronger argument could be made for an analogy to the Jones Act.<sup>154</sup> The Jones Act, as distinguished from the LHWCA, applies to "seamen" who are members of a ship or vessel crew.<sup>155</sup>

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provide more stable employment and by [setting aside funds from employment income to provide benefits] . . .

§ 71-5-3.

<sup>149</sup> See LARSON, *supra* note 2, § 104.07, at 104-80 ("Since this area of compensation law is so recent, any of the many jurisdictions that must still confront the problem judicially will inevitably have to resort to analogies as well as to directly comparable compensation cases.").

<sup>150</sup> 33 U.S.C. §§ 901-950 (2006).

<sup>151</sup> 33 U.S.C. § 948a (2006 & Supp. 2009). Any employer found in violation of this section is subject to civil penalties of up to \$5000, and the employee is to be reinstated to his position with compensation for any loss of wages during the interim period. *Id.* Thus, since the Act expressly provides the remedy, any state-law-based retaliatory discharge claim might be pre-empted. See *Ravencraft v. Sundowner Offshore Servs., Inc.*, No. 97-3572, 1998 U.S. Dist. LEXIS 7478, at \*4 (E.D. La. May 13, 1998).

<sup>152</sup> See *supra* note 130 (establishing sources of public policy may include legislation).

<sup>153</sup> See *supra* notes 70-73 and accompanying text.

<sup>154</sup> 46 U.S.C. § 30101 (2006 & Supp. 2009). The Jones Act makes the provisions of Federal Employer's Liability Act applicable to seaman injured in the course of their employment. See Ann K. Wooster, *Validity, Construction, and Application of the Jones Act*, 46 U.S.C.A. § 688—*Supreme Court Cases*, 170 A.L.R. FED. 587, 589 (2001); see also Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (2006).

<sup>155</sup> See 46 U.S.C. § 30104 (2006). The Jones Act and the LHWCA are exclusive. Which federal act applies depends not on the place of injury, but rather on the nature of the employee's service. If the worker owes his allegiance to a vessel and not a land-based employer, the Jones Act will apply, and vice versa. See Wooster, *supra* note 154,

Importantly, like the Mississippi Workers' Compensation Act, the Jones Act does not contain an explicit provision prohibiting retaliatory discharge.<sup>156</sup> Many jurisdictions have instead taken the liberty to imply a right of action, following the lead of the seminal Fifth Circuit decision, *Smith v. Atlas Off-Shore Boat Service, Inc.*<sup>157</sup> Having no statutory or case law to rely on, the Fifth Circuit in *Smith* resorted to common law maritime cases involving at-will employment for guidance.<sup>158</sup> Rejecting the rationale behind the common law at-will doctrine as no longer applicable to modern employment, the court adopted a public policy based approach to recognize a cause of action for retaliatory discharge.<sup>159</sup> The court stated that failing to do so would in effect abrogate employees' rights under the Jones Act, leaving the employee with no legal redress whatsoever for his injuries.<sup>160</sup> The court was also mindful of the potential effect upholding retaliatory discharge has on the government's economic interest, stating: "To permit the seaman's discharge because he resorts to the courts may result in casting the burden of the employer's reprisal in part

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at 611-13. If neither the Jones Act nor the LHWCA is applicable, the injured worker may still recover under state workers' compensation laws. See *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56 (1995).

<sup>156</sup> The Jones Act however, differs from the Mississippi Workers' Compensation Act in one important aspect: A seaman under the Jones Act may bring a civil action in tort against his employer for personal injury or death caused by the employer's negligence. See 46 U.S.C. § 30103 (2006).

<sup>157</sup> 653 F.2d 1057 (5th Cir. Unit A Aug. 1981).

<sup>158</sup> *Id.* at 1060. Absent an express contractual provision, the majority of maritime employment is deemed to be "terminable at will by either party." *Id.* (quoting *Findley v. Red Top Super Mkts., Inc.*, 188 F.2d 834, 837 n.1 (5th Cir. 1954)). The court also cited *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981), for the position that an at-will employee may be terminated for filing a workers' compensation claim. *Smith*, 653 F.2d at 1061 n.4.

<sup>159</sup> *Smith*, 653 F.2d at 1061-65. The court stated that the principle of mutuality of obligations between employer and employee as a premise for at-will employment is misguided, given that in modern settings the employer often has a superior bargaining position. *Id.* at 1061; see also *supra* note 29 and accompanying text. Relying on public policy rationale, the court created a cause of action for retaliatory discharge in the event an employee is terminated for exercising his right to bring a personal injury claim against his employer. *Smith*, 653 F.2d at 1065.

<sup>160</sup> *Smith*, 653 F.2d at 1062. While acknowledging that discharge of at-will seaman is in essence lawful under the Jones Act, "[t]he employer should not be permitted to use his absolute discharge right to retaliate against a seaman for seeking to recover what is due him or to intimidate the seaman from seeking legal redress." *Id.*

on the public in the form of unemployment compensation or social security for the worker or his family.”<sup>161</sup>

This reasoning of the Fifth Circuit, subsequently adopted by other jurisdictions interpreting the Jones Act,<sup>162</sup> could conceivably provide guidance for Mississippi state courts interpreting the Mississippi Workers’ Compensation Act.<sup>163</sup> Both statutes compensate workplace injuries and lack express provisions for retaliatory discharge.<sup>164</sup> Denying a cause of action under either statute also potentially places the financial responsibility for injuries on the shoulders of federal and state government programs.<sup>165</sup> Thus, a state court could likewise resort to the common law to create a much needed public policy exception for retaliatory discharge in workers’ compensation.<sup>166</sup>

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<sup>161</sup> *Id.* at 1062-63. This rationale can be analogously applied to the argument that upholding retaliatory discharge under the Mississippi Workers’ Compensation Act would be contrary to the Act’s design to ensure injured workers are not “reduced to a penniless state and thereby become dependent on some form of governmental public assistance.” *Franklin Corp. v. Tedford*, 18 So. 3d 215, 220 (Miss. 2009) (en banc) (quoting *Miller v. McRae’s, Inc.*, 444 So. 2d 368, 370 (Miss. 1984)); *see supra* notes 101, 144-48 and accompanying text.

<sup>162</sup> Following *Smith*, several federal courts have recognized wrongful discharge as an exception to the at-will employment doctrine under general maritime law. *See, e.g.*, *Zbylut v. Harvey’s Iowa Mgmt. Co.*, 361 F.3d 1094, 1095-96 (8th Cir. 2004); *Borden v. Amoco Coastwise Trading Co.*, 985 F. Supp. 692, 697 (S.D. Tex. 1997). At least one court has broadened *Smith’s* holding to include termination for any condition that presents perilous dangers for mariners and the general public. *See Seymore v. Lake Tahoe Cruises, Inc.*, 888 F. Supp. 1029, 1034-35 (E.D. Cal. 1995). Of the jurisdictions which have narrowly construed *Smith’s* holding, at a minimum a cause of action for retaliatory discharge still exists in the event an employee is terminated for filing a personal injury action against his maritime employer. *See Meaige v. Hartley Marine Corp.*, 925 F.2d 700, 702 (4th Cir. 1991).

<sup>163</sup> *See supra* notes 144-49, 161 and accompanying text.

<sup>164</sup> *See supra* notes 149, 156 and accompanying text.

<sup>165</sup> *See supra* note 161 and accompanying text.

<sup>166</sup> Alternatively, provided the jurisdictional requirements are met, a plaintiff could seek redress in the federal courts on a pendent retaliatory discharge claim. However, any success seems more likely to occur in the state court. Although the lone district court to make an “*Erie-guess*” for an exception to the at-will rule for refusal to participate in illegal acts proved to be correct, the court had strong dicta to rely on from its state counterparts. *See Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 346 (N.D. Miss. 1987) (basing decision in part on dicta from *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086 (Miss. 1987)). In contrast, no state court to date has provided any indication of a willingness to depart from the holding in *Kelly*. *See supra* notes 74-82 and accompanying text. Furthermore, the last federal court to pass on retaliatory discharge

## CONCLUSION

Mississippi was the last state to enact a workers' compensation law.<sup>167</sup> It should not be the last state to permit a cause of action for employees terminated solely for exercising rights created under these exact same laws.<sup>168</sup> The rationale behind a strict at-will doctrine is severely outdated, and modern employment expectations are no longer consistent with its application.<sup>169</sup> An overwhelming majority of jurisdictions have acknowledged this and applied sound reasoning based on public policy to recognize a cause of action for retaliatory discharge.<sup>170</sup> Mississippi's failure to do so leaves its at-will employees with a risk nearly unique in America, and no remedy against an employer who chooses to circumvent his statutory duties by means of intimidation and coercion.<sup>171</sup>

While the legislature's failure to rectify the situation is particularly inexcusable, the judiciary is also in no small part to blame since the courts likewise possess authority to recognize retaliatory discharge.<sup>172</sup> Several principles of statutory construction are available to imply a cause of action into the Mississippi Workers' Compensation Act.<sup>173</sup> Reference could also be made to similar federal laws, such as the Jones Act and the LHWCA.<sup>174</sup> Perhaps most significantly, however, public policy

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in the context of workers' compensation emphasized that absent any statutory provision or state court decision, it was without authority to permit a cause of action. See *Pipkin v. Piper Impact, Inc.*, 70 F. App'x 760, 762-63 (5th Cir. 2003) (per curiam); *supra* notes 74-76 and accompanying text.

<sup>167</sup> The state legislature adopted the Mississippi Workers' Compensation Act in 1948. Workmen's Compensation Law, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -129 (2011)); see *Satterfield*, *supra* note 3, at 27.

<sup>168</sup> See *supra* notes 1-2 and accompanying text.

<sup>169</sup> See *supra* notes 27, 30, 129, 159 and accompanying text.

<sup>170</sup> See *supra* notes 1-2, 118-21 and accompanying text.

<sup>171</sup> See *supra* notes 88, 120-24 and accompanying text.

<sup>172</sup> See *supra* notes 83-89, 102-49 and accompanying text. The legislature's failure is particularly inexcusable due to the framework provided by the Mississippi Supreme Court in *Kelly* for a future amendment expressly permitting a cause of action that presumably has judicial approval. See *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 877 n.2 (Miss. 1981).

<sup>173</sup> See *supra* notes 96-124 and accompanying text.

<sup>174</sup> See *supra* notes 149-66 and accompanying text.

considerations strongly suggest that the State of Mississippi would benefit considerably from a long-overdue change in the law.<sup>175</sup> The percent of contested compensation cases has risen dramatically since *Kelly*, suggesting that apprehension towards filing claims has risen.<sup>176</sup> Moreover, the financial responsibility for workplace injuries should under no circumstances fall on government programs, particularly when express statutory provisions place the burden directly on employers who derive their income from these same employees.<sup>177</sup> As societies have evolved in modern times, so too has public policy.<sup>178</sup> Mississippi needs to evolve as well, and in doing so, *Kelly's* outdated decision must be overruled.<sup>179</sup>

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<sup>175</sup> See *supra* notes 125-48 and accompanying text.

<sup>176</sup> See *supra* notes 142-43 and accompanying text.

<sup>177</sup> See *supra* notes 144-48, 161, 165 and accompanying text.

<sup>178</sup> See *supra* note 140 and accompanying text.

<sup>179</sup> Thirty years ago a commentator observed that *Kelly's* failure to permit a cause of action for retaliatory discharge "opens the door to coercion, duress, and other unconscionable acts." See Baker, *supra* note 9, at 598 (footnote omitted). Why this topic is still discussed is disappointing and can fairly be depicted as a valid reason for members of the public to be skeptical of the capacity of the courts and legislature to protect the interests of those with inferior political power, i.e., the at-will employee.

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