

A CITATION HISTORY OF *PINE RIVER STATE BANK V. METTILLE*: A STUDY OF COMMON LAW CHANGE, JUDICIAL INFLUENCE, AND THE BIRTH OF A DISCIPLINE

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I. INTRODUCTION

This essay is about change in the common law. More exactly, it is about how a principle of common-law contracts known as the “at-will rule” was redefined by the Minnesota Supreme Court in 1983 in a case known as *Pine River State Bank v. Mettille*.¹ That ruling

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1. 333 N.W.2d 622 (Minn. 1983).

changed the law of employment relations in Minnesota, it influenced many other state supreme courts as they too faced challenges to make archaic common-law principles more compatible with a modern industrial economy, and it helped bring about the birth of a new legal discipline, now known as employment law. This essay describes and explains *Pine River's* influence, primarily through a history of its citations.

II. THE LAW OF "MASTER AND SERVANT" ON THE EVE OF *PINE RIVER*

When West Publishing Company introduced its "Key-Number System" in 1908, it placed court rulings in categories ranging from "Abandoned and Lost Property" to "Zoning and Planning."² West classified litigation between employees and their employers under the heading "Master and Servant," and this accurately described the small body of law for most of the last century. It heavily favored the master.

In his famous address, *The Path of the Law*, Justice Holmes observed:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³

Though Holmes made these caustic remarks in 1897, he might well have been writing about the "at-will rule of law" as it stood for most of the next century.⁴ According to this rule, either the employer or the employee is free to quit their relationship at any time and for any reason. The rule is so short, simple, and clear that for generations courts repeated it without appending a history of its origins or attempting to explain its pertinence to contemporary industrial relations. But it is in the nature of academicians to accept, if not welcome, Holmes's challenge to reexamine and not

2. WILLIAM W. MARVIN, *WEST PUBLISHING COMPANY: ORIGIN, GROWTH, LEADERSHIP* 79 (1969).

3. OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 187 (1920). Holmes, then serving on the Supreme Judicial Court of Massachusetts, delivered this address at the dedication of a hall at Boston University School of Law on January 8, 1897. *Id.* at 167.

4. In his address, Holmes made it clear that he was speaking of a particular obsolete doctrine: "I am thinking of the technical rule as to trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case." *Id.* at 187 (citing *Commonwealth v. Rubin*, 43 N.E. 200 (Mass. 1896)).

just repeat the common-law principles that judges and lawyers apply. Accordingly, beginning in the tumultuous 1960s, scholars began to explore the origins of the rule to see if it realistically described the status of non-union employees in a modern economy. One of the first and most influential of these scholarly endeavors appeared in 1967, when Professor Lawrence E. Blades published an article advocating relaxation of the at-will rule by giving employees a tort remedy for what he termed “abusive discharge.”⁵

Professor Blades’s article was published three years after the passage of the Civil Rights Act of 1964. Such anti-discrimination legislation, which restricted employers’ freedom to discharge, was noted by state courts when they subsequently faced challenges to the common law at-will rule. Moreover, as implemented by the Supreme Court, Title VII of the Civil Rights Act had the unintended effect of accelerating erosion of the rule. In the familiar *McDonnell Douglas Corp. v. Green*⁶ three-part burden-shifting paradigm, the employee first makes out a prima facie case of discrimination, which is followed by the employer’s answer, and concluded by the employee’s rebuttal.⁷ Because a prima facie case is relatively easy to prove,⁸ the employer usually is required to explain or justify the action being challenged (typically discharge), and those reasons must be both “legitimate” and “nondiscriminatory.”⁹ As a practical matter, therefore, an employer, facing the second step of the *McDonnell Douglas* test, cannot risk resting on the at-will rule (i.e., “we were free to fire the plaintiff without prior notice and for no reason at all, and that’s exactly what we did”).¹⁰

Long before this, many companies had adopted policies setting forth the terms, conditions, and benefits of employment.

5. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967). Blades was an Associate Professor of Law at the University of Kansas when he wrote this article. *Id.* at 1404.

6. 411 U.S. 792 (1973).

7. *Id.* at 802–04.

8. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (“The burden of establishing a prima facie case of disparate treatment is not onerous.”).

9. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

10. *Burdine*, 450 U.S. at 258 (“[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.”).

While there were sound business reasons for their original adoption, the civil rights laws and subsequent deluge of litigation gave them a new importance—by establishing and following standard operating procedures, typically placed in manuals for their employees and managers, employers could minimize the chance that illicit bias would motivate a particular decision on hiring, promotion, or discharge. One purpose of these rules, therefore, was to instill in the workforce the belief that they would be enforced uniformly, not selectively. Subsequent court rulings relaxing the at-will rule noticed this goal of equality of treatment,¹¹ and they support one thesis of this essay—while the roots of employment law are many, the deepest lie in the civil rights movement, not in the organized labor movement.¹²

11. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 894–95, 897 (Mich. 1980) (“Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue in force. Employees could, however, legitimately expect that policies in force at any given time will be uniformly applied to all. . . . An employer who only selectively enforces rules or policies may not rely on the principle that a breach of a rule is a breach of the contract, there being in practice no real rule. An employee discharged for violating a selectively enforced rule or policy would be permitted to have the jury access whether his violation of the rule or policy amounted to good cause. Rules and policies uniformly applied are, however, as much a part of the ‘common law of the job’ and a part of the employment contract as a promise [in a handbook] to discharge only for cause.”); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1269 (N.J. 1985), *modified*, 499 A.2d 515 (N.J. 1985) (“Here the question of good cause is made considerably easier to deal with in view of the fact that the agreement applies to the entire workforce, and the workforce itself is rather large. Even-handedness and equality of treatment will make the issue in most cases far from complex . . .”). In this embryonic stage of wrongful discharge law, one court adopted a theory of liability that was influenced by the prohibition against sex discrimination in civil rights legislation. In *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), the New Hampshire Supreme Court held that a female employee who was fired for refusing to date her supervisor stated a common law claim for malicious discharge. Only a few years later, those facts would give rise to a claim of quid pro quo sexual harassment under state and federal anti-discrimination laws.

12. Nevertheless, the influence of the labor movement on the employee rights movement is apparent. For example, the “just cause” standard in collective bargaining agreements is identical to provisions in personnel manuals which state supreme courts construed to relax the at-will rule in the 1980s. Borrowing a critical feature of labor contracts, the Michigan Supreme Court concluded its ruling in *Toussaint* with the suggestion that non-union employers adopt a policy of “binding arbitration” on “cause and damages” to extract themselves from what it called the “perils” of the jury system. 292 N.W.2d at 897. There is an enormous amount of literature on whether it is advisable for employers to force non-union employees to arbitrate employment-related claims, as suggested by the Michigan

During these times, there were scattered signs of unease about the at-will rule in the states. In 1959, the California Court of Appeal held that a worker who was fired because he refused his employer's order to commit perjury before a legislative committee stated a claim for wrongful dismissal—the first of what became known as the “public policy exception” to the at-will rule.¹³ In the next two decades, there was a trickle of state court rulings recognizing employee wrongful discharge suits, usually in particularly egregious situations.¹⁴ In 1980, in *Touissant v. Blue Cross & Blue Shield of Michigan*,¹⁵ the Michigan Supreme Court upheld jury verdicts in favor of non-union employees who were discharged in violation of “just cause” provisions in personnel manuals issued by their employers.¹⁶ Two years later, in *Weiner v. McGraw-Hill, Inc.*,¹⁷ New York's highest court issued a similar ruling.¹⁸

There were parallel developments in constitutional law. In 1968, in *Pickering v. Board of Education*,¹⁹ the United States Supreme Court held that a public employee who expressed his views about important public issues was protected from reprisal by his employer by the Free Speech Clause of the First Amendment.²⁰ Four years

Supreme Court; however, the movement has not made much headway. One reason is that federal courts (and arbitrators) have ruled that the common law at-will rule is abrogated by a contractual clause mandating arbitration—in other words, the arbitration clause implies a just cause standard for dismissal. *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 352 (8th Cir. 1995); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312–13 (7th Cir. 1981).

13. *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959). This case is thought to be the beginning of the employee rights movement, but at the time it likely was motivated by considerations of intra-governmental relations—the judiciary wanted to preserve the integrity of proceedings before the legislative branch.

14. Several of these cases were logical extensions of *Petermann*. *E.g.* *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (employee fired after refusing to participate in illegal price-fixing scheme stated claim for retaliatory discharge); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (employee fired for applying for workers' compensation benefits had claim for retaliatory discharge).

15. 292 N.W.2d 880 (Mich. 1980).

16. *Id.* at 885.

17. 443 N.E.2d 441 (N.Y. 1982).

18. *Id.* at 445 (“[A]n agreement on the part of an employer not to dismiss an employee except for ‘good and sufficient cause only’ and, if such cause was given, until the prescribed procedures to rehabilitate had failed, does not create an ineluctable employment at will.”).

19. 391 U.S. 563 (1968).

20. *Id.* at 574. This was followed by *Connick v. Myers*, 461 U.S. 138, 147 (1983) (absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the termination of a public employee speaking not as a

later, in *Perry v. Sindermann*, the Court held that a state college's faculty guide gave a teacher who had served under ten one-year contracts a property right to continued employment that could not be taken away without the due process guaranteed by the Fourteenth Amendment.²¹

In Minnesota, at the beginning of the 1980s, the at-will rule was, seemingly, rock-solid substantive law. The leading case was *Skagerberg v. Blandin Paper Co.*,²² where the state supreme court rejected a contract claim by a professional engineer who accepted a promise of "permanent employment" by a paper company, turned down another job offer, closed his business, moved from Minneapolis to Grand Rapids where he bought a house, and was fired two years later.²³ The ruling was issued in 1936, when courts were loath to place additional economic burdens on struggling enterprises. Decades later, in the early 1960s, the Minnesota Supreme Court twice rejected suits by employees alleging that they were fired in breach of the provisions of their employers' personnel manuals.²⁴ Subsequently, it ruled in favor of employees in two unusual cases. In *Bussard v. College of Saint Thomas*,²⁵ the court held that a priest's gift of stock in a publisher of a religious magazine, worth \$350,000, constituted "additional consideration" for "permanent employment" by the recipient, a college—which simply meant that he could be discharged only for good cause.²⁶ The court went behind labels, which figure predominately in this area of law, and examined Rev. Bussard's "unique" circumstances.²⁷ And in *Grouse v. Group Health Plan*,²⁸ the court imprinted a

citizen upon matters of public concern, but as an employee upon matters only of personal interest) and *Waters v. Churchill*, 511 U.S. 661, 681 (1994) ("An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.").

21. 408 U.S. 593, 601 (1972). The Supreme Court decided a companion case the same day. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (holding that the professor had no protected interest in continued employment because he had completed his contracted-for term and, therefore, was not protected by the Fourteenth Amendment).

22. 197 Minn. 291, 266 N.W. 872 (1936) (Olson, J.).

23. *Id.* at 294–95, 266 N.W. at 874.

24. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 537, 117 N.W.2d 213, 224 (1962) (Rogosheske, J.); *Degen v. Investors Diversified Servs., Inc.*, 260 Minn. 424, 428–30, 110 N.W.2d 863, 866–67 (1961) (Thomas Gallagher, J.).

25. 294 Minn. 215, 200 N.W.2d 155 (1972) (Peterson, J.).

26. *Id.* at 228, 200 N.W.2d at 163.

27. *Id.* at 225–26, 200 N.W.2d at 162.

28. 306 N.W.2d 114 (Minn. 1981) (Otis, J.).

promissory estoppel analysis on the familiar “lure away” scenario to give the plaintiff a cause of action against a company that broke a promise to him of new employment.²⁹ To Group Health’s argument that under the at-will rule, it could have fired Grouse on his first day of work, the supreme court disagreed and held that it was required to give him a “good faith opportunity to show he could perform his duties.”³⁰

III. THE REPUTATION OF THE MINNESOTA SUPREME COURT ON THE EVE OF *PINE RIVER*

Whether a particular court ruling becomes influential depends in part on whether that court is well regarded by its peers. The decision of a state court with a high reputation is likely to be cited more frequently by other state courts.³¹ A ruling by a prestigious court may be cited by other courts because it is persuasive and helps explain why the citing court reached the conclusion it did, or that court may merely cite the ruling of another to justify or “legitimate” its own decision in a developing area of law.³²

In 1983, on the eve of *Pine River*, the Minnesota Supreme Court was one of the nation’s elite courts. In one widely cited academic study of the “prestige” of state supreme courts published that year, Minnesota’s ranked eleventh.³³ It also had a reputation

29. *Id.* at 116. Grouse quit a pharmacist position he held at Richter Drug after accepting a job offer from Group Health, which withdrew it before he could start work, leaving him jobless. *Id.* at 115–16. Grouse’s two-count suit against Group Health alleged breach of contract and negligence. See Appellant’s Brief and Appendix at A-3–A-6, *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981) (No. 51128). The supreme court, on its own, imposed a promissory estoppel theory of liability on Grouse’s suit. *Grouse*, 306 N.W.2d at 116. A decade later, it did this again in a celebrated case, which led to an unexpected result. See *Cohen v. Cowles Media Co.*, 457 N.W.2d 199 (Minn. 1990) (Simonett, J.), *rev’d*, 501 U.S. 663 (1991), *on remand*, 479 N.W.2d 387 (Minn. 1992) (Simonett, J.).

30. *Grouse*, 306 N.W.2d at 116.

31. David J. Walsh, *On the Meaning and Patterns of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC’Y REV. 337, 340 (1997) (“Courts intent on legitimation can be expected to cite prestigious courts most often, regardless of the substance of those elite courts’ decisions. Ultimately, the sheer number of citations and prestige of cited courts may be more important from the standpoint of legitimation than any close correspondence between the holdings of the cited and citing courts.”).

32. *Id.*

33. Gregory A. Caldeira, *On the Reputation of State Courts*, 5 POL. BEHAV. 83, 89 (1983). Caldeira’s methodology was quite simple. He counted the number of citations each of the state supreme courts made in 1975. The percentage of this total of each supreme court was then computed. He then created an “expected

as an “activist” court. In a study of post-World War II innovation in tort law by state supreme courts, Minnesota and New Hampshire tied for tenth.³⁴

A court ruling may also have influence if its author is well regarded by other jurists and in the legal community at large.³⁵ In 1983, Associate Justice John E. Simonett, the author of *Pine River*, had yet to make his reputation as a judge. He had served on the court less than three years—too brief a time to establish a reputation.³⁶ By the time of his departure from the court in 1994, however, he was regarded by the bar—and likely will be by future legal historians—as one of this state’s greatest jurists.³⁷ *Pine River* is one of the foundation blocks of his high stature.

IV. THE COMPETITION

In business, a product that reaches the marketplace first

score” for each supreme court, that is, “the percentage of references it should have received if judges were inserting citations on a random basis.” *Id.* at 88. Using this as a “baseline,” he subtracted the expected from the actual percentage of references for each court, which yielded positive and negative deviations. “This number, then, serves as the dependent phenomena—judicial reputation.” *Id.* at 92. In two earlier studies of state supreme court reputation or “prestige,” Minnesota ranked twelfth in 1920 and eighth in 1936. *See id.*; Rodney L. Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 205, 314 (1936).

However, in another more subjective survey published in 1973 that rated entire state court systems on their “legal professionalism” (defined to include their methods of judicial selection, structure, administrative apparatus, terms of office, and compensation), Minnesota’s came in at the midpoint. HENRY R. GLICK & KENNETH N. VINES, *STATE COURT SYSTEMS* 12 (Prentice-Hill 1973). Idaho, Minnesota, and Oklahoma received composite scores of twelve, placing them at numbers twenty-two through twenty-four among the fifty state court systems. *Id.* California ranked first with a composite score of 21.7, and Mississippi was last with 3.4. *Id.*

34. Lawrence Baum & Bradley C. Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 83, 98 (Mary Cornelia Porter & G. Alan Tarr, eds., 1982). The rankings were based on how many of fourteen “innovations” in tort doctrine were adopted by a particular court. *Id.* The innovations included limitations on sovereign immunity, reform of products liability rules, family-related issues such as abrogation of interspousal and parent-child immunities, and the right of privacy, among others. *Id.* (charting innovative techniques discussed in the chapter). The states ranked at the top were New Jersey, Michigan, Kentucky, and California. *Id.*

35. *See generally*, David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U. S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999).

36. Simonett was appointed by Governor Albert Quie in 1980. Donna Halvorsen, *John Simonett’s Legacy is One of High Wit and Deep Wisdom*, STAR TRIB. (Minneapolis), June 6, 1994, at 1B.

37. Simonett resigned in 1994. *Id.*

benefits from its novelty. It can build a base of loyal customers before competition arrives. Similarly, in law, a “leading case” is frequently the first—but not always. Occasionally that first court, while recognizing that the conditions which called a common-law doctrine into being cease to exist, struggles to forge a new approach to the problem. The next court may rework that initial ruling to create a more practical resolution, one that persuades the courts of other states. In the early 1980s, there were three products vying for leadership in the swiftly changing field of employment contract law—*Toussaint*, *Weiner*, and *Pine River*.³⁸

Of the three, the *Toussaint* decision came first—but it was not the first state supreme court ruling holding an employer liable for breaking promises in its handbook. Four months before *Toussaint*, the New Mexico Supreme Court, in an opinion of only six paragraphs, held that the termination procedures in an employer’s policy guide were an implied employment contract.³⁹ It went unnoticed. In contrast, *Toussaint* was a struggle that caught the attention of commentators and courts when it was finished. The first indication of this is the notation on the first page of the published decision, which states that the Michigan Supreme Court heard arguments on December 5, 1978 and issued its decision on June 10, 1980, a remarkably long gestation period for a court ruling.⁴⁰ The court was badly fractured. In search of authority, both the majority and dissent dug deeply into moss-covered nineteenth century “master and servant” law. Each side dissected ad nauseam a Depression-era case that concerned a claim for “permanent employment” not unlike *Skagerberg*.⁴¹ Pulling out all the stops, the majority quoted *Perry v. Sindermann*,⁴² while the

38. There were a scattering of similar rulings, but none had the influence of this trio.

39. *Forrester v. Parker*, 606 P.2d 191, 192 (N.M. 1980).

40. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 880 (Mich. 1980). Two cases were consolidated on appeal in *Toussaint*, Charles Toussaint’s suit against Blue Cross & Blue Shield of Michigan and Walter Ebling’s suit against Masco Corporation. Both men won jury trials. The Michigan appeals court reversed *Toussaint*, but affirmed *Ebling*. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 262 N.W.2d 848, 853 (Mich. Ct. App. 1977); *Ebling v. Masco Corp.*, 261 N.W.2d 74, 77 (Mich. Ct. App. 1977). A four-member majority of the Michigan Supreme Court reversed the appeals court in *Toussaint*, reinstating the jury verdict, and it affirmed *Ebling*. 292 N.W.2d at 883. Three other members of that court concurred in *Ebling*, but dissented in *Toussaint*. 292 N.W.2d at 880.

41. *Lynas v. Maxwell Farms*, 273 N.W. 315 (Mich. 1937).

42. *Toussaint*, 292 N.W.2d at 894 (quoting *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972)).

dissent turned to Thomas M. Cooley, a state supreme court justice and noted treatise writer in the Gilded Age.⁴³ When the majority emerged from these meanderings, it stated its holdings:

1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is “indefinite,” and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee’s legitimate expectations grounded in an employer’s policy statements.⁴⁴

The court later described how an employee’s “legitimate expectations” might arise, but in doing so, it disregarded the fact that the employees in *Toussaint* received promises that they would not be discharged without cause before they started work:

No pre-employment negotiations need take place and the parties’ minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer’s policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation “instinct with an obligation.”⁴⁵

In the following years, this expansive dictum attracted some courts and troubled others.

The next case, *Weiner v. McGraw-Hill, Inc.*, seems to have had the least influence on other state courts. The reason lies in its facts and the narrow body of case law it cited. *Weiner*, already working at another publishing company, was approached by McGraw-Hill to

43. *Id.* at 907. Cooley served on the Michigan Supreme Court from 1864 to 1885. The standard works on Cooley are CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954) and ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS* (1987) (publication of 1960 Ph.D. dissertation, University of Michigan). A recent study of Cooley appears in PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999).

44. *Toussaint*, 292 N.W.2d at 885.

45. *Id.* at 892 (citations omitted).

join it; to make its offer more attractive, McGraw-Hill assured him that he would not be terminated without “just cause.”⁴⁶ The company’s handbook promised that as well.⁴⁷ After eight years of employment, Weiner was suddenly cashiered, triggering his suit for breach of contract.⁴⁸ McGraw-Hill’s motion to dismiss on the pleadings was denied and an appeal taken.⁴⁹ Construing the facts most favorably to Weiner, the non-moving party, a majority of the New York Court of Appeals held that he stated a claim and remanded his case for trial.⁵⁰

The pre-hiring negotiations between the litigants permitted other state supreme courts to view *Weiner* as a unique, fact-bound case. The majority in *Weiner* relegated *Toussaint* and several foreign cases to a footnote and referred dismissively to their “less than conventional theories” of contract law.⁵¹ Aside from these citations and a few to professional articles, both the majority and dissent in *Weiner* relied *entirely* on New York precedent to reach their conclusions. Stylistically, the majority’s opinion was taut and highly polished—the converse of *Toussaint*.

Weiner differed from *Toussaint* in another important respect—it gave a thumbnail sketch of the history of the at-will rule:

[B]y way of background, it is of interest to observe that the at-will employment rule, which originated centuries ago as an adjunct to the law of master and servant in England, in later times was to find a receptive legal environment in laissez-faire nineteenth century America. So strong indeed was the turn-of-the-century legal and socioeconomic philosophy that nurtured it that for long Federal constitutional law deferred to it as well. But, significantly, starting approximately in the days of the Great Depression in the early nineteen thirties and continuing through the present, though political, scholarly and industrial agitation for modification of the rule to provide greater job security has been insistent, there is growing support for remedial legislat[ion].⁵²

46. *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 442 (N.Y. 1982).

47. *Id.*

48. *Id.* at 443.

49. *Id.*

50. *Id.* at 446.

51. *Id.* at 443 n.3, 446 n.7.

52. *Id.* at 443–44 (citations omitted). When courts such as *Weiner* traced the origins of the at-will rule and reexamined it in the context of late twentieth century workplace relations, they were able to do so without using stilted and

Outside New York, *Weiner* occasionally appears in string cites by other courts, yet it is rarely quoted. Its explanation of the origins of the at-will rule—particularly coupling it to discredited *Lochner*-era constitutionalism—may have encouraged the courts of sister states to relax the at-will rule. However, its importance comes from the fact that it reached the same conclusion as *Toussaint* and *Pine River*. If the Court of Appeals of New York—one of the most prestigious and influential state courts—had dismissed *Weiner*'s suit, the development of employment law in this country would have been much different.

Of the first major state supreme court decisions holding that an employer's personnel policies can modify the common law at-will relationship, *Pine River* came last, and it became the most influential.

V. THE LITIGANTS, THE JUDGE, THE TRIAL

When remanding a suit involving a "sharp bid" in a sealed auction for the ownership of a newspaper in 1980, Simonett concluded his opinion for a unanimous court with a detached observation: "At trial, the legal theories and issues may develop differently. Whether a party is likely to prevail at trial is not a consideration here."⁵³ He could not make such a statement in *Pine River* because it had already been tried by a jury. If it had been appealed from a judgment on the pleadings, summary judgment, or a directed verdict, he would have written differently, and his opinion would not have had the influence it did.

It started as a run-of-the-mill collection case. Richard Mettille took out several real estate and personal loans during the twenty-one months he worked as a loan officer at the Pine River State Bank.⁵⁴ When an auditor found deficiencies in his paperwork, the bank fired him.⁵⁵ After he refused to repay the loans, the bank sued him in Cass County District Court.⁵⁶ It is the nature of collection

politically charged terms such as "labor" and "capital," which were current in the Populist, Progressive, and New Deal periods. This change in discourse was due, in part, to the ideals and the spirit of 1960s Civil Rights legislation and the Civil Rights era in general.

53. *Short v. Sun Newspapers, Inc.*, 300 N.W.2d 781, 790 (Minn. 1980) (citation omitted).

54. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 624–25 (Minn. 1983).

55. *Id.*

56. *Id.* at 625.

litigation that the debtor seeks some leverage to bargain with the lender. Mettille's lawyer, aware of *Toussaint*, sought refuge in a handbook that was issued to his client a few weeks after he began work. He brought a two-count counterclaim against the bank: first, breach of contract⁵⁷—the contract being the handbook—and second, a tort claim that the “Bank’s conduct was so grossly negligent and wrongful and was further intentional, causing Mettille to suffer personal humiliation and defamation of his credit and his family’s credit.”⁵⁸

The case was assigned to the docket of Judge John Spellacy, sitting in Grand Rapids. Before his appointment to the district court in 1974, Spellacy had been a trial lawyer for a quarter century, and insurance companies seem to have been an important part of his clientele; he was fifty-six years old when he presided over *Pine River*.⁵⁹

The case was tried to a jury in January 1982; before trial, Spellacy dismissed Mettille's mishmash tort claim.⁶⁰ He directed a verdict for the bank on its claims and offset the jury's verdict in favor of Mettille by that amount, leaving the latter with a judgment of \$24,141.07.⁶¹ He denied both parties' motions for a new trial and attached an eight-page memorandum explaining his reasoning.⁶² Spellacy's memorandum, though unusually self-revelatory, even provocative, was an important chapter in this litigation:

I conceded from the start that in following the recent case of the Michigan Supreme Court, *Toussaint v. Blue Cross* (1980), 408 Mich. 579, 292 NW2d 880, I was going well beyond existing Minnesota employment contract law.

57. *Id.*

58. Appellant's Brief and Appendix at A-6, *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983) (No. 82-543).

59. Spellacy's "official" biography reads: "John A. Spellacy, Grand Rapids. Born February 3, 1925, Hibbing; education: University of Minnesota (LL.B., J.D.); Lt. (jg.), U.S. Navy (World War II); twenty-five years as a practicing lawyer, primarily trial work; member: Int'l Academy of Trial Judges, Order of the Colif [sic]; fellow, Int'l Society of Barristers; American Board of Trial Advocates; Ass'n of Insurance Attorneys; Int'l Ass'n of Insurance Counsel; board of governors, Minnesota State Bar Ass'n; past pres., Itasca County and Fifteenth District Bar Assns.; chief judge, Ninth Judicial District; married; four children. Appointed March 1, 1974, elected 1976." JOAN ANDERSON GROWE, MINNESOTA SECRETARY OF STATE, MINNESOTA LEGISLATIVE MANUAL 367 (1981-1982).

60. Appellant's Brief and Appendix, *supra* note 58, at A-25.

61. *Id.* at A-22, A-25.

62. *Id.* at A-22.

One of the pure thrills enjoyed by a trial Judge is the opportunity to aid in the orderly development and progression of the law. The present Minnesota Supreme Court, to its credit, has never been accused of adamantly refusing to discard outmoded past precedent. . . . I admit that the rule I've applied is contrary to the cases relied upon by the plaintiff: *Skagerberg v. Blandin Paper Co.*, 197 Mn. 291, 266 NW 872; *Degen v. Investors Diversified Services, Inc.*, 260 Mn. 424, 110 NW2d 863; *Cederstrand v. Lutheran Brotherhood*, 263 Mn. 520, 1117 NW2d 213; *Lundeen v. Cozy Cab Mfg.*, 288 Mn. 78, 179 NW2d 73. Any attempt to harmonize these cases is an exercise in futility. However, *Cederstrand* contains some interesting observations by Justice Rogesheske, by all odds one of the members of the Court renowned for his compassion.⁶³

After quoting dicta from *Cederstrand*, which he described as “a lengthy, 17 page struggle to uphold precedent,”⁶⁴ Spellacy continued:

I further concede that *Bussard v. College of St. Thomas*, 294 Mn. 215, 200 NW2d 155, and *Grouse v. Group Health Plan, Inc.*, (Mn. 1981) 306 NW2d 114, while decided in favor of the employees, are distinguishable in that the employees furnished express, new consideration in exchange for job security. Indeed, the language in *Grouse* is not nearly as supportive as Justice Rogesheske's in *Cederstrand*.⁶⁵

And he concluded on a highly personal note, one that reminds us that the fellowship of the bench is small and intimate:

I strongly suspect that Justice Rogesheske would have enjoyed the fact situation in *Toussaint* and in the case before me so that he could, indeed, find an enforceable, unilateral modification of a non-union employee's contract so as to *permit* a fact finder to award damages for wrongful termination. That is all I have done.⁶⁶

63. *Id.* at A-26.

64. *Id.* at A-27.

65. *Id.*

66. *Id.* at A-30 (emphasis in original). We do not know whether Justice Rogesheske would have followed the path Spellacy blazed in his memorandum, but we do know that his replacement did. Walter Rogesheske served as associate justice from 1962 to 1980, when he resigned. He was replaced by John Simonett. They both came from Little Falls. Realizing these relationships brings to mind Simonett's best known writing: John E. Simonett, *The Common Law of Morrison County*, 49 A.B.A.J. 263 (1963). On the surface, it is a whimsical piece, yet on closer reading, it can be seen as expressing his deeply held views on the

As it turned out, not one of the reasons Spellacy advanced in his memorandum—certainly not his sharp break with precedent—found its way into Simonett’s final opinion; yet, he had seen the need for change in this stagnant area of law, and he boldly challenged the supreme court to follow him and the Cass County jury. The following year, the Minnesota Supreme Court took only a slightly different path to reach the same conclusion that Judge Spellacy had: an employer’s handbook may be an “enforceable, unilateral modification of a non-union employee’s contract so as to permit a fact finder to award damages for wrongful termination.”⁶⁷

VI. THE DECISION IN *PINE RIVER*

To appeal Judge Spellacy’s ruling, the Pine River State Bank retained one of the premier appellate firms in the state.⁶⁸ Mettille, not surprisingly, stuck with his trial counsel.⁶⁹ By now it was clear that the stakes in this litigation were very large. In its brief, the bank advocated adherence to the at-will rule, citing *Skagerberg*, *Cederstrand*, and *Degen*.⁷⁰ If the appeal was to be decided on the basis of *stare decisis*, the bank would win. Mettille’s brief cited recent law review articles advocating reform of the at-will rule, state statutes already limiting the employer’s freedom to discharge, and dozens of wrongful discharge decisions from various jurisdictions around the country.⁷¹ Few times in the supreme court’s history has

importance of the professional mores and customs that complement book-law as well as the special place of the law—and the lawyer and the judge—in the community.

67. Appellant’s Brief and Appendix, *supra* note 58, at A-30 (emphasis in original).

68. Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, Minneapolis, joined the bank’s trial counsel, Lundrigan, Hendricks & Lundrigan, Pine River, for the appeal. *See Pine River*, 333 N.W.2d at 624.

69. Throughout the litigation, Mettille was represented by Stephen R. Van Drake of Van Drake & Van Drake, Brainerd. *See Pine River*, 333 N.W.2d at 624.

70. Respondent’s Brief and Appendix at 12–18, *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983) (No. 82-543).

71. A comparison of the citations in the briefs of the two sides shows the stark differences in their approach to precedent.

Citations by Source

	Minnesota Cases	Foreign Cases	Law Reviews
Bank	18	11	1
Mettille	16	70	8

The bank also cited Prosser’s treatise on torts, and Mettille cited Blackstone’s *Commentaries* once.

the preference for continuity and stability in the common law clashed so openly with its need to change, to stay close to the realities of society, as in this appeal.

John E. Simonett was assigned to write the court's opinion. He was almost fifty-nine years old at the time. He had practiced as a trial lawyer from 1951 to 1980 in Little Falls in partnership with Gordon Rosenmeier, a dominating figure in the Minnesota legislature from the 1940s through the 1960s.⁷² In an interview after being appointed to the court in 1980, Simonett described his judicial philosophy as "pragmatic."⁷³ *Pine River* reflects his philosophy of judicial pragmatism.

An influential opinion is usually well-written. If such an opinion necessarily has substance, the style in which that substance is expressed is critical to its success. Simonett had a distinct style of writing. His discussion of a case sometimes had literary overtones.⁷⁴ He seems to have been uncomfortable making the sweeping declarations about society, the human condition, and similar matters which some judges find irresistible. At times, his style becomes relaxed, even conversational. He frequently started a paragraph, "It appears to us,"⁷⁵ or "We believe,"⁷⁶ thus suggesting

72. Memorial Service for Gordon Rosenmeier on January 21, 1989, in *THE JUDICIAL CAREER OF JOHN E. SIMONETT* (Marvin Roger Anderson & Susan K. Larson, eds. 1998) (Minnesota Justices Series No. 11).

73. Douglas R. Heidenreich, *Justice John Simonett*, 50 *THE HENNEPIN LAW* 9 (Sept.–Oct. 1980). Richard Posner has given twelve "generalizations" about "legal pragmatism." For our purposes, six stand out: "1. Legal pragmatism . . . involves consideration of systemic and not just case-specific consequences 3. The ultimate criterion of pragmatic adjudication is reasonableness 5. Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty 7. Legal pragmatism is empiricist 8. Therefore it is not hostile to all theory Legal pragmatism is hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking. 9. The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages of the evolution of a legal doctrine." RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59–60 (2003).

74. Several of Simonett's extra-judicial writings concerned literary aspects of a judicial opinion. See, e.g., John E. Simonett, *The Footnote as Excursion and Diversion*, 55 *A.B.A.J.* 1141 (1969) (praising "exclusionary footnotes" in legal writing); John E. Simonett, *The Use of the Term 'Result-Oriented' to Characterize Appellate Decisions*, 10 *WM. MITCHELL L. REV.* 187 (1984) (discussing the positive and negative aspects of "result-oriented" judicial decisions).

75. *Short v. Sun Newspapers, Inc.*, 300 N.W.2d 781, 787 (Minn. 1980) (dispute over sealed bidding process).

76. *In re Petitions of Space Ctr., Inc.*, 302 N.W.2d 17, 22 (Minn. 1981) (tax case).

there are other views of the situation. In *Miller v. Shugart*,⁷⁷ a famous insurance case, he began the dispositional paragraph by asking, “This leaves us with the question of what to do in this case.”⁷⁸ His casual question invited readers—there, hard-nosed personal injury lawyers—into the deliberative process. Of course, he knew what should be done with Miller’s case, but only a judge with a complete command of insurance law could write like that.⁷⁹ The danger of this style of opinion writing is that it reveals the highly subjective nature of the job of judging. Shrewdly, Simonett did not follow this style in *Pine River*.

Pine River is only nine pages long. Its statement of the facts is about two pages, and it concludes with another two pages fielding objections to the trial court’s jury instructions and evidentiary rulings. The legal analysis occupies less than five pages and proceeds like chapters in a text book on contract law—offer, acceptance, consideration. The progressive disciplinary procedures in an employer’s handbook distributed to its workforce are nothing more than an offer, and employees who continue working thereby accept that offer and supply consideration.⁸⁰ The at-will rule, Simonett writes, is “only a rule of contract construction,” a “presumption” that can be overcome by contrary evidence, not a “rule imposing substantive limits to the formation of a contract.”⁸¹ For Simonett, like Holmes, the repetition of a phrase was no substitute for clear thought; reexamining the at-will rule, he saw that it still performed an important function in employment relations and so he demoted it from a rule of substantive law, which it clearly was in earlier decisions of the court, to a rebuttable presumption.

77. 316 N.W.2d 729 (Minn. 1982).

78. *Id.* at 736.

79. See generally, John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977) (arguing that Minnesota law and policy embraced the adoption of the *Pierringer* release); John E. Simonett & David J. Sargent, *The Minnesota Plan: A Responsible Alternative to No-Fault Insurance*, 55 MINN. L. REV. 991 (1971) (criticizing the proposed “no fault” legislation in Minnesota and advocating reform of the current fault system).

80. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626–27 (Minn. 1983). Simonett reaffirmed that an objective standard determined contract formation. *Id.* at 626. He avoided discussing whether the parties had a “meeting of the minds,” which divided the Michigan Supreme Court in *Toussaint*. See *id.* For the “faulty etymology” of this attractive alliteration, see E. Allan Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 YALE L. J. 939, 943–45 (1967).

81. *Pine River*, 333 N.W.2d at 628.

In a critical passage, Simonett declares that his court will follow a policy of judicial self-restraint—it will not interfere with the decision by the employer to restrict its own freedom to act arbitrarily: “There is no reason why the at-will presumption needs to be construed as a limit on the parties’ freedom to contract. If the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so.”⁸²

Here, Simonett masked the boldness of his ruling in a laissez-faire cloak. Crafting it in this subtle fashion, he had no need to discuss the origins of the rule or its applicability to modern industrial relations, though the four law review articles he cited did so.⁸³

Simonett broke with the status quo, but in a decidedly unoriginal way. His opinion gives the appearance of merely applying several traditional contract principles to an everyday controversy in the workplace; yet, the final product is innovative and fresh. He did not openly revolt against precedent, as did Judge Spellacy; rather than overrule *Cederstrand* and *Degen*, he culled black-letter principles from both to support his analysis and then disingenuously distinguished them by their facts.⁸⁴ While he cites

82. *Id.* *Toussaint* made this same point, though more laboriously. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 891 (Mich. 1980). Aside from its rhetorical force, there is considerable irony in this passage from *Pine River*. “Freedom of contract” was once a central feature of laissez-faire capitalism. Justice Sutherland famously said that it was “the general rule and restraint the exception” when he struck down the District of Columbia’s minimum wage act in *Adkins v. Children’s Hospital*, 261 U.S. 525, 546 (1923). Laid to rest in the constitutional revolution of the mid-1930s, this concept suddenly reappears in 1983 in *Pine River* to give workers, usually considered exploited and lacking judicial favor in the old regime, new claims of job security against their employers who, we are led to believe, have voluntarily chosen to restrict their own freedom of action.

83. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Joseph DeGuiseppe, Jr., *The Effect of the Employment-at-will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1 (1981); *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942); *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

84. *Pine River*, 333 N.W.2d at 626–27. After giving abbreviated versions of the facts of these cases, Simonett summed up: “It is clear that the Pine River State Bank’s handbook, both with respect to its content and its dissemination, differs markedly from the situations in *Cederstrand* and *Degen*.” *Id.* at 627 n. 4. To the contrary, what is clear is that if these cases had arisen post-*Pine River*, they would have survived summary judgment.

both *Toussaint* and *Weiner*,⁸⁵ his opinion differs from them in the number and breadth of his authorities. He has a far-ranging interest in how other courts and academic scholars were approaching the problem of reforming the at-will rule. In addition to law reviews, an ALR, and Restatements,⁸⁶ he cites twenty-five separate cases, some more than once, and they are about evenly divided: thirteen are from the Minnesota Supreme Court and twelve are from other state and federal courts, all relatively recent rulings. The variety of anchors in *Pine River* gave it distinct advantages over its competition.

VII. EMPLOYMENT CONTRACT LITIGATION AFTER *PINE RIVER*

Two months before *Pine River*, the supreme court recognized the tort of intentional infliction of mental distress in *Hubbard v. United Press International*.⁸⁷ Chief Justice Douglas Amdahl's opinion for the court in that matter suggests that the first assault on the citadel of the at-will rule may have been successful, in part, because it sounded in contract, not tort.⁸⁸ The result in *Hubbard* was not unexpected; the court had discussed the tort only three years earlier.⁸⁹ But it was a reluctant recognition. The Chief Justice dwelled on the common law's concern about the authenticity of claims of emotional distress that did not accompany a physical injury.⁹⁰ He might have acknowledged the increased ability of

85. *Id.* at 629, 631 n.7. Simonett distinguished *Toussaint* on its facts: "We do not think, however, that *Toussaint*, which was relied on by respondent and the trial court, aids particularly in construing Mettille's contract. *Id.* at 631 n.7. In *Toussaint* the employees, in accepting employment, had been explicitly assured, both orally and in an employer's manual, that termination would require good cause, so that good-cause termination was a negotiated item of the employees' contracts." *Id.* In dictum, however, the Michigan Supreme Court noted that the pre-employment job security assurances were not necessary to its holding: "No pre-employment negotiations need take place and the parties' minds need not meet on the subject." *Toussaint*, 292 N.W.2d at 892.

86. Simonett cited the Restatement (Second) of Agency (1971) once and the Restatement (Second) of Contracts (1981) three times. *Pine River*, 333 N.W.2d at 628-30. He also cited Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-will Employee For Any Reason*, 12 A.L.R.4th 544 (1982). *Pine River*, 333 N.W.2d at 630.

87. 330 N.W.2d 428, 438 (Minn. 1983).

88. See generally *Hubbard*, 330 N.W.2d 428 (overturning and dismissing a jury verdict for the Plaintiff on an intentional infliction of emotional distress claim).

89. *Peterson v. Sorlien*, 299 N.W.2d 123, 129-30 (Minn. 1980) (Sheran, C.J.).

90. *Hubbard*, 330 N.W.2d at 437-38. Needless to say, though a Hennepin County jury had found UPI guilty of outrageous conduct, after reviewing the facts,

mental health professionals to verify emotional injuries or even society's greater knowledge of mental illness, but he did not. His skepticism has never washed off this tort. Though adopted over two decades ago, recoveries for the tort of outrage in Minnesota can be counted on the fingers of one hand.⁹¹

There was no need for Simonett to sound a warning about feigned mental anguish allegations in *Pine River* because in an action for breach of contract in Minnesota, as in most states, emotional distress damages cannot be recovered. Nor can punitive damages. Thus, the court limited Mettille's recovery against the bank to his wage loss, offset by the amount of his debt to the bank.⁹²

If contract litigation met initial success in challenging the at-will rule, it also was the easiest for employers to defeat in future battles. In *Pine River*, Simonett gave comfort to employers by advising them that they could change their handbooks when needed.⁹³ Over time, most of them added a conspicuous

Amdahl concluded that its treatment of Hubbard was not so extreme as to be "utterly intolerable to the civilized community," one of the elements of the tort. *Id.* at 439.

91. Cf. Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 38-39 (1993) ("Claims for intentional infliction of emotional distress and defamation are increasingly common in cases where the employer discharges an employee or otherwise takes action affecting the employee's job status. Whether the claim is for defamation or the intentional infliction of emotional distress, the Minnesota Supreme Court has been reluctant to expand tort remedies to supplement the traditional contract remedies available to discharged employees. One of the factors that appears to be at work in cases such as *Hubbard*, even if not explicitly stated, is the desire to avoid that expansion.") (citations omitted).

92. "The measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 632 (Minn. 1983) (quoting *Zeller v. Prior Lake Pub. Schs.*, 259 Minn. 487, 493, 108 N.W.2d 602, 606 (1961)). The court dismissed Mettille's tort claim for mental distress before trial. Appellant's Brief and Appendix, *supra* note 58, at A-25. Mettille's final judgment against the bank totaled only \$24,141.07, plus interest. *Id.* at A-22.

93. *Pine River*, 333 N.W.2d at 627 ("Unilateral contract modification of the employment contract may be a repetitive process. Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions."). In *Toussaint*, the Michigan Supreme Court suggested that an employer may choose not to have any personnel policies at all. See *Toussaint*, 292 N.W.2d at 894. Simonett did not hold out such an illusion. He undoubtedly was aware that this option was closed three years earlier in *Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980) (Kelly, J.), where the supreme court recognized a claim for sexual harassment under the Minnesota Human Rights Act. The court stated that one means of avoiding

“disclaimer” that declared that the handbook was not a contract, that its provisions could be changed, and that employees who received it served on an “at-will” basis. With a few exceptions, courts in Minnesota have not enforced a handbook with a disclaimer against the employer. As a result, pure *Pine River* contract suits virtually ceased to exist by the end of the century.⁹⁴

The most radical effort after *Pine River* to use contract principles to reform the at-will employment relationship, imposing a covenant of good faith and fair dealing in unilateral employment contracts, was rejected by the supreme court in *Hunt v. IBM Mid America Employees Federal Credit Union*.⁹⁵ While unavailable in most discharge suits, the covenant exists, *sub rosa*, in common law benefit cases—that is, suits alleging that the employer fired an employee to avoid paying some other type of compensation, usually a commission.⁹⁶

liability for workplace harassment was for the employer to disseminate a policy prohibiting harassment to its workers. *Id.* at 248, 250. A harassment policy typically is placed in an employee handbook.

94. *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. Ct. App. 1991) (citing cases), *aff'd mem.*, 479 N.W.2d 58 (Minn. 1992). *See also* *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 708 (Minn. 1992).

95. 384 N.W.2d 853, 858–59 (Minn. 1986). *But see* *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 503 (Minn. 1991) (“This court has not made clear whether it recognizes such a cause of action, but there is no need to go into the question here. After a careful review of the record, we conclude as a matter of law that no covenant could in any event exist in this case.”). The question of whether the covenant exists in an individually negotiated express employment contract remains open in Minnesota (because the typical employee in such a situation is a professionally trained and licensed individual in whom the employer has placed considerable trust and responsibility, it is likely that the supreme court could read the covenant into their particular compact).

96. After the Second World War, there were a handful of what may be called pre-Employment Retirement Income Security Act (ERISA) benefits cases. These were successful contract suits by employees to recover bonuses, severance pay and even retirement pay an employer promised them if they satisfied certain conditions, but then refused after the employees performed. These cases held that an employer could not renege on such a commitment at its will, and were sometimes cited by courts relaxing the at-will rule in the 1980s. In Minnesota, *Hartung v. Billmeier*, 243 Minn. 148, 66 N.W.2d 784 (1954) (Matson, J.) (enforcing employer’s promise of a yearly \$100 bonus to employee if he worked at least five years), cited in *Pine River*, 333 N.W.2d at 627, falls within this small category, as do *Holman v. CPT Corp.*, 457 N.W.2d 740, 744 (Minn. Ct. App. 1990) (citing *Buysee v. Paine, Weber, Jackson & Curtis, Inc.*, 623 F.2d 1244, 1249 (8th Cir. 1980)) and *Bratton v. Menard, Inc.*, 438 N.W.2d 116, 119 (Minn. Ct. App. 1989). The most famous early case explicitly holding that an employer’s discharge of an employee to avoid paying a benefit violated a covenant of good faith and fair dealing is *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), which was cited by *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 443 n.3 (N.Y. 1982).

If *Hunt* slammed one door shut, it seemed to open another. Holding that the handbook relied upon by Hunt was by itself too indefinite to constitute an offer to him,⁹⁷ the court emphasized that he was relying *solely* on the manual as a basis for his contract action.⁹⁸ Oddly, given this judicial hint, few attempts have been made by employees in Minnesota to combine documentation with oral representations and a course of conduct by the employer as a basis for a contract action.⁹⁹ The most noteworthy of these cases was *Martens v. Minnesota Mining & Manufacturing Co.*, where a plurality of the state supreme court held that a company's brochures, as well as oral statements by its managers concerning a system of compensation and promotion, were too indefinite to constitute a contract as a matter of law.¹⁰⁰ In striking contrast, most

97. *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 857 (Minn. 1986).

98. *Id.* at 856–57. In *Pine River*, Simonett noted that “[n]ot every utterance of an employer is binding.” 333 N.W.2d at 630. This observation has sometimes been quoted by courts when disallowing an employee’s contract claim; however, it can also be interpreted as suggesting that in a particular case a multiplicity of utterances about job security by the employer will be binding. There can be little doubt that Justice Simonett would have welcomed what became known as the “all factors test” for determining the nature of a common law employment contract. In his article, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, Simonett noted the century-long trend for appellate courts to decide cases less on the basis of general legal principles and more on their individual facts; and as an example, he cited the adoption of a “totality of the circumstances” test for warrants in criminal cases. John E. Simonett, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 189, 209 nn.66–67 (1984) (citations omitted). As another example, he might have noted his court’s redefinition of the “at-will rule” from one of substantive limitation on employer-employee relations to an evidentiary presumption in *Pine River*.

99. Oral promises of an employer formed binding contracts in *Hartung*, 243 Minn. 148, 66 N.W.2d 784, and *Maschenik v. Park Nicollet Medical Center*, 385 N.W.2d 362 (Minn. Ct. App. 1986) (employee told about written grievance procedure before hire, but was never given a copy). The Minnesota Court of Appeals has explicitly adopted an “all factors” test when interpreting the Minnesota Business Corporation Act, which instructs a court when resolving an intra-corporate dispute to “take into consideration the . . . reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders’ relationship with the corporation and with each other.” MINN. STAT. § 302A.751, subdiv. 3a (2004). The appeals court has written, “When ascertaining the [parties’] intent, trial courts must consider the written and oral negotiations of the parties as well as the parties’ situation, the type of employment and the particular circumstances of the case.” *Pedro v. Pedro*, 489 N.W.2d 798, 803 (Minn. Ct. App. 1992). See also *Pedro v. Pedro*, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990).

100. 616 N.W.2d 732 (Minn. 2000) (Anderson & Gilbert, JJ., dissenting). For the plurality, Justice Edward C. Stringer cited *Cederstrand v. Lutheran Brotherhood*,

other state supreme courts, some of which originally followed the lead of the Minnesota Supreme Court in *Pine River*, have adopted a totality of circumstances test for contract formation.¹⁰¹

In 1991, an appeal came before the supreme court which

263 Minn. 520, 523, 117 N.W.2d 213, 216 (1962), *Degen v. Investors Diversified Services, Inc.*, 260 Minn. 424, 425, 428, 110 N.W.2d 863, 864–66 (1961), and dusted off the Depression-era *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 294–95, 266 N.W. 872, 874 (1936) to prop up his conclusion that the plaintiffs' suit should be dismissed under Rule 12. *Martens*, 616 N.W.2d at 741–42. The plurality's analysis was devoid of the wide-ranging interest in scholarly and foreign authorities that was a hallmark of Simonett's work in *Pine River*. Even Justice Gilbert, writing in dissent, did not cite authority from beyond Minnesota's borders for his conclusion that the plaintiffs should have the opportunity to engage in discovery to prove an agreement "bound up in a myriad of representations spanning some fifty years of 3M's history." *Id.* at 753 (Gilbert, J., dissenting).

101. The West Virginia Supreme Court of Appeals suggests that the "all factors test" is the majority rule. *Adkins v. Inco Alloys Int'l, Inc.*, 417 S.E.2d 910, 914–15 (W. Va. 1992) (citing cases). See also *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1036–38 (Ariz. 1985) (specific promissory language not essential to formation of implied contract; parties' intent to be discerned from totality of statements and actions). In a case cited favorably in *Pine River*, the California Court of Appeals wrote, "[w]hile oblique language will not, standing alone, be sufficient to establish agreement . . . it is appropriate to consider the totality of the parties' relationship . . ." *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981). See *Weiner*, 443 N.E.2d at 446 ("In determining whether such a presumption [of at-will employment] is overcome here, the trier of the facts will have to consider the 'course of conduct' of the parties, 'including their writings' . . . and their antecedent negotiations. . . . [I]t is not McGraw's subjective intent, nor 'any single act, phrase or other expression' but 'the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain,' which will control." (citations omitted)). See also *Wright v. Honda Mfg., Inc.*, 653 N.E.2d 381, 384 (Ohio 1995) ("[I]t is important for the trier of fact to review the history of relations between the employer and employee and the 'facts and circumstances' surrounding the employment-at-will relationship. These 'facts and circumstances' include 'the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question' [I]n addition . . . such evidence . . . includes . . . that information contained in employee handbooks, oral representations made by supervisory personnel that employees have been promised job security in exchange for good performance, and written assurances reflecting company policy." (citations omitted)). See also *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1044 (Utah 1989) ("[E]mployment contracts should be construed to give effect to the intent of the parties. An implied-in-fact promise is a judicial attempt to reach precisely that result. The conclusion that a promise exists may arise from a variety of sources, including the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances which show the existence of such a promise." (citations omitted)). For some courts, a handbook disclaimer is just one factor among many to be considered when deciding whether a contract has been formed. See, e.g., *McGinnis v. Honeywell, Inc.*, 791 P.2d 452, 457 (N.M. 1990); *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1005 (Utah 1991) (Stewart, J., concurring).

permitted Simonett to return to *Pine River*. It was the multi-count wrongful discharge claim of Gail Nordling, a career in-house attorney at an electrical utility, on appeal from summary judgment.¹⁰² Nordling claimed that when he was discharged, his employer violated the procedures in its handbook and engaged in reprisal for his objection to what he thought was illegal surveillance of other employees, and he further claimed that his supervisor tortiously interfered with his employment contract.¹⁰³

Simonett, speaking for the full court, reinstated Nordling's contract and tortious interference claims.¹⁰⁴ He took note of the transformation of the profession from single practitioners or "relatively small partnerships"—not unlike his practice for nearly three decades in the firm of Rosenmeier & Simonett—to specialized practices and "salaried employment lawyers."¹⁰⁵ He saw that for many purposes Nordling's employer treated him as a salaried worker.¹⁰⁶ He concluded that the common-law rule that a lawyer could be fired by a client for any reason and be entitled to recover only quantum meruit was out-of-date for a salaried lawyer-employee.¹⁰⁷ While holding that Nordling could hold his ex-employer liable for disregarding its progressive disciplinary system when it fired him,¹⁰⁸ Simonett was highly sensitive to preserving the confidential relations between staff lawyer and employer-client.¹⁰⁹ A model of appellate writing, *Nordling* is one of Simonett's finest opinions.

VIII. *PINE RIVER* IN THE COURTS OF MINNESOTA

Practicing lawyers quickly took advantage of *Pine River*. Initially, there were many suits like *Hunt*—one count complaints alleging that the employer violated the graduated disciplinary procedures in its handbook when it fired the plaintiff. But its influence was soon felt in other types of employment litigation—retaliatory discharge cases, unemployment compensation claims, and discrimination suits, among others.

102. Nordling v. N. States Power Co., 478 N.W.2d 498, 500 (Minn. 1991).

103. *Id.*

104. *Id.* at 499.

105. *Id.* at 501–02.

106. *Id.* at 502.

107. *See id.*

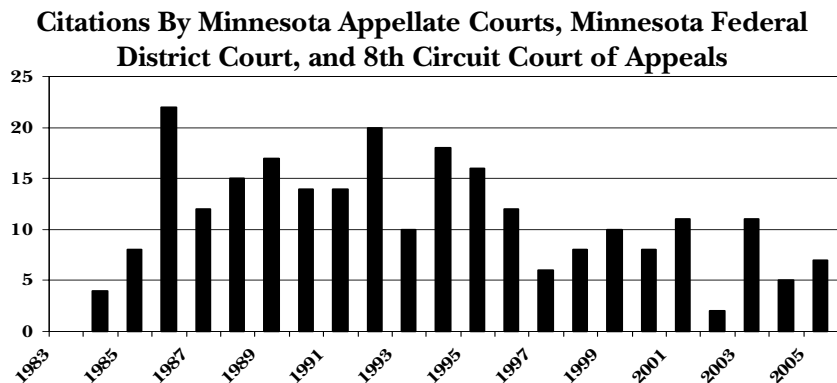
108. *Id.* at 503.

109. *Id.* at 502–03.

One measure of a case's influence is the number of times it is cited by other courts. As Daniel A. Farber has written,

Clearly, a host of extraneous factors can influence the number of citations that an opinion receives. In general, however, citation impact is a plausible measure of the significance of an opinion, that is, how far it 'moves' the law. An opinion that contributes little new information about the law will not be very useful to later courts, nor will it usually be of much interest to commentators. Thus citation frequency provides at least a rough measure of how significantly an opinion changes the law.¹¹⁰

The following is a tabulation of the number of reported decisions citing *Pine River* between 1983 and 2005 by Minnesota appellate courts and by federal courts applying Minnesota law in diversity cases or in federal cases with a pendent state contract claim.¹¹¹ Each of these courts turned to *Pine River* as authority for deciding some issue or for declaring some proposition in its opinion.



110. Daniel A. Farber, *Earthquakes and Tremors in Statutory Interpretation: An Empirical Study of the Dynamics of Interpretation*, 89 MINN. L. REV. 848, 852 (2005).

111. Our methodology was quite simple. We conducted a Westlaw search of *Pine River*, and counted all cases citing *Pine River* issued by the Minnesota Supreme Court, the Minnesota Court of Appeals, United States District Courts for the District of Minnesota, and the Eighth Circuit Court of Appeals between 1983 and December 31, 2005. The results appear in the table. A hard copy of the Westlaw tabulation is on file with the *William Mitchell Law Review*.

Gross numbers of citations such as these, however, “are at best a crude and rough proxy for measuring influence.”¹¹² Yet, if they say something, but not much, about *Pine River*’s influence, they tell a great deal more about the explosion of litigation it ignited. During this period, *Pine River* affected the outcomes of many cases that were not reported. There were rulings in small claims court in actions to recover wages or commissions and administrative awards on claims for unemployment compensation.¹¹³ In the folklore of the trial bar and the insurance industry, for every case that is tried, nine or more are settled.¹¹⁴ The percentage of settlements is much higher in employment law. This is because the at-will rule, even if only a presumption, favors the employer. Few claims by employees are ever placed into suit; most settle pre-suit on a confidential basis.¹¹⁵ The number of cases, claims, and situations that were influenced by *Pine River* in any year from 1983 through 2005 in the state of Minnesota is closer to thirty times the number of citations recorded for that year in this table—and this is a conservative estimate.

The bar graph of citations to *Pine River* in Minnesota courts resembles a ski jump, though a descending roller coaster ride may be a more apt metaphor. In fact, it is typical of the citation histories of most significant court rulings. They are cited most frequently soon after they are published, less so over time. This is the process of the “aging” of judicial authorities or the “depreciation” of legal capital.¹¹⁶ Yet, while this process may be true of cases in general, the question remains as to what causes a

112. William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271 (1998).

113. In 1984, the Minnesota Court of Appeals, applying *Pine River*, held that an employee who is fired in violation of the disciplinary procedures in the employer’s handbook cannot be denied unemployment compensation. *Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676, 678 (Minn. Ct. App. 1984). See also *Neubert v. St. Mary’s Hosp. & Nursing Ctr. of Detroit Lakes*, 365 N.W.2d 780, 782 (Minn. Ct. App. 1985). In subsequent years, dozens of similar claims were resolved administratively, and not always to the benefit of the claimant.

114. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 66 (1982) (citing H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970)).

115. For example, in the two decades after *Pine River*, many employees were able to negotiate confidential severance packages before filing suit by arguing that the manner of their discharge violated their employers’ own policies.

116. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 262–63 (1976). Borrowing a phrase from nuclear physics, they suggest that a case has a limited “half-life.” *Id.* at 259.

particular case to lose influence—in other words, are there external events, occurring outside the chambers of a judge searching for authority for an opinion, which cause a particular case to diminish in influence?

There are several external causes of the waning impact of *Pine River*, as measured by its frequency of citation. First, employers learned to follow their own rules when disciplining and dismissing employees.¹¹⁷ Next, they took Simonett's suggestion and amended their manuals to include a broad disclaimer, thus creating a defense to a *Pine River* claim. They also learned the advantages of having a departing worker sign a general release as part of a modest severance package. Finally, state appellate courts applied *Pine River* to a variety of situations in published opinions, thereby reducing the uncertainty that unnerves practicing lawyers as they endeavor to predict to their clients how a court or agency will rule in a particular situation.¹¹⁸ A byproduct of a lawyer's greater certainty of judgment is less litigation—and fewer opportunities for later courts to cite *Pine River*.

IX. PINE RIVER AMONG THE STATES

In 1988, the New Hampshire Supreme Court faced the question of the enforceability of an employer's manual in a

117. This is related to two other phenomena of the 1980s: the preventive law programs of large law firms, which sought to educate corporate clients about developments in employment law, and second, continuing legal education courses during which practicing lawyers learned the lessons of *Pine River* and advised their clients accordingly. The Minnesota Supreme Court adopted a policy on mandatory minimum CLE credits for practicing lawyers in 1975.

118. The Minnesota Supreme Court addressed *Pine River* issues twice in 1986: *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853 (Minn. 1986), and *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 892–93 (Minn. 1986) (Simonett, J., dissenting in part and concurring in part); once in 1991 in *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991), and again in 1992 in *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701 (Minn. 1992). The appeals court decided a raft of cases in the years immediately following *Pine River*, each incrementally advancing the bar's understanding: in 1984, *Hoemberg*, 343 N.W.2d 676; in 1985, *Neubert*, 365 N.W.2d 780, and *Tobias v. Montgomery Ward & Co.*, 362 N.W.2d 380 (Minn. Ct. App. 1985); in 1986, *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33 (Minn. Ct. App. 1986), *Fitzgerald v. Norwest Corp.*, 382 N.W.2d 290 (Minn. Ct. App. 1986), *Maschenik v. Park Nicollet Medical Center*, 385 N.W.2d 362 (Minn. Ct. App. 1986), and *Kulkay v. Allied Central Stores, Inc.*, 398 N.W.2d 573 (Minn. Ct. App. 1986); in 1987, *Skramstad v. Otter Tail County*, 417 N.W.2d 124 (Minn. Ct. App. 1987), and *Herron v. Green Tree Acceptance, Inc.*, 411 N.W.2d 192 (Minn. Ct. App. 1987).

wrongful discharge action. Writing for the court, Justice David Souter surveyed the judicial landscape and concluded: “Judicial responses to actions for the enforcement of job security provisions contained in handbooks fall into four broad categories.”¹¹⁹

He cited only one case, *Pine River*, as exemplifying the first category of cases which enforced manuals “if, but only if, they satisfy generally applicable standards of unilateral contract formation.”¹²⁰ He placed *Toussaint* and *Woolley v. Hoffmann-La Roche*, a 1985 decision of the New Jersey Supreme Court, into the second category, which recognized the “enforceability of the handbook’s statement of policy, but without so clearly requiring compliance with unilateral contract rules.”¹²¹ The third category relied upon a theory of promissory estoppel, while the fourth rejected all efforts to modify the at-will rule.¹²² After holding that a manual should be enforced if certain conditions were met, Souter concluded: “Our holding is in line with *Pine River State Bank v. Mettille*, not with the arguably interventionistic passages in *Woolley v. Hoffmann-LaRoche*.”¹²³

Like Souter, many state courts cited both *Toussaint* and *Pine River* and less frequently *Weiner*, while holding that the terms of a handbook could limit an employer’s right to discharge its employees at will. Because of this, bar graphs of the citation histories of *Toussaint*, *Weiner*, and *Pine River* will mirror one another, with the number of cites to *Weiner* far less than its competitors. The following table lists the number of cases in which other state courts (primarily state supreme courts) cited *Pine River* in the United States from 1983 through 2005.¹²⁴ The total comes to 125 separate decisions by appellate courts in thirty-six states.¹²⁵

119. *Panto v. Moore Bus. Forms, Inc.*, 547 A.2d 260, 266 (N.H. 1988).

120. *Id.*

121. *Id.* (citing *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) and *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1264, 1268 (N.J. 1985)).

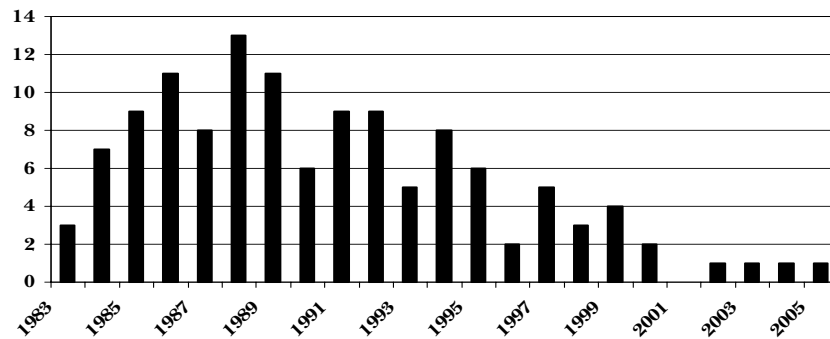
122. *Id.*

123. *Id.* at 268.

124. For our methodology, see *supra* note 111. The cases that were tabulated for this table appear in a Westlaw search of all cases citing *Pine River* from 1983 through December 31, 2005 by courts in states other than Minnesota. Except for a few cites by state trial courts such as the Pennsylvania Court of Common Pleas, all cites are from appellate courts in other states. The tabulations for this graph are on file with the *William Mitchell Law Review*.

125. Appellate courts in the following states did not cite *Pine River* during this period: Florida, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi,

Citations By Other State Courts



There are, however, different ways to cite a case.¹²⁶ It is one thing for a case to be one of many in a block of cites supporting a proposition, still another for that case to be quoted. When one state supreme court *quotes* the opinion of another state supreme court, that act signifies that the quoted case is particularly influential.¹²⁷ *Pine River* was widely quoted, and this is a sure sign of its influence.

In 1983, several months after *Pine River* appeared, the Nebraska Supreme Court quoted it with approval: “We agree with the reasoning of the Minnesota Supreme Court that [the employer’s] argument enlarges the at-will rule to impose substantive limits on the formation of contracts.”¹²⁸ The next year, the Arizona Supreme Court quoted *Pine River*: “We agree with the Minnesota Supreme Court that ‘[i]f the parties choose to provide in their employment contract of indefinite duration for provisions of job security, they should be able to do so.’”¹²⁹ In a short ruling, issued in 1985, the Vermont Supreme Court quoted *Pine River’s*

Montana, Nevada, New York, Oregon, Rhode Island, and Tennessee. *See supra* note 124 and accompanying text. A tabulation of the states whose appellate courts have cited *Pine River* is on file with the *William Mitchell Law Review*.

126. *See generally* David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC. REV. 337 (1997).

127. *Id.* at 342.

128. *Morris v. Lutheran Med. Ctr.*, 340 N.W.2d 388, 391 (Neb. 1983). Four years later, in *Johnson v. Panhandle Co-op Ass’n*, 408 N.W.2d 261, 266 (Neb. 1987), it quoted *Pine River* at length, concluding, “We agree with the reasoning of the Minnesota court.”

129. *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 173 (Ariz. 1984).

holding that the “at-will rule . . . is . . . a rule of . . . construction” and concurred with its suggestion that a court need not interfere if the parties wished to contract limitations of the employer’s ability to discharge.¹³⁰

In 1987, the Arkansas Supreme Court, while acknowledging *Toussaint* and *Pine River*, rebuffed an attempt to hold the employer to its promises in its handbook, while a dissent called the majority’s strict adherence to the at-will rule “archaic and in need of revision.”¹³¹ Four years later, the full court reversed course, quoting long passages from *Pine River*, and when the issue rose years later, it returned to *Pine River*, quoting it once more.¹³² The West Virginia Supreme Court quoted *Pine River* in two cases and cited it in three others as it developed this body of law over a period of ten years.¹³³ The South Dakota Supreme Court quoted the decision of the Minnesota Supreme Court in *Lewis v. Equitable Life Assurance Society*, which in turn was based on *Pine River*.¹³⁴

It is noteworthy that other courts quoted *Pine River* for a variety of propositions. The Connecticut Supreme Court quoted *Pine River*’s holding that “additional consideration” was but one sign of

130. *Sherman v. Rutland Hosp., Inc.*, 500 A.2d 230, 232 (Vt. 1985). Years later, in a curious case, the Vermont Supreme Court, after announcing its decision to “join the many courts” that have held that a personnel manual may modify an at-will relationship, string-cited six decisions that included *Pine River* and *Toussaint* and then inexplicably announced, “We recognize that this holding draws on aspects of both unilateral contract formation and promissory estoppel.” *Taylor v. Nat’l Life Ins. Co.*, 652 A.2d 466, 471 (Vt. 1994). The court then quoted with approval a long passage from *Toussaint*, which it described as “the leading case.” *Id.*

131. *Gladden v. Ark. Children’s Hosp.*, 728 S.W.2d 501, 503 (Ark. 1987). In a stinging dissent to this decision, Associate Justice John T. Purtle summarized the history of employment relations over the previous century in three sentences: “After the abolishment of slavery in 1865 the employment relationship became known as ‘master-servant.’ As late as 1968 this Court determined that a ‘servant’ is an employee whose physical conduct is subject to the master’s . . . control. We have now elevated the relationship to one of ‘employer-employee.’” *Id.* at 505 (Purtle, J. dissenting) (citations omitted).

132. *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910, 914–15 (Ark. 1991); *Sexton Law Firm, P.A. v. Milligan*, 948 S.W.2d 388, 393–94 (Ark. 1997).

133. The West Virginia Supreme Court quoted *Pine River* in *Cook v. Heck’s Inc.*, 342 S.E.2d 453, 458–59 (W. Va. 1986) and *Adkins v. Inco Alloys International, Inc.*, 417 S.E.2d 910, 914 (W. Va. 1992). It also cited *Pine River* in *Williamson v. Sharvest Management Co.*, 415 S.E.2d 271, 274 (W. Va. 1992), *Hogue v. Cecil I. Walker Machinery Co.*, 431 S.E.2d 687, 689 (W. Va. 1993), and *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 340 (W. Va. 1995).

134. *Bauer v. Am. Freight Sys., Inc.*, 422 N.W.2d 435, 438 (S.D. 1988) (quoting *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 883 (Minn. 1986)).

the parties' intent, and that the at-will rule is a rule of construction of an employment contract, not a substantive requirement.¹³⁵ The Utah Supreme Court cited *Pine River's* repudiation of the alleged need for "mutuality of obligation" under a contract.¹³⁶

The North Dakota Supreme Court initially cited both *Pine River* and *Toussaint* and did not distinguish their different approaches to the problem. However, as the issues recurred, its analyses became more sophisticated, and in the end *Pine River* prevailed over its competitor. In 1984, the North Dakota Supreme Court held for the first time that an employer could be held liable for disregarding the dismissal provisions in its personnel manual, citing *Pine River* and *Toussaint*.¹³⁷ Four years later, the issue rose again. In a less perfunctory analysis, the North Dakota Supreme Court quoted *Pine River's* statement that a unilateral contract can be changed and the new conditions become part of that contract.¹³⁸ It did not cite *Toussaint*. In each of the next three cases involving unilateral contract issues, the court cited *Pine River* but not *Toussaint*.¹³⁹

To be sure, other state supreme courts quoted *Toussaint*. The New Jersey Supreme Court cited *Pine River*¹⁴⁰ but quoted *Toussaint* in *Woolley*.¹⁴¹ This approach was followed by the Alaska Supreme Court in a 1989 decision¹⁴² and by the New Mexico Supreme Court

135. *Coelho v. Posi-Seal Int'l, Inc.*, 544 A.2d 170, 175 (Conn. 1988). On this point the Supreme Court of Connecticut noted that "the Minnesota Supreme Court adopted the *Littell* rule." *Id.* (referencing *Littell v. Evening Star Newspaper Co.*, 120 F.2d 36 (D.C. Cir. 1941), *cited in Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn. 1983)).

136. *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1045 (Utah 1989) (quoting *Pine River*, 333 N.W.2d at 629). The *Berube* court also cited *Weiner v. McGraw-Hill, Inc.* for the same proposition. *Id.* (citing 443 N.E.2d 441, 444-45 (N.Y. 1982)).

137. *Hammond v. N.D. State Pers. Bd.*, 345 N.W.2d 359, 361 (N.D. 1984). It also cited a lower court from Pennsylvania and one of its own decisions from 1972. *Id.*

138. *Sadler v. Basin Elec. Power Coop.*, 431 N.W.2d 296, 298 (N.D. 1988) (quoting 333 N.W.2d at 627).

139. *Aaland v. Lake Region Grain Co-op.*, 511 N.W.2d 244, 246 (N.D. 1994); *Pratt v. Heartview Found.*, 512 N.W.2d 675, 677 (N.D. 1994); *Habeck v. MacDonald*, 520 N.W.2d 808, 811 (N.D. 1994).

140. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1263 (N.J. 1985) (citing *Pine River*, 333 N.W.2d at 628).

141. *Id.* at 1268 (quoting *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)).

142. *Jones v. Cent. Peninsula Gen. Hosp.*, 779 P.2d 783, 786 (Alaska 1989).

in 1993.¹⁴³ Typifying Professor David Walsh's contention that many courts cited cases to "legitimate" or serve as cover for their own rulings in a new area of law, the Ohio Court of Appeals quoted both *Pine River* and *Toussaint* while holding that an employer's promise to pay severance to its employees was binding.¹⁴⁴ The Wyoming Supreme Court first recognized that a handbook could modify the presumptive employment at-will relationship in 1985 and cited *Toussaint*.¹⁴⁵ When the issue reappeared in 1994, the court quoted *Toussaint* multiple times.¹⁴⁶ In 2000, it cited *Pine River*'s repudiation of the mutuality of obligation argument.¹⁴⁷ The Maryland Court of Special Appeals quoted *Pine River* on the formation of contracts and its admonition that "general statements of policy are no more than that and do not meet the contractual requirements for an offer"¹⁴⁸; however, it also quoted *Toussaint* at length and described that opinion as having the "best exposition" of the view that an employer's pronouncements may create legally enforceable obligations.¹⁴⁹

In his study of the citation practices of state courts in wrongful discharge cases, which included contract actions, public policy retaliatory discharge cases, and suits involving the covenant of good faith and fair dealing, Professor Walsh saw that very few courts explicitly stated that they relied upon the ruling of another court; he noticed that when such statements were made, they "tended to be scattered about rather than directed at one or a few courts."¹⁵⁰ However, he found one exception to this pattern:

143. *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 781, 786 (N.M. 1993) ("We find the reasoning of *Toussaint* and similar cases persuasive.").

144. *Helle v. Landmark, Inc.*, 472 N.E.2d 765, 772-73 (Ohio Ct. App. 1984). *Helle* was cited with approval by the Ohio Supreme Court when it recognized that the at-will doctrine could be modified by implied or express contract. *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 154 (Ohio 1985).

145. *Mobil Coal Producing, Inc. v. Parks*, 704 P.2d 702, 707 (Wyo. 1985).

146. *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 217-18 (Wyo. 1994).

147. *Worley v. Wyo. Bottling Co.*, 1 P.3d 615, 623 (Wyo. 2000) (citing *Pine River*, 333 N.W.2d at 629).

148. *Staggs v. Blue Cross of Md., Inc.*, 486 A.2d 798, 802, 804 (Md. Ct. Spec. App. 1985).

149. *Id.* at 802. The court later quoted *Pine River* again in *MacGill v. Blue Cross of Maryland, Inc.*, 551 A.2d 501, 503 (Md. Ct. Spec. App. 1989). The Maryland Supreme Court eventually held that handbooks may constitute a unilateral contract and cited both *Pine River* and *Toussaint* in its analysis. *Suburban Hosp., Inc., v. Dwiggins*, 596 A.2d 1069, 1075 (Md. 1991).

150. Walsh, *supra* note 31, at 354.

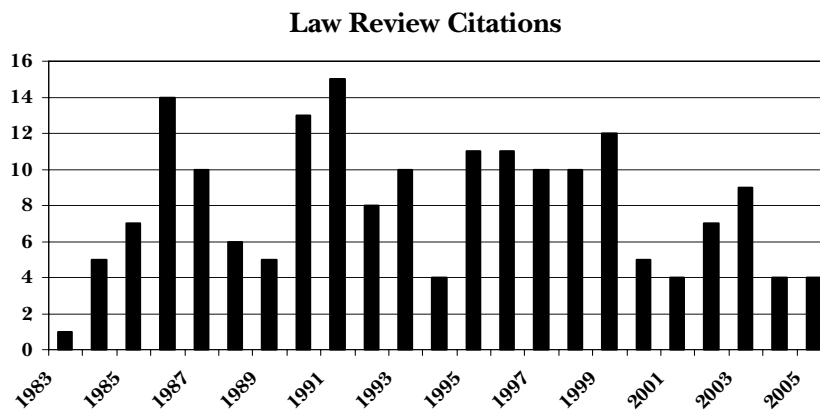
The main exception in this regard is the Minnesota Supreme Court, whose decision in *Pine River State Bank v. Mettille* (1983) was cited as particularly influential by all of the courts that made such a statement in an implied contract precedent case. Other courts seemed to be impressed by the manner in which that decision, while adopting a new wrongful discharge doctrine, was firmly couched in the familiar discourse of contract law.¹⁵¹

This is exactly why Justice Souter sided with *Pine River* in his meticulous survey of the case law.

X. *PINE RIVER* IN THE LAW REVIEWS

Law reviews serve the legal profession in many ways. They are a forum for serious scholarship, commentary, and debate; they monitor the activities of the United States Supreme Court especially closely, if not obsessively; and they sometimes critique the decisions of state supreme courts. For our purposes, the reviews are important for another reason: they are a sensitive barometer of judicial innovation. As in other disciplines, originality, a break with the status quo, is noted in professional journals.

The following chart lists the number of times American law reviews cited *Pine River* from 1983 through 2005.¹⁵²



151. *Id.* at 360 n.17.

152. For our methodology, see *supra* note 111 and accompanying text. Monthly publications of county and state bar associations in Minnesota are not included.

From 1983 through 2005, *Pine River* was cited in 185 separate law review articles. Only one article was a narrow case note in a law review published by a law school in Minnesota.¹⁵³ The rest concerned developments in the common law of employment contracts in individual jurisdictions as well as a wide range of other employment-related subjects. The sheer number of these articles attests to the upheaval in employment relations caused by the employee rights movement during this period. The decade spanning the 1990s, when *Pine River* was cited with consistently high frequency, coincides with the emergence of employment law as a legal specialty.

It has been said of Benjamin Cardozo that he “cultivated academics.”¹⁵⁴ Cardozo cited four times more scholarly articles in his opinions than his colleagues on the New York Court of Appeals,¹⁵⁵ and he wrote three famous books on the law, each published by a university press.¹⁵⁶ It could never be said that Justice Simonett set out to curry favor with academia. Nevertheless, he admired law reviews, and he saw that the bench benefited from their critiques.¹⁵⁷ He was the President of the *Minnesota Law Review* in the 1950–1951 school year. In an interview after being appointed, he remarked with evident pride about the *Minnesota Law Review*, “Volume 34 is mine.”¹⁵⁸ Within a few years after his

153. Sarah C. Steefel, Note, *At-Will Employment—Contractual Limitation of an Employer’s Right to Terminate: Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983), 7 HAMLINE L. REV. 463 (1984).

154. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 135 (1990). Anyone who reads this insightful book quickly realizes that it contains almost as much Posner-on-Posner as Posner-on-Cardozo.

155. *Id.*

156. *THE NATURE OF THE JUDICIAL PROCESS* (1921); *THE GROWTH OF THE LAW* (1924); and *THE PARADOXES OF LEGAL SCIENCE* (1928).

157. Speech to the University of Minnesota Law Review on April 11, 1986, in *THE JUDICIAL CAREER OF JOHN E. SIMONETT* (Marvin Roger Anderson & Susan K. Larson, eds., 1998) (Minnesota Justices Series No. 11) (“We need the informed criticism and comment of the bar to tell us what we have said and to put our opinions in perspective. Here law reviews are of immense help. Law reviews provide a forum for objective and reflective criticism of appellate decision-making. Judges tend to be generalists, and we need the view of scholars and experts in the particular field. Our opinions are bound by the facts of a particular case, and we find it helpful for law reviews, which can treat a problem more abstractly, to explore the theoretical underpinnings of our rulings. Knowing that our opinions are being written not just for the litigants but for a broader sophisticated audience serves as a healthy discipline and, as Lord Bryce observed, helps to keep the courts from ‘immersion in the turbid pool of politics.’”).

158. Heidenreich, *supra* note 73, at 9.

retirement, he could walk through the stacks of the library of any law school and point to hundreds of bound volumes of law reviews containing references to his opinions.

XI. THE UNEXPECTED AFTERMATH OF *PINE RIVER*

What appears incremental in *Pine River* masked seismic change. Simonett's reexamination of the at-will employment relationship within the parameters of traditional contract law encouraged a major attack on the rule a few years later, this one sounding in tort. In 1986, the Minnesota Court of Appeals recognized the so-called "public policy exception" to the at-will rule.¹⁵⁹ The court noted that the Minnesota Supreme Court, beginning in *Pine River*, had created an "implied-in-fact contract exception."¹⁶⁰ From there the appeals court easily carved out another "exception"—an employee who is fired for refusing to break a law has a tort claim for retaliatory discharge.¹⁶¹ The legislature quickly enacted a statute on the subject,¹⁶² and when this

159. *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588, 591–93 (Minn. Ct. App. 1986) (citing *Petermann v. Int'l Bhd. of Teamsters*, 334 P.2d 25 (Cal. Dist. Ct. App. 1959), among others). The phrase "exception to the at-will rule" was not used by Simonett when he discussed unilateral contracts in *Pine River*; instead, he very carefully and pointedly stated that the at-will rule is "only a rule of contract construction." 333 N.W.2d at 628. The description of *Pine River*'s contract analysis as an "exception to employment at will" first appeared in *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 882 (Minn. 1986). The appeals court repeated the phrase a few months later in *Phipps*. 396 N.W.2d at 591. In the following years, Simonett's pragmatic holding that the at-will rule is only a means of interpreting employment contracts is rarely mentioned by Minnesota trial courts or the appeals court; instead, the rule, or "doctrine" as it is sometimes labeled, has been restored to near-substantive-law status and challenges to it are mechanically placed within several firm classifications—promissory estoppel, contract, whistleblower, and so on.

160. 396 N.W.2d at 590.

161. *Id.* at 593 ("[W]e believe that a public policy exception to the employment-at-will doctrine would assist in maintaining the integrity and limitations of other causes of action. Rather than attempting to reach a grievous wrong, repugnant to an ordered society, through the artificial expansion of other doctrines, it is preferable to recognize it in its individual posture." (citation omitted)).

162. MINN. STAT. § 181.932 (2004) (originally enacted as Act of May 11, 1987, ch. 76, sec. 2, 1987 Minn. Laws 140 (prohibiting certain terminations)). Retaliatory discharge suits against government entities under the Minnesota Whistleblower Act frequently include a separate count alleging denial of the employee's First Amendment free speech rights. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

case came before the supreme court, it affirmed that such a retaliatory discharge called for tort remedies.¹⁶³

From the late 1980s through the end of the next decade, there was a tsunami of sexual harassment litigation against all sizes and shapes of American businesses. Many of these civil rights suits included common law tort claims such as defamation,¹⁶⁴ assault and battery,¹⁶⁵ and intentional infliction of mental distress.¹⁶⁶ In still other cases, dismissed employees resurrected tort theories such as fraud in the inducement to the contract¹⁶⁷ and intentional misrepresentation¹⁶⁸ and alleged them in workplace litigation that would have been summarily dismissed before *Pine River*. In addition, *Pine River*, a common law contract action, reaffirmed the importance of the employer's own rules in litigation under civil rights legislation.¹⁶⁹

163. *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987) (Scott, J.). The Whistleblower Act confounded the intermediate court for the next fifteen years. Finally in 2002, much of the gloss that had been slathered on this legislation was removed by the supreme court in *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 637 N.W.2d 270, 277 (Minn. 2002) (employee who reports suspected violation of law need not prove that law implicates "public policy"), and in *Abraham v. County of Hennepin*, 639 N.W.2d 342, 354 (Minn. 2002) (employees alleging dismissals violated Whistleblower Act and Minnesota Occupational Safety and Health Act (MOSHA) were entitled to jury trials and tort remedies).

164. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990) (sexual harassment and defamation). The Minnesota Supreme Court recognized the tort of defamation by self-publication in *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 886-88 (Minn. 1986) (employee recovered for both breach of contract and defamation).

165. *See Johnson v. Ramsey County*, 424 N.W.2d 800, 808-10 (Minn. Ct. App. 1988) (recovery for assault and battery, the statute of limitations for harassment under the Minnesota Human Rights Act (MHRA) having passed).

166. In addition, sexual harassment plaintiffs began pleading torts claims such as negligent hiring, negligent retention, and negligent supervision, but these have not fared well. Compare Timothy P. Glynn, *The Limited Viability of Negligent Supervision, Retention, Hiring, and Infliction of Emotional Distress Claims in Employment Discrimination Cases in Minnesota*, 24 WM. MITCHELL L. REV. 581 (1998), with Richard A. Ross, *How Exclusive is the Exclusivity Provision of the Minnesota Human Rights Act?*, 27 WM. MITCHELL L. REV. 1063 (2000).

167. *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120 (Minn. Ct. App. 1992).

168. *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302 (Minn. Ct. App. 1992).

169. One of the classic pieces of circumstantial evidence of disparate treatment is proof that the employer violated its own policies when it engaged in the challenged activity. The cases discussing this proof are legion. *See Muldrew v. Anheuser Busch*, 554 F. Supp. 808, 810 (E.D. Mo. 1982), *aff'd*, 728 F.2d 989 (8th Cir. 1984) (arguing that application of a policy different than company's written

Finally, as evidence of the common law's ability to regenerate, the concept of additional consideration that was used by the supreme court to give relief to Rev. Bussard¹⁷⁰ and that Simonett relegated to a "presumption" in construing employment contracts in *Pine River*¹⁷¹ reappeared in an important corner of corporate law—involving employment disputes between shareholders of close corporations. In a series of cases the Minnesota Appeals Court has interpreted the Minnesota Business Corporation Act to give protection to shareholder-employees who invest capital in the new enterprise—in other words, provide "additional consideration" to their employer—against oppression (i.e., arbitrary discharge) by those in control.¹⁷² Simonett's description of the evidentiary

policy is evidence of pretext); *Clymore v. Far-Mar-Co.*, 709 F.2d 499, 503–04 (8th Cir. 1983) (finding salary discrimination where plaintiff's wages were below the salary guidelines for her position); *EEOC v. Minneapolis Elec. Steel Casting Co.*, 552 F. Supp. 957, 964 (D. Minn. 1982) (noting that a failure to uniformly enforce unwritten safety policies can be evidence of discriminatory treatment). The theory underlying this proof is that the employee who is not given the benefit of the employer's policies on discharge, promotion, etc., is denied "employment opportunities" afforded other employees. In civil rights litigation where this evidence is offered, it is not necessary to prove that the employer's personnel policy in question satisfies *Pine River's* high standards for the formation of a unilateral contract.

170. *Bussard v. Coll. of St. Thomas*, 294 Minn. 215, 200 N.W.2d 155 (1972).

171. 333 N.W.2d 622, 628 (Minn. 1983). An employee who provides additional consideration to the employer is "presumed" to have an employment contract terminable for cause. In such a situation, the burden is on the employer to rebut the presumption of heightened job security.

172. In determining whether a shareholder-employee had a "reasonable expectation" of job security, which is the standard in Minnesota Statutes, section 302A.751, subdivision 3a (2004)—in other words, whether that employment was not terminable at the whim of those controlling the corporation, and whether all other shareholders had the same understanding—the appeals court in *Haley v. Forcelee*, 669 N.W.2d 48, 60 (Minn. Ct. App. 2003), listed four factors, the first of which was "whether the shareholder made a capital investment in the company." *Cf. Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 190 (Minn. Ct. App. 2001) ("[A]n employee who has no capital investment in the corporation but either buys a small percentage of stock through periodic company offerings or receives a small percentage of stock as part of a compensation package most likely lacks a reasonable expectation of employment."). *See also Harris v. Mardan Bus. Sys. Inc.*, 421 N.W.2d 350, 353 (Minn. Ct. App. 1988) (affirming dismissal of an employee-shareholder's wrongful discharge suit and noting that the employee received stock as compensation). In this state, at least since 1896, an employee's investment of capital in the employer has been recognized as a form of "additional consideration" sufficient to give that investor-shareholder-employee a job terminable only for cause. *McMullan v. Dickinson*, 63 Minn. 405, 407–09, 65 N.W. 661, 662 (1896). In *Pine River*, Simonett cited two cases in his analysis of additional consideration, and both involved employees who had "invested" in their

significance of the old common law concept of “additional consideration” in *Pine River* permeates the law of entrepreneurship in the state of Minnesota.

Similar developments in the law of employment relations—a relaxation of the “at-will rule” of contract construction and, simultaneously, a willingness by the judiciary to grant new remedies for unfairness in the workplace to employees—occurred in every state in the nation in the late 1980s and 1990s. By century’s end, the employee rights movement had reached maturity; yet, significantly, it had not in any demonstrable manner impaired the ability of management to make decisions on allocation of capital, restructuring, product development, and every other matter necessary to keep the enterprise competitive, efficient, and functioning.

XII. THE BIRTH OF A NEW DISCIPLINE

By the end of the 1980s, the outlines of employment law as a distinct legal discipline were emerging. This was part of the movement toward specialization in the legal profession that Simonett had noted in *Nordling*, a trend encouraged by the removal of ethical restrictions on lawyer advertising.

Many legal specialties work with one piece of legislation or even subparts of an act—the bankruptcy act, the tax code, the criminal code, and so on. While civil rights laws such as Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act required specialized knowledge, the civil rights bar was too small and fragmented to form a separate discipline within the profession in the 1960s and 1970s. This began to change with the erosion of the at-will rule in the 1980s, its transformation from a rule of substantive law to one of common law contract construction, and the recognition in most jurisdictions of the “public policy” tort of retaliatory discharge. And then Congress acted. With the passage of three major pieces of legislation in the early 1990s—the Americans With Disabilities Act of 1990 (ADA), the 1991 Amendments to the Civil Rights Act of 1964, which provided for jury trials and expanded remedies for victims of intentional discrimination, and finally the Family and Medical Leave Act of

employers, thereby giving them job security: *Littell v. Evening Star Newspaper Co.*, 120 F.2d 36 (D.C. Cir. 1941) and *Drzewiecki v. H & R Block, Inc.*, 101 Cal. Rptr. 169 (Ct. App. 1972). 333 N.W.2d at 629.

1993 (FMLA)—employment law as a specialty within the profession came into being.¹⁷³

Within the profession, lawyers began to identify themselves as “employment lawyers.” Labor law firms that were once pegged as “management” or “union” learned they had to provide additional services to their clients in the areas of the Employee Retirement Income Security Act (ERISA), the Family and Medical Leave Act (FMLA), Title VII, the Americans with Disabilities Act (ADA), and many state employment laws. In similar fashion, civil rights lawyers were quick to expand their services.¹⁷⁴ The legal departments of large corporations had specialists on employment law who handled routine in-house matters and, occasionally, defended litigation against their employer-client as well.

One characteristic of specialties is that they have their own professional organizations and honor societies. In 1976, the National Employment Law Institute was formed to educate corporate lawyers and managers about Equal Employment Opportunity (EEO) matters.¹⁷⁵ It quickly expanded its mission to include wage and hour laws, occupational safety, employee benefits, wrongful discharge, and compliance with the federal laws of the early 1990s. In 1985, the National Employment Lawyers

173. The evolution of “human resources” into a specialized area of management parallels that of employment law. Employees in this area were once known as benefits coordinators. As such, they handled pension, retirement and wage and hour matters; but, in the civil rights era, their duties came to encompass EEO compliance, affirmative action duties, sexual harassment training, development of reasonable accommodations under the ADA, administration of the FMLA, as well as administration of the company’s own internal rules. As professionally trained human resources managers in large corporations, they too had their own journals, organizations, continuing education courses, and ethical standards. As with employment law, the roots of human resources, as a profession, lie in 1960s civil rights legislation.

174. At the beginning of the 1980s, the civil rights bar, an extremely small segment of the profession, represented non-union employees in discrimination claims against their employers. Because intentional discrimination is hard to prove and less prevalent than many think, they could offer no assistance to most potential clients who had been treated arbitrarily or unfairly but not discriminatorily. Thus, when the first cracks in the facade of the at-will rule were exposed, these lawyers seized the opportunity and resurrected old common law theories and pressed newly recognized ones, frequently in conjunction with allegations of discrimination. Lawyers representing unions did not have similar urgings to advance the emerging rights of unorganized workers, though as the employee rights movement gained momentum in the early 1990s, they too took on many of these cases.

175. National Employment Law Institute, <http://www.neli.org> (last visited Oct. 12, 2006).

Association (NELA) was formed to benefit lawyers representing employees in statutory and common-law claims against their employers.¹⁷⁶ The Minnesota chapter of NELA was formed in 1990. An honorary society, The College of Labor and Employment Lawyers, headquartered in Washington, D.C., was founded in 1995 on the 60th anniversary of the National Labor Relations Board and the 30th anniversary of Title VII and Executive Order 11246.¹⁷⁷

Specialties also have their own literature. The management-sponsored *Employee Relations Law Journal*, started in 1975, originally dealt with labor, EEO, and pension issues, but it soon encompassed developments in wrongful discharge law and newly enacted federal legislation. The *Industrial Relations Law Journal*, founded in 1976, changed its title to *Berkeley Journal of Employment and Labor Law* in 1993. The American Bar Association's *The Labor Lawyer* was started in 1985; it is sub-headed, "A Journal of Ideas and Developments in Labor and Employment Law." The *Employee Rights and Employment Policy Journal*, affiliated with the Chicago-Kent College of Law, was founded in 1997, and the *University of Pennsylvania Journal of Labor and Employment Law* was started the following year.

Law schools began to teach courses on employment law, and they were separate from classes on labor law and employment discrimination. During the 1987–88 school year, Professor Deborah Schmedemann taught the first course in employment law at William Mitchell College of Law.¹⁷⁸ In the fall semester of 1988, Professor Stephen F. Befort taught the first class at the University of Minnesota Law School.¹⁷⁹

Finally, as the ultimate proof of the emergence of the new discipline, a change was made in the hallowed Key-Number System. In 2004, Thompson Publishing Company, the successor of West, eliminated "Master and Servant" and "Labor Relations" and merged them into a new classification: "Labor and Employment."

176. NELA was first known as the Plaintiff Employment Lawyers Association. It changed its name in 1990.

177. The College of Labor and Employment Lawyers, Inc., <http://www.laborandemploymentcollege.org/> (enter the site; then follow "About the College" hyperlink) (last visited Oct. 17, 2006).

178. WILLIAM MITCHELL COLLEGE OF LAW, BULLETIN/CATALOG 40 (1987).

179. E-mail from Stephen F. Befort, Professor of Law, University of Minnesota Law School, to Douglas Hedin, Lawyer (July 28, 2006, 12:32:35 CST) (on file with author).

XIII. CONCLUSION

Just as biographers must not identify themselves too closely with their subjects, giving them an influence they do not deserve, so also should a study of a particular court case not overstate its importance. And so, while *Pine River* was significant, and that can be documented, its influence really derives from being the most important member of the trio. It was the trio—*Toussaint*, *Weiner*, and *Pine River* itself—decided separately yet reinforcing one another—that launched the first major successful assault on the citadel, one that was warmly received by most other state supreme courts. They changed the common law of employment relations in this country and were midwives to the birth of a new discipline—employment law.