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The Disconnect between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context

Alex B. Long

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I. INTRODUCTION

For employment law practitioners, the modern version of the employment at-will rule is a relatively easy concept to grasp. Employers are free to discharge employees for any reason, so long as that reason does not offend public policy.[1] Despite lawyers' ease with the rule, misconceptions about the rule may still be prevalent among employees themselves. In a 1997 law review article, Pauline T. Kim reported that 89% of respondents to her survey, conducted to test employees' knowledge of the employment at-will rule, believed that the law forbids a termination based on personal dislike.[2] Kim refers to the respondents' belief as erroneous,[3] which is technically accurate–under the employment at-will rule, employers are free to discharge an employee out of personal dislike. In reality, however, employees who hold such a belief may not be as mistaken as most attorneys would automatically think. As this Article explains, a discharge based on personal dislike may indeed be unlawful, even if that dislike is not based on race, gender, or some other protected characteristic. The outcome simply depends on who one defines as "the employer" and how strong the dislike is.

For example, IBM is not capable of discharging an employee out of personal dislike. IBM is a corporation, not a person. As such, it is incapable of liking or disliking anyone. Similarly, questions as to hiring and

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1. Cynthia L. Estlund, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1664-65 (1996).

2. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133-34 (1997).

3. *Id.* at 110.

firing, although nominally made by IBM, are, in reality left to individuals within the corporation. If an IBM employee is fired out of personal dislike, then the decision to fire and the personal dislike must come from an individual, usually a supervisor or officer. Although Kim is absolutely correct that the employment at-will rule prevents an employee from successfully suing IBM over such a discharge, the rule does little to stop the employee from suing the supervisor or officer. Of course, run-of-the-mill "dislike" is hardly a strong basis upon which to bring any legal claim against anyone. However, if the "dislike" can be characterized as "personal hostility," "ill will," or some other reasonable synonym, and the at-will employee can show that such feelings were the sole motivation behind the discharge, then, according to the *Restatement (Second) of Torts* (hereinafter "*Second Restatement*"), such a discharge "is almost certain to be held" unlawful.[4]

The legal theory on which such a claim could be founded is tortious interference with prospective contractual relations (also known as tortious interference with business relations), and it is a claim that is frequently used in the employment setting in an attempt to hold individual supervisors and officers liable for discharges which, although legal for "employers," are illegal for the agents of employers. Under an interference theory, an outsider to an at-will relationship may be held liable for an improper or unjustified interference that causes one of the parties not to continue the relationship.[5] Numerous courts have held that supervisors or officers who act for reasons apart from benefitting their employers in discharging an employee may be considered such outsiders and may be held liable.[6] As a result, tortious interference claims have emerged as a valuable tool in escaping some of the restrictions of the employment at-will rule.

Although some critics of the at-will rule might applaud any tool that helps alleviate the perceived unfairness in the rule, tortious interference claims in the employment setting raise some serious concerns. For one, as the authors of the *Second Restatement* noted, because the evaluation of whether an interference is improper involves a balancing of a variety of factors and depends on the particular circumstances of a case, the determination that an interference was improper in one case is usually not controlling in another.[7] As a result, employers and employees are often left with little to go on in

4. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977).
5. *Id.* §§ 766 cmt. g, 766B.
6. *See infra* notes 69-70 (citing examples).
7. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1977).

evaluating whether a discharge was "improper" under the facts of a particular case.

Perhaps more importantly, the insertion of interference claims into the workplace tends to undermine the employment at-will default rule. In the modern workplace, it is difficult to state for certain just where an "employer" ends and a "supervisor" begins. Gone are the days when an employer was often a sole proprietor. Instead, in the words of one court, "[t]he employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee."[8] Although it is still true that an employer may fire an employee for nearly any reason, the impetus behind the discharge must come from a superior. If the reason behind the discharge is "improper," but not otherwise actionable under a wrongful discharge theory, then the employer may not be liable by virtue of the at-will rule, but the individual who made the decision may be under the interference tort. The result is a blurring of the line between wrongful discharge law and tortious interference law and an overall weakening of the employment at-will rule.

This Article addresses some of the problems that tortious interference claims may present under existing wrongful discharge law. Part II provides a background as to how tortious interference claims operate in the generic sense, as well as in the employment setting. Part III focuses specifically on such claims in the workplace. It analyzes the ways in which such claims are frequently brought against officers and supervisors as an alternative to wrongful discharge claims against employers. In addition, it focuses on the difficulty courts have had in creating a consistent framework of analysis for such claims. Part IV takes a somewhat formalistic approach to the relationship between the employment at-will rule and tortious interference claims in the workplace. Specifically, it discusses the arguments in favor of and in opposition to the employment at-will rule as a whole and how that rule may be weakened by judicial treatment of interference claims in employment at-will settings. To the extent possible, Part V proposes a rough means of closing the disconnect that currently exists between wrongful discharge law and tortious interference claims. By its nature, tortious interference with business relations is an amorphous tort, incapable of precise definition. As such, it is difficult to craft clear guidelines for the treatment of such claims. However, this Article suggests that courts can and should attempt to minimize the imposition that interference claims can have on the at-will rule. Specifically, by the simple act of recognizing that interference claims can weaken the at-will rule, courts may be more vigilant about drawing

8. Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509 (N.J. 1980).

appropriate lines in interference cases to prevent the weakening of this default rule. Once courts take this step, they can formulate a test which takes the emphasis off the mental state of officers and supervisors and instead places the emphasis in interference cases on whether the interference was independently wrongful.

II. INTERFERENCE WITH BUSINESS RELATIONS CLAIMS IN THE EMPLOYMENT CONTEXT

A. Tortious Interference with Business Relations

According to the authors of the *Second Restatement*, the claim of tortious interference with business relations has historical roots dating back to at least the fifteenth century.[9] The precedent relied upon by the authors involves situations in which an actor wrongfully interfered not with an existing contract, but rather simple business expectancies, such as the ability to engage in trade with another.[10] Despite what the authors perceive as the historical justification for the tort of interference with business relations, it was the tort's more well-known cousin, interference with contractual relations, that first gained a solid foothold in modern tort law. Courts and commentators were slower to accept interference with mere prospective contractual relations or business relations as a viable cause of action, often on the grounds that one possesses a property-like right in a contract not present in other types of business relations.[11] By the time of the enactment of the *Restatement of Torts* (hereinafter "*First Restatement*"), proponents had carried the day. The *First Restatement* advocated a prohibition against an unprivileged interference with both existing contracts and prospective or existing business relations not reduced to contract form.[12]

The *Second Restatement* created a more formal distinction between interference with existing contracts and interference with business relations,

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9. RESTATEMENT (SECOND) OF TORTS § 766B cmt. b (1977).

10. *Id.*

11. Mark P. Gergen, *Tortious Interference: How it is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1213-18 (chronicling the historical development of the tort of interference with business relations).

12. RESTATEMENT OF TORTS § 766 (1939).

classifying them as separate actions.[13] The main difference in the formulation of the tort between the *First Restatement* and the *Second Restatement* is in the elimination of the concept of privilege. Under the *First Restatement*, "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to . . . enter into or continue a business relation with another" may be held liable for damages.[14] Under the *Second Restatement*, the concept of privilege is somewhat softened: "one who intentionally and *improperly* interferes with another's" business relations may be held liable.[15] The tort of interference with contractual relations employs the same basic framework, but prohibits improper interference with existing contracts, rather than mere business relations.[16] The authors of the *Second Restatement* chose not to use the privilege concept because they felt that interference law had not "developed a crystallized set of definite rules as to the existence or non-existence of a privilege" to interfere.[17] The authors also rejected the term "unjustified" because, in part, they felt it was too closely associated with the idea of an affirmative defense.[18] As such, the authors believed that "improper" was a more neutral term which better captured the myriad factors that may be involved in assessing whether an interference should be actionable in a given situation.[19] Despite the insertion of the word "improperly" for "without a privilege" in the *Second Restatement*, the analysis of an interference claim remains similar.[20] Because, in most cases, an "improper" interference will also typically be an "unprivileged" one, the behavior or motives of the interfering party will almost always be in question.[21]

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13. RESTATEMENT (SECOND) OF TORTS §§ 766, 766B (1977). Despite the distinction, many courts continue to treat the two torts as one and the same. Gergen, *supra* note 11, at 1180-81.

14. RESTATEMENT OF TORTS § 766(b) (1939).

15. RESTATEMENT (SECOND) OF TORTS § 766B (1977) (emphasis added).

16. *Id.* § 766.

17. *Id.* § 767 cmt. b.

18. *Id.*

19. *Id.* § 766B cmt. b. In the comments, the authors compare the evaluation of whether an interference is improper with the assessment of whether conduct is negligent – both are fact-specific and the outcome of one case is not usually controlling on the next. *Id.* Although the authors noted that the factors to be considered in making this assessment reflect, to some extent, generalized privileges which had developed through judicial decisions, there still existed "ambiguity" as to the scope of these privileges. *Id.* Thus, the implication is that the better approach would be to conduct a balancing of interests based upon all of the surrounding circumstances to assess whether a defendant may be held liable for interfering in the relations of others.

20. *See* Nordling v. Northern States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) ("Interference is improper, we might say, if it is without legal justification."); Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236, 245 (Wyo. 1991) (Urbigkit, C.J., dissenting) (referring to justification, privilege, and "not improper" as "all being the same concept").

21. Gergen, *supra* note 11, at 1197 n.116.

Section 767 of the *Second Restatement* lists the factors to consider in assessing whether a defendant's interference with a contract or a prospective contractual relation is improper:

> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.[22]

The authors recommended that each factor be taken into consideration and weighed against each other in making the determination as to the impropriety of the defendant's conduct.[23]

Although the *Second Restatement* authors believed they were making an improvement by substituting the term "improperly" for "unprivileged," the impropriety standard has met with considerable disfavor. Some commentators and courts have argued that the tort, as a whole, lacks doctrinal clarity and that the impropriety standard only exacerbates the confusion.[24] The chief complaint is that section 767's balancing-of-factors

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22. RESTATEMENT (SECOND) OF TORTS § 767 (1977).

23. *Id.* § 767 cmt. a.

24. Ran Corp. v. Hudesman, 823 P.2d 646, 648 (Alaska 1991) (stating that the factors listed in section 767 "are hard to apply in any sort of predictive way"); Kutcher v. Zimmerman, 957 P.2d 1076, 1088-89 (Haw. Ct. App. 1998) (refusing to accept the seven-factor analysis of section 767 and noting the criticism that the test is "unpredictable and does not clearly delineate burdens of pleading and proof"); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 303-04 (Utah 1982) ("In short, there is no generally acknowledged or satisfactory majority position on the definition of the elements of the tort of intentional interference with prospective contractual economic relations."); Gergen, *supra* note 11, at 1184 ("Courts struggle with this issue of [improper interference] because the law of interference, and tort law more generally, provides little assistance in setting limits on the tort."); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1099 (1993) ("tortious

approach provides little guidance from case to case as to what behavior may be deemed improper. For example, Prosser states that the standards that have developed in assessing impropriety have not clearly outlawed any specific action, "leaving a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."[25] Although the question of motive would naturally seem to play a large role in assessing whether a defendant's actions are improper, the comments to section 767 make plain that motive is but one factor to be weighed against the others. Although the defendant's motive may be "very important," the desire to interfere need not be the sole or even the primary motive in order for an interference to be improper.[26] Even if the desire to interfere is only a "casual motive it may still be significant in some circumstances."[27] However, where the means used to accomplish the interference are innocent, some showing of a desire to accomplish the interference may be essential to succeed on an interference claim.[28]

In addition, assessment of whether an interference is improper also involves consideration of a host of other factors. Where the interfering party enjoys a close relationship with the breaching party or the party who ends the business relationship with the plaintiff, this fact cuts against a finding that the interference was improper.[29] Interference with a plaintiff's formal, existing contract is entitled to more protection than is an interference with a prospective contract or a business relation.[30] Consideration of whether an

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interference law suffers from considerable doctrinal confusion."); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Principles*, 49 U. CHI. L. REV. 61, 61 (1982) ("Today, courts impose liability under the rubric of the interference tort in a variety of contexts, but they have failed to develop common or consistent doctrines."). Other commentators have criticized the tort for its effect on other areas of the law. Myers, *supra*, at 1109; Gary D. Wexler, Note and Comment, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 281-82 (1994) (criticizing the tort's impact on, *inter alia*, market efficiency, and fundamental constitutional rights).

25. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 129, at 979 (5th ed. 1984). *See also* Benjamin L. Fine, Comment, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1116 n.9 (discussing the uncertainty in the area of "the proper scope of defense of privilege or justification"); Myers, *supra* note 24, at 1133-35 (discussing the ambiguities inherent in the motive inquiry and the problems they bring about); Wexler, *supra* note 24, at 295 ("Every case turns out to be essentially an ad hoc determination . . . .").

26. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977).

27. *Id.*

28. *Id.*

29. *Id.* § 767 cmt. i.

30. *Id.* § 767 cmt. e.

interference is improper also requires looking at the means used to accomplish the interference in conjunction with the other factors listed. Thus, the resort to physical violence might be enough to render an interference improper in one set of circumstances, but not another, depending upon, *inter alia*, the relations between the parties and the nature of the interest affected.[31] This tension between a defendant's mental state, the plaintiff's interests, the defendant's interests, the relationship between the parties, the means used, and societal interests will usually render the question of whether an interference was improper a jury question.[32]

Compounding the confusion is the fact that courts have failed to develop a unified approach in dealing with the allegedly wrongful behavior of defendants. Despite the development of the impropriety standard reflected in the *Second Restatement*, many courts continue to rely upon the old notions of privilege and justification.[33] For example, in the employment context, numerous opinions refer to the "manager's privilege" to take or recommend adverse actions against employees, rather than assessing whether the manager's actions were improper.[34] Although the two concepts are unquestionably similar, the authors of the *Second Restatement* chose to replace "without a privilege" with "improperly" due in part to what they perceived as the ambiguity inherent in assessing the scope of the privilege to interfere.[35]

Other courts ostensibly follow the *Second Restatement* approach in determining whether an interference was improper, but make little attempt to

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31. *Id.* § 767 cmt. c.

32. *See, e.g.*, Basin Elec. Power Coop. v. Howton, 603 P.2d 402, 405 (Wyo. 1979); Holly M. Poglase, Handling the Intentional Interference with Employment Contract Case, FOR THE DEFENSE 8, 8 (Nov. 1995).

33. *See* Stebbins & Roberts, Inc. v. Halsey, 582 S.W.2d 266, 268 (Ark. 1979); Turner v. Halliburton Co., 722 P.2d 1106, 1115-16 (Kan. 1986); Luketich v. Goedecke Wood & Co., 835 S.W.2d 504, 508 (Mo. Ct. App. 1992); Chaves v. Johnson, 335 S.E.2d 97, 102-04 (Va. 1985); Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 592 (W. Va. 1998).

34. Halvorsen v. Aramark Unif. Servs., Inc., 77 Cal. Rptr. 2d 383, 390 (Cal. Ct. App. 1998) (recognizing an absolute "manager's privilege" to interfere); Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 386 (Fla. Dist. Ct. App. 1999) (recognizing a qualified "'privilege to interfere' enjoyed by an officer or employee of a contracting party"); Clement v. Rev-Lyn Contracting Co., 663 N.E.2d 1235, 1237 (Mass. App. Ct. 1996) (recognizing supervisor's privilege to interfere); Nix v. Temple Univ., 596 A.2d 1132, 1137 (Pa. Super. Ct. 1991) (stating that managerial employees are "permitted to take actions which would have the effect of interfering with a contractual relationship between the corporation and an employee"); *see also* Meyer v. Enoch, 807 S.W.2d 156, 159 (Mo. App. Ct. 1991) (referring to a corporate officer's privilege "to induce a breach of a corporate contract").

35. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1977).

conduct the balancing test advocated by section 767.[36] In other words, these courts claim to assess whether the defendant's behavior was improper, but fail to weigh the factors listed in section 767 against each other as the authors of the *Second Restatement* specifically intended.[37] Again, the result of this lack of a unified approach is to create uncertainty in a highly fact-specific tort that already suffers from a lack of certainty.

B. The Utility of Tortious Interference Claims in the Employment Setting

> *The law of wrongful discharge is like a fleet of vessels, varying in size and seaworthiness, that must travel over the stormy sea of employment at will.*[38]

Of all the collateral torts that are frequently asserted in employment cases, perhaps none fits as nicely for plaintiffs into existing employment law paradigms as interference with business relations. Interference with business relations may prove in some instances to be the most natural, and indeed, the only logical alternative basis for recovery when the stormy seas of the employment at-will doctrine and statutory discrimination laws make recovery against the employer impossible. At least one court has expressed the view that wrongful discharge claims are simply a more particularized form of a tortious interference claim.[39] Other courts have gone further, suggesting that if left unchecked, interference claims have the potential to eliminate the employment at-will doctrine altogether.[40]

Several factors make interference claims potentially useful in employment litigation. The first is the fact that the at-will status of an employee is not a bar to an action. The *Second Restatement* provides that a contract terminable

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36. *See, e.g.*, Sorrells v. Garfinckel's, 565 A.2d 285, 290-92 (D.C. 1989) (listing the factors contained in section 767, but considering the case in terms of whether the interference was justified and considering only the defendant's motive in reaching its determination).

37. RESTATEMENT (SECOND) OF TORTS § 767 cmt. b ("This Section states the important factors to be weighed against each other and balanced in arriving at judgment . . . .").

38. Estlund, *supra* note 1, at 1657.

39. Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 422 A.2d 611, 618 (Pa. Super. Ct. 1980).

40. Clement v. Rev-Lyn Contracting Co., 663 N.E.2d 1235, 1236 n.6 (Mass. App. Ct. 1996) (stating in the context of an interference claim that "what is at stake is the risk of converting the existing rule regarding at-will employees into a rule requiring just cause for terminating such employees); *see also* Halvorsen v. Aramark Unif. Servs., Inc., 77 Cal. Rptr. 2d 383, 390 (Cal. Ct. App. 1998) (stating that by providing an absolute privilege to managers to interfere with the business relation between the corporation and the employee, "[p]laintiffs are also precluded from pleading around at will employment contracts by challenging the motives of management, which, in effect, would require management, that is, the employer, to have good cause to terminate.").

at-will is nonetheless a "valid and subsisting" contract until terminated.[41] Thus, interference with a contract of employment terminable at-will may be actionable under an interference with contractual relations theory. In addition, the *Second Restatement* also provides that interference with a continuing business or other customary relationship not amounting to a formal contract may be actionable under an interference with business relations theory.[42] Therefore, under the *Second Restatement*, the at-will status of an employee is not necessarily a bar to an interference claim—a court can treat an employment at-will relationship as either an interference with a contractual relation or an interference with a business relation. Most states to consider these issues are in agreement with the *Second Restatement*'s position.[43] As discussed *infra*, courts are often less than clear as to whether such claims should be characterized as interference with contractual relations or interference with prospective contractual relations or business relations.[44] Some courts refer to employment at-will relationships as a contract terminable at-will, but state that such relationships are more analogous to the tort of interference with business relations and treat them accordingly.[45] The fact that the at-will status of an employee is not a bar to an interference claim is significant. Under the traditional formulation of the employment at-will doctrine, an employee may be discharged for a good

41. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977).

42. *Id.* § 766B cmt. c.

43. Agugliaro v. Brooks Bros., Inc., 802 F. Supp. 956, 963 (S.D.N.Y. 1992) (applying New York law); Sorrells v. Garfinckel's, 565 A.2d 285, 290 (D.C. 1989); Hall v. Integon Life Ins. Co., 454 So. 2d 1338, 1344 (Ala. 1984); Wagenseller v. Scottsdale Mem. Hosp., 710 P.2d 1025, 1041 (Ariz. 1985); Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 271 (Fla. Dist. Ct. App. 1983); Georgia Power Co. v. Busbin, 250 S.E.2d 442, 444 (Ga. 1978); Chapman v. Crown Glass Corp., 557 N.E.2d 256, 265 (Ill. Ct. App. 1990); Bochnowski v. Peoples Fed. Sav. & Loan Ass'n, 571 N.E.2d 282, 284-85 (Ind. 1988); Toney v. Casey's Gen. Stores, Inc., 460 N.W.2d 849, 852-53 (Iowa 1990); Prysak v. R.L. Polk Co., 483 N.W.2d 629, 635 (Mich. Ct. App. 1992); Nordling v. Northern States Power Co., 478 N.W.2d 498, 505 (Minn. 1991); Levens v. Campbell, 733 So. 2d 753, 760 (Miss. 1998); Hester v. Barnett, 723 S.W.2d 544, 564 (Mo. Ct. App. 1987); Huff v. Swartz, 606 N.W.2d 461, 467 (Neb. 2000); Privette v. Univ. of N.C., 385 S.E.2d 185, 190 (N.C. Ct. App. 1989); Hennum v. City of Medina, 402 N.W.2d 327, 338-39 (N.D. 1987); Lewis v. Or. Beauty Supply Co., 733 P.2d 430, 433 (Or. 1987); Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 422 A.2d 611, 618 n.6 (Pa. Super. Ct. 1980); Todd v. S. C. Farm Bureau Mut. Ins. Co., 321 S.E.2d 602, 607 (S.C. Ct. App. 1984); Forrester v. Stockstill, 869 S.W.2d 328, 331 (Tenn. 1994); Sterner v. Marathon Oil Co., 767 S.W.2d 686, 688 (Tex. 1989); Trepanier v. Getting Organized, Inc., 583 A.2d 583, 589 (Vt. 1990); Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 591 n.20 (W. Va. 1998); Harman v. La Crosse Tribune, 344 N.W.2d 536, 540 (Wis. Ct. App. 1984); *but see* Weld v. Southeastern Cos., 10 F. Supp. 2d 1318, 1322 n.8 (M.D. Fla. 1998) (stating that an at-will employment relationship does not amount to an advantageous business relationship that can be protected from interference).

44. *Infra* notes 126-32 and accompanying text.

45. *See, e.g.*, Toney v. Casey's Gen. Stores, Inc., 460 N.W.2d 849, 853-54 (Iowa 1990).

reason, a bad reason, or no reason at all.[46] Hence, the at-will doctrine itself is often a quite significant hurdle to overcome for a discharged plaintiff. In order to avoid the limitations of the rule, a discharged employee must somehow prove that the discharge was not merely for a bad reason in the sense that it was unwise, unfair, or founded on personal dislike, but that it offended public policy in some fashion.[47] A firing in contravention of an anti-discrimination statute provides the most obvious example. Other possible examples (depending upon the jurisdiction in question) include situations where an employer fires an employee for engaging in jury service,[48] for refusing to commit perjury,[49] or for reporting illegal behavior on the part of the employer.[50] Even here, however, plaintiffs can potentially face significant obstacles. For one, some jurisdictions still cling tenaciously to the employment at-will rule and are reluctant to create these types of public policy exceptions to the rule.[51] For another, even with the statutorily-based discrimination statutes, plaintiffs must prove a highly specific form of motivation on the part of the employer. For example, federal courts are sometimes willing to rule as a matter of law that a plaintiff lacks sufficient evidence of discriminatory intent in order to prevail on her discrimination claim, despite the existence of evidence which, at first glance, would seem to raise a jury question.[52] As Ann McGinley has characterized the situation, judges often rely on the employment at-will doctrine to conclude that an employer has a "license to be mean," as long as there is no evidence that the

46. *See, e.g.*, Martin v. Tapley, 360 So. 2d 708, 709 (Ala. 1978).

47. Estlund, *supra* note 1, at 1662. Cynthia L. Estlund effectively summarizes the modern formulation of the employment at-will rule when she states that "employers are free to fire employees for good reason or no reason, but not for the many bad reasons that are condemned by law." *Id.*

48. *See, e.g.*, Pearson v. Hope Lumber & Supply Co., 820 P.2d 443 (Okla. 1991).

49. *See, e.g.*, Ressler v. Humane Soc. of Grand Forks, 480 N.W.2d 429 (N.D. 1992).

50. *See generally* Tex. Dep't of Human Servs. v. Green, 855 S.W.2d 136, 140 (Tex. App. 1993).

51. *See, e.g.*, Dray v. New Mkt. Poultry Products, Inc., 518 S.E.2d 312, 313 (Va. 1999) (refusing to recognize a whistle blower exception to the employment at-will rule).

52. *See, e.g.*, Mendoza v. Borden, Inc., 195 F.3d 1238, 1247, 1252-53 (11th Cir. 1999) (upholding judgment as a matter of law in favor of employer in a sexual harassment case where the supervisor was accused of constantly following the plaintiff, making sniffing noises while staring at her crotch, and bumping hips with her in the hallway, because such conduct was not sufficiently severe or pervasive to form the basis of a Title VII claim); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993) (holding on summary judgment in favor of employer that no actionable harassment occurred where plaintiff's supervisor asked plaintiff out on dates, called her a "dumb blond," placed his hand on her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her on one or more occasions).

meanness was motivated by discriminatory animus.[53] Thus, plaintiffs often carry a difficult burden of proof in traditional wrongful discharge cases.[54]

As such, on their face, at-will employment relationships have limited legal value. If they are viewed as contracts, then they are contracts with rather weak contours. Such relationships may be terminated by either party, literally, upon a whim. However, interference theory gives greater form and substance to such relationships. Under interference theory, at-will relationships take on greater value. Although the parties to the relationship themselves are still free to sever the relationship for whatever reason they may choose without fear of incurring liability, outsiders do not enjoy such freedom. Suddenly, what was once a mere desire for continued employment on the part of an employee now takes on property-like dimensions, "good against the world."[55]

III. THE PRACTICAL REALITIES OF TORTIOUS INTERFERENCE CLAIMS IN THE WORKPLACE

Most of the case law surrounding interference claims in the employment context involve one of two situations: (1) claims by an employee against a supervisor or officer for causing the termination of an employment relationship between the employee and the corporate employer, or (2) claims by an employee against a former employer for interfering with a new or prospective employment relationship. Despite the seemingly natural fit between interference claims and traditional employment law paradigms, the fit has not been altogether seamless. Although courts have experienced less difficulty in cases involving a former employer's attempts to interfere with an employee's new employment relationship, these types of cases have not been free of controversy. The greater confusion, however, has come in the former category of cases involving interference by an officer or supervisor which leads to the discharge of an employee. Before getting to the root of the problem, this section looks at some of the tangential problems that often arise when employees bring interference claims in the employment setting.

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53. Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1459-60 (1993).

54. *Id.*; Estlund, *supra* note 1, at 1670.

55. Dan Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 351 (1980). Of course, this phenomenon is not specific to interference claims alone. Anti-discrimination laws have the same effect.

A. Types of Claims

1. Employee vs. Former Supervisor or Officer

Perhaps the most frequently asserted interference claim in the workplace is that of an employee against an officer or supervisor of the corporate employer for interfering with the relationship between the employee and the corporation. Typically, the officer or supervisor, allegedly motivated by discriminatory animus,[56] malice,[57] or self-interest,[58] induces or causes the employee's termination. The situations involved in this type of claim tend to run the gamut. In some cases, the officer or supervisor has the actual authority to hire and fire and acts upon that authority.[59] In other cases, the officer or supervisor merely recommends adverse action[60] or passes his evaluation of the employee's work on to higher ups within the company[61] who do the actual firing.

2. Employee vs. Former Employer

The other common situation in which an employment-related interference claim can arise is where a former employer takes action which somehow affects an employee's new or prospective employment relationship. This situation often involves the case of a former employer passing along information to a current or prospective employer which ends up influencing the current or prospective employer to no longer deal with the employee. Thus, an interference with prospective contractual relations claim may arise where a former employer responds to a request for a reference concerning a former employee.[62] Sometimes the alleged interference occurs where the

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56. *See, e.g.*, Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254, 260-61 (D. Del. 1996).

57. *See, e.g.*, Sorrells v. Garfinckel's, 565 A.2d 285, 290-91 (D.C. 1989).

58. *See, e.g.*, Hunter v. Bd. of Trs. of Broadlawns Med. Ctr., 481 N.W.2d 510, 518 (Iowa 1992).

59. *See, e.g.*, Finley v. Giacobbe, 79 F.3d 1285, 1295 (2d Cir. 1996).

60. *See, e.g.*, *Sorrells*, 565 A.2d at 290.

61. *See, e.g.*, Allen v. Safeway Stores, Inc., 699 P.2d 277, 278-79 (Wyo. 1985).

62. Delloma v. Consolidation Coal Co., 996 F.2d 168, 170-71 (7th Cir. 1993) (applying Illinois law); Watkins v. General Refractories Co., 805 F. Supp 911, 917-18 (D. Utah 1992) (applying Utah law); Brown v. Chem Haulers, Inc., 402 So. 2d 887, 888 (Ala. 1981); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1205-06 (D.C. 1991); Nowik v. Mazda Motors of America (East), Inc., 523 So. 2d 769, 771 (Fla. Dist. Ct. App. 1988); Turner v. Halliburton Co., 722 P.2d 1106, 1115-17 (Kan. 1986); Bagwell v. Peninsula Reg'l Med. Ctr., 665 A.2d 297, 305, 315 (Md. Ct. Spec. App. 1995); Eib v. Fed. Reserve Bank, 633 S.W.2d 432, 433 (Mo. Ct. App. 1982);

former employer volunteers, without awaiting a request, potentially damaging information about a former employee.[63]

These types of scenarios represent the classic interference case. Here, the former employer is truly an outside third party, separate from the relationship between the employee and the current or prospective employer. In contrast, claims against supervisors or officers for interfering in an employment relationship with a current employer represent more complicated and subtle forms of interference which bring with them various difficulties.

B. Some Initial Problems with Judicial Treatment of Interference Claims in the Employment Setting

Perhaps the greatest utility of interference claims in the employment context is that they provide another possible avenue of recovery where recovery against the employer would be foreclosed. In some instances, the limitations of the employment at-will rule and statutory anti-discrimination laws may prevent an employee from recovering against her employer. However, an interference theory can potentially still be used to obtain recovery from the employer's agent who may actually have been responsible for the employee's dismissal.

In order for an interference claim to exist, there must be three parties involved: the two parties to the relationship and the interfering party.[64] In the case of an employee suing a former employer for interfering with a current or prospective employment relationship, the requirement that three parties exist is easily satisfied. If the source of the interference stems from

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Geyer v. Steinbronn, 506 A.2d 901, 904 (Pa. Super. Ct. 1986); DiBiasio v. Brown & Sharpe Mfg. Co., 525 A.2d 489, 490 (R.I. 1987).

63. Saliba v. Exxon Corp., 865 F. Supp. 306, 308-09 (W.D. Va. 1994) (involving situation where former employer contacted attorney's new employer and informed it of former employer's displeasure with attorney's alleged violation of confidentiality agreement); Bon Temps Agency, Ltd. v. Greenfield, 584 N.Y.S.2d 824, 826 (N.Y. App. Div. 1992) (involving agency's sending of letter by counsel to party with which employee was allegedly about to enter into contract, advising of employee's acknowledgment of agency's trade secrets, and warning it against improper use of such secrets); Collincini v. Honeywell, Inc., 601 A.2d 292, 293-94 (Pa. Super. Ct. 1991) (affirming jury verdict on interference claim where defendant-employer notified plaintiff's new employer that plaintiff was interfering with defendant's existing contracts); Pratt v. Prodata, Inc., 885 P.2d 786, 787 (Utah 1994) (affirming jury verdict in favor of plaintiff on interference claim where former employer contacted plaintiff's new employer and informed new employer that employee had previously signed a noncompete covenant); Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 581-82 (W. Va. 1998) (involving situation where former employer, without awaiting request, informed new employer that employee had been employed as a union organizer).

64. *See, e.g.*, Postell-Russell v. Inmont Corp., 691 F. Supp. 1, 5 (E.D. Mich. 1988).

negative information passed on to the current or prospective employer, then an interference claim may prove to be an effective alternative to a defamation claim. For a defamation claim to succeed, there must exist a false and defamatory statement of fact.[65] Thus, for example, a former employer who truthfully reports that an employee was absent from work on twenty occasions during a one-year period should not be held liable under a defamation theory. In contrast, truth is not necessarily a defense to an interference claim in all jurisdictions. Although the *Second Restatement* provides that truth is a defense to an interference claim,[66] several courts have ruled that a truthful statement may, nonetheless, be actionable.[67] The majority of courts to consider the question, however, have agreed with the *Second Restatement's* position and concluded that the providing of truthful information is not actionable.[68]

In claims brought against supervisors or officers for interfering with an existing employment relationship, interference claims may provide an alternative to the traditional statutory or common law wrongful discharge claims. In numerous cases, employees have been able to proceed to trial and sometimes succeed in suits against supervisors, managers, officers, and directors of corporations for their interference with the employment relationship between a corporate employer and an employee.[69] As such, the

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65. RESTATEMENT (SECOND) OF TORTS §§ 558, 581A (1977).

66. *Id.* § 772(a).

67. Carman v. Entner, No. 13978, 1994 Ohio App. LEXIS 387, at *23 (Ohio Ct. App. Feb. 2, 1994); Collincini v. Honeywell, Inc., 601 A.2d 292, 295 (Pa. Super. Ct. 1991); Pratt v. Prodata, Inc., 885 P.2d 786, 790 (Utah 1994); *see also* Stonestreet Mktg. Servs., Inc. v. Chicago Custom Engraving, Inc., No. 93-C1785, 1994 U.S. Dist. LEXIS 5548, at *16 n.2 (N.D. Ill. Apr. 26, 1994) (stating that the providing of truthful information only entitles a defendant to a qualified privilege which may be defeated); C.N.C. Chemical Corp. v. Pennwalt Corp., 690 F. Supp. 139, 143 (D.R.I. 1988) (noting "the general rule that communicating truthful information does not constitute 'improper' interference," but stating that the rule is not absolute and depends upon the circumstances); Puente v. Dillard's Dep't Stores, No. 07-98-0013-CV, 1998 Tex. App. LEXIS 7627, at *17 (Tex. Ct. App. Dec. 10, 1998) (noting that truth may be a defense to a tortious interference claim, but stating that "[e]ven assuming that Kayser called Bartley and gave entirely truthful statements to him, her act might still constitute tortious interference.").

68. Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 592 (W. Va. 1998).

69. Soltani v. Smith, 812 F. Supp. 1280, 1297 (D.N.H. 1993) (denying summary judgment to individual superiors on plaintiff's interference claim); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1043-44 (Ariz. 1985) (reversing grant of summary judgment in favor of supervisor); Trimble v. City and County of Denver, 697 P.2d 716, 726-27 (Colo. 1985) (affirming judgment against director of hospital); Sorrells v. Garfinckel's, 565 A.2d 285, 286 (D.C. 1989) (upholding jury verdict against supervisor); Girsberger v. Kresz, 633 N.E.2d 781, 791-92 (Ill. App. Ct. 1993) (upholding $784,000 jury verdict against officer of corporation for his interference with plaintiff's employment contract); Hunter v. Bd. of Trs. of Broadlawns Med. Ctr., 481 N.W.2d 510, 511 (Iowa 1992) (upholding $173,821 jury verdict against executive director of medical center for his interference with plaintiff's employment contract); Mailhiot v. Liberty Bank & Trust Co.,

logical conclusion, whether stated explicitly or implied by the court, is that these individuals may be third parties to the relationship. In many instances, the actions which give rise to such an interference claim would not be actionable under a wrongful discharge theory.[70] Thus, there may be cases in which an employee cannot proceed against the employer due to the limitations of the at-will rule, but may be able to proceed against the employer's agent under an interference theory. Admittedly, an employee still may not sue her employer for a discharge motivated by an improper, but non-discriminatory purpose; however, the employee may, in some instances, potentially hold liable the individual who actually did the firing or who recommended the firing. Although that person's pockets may not be as deep as the corporate employer's and attorney fees might not be available as they would under a statutory discrimination claim, interference claims create another avenue of recovery where recovery would be foreclosed under the employment at-will rule.

1. Third-Party Status vs. Privilege

One area in which courts have demonstrated a frustrating lack of consistency is in the assessment of one of the most basic requirements of an

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510 N.E.2d 773, 776 (Mass. App. Ct. 1987) (upholding $95,000 jury verdict against president of bank for interference with plaintiff's employment relationship with bank); Stack v. Marcum, 382 N.W.2d 743, 743-44 (Mich. Ct. App. 1985) (reversing grant of summary judgment in favor of supervisor); Eib v. Fed. Reserve Bank, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982) (reversing grant of summary judgment in favor of officers); Barker v. Kimberly-Clark Corp., 524 S.E.2d 821, 828 (N.C. Ct. App. 2000) (reversing grant of summary judgment in favor of manager); Renner v. Wurdeman, 434 N.W.2d 536, 541-42 (Neb. 1989) (reversing summary judgment against employee where employee alleged that president acted in his individual capacity in interfering with employment relationship); Giordano v. Aerolift, Inc., 818 P.2d 950, 951 (Or. App. Ct. 1991) (affirming $25,000 jury verdict against chief operating officer); Yaindl v. Ingersoll-Rand Co. Standard Pump—Aldrich Div., 422 A.2d 611, 621-22 (Pa. Super. Ct. 1980) (reversing grant of summary judgment in favor of manager); *see also* Creel v. Davis, 544 So. 2d 145, 146, 148 (Ala. 1989) (affirming $75,000 jury verdict against physician who recommended to plaintiff's immediate supervisor that plaintiff be fired).

70. Many of the cases cited in note 69 involve this situation. For a clear example, see *Sorrells*, 565 A.2d 285. In *Sorrells*, the plaintiff's supervisor allegedly acted with malice in bringing about the employee's termination. *Id.* at 286. However, the supervisor's behavior was not discriminatory, nor did it offend public policy in such a way as to form the basis of wrongful discharge in violation of public policy claim. *Id.* at 289. Thus, the employee could not proceed against her employer for wrongful discharge. *Id.* She could and did, however, successfully sue her supervisor under an interference theory for her supervisor's improper interference with the employee's relation with her employer. *Id.* at 290-92.

interference claim—whether there are actually three parties involved.[71] As mentioned, in order for a plaintiff to proceed with an interference claim, the interference must have come from an outside party, i.e., someone not a party to the relationship.[72] Thus, by definition, a party to a business relation cannot be charged with interfering with his own relation.[73] In the case of a former employer interfering with the existing or prospective employment relationship of a former employee, the requirement that three parties exist is obviously satisfied and poses no real problems.

The tendency of many courts, however, is to ignore or, at the least, gloss over this essential requirement when an officer or supervisor ostensibly acting on behalf of a corporate employer causes an employee to be discharged. Some courts skip past the requirement that a third party exist and proceed directly to the issue of whether the interference was privileged, justified, or improper.[74] This approach overlooks a key premise of both tort and corporate law; namely, that a corporation may only act through its agents. Under the doctrine of respondeat superior, where an agent acts within the scope of employment, the agent's acts are attributable to the corporation and become those of the corporation.[75] Thus, under traditional principles, an agent who acts within the scope of employment and on behalf of the corporation's interest is a party to the relationship. Therefore, an agent who acts within the scope of his employment cannot be held liable for interfering with a contract between his principal and a third party because, in the words of one court, to do so "would be, in effect, to hold the corporation liable in tort for breaching its own contract."[76]

However, the approach of many courts is to gloss over the requirement that a third party exist and instead first focus on whether the actions of the officer or supervisor were privileged or improper. Thus, some courts hold that an officer or supervisor who brings about the plaintiff's discharge acted

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71. *See generally* Frank B. Harty & Thomas W. Foley, *Employment Torts: Emerging Areas of Employer Liability*, 39 DRAKE L. REV. 3, 32-33 (1989-90) (noting that courts have struggled with cases in which employees allege that supervisors or managers were third parties who could interfere with the employment relationship).

72. *Supra* note 64 and accompanying text.

73. *See, e.g.*, Levens v. Campbell, 733 So. 2d 753, 757 (Miss. 1999).

74. *See* Girsberger v. Kresz, 633 N.E.2d 781, 791 (Ill. App. Ct. 1993); *Hunter*, 481 N.W.2d at 517-18; Draghetti v. Chmielewski, 626 N.E.2d 862, 868-69 (Mass. 1994); Welch v. Bancorp Mgmt. Advisors, Inc., 675 P.2d 172, 178 (Or. 1983). *But see* McGanty v. Staudenraus, 901 P.2d 841, 847 (Or. 1995) (recognizing the court's previous lack of clarity on the distinction between the third-party element of an interference claim and the improper means/improper purpose element of the tort).

75. *See, e.g.*, A-G Foods, Inc. v. Pepperidge Farm, Inc., 579 A.2d 69, 73 (Conn. 1990).

76. Bowman v. Grolsche Bierbrouwerij B.V., 474 F. Supp. 725, 733 (D. Conn. 1979).

improperly or in an unprivileged fashion without first reaching the question of whether the individual is a third party to the employment relationship.[77]

Under the *Second Restatement*, the two issues appear to be one and the same.[78] Under the *Restatement (Second) of Agency*, an employee who is motivated solely by a desire to injure another employee or to advance his own interests does not act within the scope of employment.[79] Likewise, that same employee has probably acted improperly under the balancing-of-factors approach laid out by the *Second Restatement*.[80] Indeed, courts sometimes refer to the third-party requirement of interference claims and the "privilege to interfere" interchangeably, even within the same opinion.[81]

Despite their similarity, however, the two concepts are distinct. For one, under the balancing-of-factors approach toward assessing whether a defendant's actions were improper, the motivation of the defendant and the interests sought to be advanced by the defendant are but two factors to consider. Regrettably, the tendency of many courts in these types of cases has been to focus almost exclusively on the defendant's motivation.

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77. *See Hunter*, 481 N.W.2d at 517-18; Eib v. Fed. Reserve Bank, 633 S.W.2d 432, 436 (Mo. Ct. App. 1982); Barker v. Kimberly-Clark Corp., 524 S.E.2d 821, 826 (N.C. Ct. App. 2000); Gordon v. Lancaster Osteopathic Hosp. Ass'n, 489 A.2d 1364, 1370 (Pa. Super. Ct. 1985).

78. *See generally* Gergen, *supra* note 11, at 1197 n.116 (noting that the question of whether an agent acted within his authority or against the interests of his principal is similar to the question of whether the agent acted improperly).

79. RESTATEMENT (SECOND) OF AGENCY § 235 (1959). *Accord* Baumeister v. Plunkett, 673 So. 2d 994, 999 (La. 1996) (cited in William R. Corbett, Faragher, Ellerth, *and the Federal Law of Vicarious Liability For Sexual Harassment by Supervisors: Something Lost, Something Gained, And Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801, 807 (1999)). In his thoughtful article on the relation between the concept of vicarious liability in federal discrimination law and state tort law, Professor Corbett notes a disconcerting, but quite accurate, reality: there are two distinct conceptions of vicarious liability. Corbett, *supra*, at 807. As Corbett suggests, employee conduct of a sexual nature which might not be considered within the scope of employment under state tort law could very easily subject an employer to liability under federal discrimination law. *Id.* Corbett suggests that the recent Supreme Court pronouncements on the subject of employers' vicarious liability for sexual harassment committed by their employees is an explicit rejection of state law respondeat superior theory. *Id.* at 810-11 (discussing Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)). This Article uses the term "scope of employment" in the traditional state tort law sense.

80. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977) (stating that if the actor's sole motivation was to interfere with the other's contractual relations, "the interference is almost certain to be held improper.").

81. DuSesoi v. United Ref. Co., 540 F. Supp. 1260, 1275 (W.D. Pa. 1982) (recognizing that a party cannot interfere with a contract to which it is a party and that corporations may only act through their agents, but considering the issue of whether the individual's interference was actionable as one of privilege); Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 386 (Fla. Dist. Ct. App. 1999) (addressing law firm's argument that it was not a third party to the contractual relationship, but deciding the interference question on the grounds of privilege).

Although courts sometimes will declare an interference to be improper where the defendant employs wrongful means to accomplish the interference,[82] the typical approach focuses on motivation to the exclusion of the other factors listed in section 767.[83] As a result, a court that considers only the defendant's motivation in assessing whether an interference is improper is, in actuality, doing little more than asking whether the officer or supervisor was acting within the scope of employment.

The correct approach is quite simple, both in theory and in practice. Any analysis of an interference claim must, by definition, begin with the question of whether the officer or supervisor was a third party to the relationship. For example, in *McGanty v. Staudenraus*,[84] the Supreme Court of Oregon was confronted with a complaint that alleged on its face that the president of the company had interfered with the relationship between the employee and the company by sexually harassing the employee while acting within the scope of his employment. The individual defendant moved to dismiss the complaint on the grounds that, as he was alleged to have acted within the scope of his employment, he could not be a third party to the relationship.[85] The employee argued that the fact that she claimed in her complaint that the president had acted within the scope of his employment was not dispositive; instead, she argued that the president had acted improperly and with mixed motives, thereby creating a jury question.[86] The court, quite correctly, recognized that the employee's argument placed the cart before the horse: "Whether a party has acted by either an improper means or with an improper purpose is relevant . . . *only* if that party first meets the threshold test of being a third party to the contractual relationship with which the interference allegedly has occurred."[87] Where, as in *McGanty*, the plaintiff alleges in her complaint that the defendant has acted within the scope of his employment, this allegation constitutes an admission which should prevent the plaintiff from proceeding under an interference theory.[88]

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82. Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 308-09 (Utah 1982).

83. *See, e.g.*, Sorrells v. Garfinckel's, 565 A.2d 285, 290-92 (D.C. 1989) (listing the factors contained in section 767, but analyzing the case in terms of whether the interference was justified and considering only the defendant's motive in reaching its determination).

84. 901 P.2d 841 (Or. 1995).

85. *Id.* at 845-46.

86. *Id.* at 847.

87. *Id.*

88. Interestingly, the court took time to help clarify its prior holdings which had created ambiguity in this regard, not unlike that discussed in notes 71-81 and accompanying text. Previously, the court had analyzed several interference claims without reference to whether the individual defendant was, in fact, a third person to the relationship. Instead, the court assessed whether the individual defendants had acted improperly in interfering with the employment relationships in question. *Id.* at 847-49. Thus, the court recognized that its prior decisions had

The *McGanty* opinion is sound in both law and policy. The plaintiff's complaint also contained an allegation that the president's harassment had forced her to resign, thus forming the basis of a wrongful discharge claim.[89] The court held that, as the facts were alleged, knowledge of the president's acts of harassment could be imputed to the employer. As such, the plaintiff was free to proceed under a constructive discharge theory.[90] The court's decision has the benefit of preserving a plaintiff's ability to seek recovery for actions that fall outside the protection of the at-will rule while preventing a plaintiff from pleading inconsistently and around the at-will rule. In rejecting the plaintiff's interference claim, the court noted that the premise of the doctrine of respondeat superior is that when an employee is acting in the scope of the employee's employment, the employee is acting as the employer, and not as an independent entity.[91] Therefore, it would be incongruous to permit a plaintiff to claim in one instance that the individual defendant was acting within the scope of employment for purposes of advancing a wrongful discharge claim, but ignoring the effects of such an allegation for purposes of an interference claim.

2. Going Beyond Third Party Status: Privilege vs. Impropriety

Once it has been established that the intentional interference was committed by a third party, the next step under the *Second Restatement* is to determine whether the interference was improper. As mentioned, the authors chose to frame the question of tortious interference as one of impropriety rather than privilege.[92] Despite this fact, for some courts, the question is not whether the interference was "improper," but rather whether it was privileged or justified.[93] Although the authors chose to frame the issue in terms of improper behavior, they did recognize that the traditional concept of privilege or justification could still play a role in interference analysis. The establishment of a privilege involves a weighing of competing factors in order to arrive at a socially desirable result.[94] Thus, regardless of whether a court employs the traditional concepts of privilege or justification or the

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"not been entirely clear respecting the distinction between the third-party element of the tort and the improper means/improper purpose element of the tort." *Id.* at 847.

89. *Id.* at 853.
90. *Id.* at 857.
91. *Id.* at 846.
92. *Supra* notes 13-23 and accompanying text.
93. *Supra* notes 33-35 and accompanying text.
94. KEETON, *supra* note 25, § 16, at 109.

balancing-of-factors approach of section 767, it should, in theory, be considering roughly the same factors.[95]

Instead, most courts tend to focus on the motives of the defendant or the interests sought to be advanced by the defendant to the exclusion of other factors.[96] For example, the "privilege to interfere" referred to by some courts may be lost where the officer or supervisor who induced or caused the termination of the relationship acted out of a desire to injure the plaintiff, for pecuniary benefit, or for reasons apart from advancing the corporations's interests.[97] This consideration parallels the *Second Restatement*'s advice that the defendant's motive and the interests sought to be advanced by the defendant should be considered in assessing whether the interference was improper.[98] However, it largely omits consideration of the other factors listed in section 767.

As the figure below illustrates, courts tend to follow one of four basic approaches in addressing the actions of an officer or supervisor:

Privilege	Nature of Protection
Mixed motive	Supervisor's or officer's interference is privileged (or not improper) where supervisor or officer is motivated in part to benefit the employer; privilege is lost if supervisor's or officer's actions are totally unrelated to benefitting the employer.
Predominant motive	Supervisor's or officer's motive to benefit the employer must predominate over other, self-interested motives in order for the interference to be privileged (or not improper).

95. *See generally* RESTATEMENT (SECOND) OF TORTS § 767 cmt. j (1977) ("In some situations the process of weighing the conflicting factors set forth in this Section has already been performed by the courts, and incipient privileges and rules defining conduct as not improper are developing.").

96. *Supra* note 83 and accompanying text. *See generally* Huff v. Swartz, 606 N.W.2d 461, 468 (Neb. 2000) (criticizing a prior opinion by the Nebraska Court of Appeals and noting that the fact that a co-employee acts in furtherance of interests other than that of the employer does not necessarily establish unjustified interference).

97. *See, e.g.*, Nickens v. Labor Agency, 600 A.2d 813, 820 (D.C. 1991).

98. RESTATEMENT (SECOND) OF TORTS § 767(a), (b), (d) (1977).

Absolute privilege	Supervisor or officer has an absolute privilege to interfere with an at-will employee's relationship with his or her employer.
Catch-all	Supervisor's or officer's interference is improper or unprivileged where supervisor or officer exceeds the scope of employment, acts with malice, acts in bad faith, and/or uses improper means to accomplish the interference.

Perhaps most common is the first approach, in which a supervisor or officer retains a privilege to interfere unless the supervisor or officer is motivated solely out of personal interests, unrelated to the employer's interests. Where the supervisor or officer is motivated at least in part to benefit the employer, the privilege remains intact, despite the fact that the supervisor or officer may also have acted out of self-interest.[99] This standard typically applies whether the employment relationship is at-will or contractual.[100]

This mixed-motive standard is actually almost identical to the traditional test for determining whether an employee acts within the scope of employment. Under the *Restatement (Second) of Agency* § 236, "the fact that the predominant motive of the [agent] is to benefit himself . . . does not prevent the act from being within the scope of employment."[101] The act of the agent is outside the scope of employment only "if it is done with no

99. Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 328 (9th Cir. 1982) ("[W]here, as here, an advisor is motivated in part by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged."); Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 386 (Fla. Dist. Ct. App. 1999) ("The privilege [of an officer or employee of a contracting party] is destroyed where [the officer or] an employee acts solely with ulterior purposes, without an honest belief that his actions would benefit the employer, and the [officer or] employee's conduct concerning the contract or business relationship is not in the employer's best interest."); HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 678 (Ill. 1989) ("A defendant who is protected by a privilege, however, is not justified in engaging in conduct which is totally unrelated or even antagonistic to the interest which gave rise to defendant's privilege."); Welch v. Bancorp Mgmt. Advisors, Inc., 675 P.2d 172, 178-79 (Or. 1983) (adopting a mixed-motives test whereby corporate officers or employees are privileged to interfere unless they act against the employer's best interests or solely for their own benefit).

100. *See, e.g., Salit*, 742 So.2d at 386 (referring to the privilege to interfere in the context of both contractual and business relationships).

101. RESTATEMENT (SECOND) OF AGENCY § 236 cmt. b (1959).

intention to perform it as a[n] . . . incident to a service."[102] Thus, the mixed-motive approach to privilege, if considered in isolation, is merely another way of asking if the agent was a third party to the relationship.

Another, lesser-used approach extends a privilege to officers or supervisors where the motive to benefit the employer predominates over other, self-interested motives.[103] In *Geolar, Inc. v. Gilbert/Commonwealth, Inc.*,[104] the Supreme Court of Alaska laid out the commonly-accepted notion that an agent is privileged to interfere with his principal's relationship with another if the agent is acting to further the principal's best interest.[105] However, the court added the stipulation that the essential question was whether the agent's "actions were predominately motivated by a desire to protect [the principal's] interests or by spite, malice, or some other improper objective."[106]

Perhaps least common is the absolute privilege afforded to a manager to induce an employee's termination by a California appellate court. In *Halvorsen v. Aramark Uniform Services, Inc.*,[107] a manager allegedly induced the plaintiff's employer to discharge the plaintiff because the plaintiff had embarrassed the manager during a supervisory meeting. Relying upon the policy of promoting and protecting an employer's control over his business, as well as protecting confidential communications between agents and principals, the court held that a manager's state of mind was irrelevant in assessing an interference premised upon termination of an at-will employee.[108] The court reasoned that a corporation may only act through its agents. Therefore, by extending an absolute privilege to managers in such cases, the court believed it was acting to prevent employees from pleading

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102. *Id.* § 235.

103. King v. Sioux City Radiological Group, P.C., 985 F. Supp. 869, 882-84 (N.D. Iowa 1997) (discussing interference in terms of improper behavior, rather than privilege, but holding that agent's interference with business relationship between employer and another employee is not improper unless there is "*substantial evidence of a predominant motive by the defendant to terminate the contract for improper reasons.*"); Geolar, Inc. v. Gilbert/Commonwealth, Inc., 874 P.2d 937, 940-41 (Alaska 1994); Forrester v. Stockstill, 869 S.W.2d 328, 334-35 (Tenn. 1994) ("[W]hen an officer, director, or employee of a corporation acts within the general range of his authority, and his actions are *substantially motivated by an intent to further the interest of the corporation*" the officer, director, or employee is immune from liability.) (emphasis added); Pratt v. Prodata, Inc., 885 P.2d 786, 788 (Utah 1994) (holding that an improper purpose exists where the defendant's ill will predominates over legitimate considerations).

104. 874 P.2d 937 (Alaska 1994).

105. *Id.* at 941.

106. *Id.*

107. 65 Cal. App. 4th 1383 (Cal. Ct. App. 1998).

108. *Id.* at 1394-96.

around the employment at-will rule.[109] "[C]hallenging the motives of management . . . in effect, would require management, that is, the employer, to have good cause to terminate."[110] Thus, in the court's view, extending an absolute privilege was the best method of preventing discharged plaintiffs from circumventing the at-will rule.

The final approach is, in reality, a catch-all category. Many states are less than clear as to when the interference of officers and supervisors is unprivileged or improper. The comments to the *Second Restatement* provide that, although the term "malice" is frequently used in interference cases, it should not be understood to mean in the sense of spite or ill will.[111] Instead, malice, for purposes of an interference claim, simply means "'intentional interference without justification.'"[112] As such, ill will is not an essential condition of liability for courts following the *Second Restatement* approach.[113] Some courts, however, specifically require a showing of actual malice in the sense of spite, ill will, or a desire to harm the plaintiff.[114] Other courts require that the officer or supervisor must have acted in bad faith (possibly meaning "maliciously" or contrary to the interests of the employer) in order for the privilege to be lost.[115] Again, it is not always clear whether this interest must simply exist, whether it must predominate or whether it must be the sole interest.[116] Still other cases note that an interference may be improper as a result of either an improper motive or improper means, such as misrepresentation of facts, threats of violence, or

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109. *Id.* at 1396.

110. *Id.*

111. RESTATEMENT (SECOND) OF TORTS § 766 cmt. s (1977) (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. k).

112. *Id.*

113. *See, e.g.*, Barlow v. Int'l Harvester Co., 522 P.2d 1102, 1114 (Idaho 1974).

114. Nickens v. Labor Agency, 600 A.2d 813, 820 (D.C. 1991) (holding that privilege may be lost, inter alia, where defendant acts to harm the plaintiff); Nordling v. Northern States Power Co., 478 N.W.2d 498, 506 (Minn. 1991) (using the terms "improper" and "justified" almost interchangeably, and holding that while motive and malice are but one factor to be considered in assessing whether an interference is improper, "when motive or malice becomes relevant on the issue of improper interference, that this malice be actual malice"); Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21, 24 (Mass. 1981) (holding that supervisor cannot be liable "unless he acted out of malevolence, that is, with 'actual' malice").

115. Martin v. Johnson, 975 P.2d 889, 896 (Okla. 1998) (holding that privilege to interfere may be lost where agent or employee acts in bad faith); Stanfield v. National Elec. Contractors Ass'n, Inc., 588 S.W.2d 199, 202 (Mo. Ct. App. 1979) ("A corporate officer is privileged to induce a corporation to breach a contract so long as he acts in good faith to protect the corporation and does not act for his own personal benefit.").

116. *See, e.g., Nickens*, 600 A.2d at 820 (holding that a corporate officer may lose the privilege to interfere if he acts maliciously or for his own benefit, but failing to identify whether these must be the sole motives or whether they must predominate over legitimate motives).

defamation; however, there are comparatively few cases in which such means have been used by a court to justify a finding of improper interference.[117]

Although the mixed-motives approach appears to be the most common approach, it is by no means universally accepted. As mentioned, part of the reason why the authors of the *Second Restatement* chose to define the tort in terms of whether behavior was improper, rather than unprivileged, was because they believed courts had not fully developed a crystallized set of rules concerning the applicability of the privilege.[118] However, the authors did not necessarily believe that the concepts of privilege and justification were obsolete. Instead, the comments state that where a privilege to interfere has developed to the point of crystallization of that privilege, assessment of the factors listed in section 767 is unnecessary.[119] The various formulations of the privilege concept, although often similar, tend to vary from state to state. Thus, although the privilege to interfere may have crystallized to a certain extent, there are still enough differing formulations as to what types of behavior are actionable to create considerable uncertainty.

3. The Privilege to Provide a Negative Reference

In the case of interference via negative information supplied to a prospective employer, courts often borrow from defamation law in assessing whether the interference was improper or unprivileged. As a result of this reliance on a well-established body of law, less confusion has arisen in interference cases in this type of case.

Perhaps the most commonly asserted claim in the case of a negative reference is defamation.[120] Numerous courts have noted the analytical similarity between interference and defamation claims.[121] As a result, some

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117. *See generally* Pratt v. Prodata, Inc., 885 P.2d 786, 789 n.3 (Utah 1994) (noting that under Utah law an interference may be improper as a result of improper motives or the use of improper means, but calling into question the future vitality of the improper purpose prong of the interference tort).

118. *Supra* notes 17-21 and accompanying text.

119. RESTATEMENT (SECOND) OF TORTS § 767 cmt. j (1977).

120. *See generally* J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV.. 115 (1998) (discussing the unwillingness of employers to provide employment references in the context of defamation law).

121. *See, e.g.*, Delloma v. Consolidation Coal Co., 996 F.2d 168, 172 (7th Cir. 1993) (noting that defamation and interference claims are "analytically intertwined."). *See also* KEETON, *supra* note 25, § 129, at 989 (noting that occasions privileged under the law of defamation may also be considered justified or privileged in cases involving interference with contractual relations).

courts import from defamation law the conditional privilege often afforded to employers who are responding to a reference request.[122] In such situations, a responding employer retains a privilege to supply even negative information about a former employee provided that the employer does not somehow abuse the privilege, for example, by excessive publication[123] or through malice.[124]

The employment reference situation is a case in which relatively clear privileges have crystallized. Given the relatively high number of cases involving negative employment references and the relative similarities in the fact patterns of such cases, courts have been able to state a fairly clear formulation of the existing privilege, which takes into account the competing policy interests of employers and employees. Although there is a general consensus that employers are reluctant to supply employment references for fear of exposing themselves to defamation claims,[125] there has at least developed a consistent framework for analyzing such claims. Admittedly, there are still difficult questions to be resolved, most notably the question of whether the providing of truthful information is actionable under an interference theory, but well-established defamation law has provided a model which courts have been able to transfer to the interference setting with little difficulty.

IV. THE BIGGER PROBLEM WITH INTERFERENCE CLAIMS IN THE EMPLOYMENT CONTEXT

The failure of courts to develop a unified standard with respect to when an officer or supervisor's interference is improper or unprivileged is symptomatic of their greater failure to fully assess the underlying justifications for the privilege in the at-will setting. As previously mentioned, most states recognize a cause of action for interference with an at-will employment relationship.[126] However, courts have been less than clear about which version of the interference torts should apply: interference

122. *Delloma*, 996 F.2d at 171-72 (applying Illinois law); Watkins v. Gen. Refractories Co., 805 F. Supp. 911, 918 (D. Utah 1992) (applying Utah law); Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 592-93 (W. Va. 1998); *see also* Bagwell v. Peninsula Reg'l Med. Ctr., 665 A.2d 297, 314 (Md. Ct. Spec. App. 1995) ("without right or justifiable cause") (quoting Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., 650 A.2d 260 (Md. 1994)).

123. *See, e.g., Delloma*, 996 F.2d at 172.

124. O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L. J. 305, 317 (1988).

125. Verkerke, *supra* note 120, at 115.

126. *Supra* notes 41-43 and accompanying text.

with contractual relations or interference with business relations, or prospective contractual relations. Some courts explicitly lump interference with at-will employment cases into the interference with business relations pile.[127] Others analogize at-will employment relationships to contracts terminable at-will, but treat such cases as an interference with business relations because such contracts only give rise to a future expectancy in employment, rather than a legal right to it.[128] Still others recognize the at-will nature of such relationships, but hold that they are contracts which nonetheless may form the basis of an interference with contractual relations claim.[129] Finally, other courts pay little mind to such distinctions and appear to use the torts interchangeably.[130]

As one court has noted, the question as to the appropriate classification of such claims involves more than mere semantics.[131] Despite the explicit admonition contained in the *Second Restatement* that prospective contractual relations and business relations are not deserving of the same level of protection from interference as are fully formed contracts,[132] many courts fail to draw any distinction between the two torts. As a result, some courts have engaged upon a course of action which all but eliminates the employment at-will doctrine. The result is a serious disconnect between the modern version of the employment at-will rule and tortious interference claims.

A. The Tension Between Employment At Will and Interference with Business Relations

The employment at-will doctrine has been under attack for over thirty years. Since Lawrence E. Blades' 1967 article criticizing the rule and calling for its replacement with a just cause standard,[133] the rule has been the subject of intense debate. Although much of the harshness that originally characterized the rule has been tempered, employment at-will lives on.

Supporters of the modern at-will rule offer a host of justifications for its continuation. Most supporters focus their arguments on economic grounds.

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127. Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166, 173 (W. Va. 1983).

128. King v. Sioux City Radiological Group, 985 F. Supp. 869, 884 (N.D. Iowa 1997) (applying Iowa law); Roy v. Woonsocket Inst. for Sav., 525 A.2d 915, 918-19 & n. 4 (R.I. 1987).

129. Bochnowski v. Peoples Fed. Sav. & Loan Ass'n, 571 N.E.2d 282, 284-85 (Ind. 1991).

130. *Torbett*, 314 S.E.2d at 173.

131. *King*, 985 F. Supp. at 881.

132. RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1977).

133. *See generally* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

Richard Epstein and Richard Posner, for example, argue that market forces limit the number of arbitrary and unjust discharges.[134] An employer who acts arbitrarily will soon be viewed as untrustworthy both by current and prospective employees, thus resulting in greater difficulty for the employer to maintain its workforce under existing wages.[135] In addition to these market-based arguments, supporters raise other concerns associated with doing away with the at-will rule, including increased record keeping costs;[136] time-consuming and expensive litigation;[137] the risk of erroneous jury verdicts;[138] the decreased ability of employers to maintain discipline within the workplace;[139] higher unemployment;[140] and the risk that the costs from these problems will ultimately be passed on to employees and consumers as a result.[141]

For supporters of the employment at-will rule, the hallmark of the doctrine is freedom.[142] In contrast to employment relationships governed by formal contracts, employment at-will relationships provide both sides with freedom of action. For Epstein, such freedom is essential because it "allows both sides to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information."[143] The benefits to employers of such relationships are obvious: they are free to run their businesses in what they believe to be the most efficient manner, unfettered by judicial second-guessing into the wisdom or fairness of their decisions. However, supporters also note the freedom that the at-will presumption affords to employees. Employees are likewise free to walk away from the relationship at any time and for any reason. This freedom benefits employees in that they are "not locked into an unfortunate

134. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 972-76 (1984); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 359 (5th ed. 1998).

135. Epstein, *supra* note 134, at 968; Posner, *supra* note 134, at 358.

136. Epstein, *supra* note 134, at 970.

137. Richard A. Posner, *Hegel and Employment At-Will: A Comment*, 10 CARDOZO L. REV. 1625, 1633 (1989).

138. Epstein, *supra* note 134, at 970.

139. Posner, *supra* note 137, at 1633.

140. *Id.* at 1634.

141. *Id.*; Jeffrey L. Harrison, *The "New" Terminable At-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 331-45 (1984).

142. Epstein, *supra* note 134, at 953.

143. Epstein, *supra* note 134, at 969; Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1923 (1996) (arguing that the at-will rule allows "individuals freedom to find employment situations which more closely approximate their [job security] preferences.").

contract" and may move on if better opportunities present themselves or if they "detect[] some weakness in the internal structure of the firm."[144]

Critics of the at-will doctrine challenge whether the attendant freedoms of such relationships are equal in practice. These critics charge that, given modern economic realities, the freedom of employees to pull up stakes and end the relationship at anytime pales in comparison to employers' almost unlimited freedom to end the relationship for a "good reason, bad reason, or no reason at all."[145] Although different critics have proposed different solutions to the perceived inequity,[146] one of the more common refrains is that at-will employees should be protected by something akin to the "just cause" standard found in most collective bargaining agreements.[147]

Underlying these types of arguments is the notion that collective bargaining agreements are, in and of themselves, somehow "better" than traditional at-will relationships. For one, they are more likely to provide a greater measure of protection from arbitrary dismissals than do at-will relationships.[148] For another, collective bargaining agreements are the result of a true meeting of minds between the parties. Contrary to the positions of Epstein and others, some commentators argue that the at-will presumption is neither the most efficient nor the most fair means of governing employment relationships, because when employees bargain with their employers (if what

144. Epstein, *supra* note 134, at 969.

145. Ruth Gara Okediji, *Status Rules: Doctrine as Discrimination in a Post-*Hicks *Environment*, 26 FLA. ST. U. L. REV. 49, 57 (1998); *see also* Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1106 (1984) ("Employees are inescapably vulnerable to economic forces; their insecurity ought not be compounded by complete vulnerability to employer whimsy or arbitrariness."); Blades, *supra* note 133, at 1411-12 (arguing that the superior bargaining power of employers accounts for the prevalence of the at-will rule).

146. McGinley, *supra* note 53, at 1447 (calling for comprehensive federal legislation to replace the at-will rule); *See generally* Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L. J. 1 (1979) (calling for judicial reform of the at-will rule).

147. Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 672 (1988); William B. Gould IV, *The Idea of the Job as Property in Contemporary America: the Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 911 (1986); Peck, *supra* note 146, at 4; Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521-24 (1976).

148. Summers, *supra* note 145, at 483 (noting the greater security given to employees covered by collective bargaining agreements than employees in the same firm not covered by such agreements); *see generally* Kenneth G. Dau-Schmidt, *Employment Security: A Comparative Institutional Debate*, 74 TEX. L. REV. 1645, 1651 (1996) (citing the prevalence of just-cause provisions in collective bargaining agreements and asking, "If workers do not desire job security, why do they negotiate for it collectively?").

they truly do can be called bargaining), they bargain with incomplete information or from an unequal position.[149]

To a certain extent, critics and supporters would agree that modern employment law has lessened some of the unfairness of the pure notion of employment at will.[150] The modern reformulation of the rule targets the most egregiously offensive discharges.[151] Most supporters of the modern-day version of employment at-will support the view expressed by various anti-discrimination laws that an employer should not have unfettered freedom to discharge employees based upon the consideration of race, gender, age, etc.[152] Also, many supporters have no real problem with many of the public policy exceptions to the at-will rule, such as permitting a cause of action where an employee has been fired for refusing to commit perjury or in retaliation for exercising a protected right.[153] Thus, there is a general consensus that employees have considerably greater protection than they did in the first half of the twentieth century and that this change has been for the better.

The dispute lies in those discharge situations that are less egregious than mentioned. Many discharges which might be considered "wrongful" in the abstract remain legal. Most employers face no liability for discharging employees out of personal animosity (at least as long as the animosity is not based on impermissible consideration of a protected trait). Also, most employers face no liability for fabricating the reasons behind an employee's discharge (at least as long as the employer does not publish the false justification). Typically, only unionized employees covered under collective bargaining agreements are protected from these types of actions. In short, modern wrongful discharge law covers only the worst forms of employer behavior and allows these other types of behaviors to go unpunished. For supporters of the more modern version of the at-will rule, this is the most practical and most efficient means of governing the employment relationship. For opponents, these justifications are insufficient.

Regardless of the desirability of the modern at-will rule, there is an argument that the current state of the rule is the result of decisions of courts

149. Blades, *supra* note 133, at 1411-12; Summers, *supra* note 145, at 1106-07; Gould, *supra* note 147 at 892-94.

150. Estlund, *supra* note 1, at 1667 ("There is thus a fairly wide consensus among the leading commentators on at-will employment that the law has legitimately and more or less adequately taken care of the most egregious unjustified discharges . . . .").

151. *Id.* at 1661.

152. *Id.* at 1663-64 (characterizing the silence of supporters of the at-will rule as assent to this exception to the at-will rule).

153. *Id.* (citing the positions of Judge Richard Posner and Professor Richard Epstein in favor of allowing certain public policy exceptions to the at-will rule).

and legislatures that this is the way the employment relationship should be governed.[154] The utility of abolishing the at-will rule has been the subject of a seemingly never-ending series of law review articles, legislative proposals, and informal discussions. Some critics have challenged employment at-will at the most basic starting point—that Horace Wood's assertion in 1877 that American courts had by that time adopted an "inflexible" rule "that a general or indefinite hiring is prima facie a hiring at-will" and is terminable at the will of either party[155] is simply wrong.[156]

Since Blades' 1967 article, there has been a barrage of scholarly commentary calling for courts and legislatures to see to the rule's demise. Indeed, state legislatures have considered various pieces of legislation which would have replaced the rule with a just cause standard.[157] Critics have attacked the rule on economic, public policy, and emotional grounds.[158] Courts and legislatures have considered these arguments, but instead of doing away with the rule, their solution has been to carve out exceptions which eliminate only the worst forms of wrongful discharges.[159]

Instead of abolishing the at-will rule, courts and legislatures have attempted to draw a line. The line may be blurry at times, but it does provide employers and employees with a rough sense of what types of discharges are permissible. Modern wrongful discharge law targets only employer behavior that affects both the employee and some interest of the public at large. As Cynthia Estlund has stated, modern wrongful discharge doctrines "protect not only the interests of employees but also the interests of third parties or of the public - interests that would suffer if employers were given the full power over their employees that the pure at-will regime would afford."[160] Thus, for example, the limitation on discharges in retaliation for refusing to commit perjury protects not only the employee in question, but

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154. For an exhaustive historical study into the adoption of the at-will rule, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

155. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, § 134, at 272 (1877).

156. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976).

157. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 71 (1988) (noting, in 1988, the introduction of "just cause" bills in several state legislatures).

158. *Supra* notes 145-49 and accompanying text; St. Antoine, *supra* note 157, at 67 (noting the "piercing hurt to individuals" who are unjustly discharged in support of abolishment of the rule).

159. To date, Montana remains the only state to have a just cause statute. MONT. CODE ANN. § 39-2-901, -904 (1999).

160. Estlund, *supra* note 1, at 1664-65.

important public interests.[161] Discharges which do not implicate such interests remain legal. The line between lawful and unlawful discharges may be vague in some instances, or, not yet drawn by some courts in others; however, it is sufficiently clear to put employers on notice as to when they may potentially face liability.

Congress has passed a series of anti-discrimination statutes. State legislatures have considered, but rejected statutes that would require just cause for discharge and instead passed legislation which, to varying degrees, mirrors federal law and extends even greater protection to employees. [162] For their part, state courts have created public policy exceptions to the at-will rule and, in some cases, have allowed actions for wrongful discharge based upon violation of these statutes.[163] What legislatures and courts have not done, despite every opportunity, is replace the basic notion that employers and employees are free to end the employment relationship at any time and for virtually any reason with a rule that would allow a cause of action based on something other than a violation of the worst forms of employer behavior. Despite predictions that employment at-will would cease to exist by the end of the twentieth century,[164] the doctrine lives on, albeit in a modified version.[165] This failure to act in the face of repeated entreaties suggests that the modern version of the employment at-will rule is the way it is because courts and legislatures want it to be that way. Whether the reason is complicated economic rationales, simple fear of change, interest group influence, or a combination of all of the above, the fact is that these law-making entities are unwilling to take from employers the freedom to discharge their employees as they see fit, except when the discharge affects interests apart from those of the parties involved.

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161. *Id.* at 1666.

162. *See, e.g.*, OR. REV. STAT § 659.550 (1998) (prohibiting retaliation against employees who report criminal activity).

163. *See, e.g.*, West Virginia Human Rights Act, W. VA. CODE § 5-11-9 (1999).

164. St. Antoine, *supra* note 157, at 81 (writing in 1988 that "[w]hether it will be in the coming decade or the following, we shall shortly see on the legal landscape only the decaying husk of the doctrine of employment at will.").

165. Okediji, *supra* note 145, at 57-58 ("Although the legitimacy of the at-will doctrine as an expression of American law has faced some challenge, the rule nonetheless continues to thrive as a cardinal principle of employment relations."); William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 308 (1996) ("Employment at will now has won so many battles before the Supreme Court that the war may almost be over.").

B. Judicial Treatment of Interference Claims in the At-Will Setting

These concerns over the relative advantages and disadvantages of at-will employment relationships and more formal employment contracts have their roots in basic contract law. Simply stated, the law does give more protection to parties who have memorialized their agreements as to their respective rights and obligations into formal contract form. When the parties have limited their ability to terminate a contract and have specifically laid out those limitations, the law provides protection. Parties who merely aspire to enter into a contract or who have a relationship lacking such limitations correspondingly lack the same type of protection because they have greater freedom of action.

This basic premise of contract law is reflected in the distinction between tortious interference with contractual relations and its more amorphous cousin, interference with business relations. The authors of the *Second Restatement* were clear on this point. The comments note that greater protection should be afforded to existing contracts than for prospective ones, "due in part to the greater definiteness of the [parties'] expectancy and [their] stronger claim to security" in existing contracts.[166] "As a result permissible interference is given a broader scope" in the case of business relations or prospective contractual relations than in the case of existing, formal contracts.[167] Thus, formalized contracts are valued more highly in interference law than are prospective contractual relations or business relations.

Not only does the law value contracts more highly than mere expectancies, it values contracts which are capable of being terminated only under specified conditions more highly than it does contracts terminable at-will. Some have questioned whether interference with a terminable at-will contract should be actionable under an interference with contract theory, because when a party terminates such a contract, there has been no breach. As such, it is impossible for an outsider to have induced a breach as the tort requires.[168] Although stating that contracts terminable at will are nonetheless valid and subsisting contracts until terminated,[169] the *Second Restatement* suggests that terminable at-will contracts might be entitled to less protection than enforceable contracts. The comments provide that one's interest in a

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166. RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1977).

167. *Id.* cmt. j; *see also* KEETON *supra* note 25, § 129, at 996 (noting the "correspondingly greater freedom of action on the defendant's part" in the case of a contract at-will).

168. Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 701-02 (1923).

169. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977).

contract terminable at-will is primarily an interest in future relations between the parties and that one has no legal assurance of them.[170] As a result, such contracts are "closely analogous" to mere prospective contractual relationships, which receive less protection from outside interference.[171]

In this sense, interference law parallels the modern version of employment at-will. Given the huge importance to any individual of holding a steady job, the modern formulation of employment at-will provides employees with some measure of protection from unjust dismissals; however, at-will employees are not entitled to the same level of protection as are employees under most collective bargaining agreements. Similarly, the *Second Restatement* is clear that prospective contractual relations or business relations are entitled to *some* measure of protection from outside interference, but that they are not entitled the same protection as existing contracts. Furthermore, the comments provide that contracts terminable at will closely resemble business relationships not reduced to formal contract form. In sum, there is ample support for the notion that as the degree of enforceability of a relationship decreases, the extent of permissible interference by an outsider increases.[172]

Therefore, the classification of employment at-will relationships matters for purposes of an interference theory. Given the realities of an at-will employment relationship, it is appropriate to afford them less protection from interference than definite-term contracts. Although courts and commentators often refer to employment at-will relationships as at-will employment contracts, they are contracts of a particularly tenuous nature.[173] Clearly, modern employment law views them as deserving of protection, but not nearly to the extent that it protects the parties' interests in employment contracts for a fixed term or contracts containing just cause provisions. Of course, the fact that the parties themselves cannot insist on performance should not mean that such relationships are terminable at the will of others.[174] However, because employers and employees have no more than a future

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170. *Id.*

171. *Id.; see also id.* § 766B cmt. b.

172. Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987); Belden Corp. v. InterNorth, Inc., 413 N.E.2d 98, 102 (Ill. App. Ct. 1980).

173. Alam v. Reno Hilton Corp., 819 F. Supp. 905, 910 (D. Nev. 1993) (stating that although theoretically governed by contract law, at-will employment relationships are not a contract with which a third party can interfere).

174. For a defense of the position that interferences with at-will employment relationships should be viewed within the interference with contractual relations paradigm, see *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282, 284 (Ind. 1991) ("The parties in an employment at will relationship have no less of an interest in the integrity and security of their contract than do the parties in any other type of contractual relationship.").

expectancy in, rather than a legal right to, the continuation of the relationship, at-will relationships are rightfully deserving of less protection.[175] To do otherwise would be to elevate at-will relationships to a level beyond what both the default rule of employment at-will and the *Second Restatement's* view on interference claims call for. As such, interferences with at-will employment relationships are better classified as interferences with terminable at-will contracts or business relations with the greater attendant freedom to interfere.

If such relationships are entitled to less protection from outside interference, then the next question that emerges is *how much* protection from outside interference are at-will employees entitled to? Here, the *Second Restatement* is less than clear. Although the *Second Restatement* specifically notes that defendants enjoy a greater latitude to interfere with such relationships, the fact specific nature of such claims and the flexible seven-factor test for determining whether an interference is improper make articulation of a hard and fast rule difficult.

Despite the *Second Restatement's* instruction that an outsider enjoys greater freedom to interfere with a prospective contractual relation, most courts have failed to draw any meaningful distinction between the freedoms to interfere in these situations. Some courts acknowledge that the at-will nature of the employment relationship is not a bar to an interference claim, but rarely is there a mention of the greater permissible scope of interference in such cases.[176] As a result, no clear standard for analysis has developed.

C. What All of This Means in Practice

The end result is a system in which two bodies of law—wrongful discharge law and tortious interference—are in tension, despite their similarities. Both claims involve "improper" or "wrongful" action, ultimately attributable to the employer, that leads to the end of the employment relationship. Indeed, a discharge that is "wrongful" in the sense that it violates public policy or offends an anti-discrimination law will most

175. For a defense of this position, see *King v. Sioux City Radiological Group*, 985 F. Supp. 869, 882-85 (N.D. Iowa 1997) (explaining why, under Iowa law, interferences with at-will employment relationships are treated as interferences with prospective contractual advantage).

176. *Compare* Hall v. Integon Life Ins. Co., 454 So. 2d 1338, 1344 (Ala. 1984) (holding that an at-will employee may state a tortious interference claim but failing to note any distinction between the theories of interference with contractual relations and business relations) *with King*, 985 F. Supp. at 882-85 (noting the greater protection given to definite-term contracts).

likely also be "improper" under an interference theory.[177] As such, it is not uncommon to see an interference claim added onto a complaint, either in addition to or in place of a wrongful discharge claim.[178]

Despite the similarities between the theories, tortious interference claims have the potential to undercut the employment at-will rule. To use David Gergen's term, interference claims lie "deeply in the shadow" of the employment at-will rule.[179] Indeed, one of the most famous formulations of the at-will rule comes from the 1884 case of *Payne v. Western & Atlantic Railroad*,[180] a case brought by a merchant under a tortious interference with contract theory.[181] One of the fundamental premises of tortious interference claims is that a party cannot be held liable for interfering with a contract or relationship to which it is a party.[182] The reality of the workplace is that, in most cases, a corporate employer's act of firing an employee is accomplished through use of an intermediary, most often a supervisor or officer. Thus, although it is the employer who officially fires the employee, it is usually a supervisor or officer who does the actual act of firing. Employment at-will allows an employer to fire an employee for nearly any reason. Thus, if a supervisor can be held liable under an interference theory for discharging an employee based solely out of personal animosity, an employer's freedom to discharge its employees is undercut by an interference theory and the default rule is weakened. Stated another way, by imposing liability on an officer or supervisor for a discharge motivated by an improper purpose, courts come close to establishing a standard requiring an employer to have just cause to terminate.[183] Assuming that an "improper" discharge would also fail to meet a just cause standard, the only difference between the two standards is that the employer is not directly held liable under the former. However, because

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177. *See, e.g.*, Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254, 260-61 (D. Del. 1996) (denying defendant's motion to dismiss an interference claim where plaintiff alleged that her supervisor had acted, in part, because of plaintiff's race and gender).

178. *Supra* notes 39, 40 and accompanying text; Gergen *supra* note 11, at 1196.

179. Gergen, *supra* note 11, at 1179, 1197-98.

180. 81 Tenn. 507 (1884).

181. According to the Tennessee Supreme Court:

> [M]en must be left . . . to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se . . . All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong.

Id. at 518-20. For an interesting discussion of the history of *Payne*, see Morriss, *supra* note 154, at 683 n.11.

182. *See, e.g.*, Finley v. Giacobbe, 79 F.3d 1285, 1295 (2d Cir. 1996).

183. Halvorsen v. Aramark Unif. Svcs., Inc., 65 Cal. App. 4th 1383, 1396 (Cal. Ct. App. 1998).

the employer can only act through its agents, the employer's freedom is, nonetheless, restricted. It is for this reason that some courts have been reluctant to allow interference claims premised upon a firing by a supervisor,[184] often being unconcerned about the possibility that the supervisor may have acted from personal motives, apart from serving the employer.[185] However, as detailed above, such claims, although far from routine and certainly not always successful, are now recognized as potentially viable in most jurisdictions.[186]

The earlier example from Pauline Kim's study provides a clear illustration of how interference claims can intrude on the at-will rule. Kim administered a written survey to over 330 unemployed workers in the St. Louis area in an attempt to gauge their knowledge as to the employment at-will rule.[187] Kim asked applicants whether it was lawful for an employer to fire an employee if the reason for the firing was "personal dislike."[188] Eighty-nine percent of the respondents believed that the law forbids such a discharge.[189] Although most employment law practitioners would conclude without hesitation that these respondents are incorrect, interference case law proves that the respondents are, in fact, correct. If a supervisor discharges an employee solely out of

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184. *Halvorsen*, 65 Cal. App. 4th at 1396 (granting supervisors an absolute privilege to terminate an at-will employee and justifying the privilege on the right of employers to discharge employees under the employment at-will rule); West v. Troelstrup, 367 So. 2d 253, 255 (Fla. Dist. Ct. App. 1979) (refusing to recognize an interference claim against a supervisor where it was undisputed that the supervisor had the authority to fire the plaintiff); Eggleston v. Phillips, 838 S.W.2d 80, 82 (Mo. Ct. App. 1992) (stating that an interference is justified if the interfering party has a legal right to do so and holding that because an employer had a legal right to discharge for any reason and because a corporation acts through its agents, a supervising employee with the power to fire has a legal right to take these actions is justified in discharging an employee); Wampler v. Palmerton, 439 P.2d 601, 606 (Or. 1968) (explaining that corporate officers have a privilege to terminate employment due to the right of the corporation to do so); *see also* Gergen, *supra* note 11, at 1197-98.

185. Georgia Power Co. v. Busbin, 250 S.E.2d 442, 444 (Ga. 1978) (stating that if a district manager had the absolute right to discharge employee, he could not be a third party); Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1262 (D. Kan. 1984) (noting that it was "quite immaterial" that the defendant may have acted out of personal motives in firing the plaintiff); Martin v. Platt, 386 N.E.2d 1026, 1027 (Ind. Ct. App. 1979) (affirming summary judgment in favor of individual supervisors on the grounds that, because the decision to discharge the plaintiff rested with the supervisors, the supervisors acted within the scope of their duty); Pinnix v. Babcock & Wilcox, Inc., 689 F. Supp. 634, 637 (N.D. Miss. 1988) (applying Mississippi law and holding as a matter of law that superiors did not tortiously interfere with employment relationship, because "[c]hoosing to terminate an at-will employee, even if based on personal animosity, would not have exceeded" their supervisory responsibilities); *Eggleston*, 838 S.W.2d at 82 (stating that whatever the motives of the supervisors, they were justified in discharging plaintiff).

186. *Supra* Part II.B.

187. Kim, *supra* note 2, at 110.

188. *Id.* at 134.

189. *Id.* at 134.

personal dislike or ill will, the supervisor may very well be held liable under an interference theory.[190] In effect, tortious interference claims revoke an employer's "license to be mean."[191]

One logical response to this observation might be that the interference torts impose some higher threshold of proof of wrongfulness other than mere personal dislike. However, neither the *Second Restatement* nor the caselaw supports such a conclusion.[192] Courts use a bewildering array of synonyms ("in bad faith," "with malice," "with actual malice," "out of spite," "out of personal hostility" or "intentionally" to name a few) to describe the type of bad motive that will render an interference wrongful.[193] Although some courts take the time to clarify what they mean by the use of the term "malice," the offending synonym is often used as a generalized expression of "meanness."

Another logical response to this assertion is that although an individual supervisor may be held liable, the central premise of the employment at-will rule is left undisturbed – the supervisor may be liable for such action, but not the employer. However, there are several opinions that have, in fact, been willing to hold the employer liable for the improper interference of a supervisor under a *respondeat superior* theory.[194] If a discharge is wrongful in the sense that it is actionable under wrongful discharge law, then it will almost certainly also be improper.[195] However, an improper interference is not necessarily wrongful under wrongful discharge law. In at least one case, an employer has been held vicariously liable under an interference theory for behavior on the part of a supervisor which would not serve as the basis of a wrongful discharge claim.[196] These types of outcomes plainly turn an

190. *Supra* notes 99-100 and cases cited therein.

191. *Supra* note 53 and accompanying text.

192. *See, e.g.*, Barker v. Kimberly-Clark Corp., 524 S.E. 2d 821, 826 (N.C. Ct. App. 2000) (finding a genuine issue of material fact existed as to whether supervisor improperly interfered with plaintiff's employment relationship where evidence existed that supervisor acted out of personal hostility). According to the comments in the *Second Restatement*, if the defendant's sole motive is to injure the plaintiff or to vent his ill will on the plaintiff, the interference "is almost certain to be held improper." RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977).

193. *Supra* notes 111-17 and accompanying text; *see also* Gergen, *supra* note 11, at 1183-84.

194. Bernstein v. Aetna Life & Cas., 843 F.2d 359, 367 (9th Cir. 1988) (allowing employee to proceed under an interference theory against the employee's corporate employer based upon an allegedly improper interference by the employee's supervisor); Cappiello v. Ragen Precision Indus., 471 A.2d 432, 437 (N.J. Super. Ct. App. Div. 1984) (upholding liability against a corporate employer, apparently based on the "malicious interference" on the part of the corporate president and a supervisor); Yaindl v. Ingersoll-Rand Standard Pump-Aldrich Div., 422 A.2d 611, 625 (Pa. Super. Ct. 1980) (holding that vicarious liability may be imposed on an employer for the improper interference of another employee).

195. *Supra* note 177 and accompanying text.

196. *Yaindl*, 422 A.2d at 621, 625.

interference theory on its head and convert an employment at-will relationship into a just cause standard.[197] Admittedly, these opinions are few and far between. The fact remains, though, that precedent exists for holding employers liable for interfering with their own business relationships because their agents behaved in a manner that wrongful discharge law allows, a result which is seemingly impossible under the employment at-will rule and tortious interference theory.

Even when these aberrant decisions are removed from the equation, the unavoidable conclusion is that interference claims represent an inviting and gaping detour around the employment at-will rule and a means of escaping the long shadow that the rule casts. Under the at-will rule, no claim will lie against the employer even if the discharge was "malicious or done for other improper reasons,"[198] so long as it does not otherwise offend some existing public policy. Yet, if supervisors and officers can be liable for improperly causing the discharge of employees based solely on a showing of malice unrelated to any protected characteristic of the employee, an interference claim makes illegal a discharge which is not wrongful under wrongful discharge law. In other words, tortious interference claims create a cause of action for malicious termination of at-will employment against a supervisor which is almost indistinguishable from imposing a just cause standard for termination on employers.[199]

Of course, critics of the modern formulation of the at-will rule might applaud such a result. One need not take a side in the debate as to the rule's desirability to have concern over such an outcome. The employment at-will rule exists. Whether that is a good thing or a bad thing is beside the point. Because it exists, courts should give effect to the rule. The modern version of the rule seeks to strike a balance between protecting an employer's freedom to run its business free from intermeddling and protecting employees from discharges that strike at public policy concerns. The result is that courts are not called upon to serve as "super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional

197. Clement v. Rev-Lyn Contracting Co., 663 N.E.2d 1235, 1236 n.6 (Mass. App. Ct. 1996).

198. Martin v. Tapley, 360 So. 2d 708, 709 (Ala. 1978).

199. Halvorsen v. Aramark Unif. Serv., Inc., 77 Cal.Rptr. 2d 383, 390 (Cal. Ct. App. 1998); *see also* Huff v. Swartz, 606 N.W.2d 461, 469 (Neb. 2000) (stating that proof of malice, standing alone, is generally insufficient to establish an improper interference by a manager because "[t]o hold otherwise would be inconsistent with the fact that Nebraska law does not recognize a cause of action for malicious termination of at-will employment.") (citing White v. Adam, Inc., 430 N.W.2d 27 (1988)).

discrimination" or strike at other policy concerns.[200] As a result, discharge decisions that are objectively unfair, but not discriminatory or that do not cross the blurry line into "wrongfulness," remain legal. Decisions which push the line in one direction or the other infringe on the default rule of employment at-will.

None of which is to say that interference claims against supervisors or officers should never be permitted. As the Supreme Court stated nearly a century ago, "[t]he fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."[201] However, when it comes to deciding whether supervisors and officers are truly "others," it is not always clear how the Court's statement should apply. Put another way, the difficulty comes in attempting to devise a framework that takes into account the realities of the modern workplace; namely, that at-will employees do have some degree of interest in their jobs and should be protected from malicious behavior, but that corporate employers must delegate the authority for firing to individual supervisors and that, by human nature, not all discharges are motivated purely by a desire to benefit only the employer.[202] The reality is that some supervisors do not like the people they fire or that they hope to benefit themselves by firing an employee; the modern exceptions to the at-will rule are not triggered in most of these cases. The question is, under what circumstances should such firings be actionable under a theory apart from wrongful discharge?

IV. A PROPOSED SOLUTION

Although the fact-specific and amorphous nature of interference claims make easy answers to such questions difficult, courts can take steps to prevent interference claims from overwhelming the at-will rule. The need to

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200. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); Crum v. American Airlines, Inc., 946 F.2d 423, 426 (5th Cir. 1991) (noting the procedural safeguards afforded to employees but stating that to second guess the defendant's decision to terminate the employee "'would severely hinder the rights of employers everywhere to effectively control and manage their companies'" (citation omitted)); NLRB v. Fla. Steel Corp., 586 F.2d 436, 444 (5th Cir. 1978) ("Neither Board nor Court can second-guess [management] or give it gentle guidance by over-the-shoulder-supervision." (quoting NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956)); *Halvorsen*, 77 Cal.Rptr. 2d, at 390 (Cal. Ct. App. 1998) (granting managers an absolute privilege to discharge and justifying the decision on the grounds of preventing disruption of the business enterprise through judicial inquiry into the motives of managers).

201. Truax v. Raich, 239 U.S. 33, 38 (1915).

202. Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 328 (9th Cir. 1982).

do so is obvious: employment at-will is the umbrella rule for employment relationships that oversees all other rules. The trick is to craft an approach that is in keeping with the limited exceptions to the modern exceptions to the at-will, but which also allows for claims based on supervisor or officer behavior that is beyond the pale.

A. Giving Effect to the At-Will Rule

The first step in tightening up the disconnect between interference theory and employment at-will is recognizing the possible effect that interference claims can have on the justifications behind the at-will rule. Here, I borrow from David Gergen's approach to dealing with an interference claim that "lies deeply in the shadow of another body of law."[203] Gergen would allow an interference claim in a case that lies deeply in a different "legal cubbyhole" only if the plaintiff can demonstrate that there "is some unusual interest or factor present . . . that the other body of law does not address."[204] Where the other body of law reflects a conscious decision to exclude a particular kind of claim from within its rubric, an interference claim brought as a means of escaping the other body of law should be denied. Gergen provides as an example an interference claim brought by an employee against an ex-employer who "filed a civil suit charging the plaintiff with misappropriating trade secrets in order to induce the employee's [new employer] to fire him."[205] Assuming the employer had probable cause to institute the suit and that the employer made no demands of the plaintiff in filing the suit, no actions for malicious prosecution or abuse of process will lie.[206] An interference claim would at first seem a viable alternative. However, Gergen argues that an interference claim should not lie in such a case because the other body of law, abuse of process, is guarded closely by courts in order to protect a party's interest in resorting to law.[207] Allowing an interference claim in such a case would adversely affect that interest.[208] As such, unless the plaintiff can distinguish his case from the general rule that it is not tortious to file a suit merely to harass someone, the court should not allow the interference claim to proceed.[209]

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203. Gergen, *supra* note 11, at 1179, 1197-98.
204. *Id.* at 1179.
205. *Id.* at 1221-22.
206. *Id.* at 1222.
207. *Id.*
208. *Id.* at 1221-23.
209. *Id.* at 1223.

Following Gergen's approach would provide courts with a basis for handling interference claims in the employment at-will setting. Instead of considering in a vacuum the question of whether the interference of a supervisor or officer was improper, a court's analysis should be informed by the justifications for the current status of the at-will rule. To a certain extent, courts already look to an existing body of law, namely defamation, in interference cases involving employment references. As mentioned, courts frequently apply the privileges developed in defamation cases to interference claims based on negative references.[210] In the case of a supervisor or officer who brings about an employee's termination, if permitting an employee's interference claim to proceed would intrude on the balance struck by modern wrongful discharge law, the claim should be denied. Where the behavior of the supervisor or officer is of a nature similar to that which would be actionable under a wrongful discharge theory, or if the balance struck by modern wrongful discharge law would not be affected, the claim should be allowed. The court's decision would necessarily look to the purposes underlying the modern version of the at-will rule and to specific examples of behavior that are actionable under a wrongful discharge theory. Specifically, it would focus on the means used to accomplish the interference and the motives of the officers or supervisor only where such motives would be unlawful under existing wrongful discharge theories.

Section 767 of the *Second Restatement* already provides the tools that would help inform a court's decision when a supervisor or officer is alleged to have interfered with an at-will relationship. As mentioned, some courts focus on the defendant's motive or the interests advanced by the defendant in assessing whether an interference is improper, almost to the exclusion of the other five factors contained in section 767.[211] However, the other factors play an important role, and several of the factors directly implicate the balancing test which currently exists in the workplace. Despite the fact-specific nature of interference claims, the analysis of several of the factors will nearly always be a constant.

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210. *Supra* Part III.B.3. Courts are frequently less than rigorous in their attempts to explain outcomes in these cases. As mentioned, there is a split of authority concerning whether truth is an absolute defense to an interference claim. *Supra* notes 64-68 and accompanying text. Despite the obvious constitutional issues raised by holding that truth is not a defense in such cases and the implications of such a rule for existing defamation principles, few courts have discussed these issues in any detail, no matter what their ultimate decision. Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 593 (W. Va. 1998) (noting the failure of courts to explain their reasoning in these cases).

211. *Supra* notes 36-37 and accompanying text.

One of the factors to consider is the interest of the plaintiff with which the defendant interferes.[212] In the case of an at-will employee, the employee's interest is of a lesser nature than that of an employee laboring under a collective bargaining agreement or other form of employment contract.[213] A court should start under the assumption, expressed in the *Second Restatement*, that the permissible level of interference by an outsider increases as the level of enforceability of the relationship decreases.[214] As this assumption mirrors the employment at-will rule itself, the bar for deeming an interference improper should naturally be raised slightly in the case of any interference with an employment at-will relationship.

Another factor to consider is the relation between the parties.[215] The comments note that "the significant relationship may be between any two of the three [relevant] parties."[216] Thus, the fact that the defendant and the party who ends the relationship enjoy a close relationship might tend to make an otherwise improper interference proper.[217] Therefore, the fact that an officer or supervisor occupies a close relationship with the employer by virtue of his position is another factor which should justify a higher threshold for at-will plaintiffs. Further support for this view can be found in the comment concerning the relations between the parties, which notes that the at-will nature of the relationship between the plaintiff and the other party to the relationship may be important to the determination.[218]

Section 767 also provides that "the proximity or remoteness of the [defendant's] conduct to the interference" should be taken into account.[219] The comments provide that the other factors contained in section 767 "need not play as important a role" if termination of the relationship is a direct consequence of the defendant's inducement of the termination.[220] However, in many cases, an officer or supervisor will have the power to directly terminate the relationship. In essence, the only way a corporate employer could not be induced or caused to terminate the relationship in such an example is if someone else higher up in the corporate hierarchy decided to overrule the discharge decision. As such, there is a certain conceptual

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212. RESTATEMENT (SECOND) OF TORTS § 767(c) (1977).

213. *Supra* notes 166-72 and accompanying text.

214. RESTATEMENT (SECOND) OF TORTS § 767 cmt. j (1977) ("permissible interference is given a broader scope" in the instance of interference with the interest of acquiring prospective contractual relations); *see also supra* notes 167-72 and accompanying text.

215. RESTATEMENT (SECOND) OF TORTS § 767(g) (1977).

216. *Id.* § 767 cmt. i.

217. *Id.*

218. *Id.*

219. *Id.* § 767(f).

220. *Id.* § 767 cmt. h.

anomaly in claiming that a supervisor induced the breach of the employment contract – a supervisor vested with the power to fire does not so much induce a termination of the relationship as he actually *terminates* the relationship.[221] As such, holding the proximity of causation against the supervisor or officer would be to ignore the realities of a corporation.

Section 767 also notes that "the social interests in protecting the freedom of action of the actor and the contractual interests of the other" is an important factor.[222] Here, the modern version of the at-will rule casts a long shadow. The modern at-will rule has already taken these competing interests into account and arrived at a rough balance: employees have an interest in being free from discriminatory or retaliatory discharges, but employers remain free to discharge employees for other, less pernicious reasons. Thus, an employer's freedom to act takes precedence over an employee's interest unless the supervisor or officer is motivated by an unlawful purpose. This balance makes consideration of a supervisor's motives or the interests sought to be advanced relevant only where the supervisor seeks to advance an unlawful interest or is motivated by discriminatory animus. Any outcome in an interference case involving an at-will employee and a supervisor or officer that would punish behavior not motivated by such purposes tips the balance struck by the at-will rule and should be rejected.

However, an employee who is discharged by an officer or supervisor would not necessarily be without a remedy against the officer or supervisor. Section 767 also lists "the nature of the [defendant's] conduct" as a factor to consider.[223] Under the *Second Restatement,* the use of certain means (such as "violence, fraudulent misrepresentation, and threats of illegal conduct") to accomplish an otherwise lawful end may subject the defendant to liability.[224]

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221. For example, in one case involving a supervisor's decision to terminate the plaintiff's employment, the court noted:

> [The employee] argues that the only parties to [the] employment relationship were [the employee and the company] . . . . [The supervisor] was the person through whom [the company] acted in dismissing [the employee]. . . . If [the supervisor] was a third party, who did he induce to terminate [the employee]? There is no allegation that [the supervisor] influenced or induced anyone to terminate [the employee]. It appears that the only person who could have been induced to terminate [the employee] was [the supervisor] himself.

West v. Troelstrup, 367 So. 2d 253, 255 (Fla. Dist. Ct. App. 1979); *see also* Willcox v. Boeing Military Airplane Co., No. 87-1015-C, 1989 WL 107728, at *8 (D. Kan. Aug. 23, 1989) (dismissing claim against supervisor who forced plaintiff to quit because plaintiff was seeking to give "two hats to a single cause of action – an agent of the employer and a third party acting in a tortious manner").

222. RESTATEMENT (SECOND) OF TORTS § 767(e) (1977).

223. *Id.* § 767(a).

224. *Id.* § 767 cmt. c.

Thus, although a defendant may be legally entitled to produce a particular result, he is not entitled to accomplish the result by the use of otherwise illegal or wrongful conduct.

Here, the underlying justifications for the employment at-will rule are not seriously threatened. Wrongful discharge law is concerned only with limiting an employer's freedom to advance a harmful interest.[225] It is silent on the issue of the means used by the employer to carry out that interest. Instead, tort law serves as the limitation on an employer's freedom to carry out an otherwise legal discharge in an unlawful fashion. For example, because an employer has a legal right to discharge an employee for nearly any reason, the simple act of discharging an employee is generally not grounds for an intentional infliction of emotional distress claim.[226] However, where the employer employs extreme or outrageous means to force the employee to quit or effectuates the firing in an outrageous manner, the at-will status of the relationship does not serve as a bar.[227] Therefore, allowing an interference claim to proceed in the case of a supervisor or officer who has used improper means to accomplish the interference would not seriously impinge on the at-will rule.

The idea that a court should make the nature of the interference the dispositive element in the case of an interference with a prospective contractual relation or business relation already has some support. A few courts already require the showing of improper means on the part of the defendant in other types of interference cases.[228] For example, in *Duggin v.*

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225. *See, e.g.*, DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998) ("Our sole concern is 'whether the reason for which the defendant discharged the plaintiff was discriminatory.'").

226. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment At Will: The Case Against the "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 395-96 (1994). However, where the employer is motivated by discriminatory animus, the discharge may be wrongful. *Id.* at 398-99 (discussing intentional infliction of emotional distress claims in this context). Part of the justification for this outcome comes from the Second Restatement's position on intentional infliction of emotional distress. The comments note that an employer's power over an employee may make actions, which if committed by a stranger would be lawful, unlawful when committed by an employer. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1977). A similar sentiment is expressed in the Second Restatement's comments on tortious interference. Section 767 provides that "the proximity or remoteness of the [defendant's] conduct" should be taken into account when considering whether the interference was improper. *Id.* § 767(f).

227. *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218-19 (Cal. 1970) (holding that plaintiff stated a cause of action where a superintendent shouted at plaintiff, used racial slurs, and then fired plaintiff).

228. NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc., 664 N.E.2d 492, 497 (N.Y. 1996) (involving allegedly tortious interference by a business competitor); Duggin v. Adams, 360 S.E.2d 832, 836 (Va. 1987) (involving allegedly tortious interference by an attorney in a real estate deal). *See generally* Speakers of Sport, Inc. v. Proserv, Inc., 178 F.3d 862, 867 (7th Cir. 1999) ("[T]he

Adams,[229] the Virginia Supreme Court held that when a contract is terminable at will, a plaintiff must prove that the defendant employed "improper methods" in order to state a prima facie case.[230] According to the court, examples of the use of improper methods could include those "that are illegal or independently tortious," violations of "an established standard of a trade or profession, . . . sharp dealing, overreaching, or unfair competition."[231] In the case of business competition, the rule represents a balance struck between "society's interest in respect for the integrity of contractual relationships, on the one hand, and, on the other, the right to freedom of action on the part of the party interfering and society's concern that competition not be unduly hampered."[232] In other cases involving interferences with at-will contracts or business relations, the rule represents a recognition that the parties' interests are merely an expectancy in future economic gain and that, unlike a definite-term contract, they have no legal assurance that they will recognize the gain.[233] These same rationales apply to interference with at-will employment relationships.

Similarly, in a 1982 law review article, Harvey S. Perlman advanced an efficiency-based argument in support of his view that interference claims should be limited to cases in which the defendant's acts are independently unlawful.[234] According to Perlman, a defendant's improper motive should only give rise to liability where there is objective indicia that the activity produces social loss.[235] Perlman argues that motive is an imperfect indicator of wrongfulness.[236] For one, proof of motivation is error prone.[237] For another, a bad motive does not necessarily produce a socially undesirable result.[238] Perlman provides as an example a case in which the interfering party, motivated by personal animosity towards one of the parties to a contract, seeks out a more advantageous opportunity for the other party and

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tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor." (citations omitted)); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 307 (Utah 1982) ("Problems inherent in proving motivation or purpose make it prudent for commercial conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct.").

229. 360 S.E.2d 832 (Va. 1987).

230. *Duggin*, 360 S.E.2d at 836 (citations omitted).

231. *Id.* at 836-37.

232. *NBT Bancorp.*, 664 N.E.2d at 496 (quoting Guard-Life Corp. v. Parker Hardware Mtg. Corp., 406 N.E.2d 445 (N.Y. 1980)).

233. *Duggin*, 360 S.E.2d at 836.

234. Perlman, *supra* note 24, at 97.

235. *Id.* at 98.

236. *Id.* at 95.

237. *Id.*

238. *Id.*

induces the other party to breach the contract.[239] The result is an efficient breach which produces a social benefit.[240] Moreover, Perlman argues, proof of malice is unnecessary where the defendant's acts are independently tortious.[241] Motive only plays a role under Perlman's formulation where the defendant's actions are otherwise lawful, but work at cross purposes with the objective of efficient allocation of resources.[242]

Perlman's theory fits neatly into the approach I describe above with only minimal explanation. The most common justification for the modern version of employment at-will is that it is the most efficient method of governing the employment relationship. Obviously, there will be unjust, arbitrary, and just plain stupid discharge decisions under the rule that are counterproductive to the notion of efficiency. Even if one rejects the efficiency-based arguments of Epstein and Posner that economic realities limit the frequency of such discharges, modern wrongful discharge law, whether purposefully or not, has determined that it is an inefficient use of judicial resources to inquire into the motives of employers, except where the wrong alleged clearly has implications for society as a whole.

Motive would not be irrelevant under this formulation, however. Instead, it could potentially factor into the analysis at two points. First, a court necessarily has to consider the supervisor's motives and the interests sought to be advanced by the supervisor at the outset of the case in order to determine whether the supervisor is an outside party. If the supervisor acts, at least in part, to advance the employer's interests, then the supervisor is not a third party to the relationship and cannot be liable.[243] If the supervisor acts for reasons unrelated to advancing the employer's interest, then he is an outside party and may be sued.[244] Second, it might be necessary to consider the supervisor's motive where advancement of that motive is illegal under existing wrongful discharge law.

The end result is a framework for analysis which protects an existing default rule and can be applied in a relatively easy fashion by courts. In cases where an officer or supervisor of an employer is alleged to have intentionally interfered with an at-will employee's relationship with the

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239. *Id.*

240. *Id.*

241. *Id.* at 96.

242. *Id.* at 98.

243. *Supra* notes 71-73 and accompanying text.

244. Of course, the fact that the defendant acts in an unlawful or outrageous manner may also be evidence that the defendant was not actuated by an intent to perform the corporation's business, i.e., that the defendant acted solely out of personal interests. RESTATEMENT (SECOND) OF AGENCY § 235 cmt. c (1957).

employer by causing the employee's discharge, the interference would be improper where the officer or supervisor acted outside the scope of employment and through the use of improper means. Because four of the seven factors contained in section 767 (the employee's interest in the relationship, the social interests in protecting the freedom of action of the defendant and the contractual interests of the employee, the proximity or remoteness of the defendant's conduct to the interference, and the relations between the parties) will almost always be a constant in the case of an officer or supervisor with supervisory authority over an at-will employee, these factors need no separate consideration. Two of the factors, the defendant's motive and the interests sought to be advanced by the defendant, are relevant under a wrongful discharge theory only where the motives and interests are discriminatory or otherwise in contravention of public policy. As to permit an interference claim where the reason for the discharge is not actionable under a wrongful discharge theory would be to undercut the default rule of employment at-will, an interference should not be improper based on motive alone unless the discharge would otherwise be actionable under existing employment laws. Finally, if the conduct of the officer or supervisor that causes the discharge is both outside the scope of employment and independently wrongful, then the interference should be held improper.

B. The Approach Illustrated

A quick look at a recent case involving an interference claim brought against supervisory personnel helps illustrate the benefits of this approach.

Barker v. Kimberly-Clark Corp.,[245] is a run-of-the-mill case from an intermediate appellate court in North Carolina. In *Barker*, an employee's supervisor accused the employee in front of both managers and non-managers of taking illegal drugs on the company's premises and accessing pornography on the Internet on a company computer.[246] In addition, the employee alleged that her name appeared on her supervisor's "hit list with names of employees he intended to get rid of" and that her supervisor had admitted to her his desire to terminate her employment.[247] After being discharged, the employee brought claims of slander per se and tortious interference with contractual rights.[248] She denied the supervisor's drug charges and alleged that, not only had she not accessed pornography, she

245. 524 S.E.2d 821 (N.C. Ct. App. 2000).
246. *Id.* at 823-25.
247. *Id.* at 827.
248. *Id.* at 823, 826.

was not on company premises on the night she was accused of the offense.[249] The appellate court reversed the trial court's grant of summary judgment in favor of the supervisor, finding that the facts raised a genuine issue of material fact as to the supervisor's motives.[250] Under the approach described above, the court should reach the same result, but for different reasons.

First, the opinion, like some others, confuses the questions of scope of employment and privilege (or proper behavior). The supervisor argued that he could not be liable under an interference theory because, as a manager, he was a "non-outsider" to the plaintiff's employment contract.[251] In other words, the supervisor was arguing that he was not a third party to the employment relationship. The court, however, held that "non-outsider status is pertinent only to the question of whether the defendant's action was justified."[252] This is simply wrong as a matter of law. However, the court did, arguably, reach the correct result in holding that the supervisor was amenable to such a claim. If a supervisor acts solely for personal interests, rather than in the interests of the company, then the supervisor becomes a third party.[253] As there is no mention of any other possible motive on the part of the supervisor apart from ill-will and personal hostility, the plaintiff could potentially prove by a preponderance of the evidence that the supervisor was a third party to the relationship and amenable to suit.

The analysis should not end there, however. The court's opinion follows the approach of most courts. Once it is determined that the supervisor acted out of personal hostility, none of the other factors listed in section 767 enter into the picture and there is a finding of improper interference. The *Barker* opinion is silent on the question of other possible motives on the part of the supervisor. However, it is at least plausible that some proper motive did exist alongside the improper motives. The supervisor's "hit list" of employees he wanted to get rid of could have been prompted by poor performance just as easily as personal animosity unrelated to performance. Without further facts, it is impossible to say; however, there is no indication from the opinion that the supervisor was motivated by any reason that would be unlawful under wrongful discharge theory. As such, the supervisor's personal animosity could not serve as the sole basis of an interference claim.

Despite the fact that the supervisor's motives, standing alone, could not convert the discharge into a wrongful interference, the plaintiff should still be able to reach a jury on her claim. The employment at-will rule prevents

249. *Id.* at 826.
250. *Id.* at 828.
251. *Id.* at 826.
252. *Id.*
253. *Supra* Part III.B.1.

courts from serving as "super personnel departments," capable of second-guessing the *reasons* behind every discharge; it should not, however, be an absolute defense which prevents a court from sanctioning behavior that is wrongful for reasons separate and apart from the mere act of discharge. In *Barker*, the supervisor allegedly accomplished the firing through slander.[254] Although the supervisor may have had every right to discharge the employee for personal reasons under the at-will rule, the fact that he accomplished his goal through the use of slanderous allegations should result in a finding of wrongful interference.

V. CONCLUSION

Depending upon one's perspective, the employment at-will rule is an affront to decent society, an efficient and just means of regulating the workplace, or something in between. Regardless of one's views, it is also the default rule in forty-nine out of fifty states.[255]

In 1923, Francis Sayre warned that "[t]he limits of the tort are still so undefined that there is a real danger that courts may unconsciously extend them beyond their proper confines."[256] In no area of the law does Sayre's comment ring more true than in the field of employment law. As some courts have recognized, tortious interference with business relations claims against officers and supervisors carry with them the risk of engulfing the employment at-will rule.[257] To prevent the default rule from being swept aside by interference claims, courts need to restore some order to the handling of such claims. The most logical place to start is by recognizing the effect that interference claims may have on the default rule. After that, courts can begin to put the focus on the means used by officers or supervisors to accomplish their discharge decisions in an effort to both protect the rights of employees and to remain true to existing law.

The employment at-will doctrine will undoubtedly continue to be the focus of scholarly, legislative, and judicial debate, and it one day may come

254. The court found that a genuine issue of material fact existed as to whether the supervisor's comments were motivated by actual malice sufficient to defeat the qualified privilege that would normally attach to such statements. *Barker*, 524 S.E.2d at 826-27. This is another example of where the defendant's motivation might be relevant for purposes of an interference claim. *Supra* notes 26-28 and accompanying text; *see also* Perlman, *supra* note 24, at 96 (stating that where a defendant's actions are independently tortious, proof of malice is unnecessary except in assessing the availability of punitive damages or where malice is an element of the independent tort).

255. *Supra* note 159.

256. Sayre, *supra* note 168, at 702.

257. *Supra* notes 177-86 and accompanying text.

to pass that the doctrine will go the way of the dinosaurs. Until that day comes, however, courts need to be mindful that, at least in theory, the rule exists to prevent the exact type of judicial action that interference claims against officers and supervisors call for.