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Jerry Smith, a seaman employed for an indefinite term by Atlas Off-Shore Boat Service (Atlas), sprained an ankle while working aboard an Atlas vessel. After six weeks of convalescence, Smith returned to work for a full two-week shift aboard another Atlas vessel. Smith's attorney then notified Atlas of the seaman's intention to file a personal injury claim under the Jones Act. When Smith refused to abandon his claim, the Atlas port captain fired him. Smith then brought an action against Atlas for retaliatory discharge under general maritime law in addition to his negligence claim under the Jones Act. The Fifth Circuit Court of Appeal held that an employer has an absolute right to discharge a seaman for good, bad, or no cause; yet when a substantial motivating factor of the discharge is retaliation for the seaman's pursuit of a personal injury claim, the employer will be liable for compensatory damages arising from the maritime tort of retaliatory discharge. Smith v. Atlas Off-Shore Boat Services, Inc., 653 F.2d 1057 (5th Cir. 1981).

Prior to Smith, no admiralty court had been presented with a claim for retaliatory discharge under the general maritime law. In particular, the question of whether maritime employers could discharge seamen in retaliation for their exercise of rights guaranteed by the Jones Act remained unresolved. A maritime retaliatory discharge action should be based upon a theory of recovery which brings the claim within admiralty jurisdiction and which adequately protects seamen from retaliatory discharge.

On both land and sea, courts interpret the contract of employment according to the "at-will" rule. This doctrine provides that either the employer or the employee can terminate the employment relationship at any time unless a term of employment is explicitly agreed upon. While admiralty courts have had only limited occasion to apply

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2. See, e.g., Findley v. Red Top Super Markets, Inc., 188 F.2d 834, 837 n.1 (5th Cir.), cert. denied, 342 U.S. 870 (1951); Bramlett v. Wilson, 413 So. 2d 600, 602 (La. App. 1st Cir. 1982); Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 484 (1976). The at-will rule arose in America in the late nineteenth century; under English common law at that time, a one year term was implied in all employment contracts unless the parties specified otherwise. See H. Wood, Law of Master and Servant § 134, at 271-272 (1877). A minority viewpoint treats the parties' intent as to termination of the contract as an open question of
this “at-will” rule, the nonmaritime common law recognizes the employer's right to discharge an at-will employee "for good cause, for no cause, or even for cause morally wrong." The absolute discharge power constitutes one facet of "the employer's right to have a free hand in the running of his business."

Statutory and jurisprudential derogations from the at-will rule afford some employees a measure of protection from retaliatory discharge. A few federal and state statutes establish a cause of action for covered employees who are discharged for a cause specifically reprobated by the particular statute. Further, a minority of state courts recognize a cause of action for retaliatory discharge.

Yet, the at-will doctrine remains the rule rather than the exception. Even in those jurisdictions which allow a claim for retaliatory discharge, the employer usually may fire workers out of malice or caprice. The plaintiff states a claim for retaliatory discharge only upon


3. See, e.g., Findley v. Red Top Super Markets, Inc., 188 F.2d at 837 n.1 (even if the purported master's hiring of a crew were authorized, the verbal employment contract was terminable at will; hence the owner owed no wages past the date he dismissed the crew); The Pokanoket, 156 F. 241 (4th Cir. 1907); The Pacific, 18 F. 703 (D. Md. 1883) (the district court relied on the at-will rule to prorate a seaman's monthly wage to the date of discharge). Merchant seamen sign articles which establish a term of employment commensurate with the duration of the voyage; these seamen can seek damages for premature termination of the employment contract. Bunn v. Global Marine, Inc., 428 F.2d 40, 45 (5th Cir. 1970); 46 U.S.C. §§ 564, 594 (1976). The instant case is concerned only with the employment relation of "brown water" seamen—maritime workers who possess the requisite occupational attachment to a vessel in navigation yet who have not signed on for a specific voyage. For the test of seaman's status, see Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980).

4. Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 327, 179 S.W. 134 (1915). Wood's at-will rule, see note 2, supra, does not necessitate the drastic extrapolation of the employer's discharge power which occurred at common law. Wood's treatise describes a rule of evidence for ascertaining the duration of the contract without stating affirmatively or negatively whether the parties' right to termination is limited by any requirement of good faith or whether a termination could constitute fault in some circumstances.


7. See, e.g., Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

demonstrating that he was discharged "because he performed an act that public policy would encourage, or refused to do what public policy would condemn." This "public policy exception" to the at-will rule seldom applies in the absence of a statutorily conferred right or a statutorily imposed duty. Judicial restraint and the vitality of the employer's right to manage his business militate against extensive jurisprudential modification of the common law rule.

While most of the retaliatory discharge cases have adopted a tort theory of recovery, a few state courts have classified the action as a breach of an implied obligation in the employment contract. Commentators disagree as to which theory of recovery extends more protection from the threat of retaliatory discharge. However, the classification of the cause of action has had little effect in this regard. The extent to which courts will expand the "public policy exception," rather than the "tort" or "contract" label, has determined the ambit of protection provided by the common law retaliatory discharge action.

The perspective of an admiralty court which is considering the viability of a retaliatory discharge action differs significantly from a court considering the same issue under state law. At the outset, the maritime tribunal exercises a limited, rather than a general, jurisdiction. Yet within that limited jurisdiction, the court enjoys a greater freedom to fashion substantive law. Moreover, an admiralty

17. See text at notes 24-25, infra.
court applies a body of law which is distinguished by its "purely commercial origins and purposes."  

In admiralty, the delictual or contractual nature of the claim asserted determines the jurisdictional criteria to be applied. The prevailing test for admiralty jurisdiction over torts requires that the wrong possess both "locality" and "maritime flavor." The tort has maritime "locality" when the damage or injury takes effect upon navigable waters. Admiralty jurisdiction also extends to harm "caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land." "Maritime flavor" exists when the "wrong bear[s] a significant relationship to traditional maritime activity." As for jurisdiction over contractual claims, the presence of flavor alone suffices. Admiralty jurisdiction embraces contracts which by their nature and subject matter bear a significant relationship to traditional maritime activity. 

Within the constraints of their jurisdiction, the maritime courts function as the primary generators of substantive law. Due to congressional acquiescence, "the Judiciary had traditionally taken the lead

22. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. at 268. The Fifth Circuit, in Kelly v. Smith, enumerated several factors which admiralty courts should look to in determining whether a tort has maritime flavor: "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of the injury; and traditional concepts of the role of admiralty law." 485 F. 2d at 525. Judge Morgan, in dissent, further clarified the policy considerations involved in this determination. He noted that "[t]he law of admiralty has purely commercial origins and purposes." Id. at 527. In the threshold question, the court seeks to determine whether there is a need for a "uniformity [which] provide[s] predictable and constant relationships between parties engaged in maritime activities." Id. at 528. Thus, the ultimate consideration in determining the presence of maritime flavor is whether the situation requires a uniform national rule in order to encourage participation in maritime commerce by businesses, investors, and workers. 
NOTES

in formulating flexible and fair remedies in the law maritime." The maritime judiciary need not rely upon statutory guidance in order to abrogate or modify long-standing principles of general maritime law.

In exercising this judicial activism, the admiralty courts adopt a special solicitude for the promotion of maritime commerce. Furthermore, the courts have historically stood as the "guardians of seamen." This judicial role reflects admiralty law's concern for the welfare of maritime workers. Maritime law seeks to protect seamen from the hazards of their employment as well as from overreaching by parties with superior bargaining expertise.

The Jones Act represents but one example of this long-standing regard for "the benefit and protection of seamen." Under the Jones Act, seamen can sue their employers for damages resulting from personal injuries suffered in the course of their employment. The employer must compensate the seaman for his damages if the injury can be attributed "in whole or in part" to the employer's negligence.

25. See, e.g., id.
26. "[T]he primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce..." Foremost v. Richardson, 102 S.Ct. 2654, 2658 (1982). Although disagreeing with the majority's application of this principle to the facts, Justice Powell's dissenting opinion gathers considerable authority which evidence this commercial interest. Id. at 2661, n.2.4. Cf. Barger v. Petroleum Helicopters, Inc., 514 F. Supp. 1199 (E.D. Tex. 1981) (the district court determined that a crew-ferrying offshore helicopter was a "vessel" for purposes of recovery under the Jones Act).
28. See text at notes 30-40, infra.
33. [For practical purpose the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part,
Neither the defense of assumption of risk nor the fellow servant doctrine bar recovery under the Act. Further, the seaman’s contributory negligence can only reduce the amount of recovery. The “featherweight” burden of proof on causation and the removal of the traditional common law defenses “provide liberal recovery for injured workers.” The Act protects seamen from the hazards of maritime employment by encouraging employers to be solicitous of seamen’s safety. Seamen benefit from the Act because the cost of industrial injury is borne by the employer.

In Smith, the Fifth Circuit engaged in “striking the balance between” the employer’s discharge power and the seaman’s Jones Act rights. While reaffirming the maritime employer’s “absolute discharge right,” the court asserted that this power “should not be used as a means of effectuating a ‘purpose ulterior to that for which the right was designed.’” The panel concluded that the employer should be prevented from exercising his discharge right to retaliate against or to intimidate seamen seeking compensation for personal injuries.

The Fifth Circuit has placed a weighty burden upon a seaman who claims that he was discharged in retaliation for filing his personal injury claim. The seaman must show that his claim for personal injury is however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.

35. See id. at § 53.
37. See note 33, supra.
40. “It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from those ‘least able to bear it’ and place it upon those who can . . . ‘measurably control their causes.’” S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910) (quoting St. Louis, I.M. & S.R. Co. v. Taylor, 210 U.S. 281, 296 (1908)). See Kernan v. American Dredging Co., 355 U.S. at 431.
41. 653 F.2d at 1064.
42. Id. at 1062.
43. Id.
injury was the substantial motivating factor in the employer's decision to discharge him. Absent this retaliatory intent, the employer can fire the seaman for any or no cause "in most circumstances." If the employer shows by a preponderance of the evidence that he would have fired the seaman regardless of the personal injury suit, then the employer will defeat the retaliatory discharge claim.

The Fifth Circuit noted that a seaman's disability would give the employer a valid independent motivation for discharge. In *Smith*, the seaman's additional claim for lost future wages due to permanent partial disability indicated that this independent ground for termination might have been present. The court implicitly rejected any contention that the mere allegation of permanent disability would automatically validate the discharge as one for good cause. Instead, the court relied on the captain's testimony that Smith was fit for seaman's duties in order to deny both Smith's permanent disability claim and the employer's defense to the retaliatory discharge claim.

The court did not explain its reasons for recognizing the retaliatory discharge claim in tort rather than in contract. Judge Rubin, writing for the three judge panel, described the common law retaliatory discharge action in a manner which attached minimal significance to the choice of the theory of recovery:

Whether grounded in tort or contract, the cause of action is based on the notion that the employer's conduct in discharging the employee constitutes an abuse of the employer's absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy.

With no further elucidation, the court concluded that maritime "retaliatory discharge is properly characterized as an intentional tort."

45. 653 F.2d at 1063.
46. *Id.*
47. *Id.* at 1064. See also cases cited in note 44, *supra*. As a practical matter, the employer should be able to defeat this action with testimony that he fired the seaman for appropriate reasons, e.g., poor job performance or actions detrimental to crew morale. Hereafter, maritime employers are not likely to be as candid in their reasons for discharging litigious seamen as was the port captain in the instant case.
48. 653 F.2d at 1063 n.18.
49. *Id.* at 1065 n.25.
50. *Id.* at 1062.
51. *Id.* at 1064.
The opinion did not discuss the jurisdictional basis for recognition of retaliatory discharge as a maritime tort. This omission is unfortunate because the court's classification of this claim may have significant ramifications for the test of admiralty jurisdiction over torts. The panel's classification presents jurisdictional difficulties because the newly-christened maritime tort very probably lacks the requisite locality. The discharged seaman's economic loss and mental distress do not occur on water; furthermore, the causal relation of a vessel to the wrong is very attenuated.

52. The discharge does have a coincidental effect which occurs on navigable waters; a vessel sails without the services of the discharged seaman. However, this incidental impact will not satisfy the traditional test of locality. See text at note 20, supra. "Under the rule, a tort occurred where the [conduct] of the defendant took effect upon the person or property of the plaintiff." Maraist, supra note 19, at 469. The impact of the tort-feasor's conduct on the seaman, as plaintiff, and not a coincidental effect on a vessel is the determinative factor for purposes of maritime locality. But cf. Carroll v. Protection Maritime Ins. Co., 512 F.2d 4 (1st Cir. 1975) (the insurer's blacklisting of litigious seamen was "felt in the operations of the affected vessels at sea"; the court relied on a simple flavor test to support jurisdiction).

Further, the traditional locality test is not relevant to the question of whether the court should exercise jurisdiction over the type of tort presented in the instant case. This physical indicium is appropriate in determining whether the admiralty court should have jurisdiction over a particular accident which causes damage to a person or to property. If a collision or personal injury takes effect on navigable waters, maritime commerce and navigation are usually involved. "Indeed, for the traditional types of maritime torts, the traditional test has worked quite satisfactorily." Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. at 254. The locality test does little to distinguish among torts which affect economic relationships rather than physical objects. See also id. at 261. The conceptual standard, maritime flavor, better isolates rights and obligations which are important to maritime commerce.

53. When the seaman's employer also owns the vessel, jurisdiction over the discharge might be obtained under the Admiralty Extension Act. See text at note 21, supra. In Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963), the Supreme Court rejected an interpretation of the Act which would limit jurisdiction to "injuries actually caused by the physical agency of a vessel or a particular part of it." Id. at 209. This broad interpretation of the Act extends admiralty jurisdiction to a wide variety of torts committed by the shipowner while operating the vessel. Lower courts have upheld jurisdiction under the Act when a plaintiff alleges that the land-based tort which caused him injury was in turn caused by the vessel. See Duluth Superior Excursions, Inc. v. Makela, 623 F.2d 1251 (8th Cir. 1980) (the plaintiff was run over by a fellow passenger minutes after disembarking from a "booze cruise"); Callahan v. Cheramie Boats, Inc., 383 F. Supp. 1217 (E.D. La. 1974) (the plaintiff was injured while disembarking on a defective pier-based crane; the vessel had failed to provide a safe alternate mode of egress). But cf. Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) (the Act does not provide jurisdiction over unseaworthiness claims when the injury is not caused by the ship or its appurtenances). Arguably, the discharged seaman's harm is "caused by a vessel" when the shipowner-employer discharges him, even when acting through a land-based agent, e.g., a port captain. The tenability of this proposi-
An absence of maritime locality does not necessarily render retaliatory discharge an inappropriate claim in admiralty. Indeed, the connection of this wrongful conduct to traditional maritime activity is especially pronounced. However, the court drifted into controversial waters by grounding the claim in tort when maritime flavor provided the only jurisdictional base.

Whether courts should "abandon the requirement of a maritime locality altogether" and apply flavor as the sole criterion of admiralty jurisdiction depends upon whether the act discharging seamen can be construed as part of the operating of the vessel. See Gutierrez v. Waterman S.S. Corp., 373 U.S. at 210.

However, this construction of the Admiralty Extension Act will not support jurisdiction in all instances of retaliatory discharge because the vessel owner and the seaman's employer are often distinct entities. In such cases, the employer's discharge cannot be a tort committed by the shipowner while operating the vessel. Yet, jurisdiction under the Act is not necessarily limited to claims against the vessel and its operator; claims against defendants whose tortious conduct was caused by a vessel might be heard under the Act. See Gebhard v. S.S. Hawaiian Legislative, 425 F.2d 1303, 1306-07 (9th Cir. 1970). In suits against a "nonvessel" defendant, the Fifth Circuit requires that some act of the vessel must proximately cause the defendant's tortious conduct before admiralty jurisdiction exists under the Act. See Karpovs v. State of Mississippi, 663 F.2d 640 (5th Cir. 1981); Adams v. Harris County, 452 F.2d 994 (5th Cir. 1972). Thus, for the retaliatory discharge claim to fall within the scope of the Act, the seaman would have to show that the vessel owner was responsible for the maritime employer's decision to terminate employment. Cf. RESTATEMENT (SECOND) OF TORTS § 766, comment g, at 10 (1977) (tort of intentional interference with contracts terminable at will).

54. "The complex and peculiar rules of admiralty are particularly suited for deciding suits arising out of 'traditional maritime activities, involving navigation or commerce on navigable waters.'" Kelly v. Smith, 485 F.2d at 527-528 (Morgan, J., dissenting), quoting Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. at 256. "The status of the seaman in the employment of his ship . . . has from the beginning been peculiarly within the province of the maritime law . . . ." O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42 (1943). "The subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty . . . ." Id. at 43. A uniform national rule is needed to protect the seaman's personal injury claim from retaliatory discharge. Few state courts recognize an action for retaliatory discharge. See text at notes 6-11, supra. If maritime law does not provide a remedy for retaliatory discharge, seamen may find no relief under the applicable state law. If seamen's personal injury claims are only haphazardly protected from retaliatory discharge, seamen may hesitate to undertake maritime employment. Thus, denial of maritime jurisdiction over this claim would lead to an absurd result. A fundamental policy of the maritime law, compensation for seamen's employment injuries, would be protected only by the vagaries of state law.

The scarcity of state retaliatory discharge actions also diminishes the effect of reliance on the federal court's pendent jurisdiction. Whether the retaliatory discharge action is in state court or is pendent to the Jones Act claim in federal court, state substantive law would apply and seamen would obtain relief in only a minority of the states.

jurisdiction over torts is unresolved. Under the "locality plus flavor" test, some torts which bear a significant relationship to maritime commerce would nonetheless be excluded because they do not possess locality. Adoption of a simple flavor standard for jurisdiction would provide a more rational result in these cases; jurisdiction then would depend upon the functional relationship of maritime law to the claim, regardless of fortuitous considerations of locality.

Yet, the rationality which a simple flavor test would furnish in individual cases is offset by the need for a standard which produces predictable results. What constitutes a "significant relationship to traditional maritime activity" must be determined in an ad hoc fashion until the judiciary develops a more precise formula for maritime flavor. Thus, use of flavor as the sole criterion for jurisdiction would tend to inhibit predictable and efficient resolution of the threshold question. Further, under the nebulous bounds of maritime flavor, admiralty jurisdiction conceivably could extend to matters occurring far inland. An admiralty court, as a court of limited jurisdiction, should be wary of a jurisdictional standard which might intrude upon the traditional domain of state law. At present, the requirement of locality defines "the presumptive boundary of admiralty jurisdiction" with a reasonable degree of certainty.

56. See note 22, supra.
57. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. at 268.
58. For articles which advocate the abandonment of the locality requirement and which suggest standards for a simple flavor test, see Bridwell & Whitten, Admiralty Jurisdiction: The Outlook for the Doctrine of Executive Jet, 1974 Duke L.J. 757, 786-795; Comment, Admiralty Tort Jurisdiction: Floundering on the Sea of Inconsistency, 27 U. Fla. L. Rev. 805, 815-16 (1975).
61. 404 U.S. at 214 n.14.
62. The traditional locality test, (see text at note 20, supra) was applied with mechanical certainty. Admiralty jurisdiction was present when the tort took effect upon navigable waters, but was absent when the tort took effect on land. (This latter result has been modified by the Admiralty Extension Act, discussed in text at note 21, supra). Further, the test has been a fairly accurate indicator of when an admiralty court should have jurisdiction. When harm or injury occurs on navigable waters (or is caused by a vessel on navigable waters), maritime entities and activities usually are involved. "The traditional test has worked quite satisfactorily [except in a few] perverse and caustic borderline situations." Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. at 254. However, some courts have departed from the rule that the situs of the injury determines the locality of the tort and have applied other measures of locality. See Bridwell & Whitten, supra note 58, at 763-64; Comment, Torts Along the Water's Edge: Admiralty or Land Jurisdiction?, 1968 U. Ill. L.F. 95, 98-99; Note, Tests of Maritime Tort Jurisdiction, 44 Tul. L. Rev. 166, 167-70 (1969). See also Black, Admiralty Jurisdiction, 50 Colum. L. Rev. 259, 264 (1950).
The Smith court did not err in classifying maritime retaliatory discharge as a tort. Yet, the panel should have confronted the uncertainties presented by a simple flavor test when it exercised jurisdiction over a tort which probably lacks maritime locality. Smith furnishes a precedent for adoption of solely a flavor test for maritime tort jurisdiction in the Fifth Circuit, but the opinion furnishes no guidance as to how such a test would be applied consistently and with due respect for the jurisdiction of state law.63

The court could have avoided this jurisdictional difficulty by classifying retaliatory discharge as a breach of the employment contract.64 The seaman's employment contract is, by nature and subject matter, a maritime contract.65 Under well-established principles, an admiralty court has subject matter jurisdiction over a claim arising out of its breach.

Of course, the court cannot classify a retaliatory discharge as a breach of contract unless the discharge constitutes a breach of a contractual duty. The court can find such a duty by recognizing a reciprocal obligation of good faith performance in the at-will employ-

63. The "maritime-status exception to the locality rule" may provide a basis for admiralty jurisdiction over Smith's claim. Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1308 (9th Cir. 1970). This "status exception" is illustrated by the ability of seamen to sue their employers in admiralty for shoreside injuries which are caused by the employer's negligence. Status, rather than locality, provides the basis of admiralty jurisdiction over these claims. See O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42-43 (1943); Swanson v. Marra Bros., Inc., 328 U.S. 1, 4 (1946).

In Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), Judge Learned Hand built upon O'Donnell to declare that "a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land." Id. at 558. While not expressly approving Judge Hand's broad formulation of maritime status jurisdiction, the Supreme Court has cited Strika in its discussion of jurisprudential exceptions to the "locality rule". Executive Jet Aviation, Inc. v. Cleveland, Ohio, 409 U.S. at 259-260. The manner in which a tort "arises out of" a maritime relationship for purposes of "status jurisdiction" remains unexplained.

Arguably, discharge of a seaman in retaliation for his initiation in a Jones Act claim is a tort which "arises out of" a maritime relationship. As the Supreme Court observed in O'Donnell, the seaman's right to compensation for injuries received in the course of his employment . . . is one traditionally cognizable in admiralty." 318 U.S. at 43. When retaliatory discharge is directed at the seaman's exercise of this "traditionally cognizable" right, the employer's intentional tort may "arise out of" the employment relationship in a manner included within Judge Hand's "status exception" to the "locality rule".


ment contract. This implied duty would prohibit the employer from exercising his discharge power to "injure the right of the [employee] to receive the benefit of his bargain."

The duty of good faith performance serves only to assure that an agreement is performed in a manner that is within the reasonable contemplation of the parties. In part, "the trade custom in the industry" governs the parties' expectations regarding termination of at-will employment. At the very least, an employee expects that the employer will not use his discharge power to hinder the employee's exercise of rights which are attached to the employment contract.

The employer's exercise of his termination right in a situation like Smith constitutes a breach of the obligation of good faith performance because the threat of retaliatory discharge deters seamen from exercising their contractual and statutory rights to sue for damages resulting from employment injuries. The seaman's right of recovery


68. See generally Burton, supra note 65, at 403.

69. Comment, "At Will" Franchise Terminations and the Abuse of Rights Doctrine: The Maturation of Louisiana Law, 42 La. L. Rev. 210, 238 (1981). See also Terrel v. Alexandria Auto Co., Inc., 125 So. 757 (La. App. 2d Cir. 1990); In interpreting a contract not specific in its wording, it is necessary to take into consideration the custom of the place and customary manner of fulfilling like contracts in arriving at what was the reasonable expectation of the parties to the contract at the time it was made." Id. at 759 (emphasis added).

70. See Snelling, Cause and Consideration in Louisiana, 8 Tul. L. Rev. 178, 194 (1933):

[I]t is readily seen that the requirement of performance in good faith is simply a command that the parties act bona fide in effecting the cause which conditions their respective obligations. Thus, cause being a condition which the contractant would have expressed had he analyzed his motives and expectations, a "subvocal" or "unvocalized" condition in the normal case, if these motives and expectations are not realized through performance performed, the case presents a situation of actual or constructive bad faith . . . .
and the employer's duty of compensation are inseparable incidents of the employment contract. Congress secures to seamen the right to sue their employer for damages from personal injuries suffered in the course of employment. If the injury can be attributed to the employer's negligence, the employer must compensate the seaman for his damages. This duty supplements the maritime employer's ancient obligation to furnish maintenance and cure to seamen who become sick or injured in the service of the ship. Maritime law affords these remedies to seamen as an inducement to undertake the hazards of maritime employment. The employer's attempt to avoid his contractual obligations by discharging claimants represents a bad faith exercise of his contractual right to terminate the employment agreement.

Application of the obligation of good faith performance to the at-will employment contract should not significantly alter the agreement. In particular, the duty of good faith performance would not prohibit employers from exercising their discharge power without cause. A requirement that the employer have just cause before discharge is necessary only when there is an expectation of job security. The employer's right to discharge the employee for good, bad, or no cause is an implied resolatory condition of the at-will employment contract. Under such an agreement, the employee has no prospect of job security. The duty to perform the at-will contract in good faith would not create in and of itself an expectation of job permanency. The requirement of good faith performance would not create promises which, by the nature of the agreement, were not contemplated by the parties. Thus, enforcing good faith in the at-will employment contract would not impose a requirement that the employer have just cause before dismissing his employees. The mere exercise of the discharge power under an at-will employment contract will not deprive

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72. See text at notes 30-40, supra.
73. See text at note 32, supra.
76. Circumstances surrounding the formation and performance of the contract may create an expectation of job security despite the absence of a specified term of employment. In order to protect the reasonable expectation of job security in such a situation, a duty of good faith performance prohibits discharges which are without just cause. See Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). Cf. La. Civ. Code art. 2037: "Every condition must be performed in the manner that it is probable the parties's wished and intended that it should be."
Further, the extent to which the good faith duty would prohibit maritime employers from discharging at-will seamen for bad or even "morally reprehensible" reasons is uncertain because application of trade custom can only be determined in regard to the facts of each case. However, the ambiguous scope of this theory of recovery for retaliatory discharge should prove advantageous. The uncertainty provides admiralty courts with flexibility to tailor the retaliatory discharge action to further the policies of protecting seamen and promoting maritime commerce. The courts should not sanction a use of the discharge power which would discourage a worker from entering maritime employment. Conversely, the judiciary should not discourage an employer from participating in the industry by significantly impairing his "right to have a free hand in the running of [his] business."79

The interests of both employers and employees should be balanced to provide a fair remedy which encourages the participation of both groups in maritime commerce. Classification of retaliatory discharge as a breach of a duty of good faith performance would facilitate this balancing of interests by furnishing an adaptable theory of recovery.80

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77. See, Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1839-1840 (1980). But see Blackburn, Restricted Employer Discharge Rights: A Changing Concept of Employment At Will, 17 Am. Bus. L.J. 467 (1980). This article proceeds on the premise that "[i]mplying a right to reasonable, good cause, discharges would serve to reflect the probable intent of the parties to the employment relationship." Id. at 482. Even if this premise is true as to the employee, Professor Blackburn overlooks the "probable intent" of one of the parties, the employer. The employer contracts with the expectation that his right to control his business includes the right to discharge at-will employees at his discretion. This expectation is recognized legally in the at-will rule. See note 2, supra. Properly applied, the obligation of good faith balances the competing interests of the parties in order to realize "the end pursued in common by all the parties." S. Litvinoff, supra note 65, at 6 (emphasis added). Good faith should not be relied upon to completely nullify the employer's contractual right to discharge at will. Further, Professor Blackburn places direct reliance on authority which does not support his conclusion that good faith requires just cause for dismissal in at-will employment contracts. See Blackburn, supra, at 490. The district court in Zimmer v. Wells Management Corp., 348 F. Supp. 540 (S.D.N.Y. 1972), applies the obligation of good faith to renewal of a term employment contract which was accompanied by a stock-purchase plan. 78. 653 F.2d at 1063.

79. Id. at 1064.

80. Those who think more of symmetry and logic in the development of legal rules than of practical adaption to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against
Smith presents one situation in which the obligation of good faith performance prohibits an employer from discharging an employee. The employer breaches the duty when he discharges seamen in retaliation for the exercise of rights attached to their status. Arguably, the obligation also should extend to protect seamen from dismissals in retaliation for the performance of legally imposed duties. These duties form part of the circumstances in which the parties manifest their consent to the employment contract. The employer and employee cannot expect that the employee's compliance with these obligations will operate as a resolutory condition of the contract. A duty of good faith performance should prohibit the employer from placing seamen in the dilemma of choosing between employment and obedience to the law.

The ability of parties to waive implied contractual rights presents a potential defect in a contractual retaliatory discharge action. However, it is unlikely that seamen could validly waive enforcement of a good faith limitation on the employer's discharge power. Professor Litvinoff asserts that "neither the law nor the courts would ... take ... into account" any intention of the parties which contradicted the implied duty of good faith performance. This proposition applies with even greater force to maritime employment contracts because

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those of equity and fairness, and found the latter to be the weightier. ... Where the line is to be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case precise boundaries are impossible." Jacob & Youngs v. Kent, 230 N.Y. 239, 242-43, 129 N.E. 889, 891 (1921).

The Smith court does not give clear guidance as to the scope of the tort claim for retaliatory discharge. The court declares that the "maritime employer may discharge the seaman ... even, in most circumstances, for a morally reprehensible cause." 653 F.2d at 1063 (emphasis added). The employer cannot use his discharge power "as a means of effectuating a 'purpose ulterior to that for which the right was designed.'" Id. at 1062. Under this language, the particular circumstances in which the discharge power is limited will have to be determined by future jurisprudence.

81. See text at notes 70-74, supra.
82. E.g., 46 C.F.R. § 35.15-5 (1981) (the engineer must notify the Coast Guard of accidents which render the boilers or machinery unsafe).
83. Cf. LA. CIV. CODE art. 11: "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals." See also Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). But see, Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. App. 4th Cir. 1982). In Gil, the employee was discharged after he refused to remove identification marks from foreign steel; removal of the marks would have been illegal. The fourth circuit mentions "Louisiana's traditional and unique deference to legislative authority," yet does not consider the applicability of Civil Code article 1901 to the claim.
85. S. LITVINOFF, supra note 65, at 7 n.28.
seamen "are emphatically the wards of admiralty."86 Justice Story describes the "rigid scrutiny" applied to seamen's contracts in Harden v. Gordon.87

If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage had been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.88

At the very least, seamen should not be able to validly waive application of the obligation of good faith performance to discharges in retaliation for personal injury claims. The employer bears an awesome burden in showing that a waiver which leaves seamen's compensation rights vulnerable to retaliatory discharge is supported by adequate consideration. Further, such a waiver faces "an insurmountable objection" because it operates in "utter hostility" to the maritime compensation scheme developed by the courts and Congress.

Judge Rubin's description of the common law retaliatory discharge action is provocative because it suggests another basis of recovery for retaliatory discharge. His analysis indicates that the essential element of the claim is founded on "an abuse of . . . right."90 Under this civilian doctrine, "when the holder of [a] right exercises his right . . . for the satisfaction of an illegitimate interest . . . he abuses and therefore ceases to have the power."91 Damages can be awarded when

86. Harden v. Gordon, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).
87. Id. at 485.
88. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).
89. Id. at 485.
90. Id. at 486.
91. Id.
92. See note 30, supra.
93. 653 F.2d at 1062.

Civil law principles are not foreign to an admiralty court. "The admiralty courts owe their origin largely to the civil law . . . ." The Kalfarli, 277 F. 391, 393 (2d Cir. 1921). "The admiralty jurisdiction is an institution borrowed from the civil-law system, from which are derived the fundamentals of its substantive law as well as of its procedure." Morrison, The Remedial Powers of the Admiralty, 43 YALE L.J. 1, 19 (1933). See also G. GILMORE & C. BLACK, supra note 36, at 8; 1 BENEDICT ON ADMIRALTY § 15, at 1-32 (7th ed. 1975 & Supp. 1981). Further, "[c]ourts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law." Brown v. Lull, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2,018).
an abuse of right is established.\textsuperscript{95}

An abuse of right theory could support recovery in the instant case. Discharging seamen in an attempt to avoid contractual and statutory obligations constitutes an abuse of the employer's right to terminate employment. Resort to this doctrine is not necessary in Smith, however, because contract theory furnishes an adequate basis for the seaman's claim. Yet, the abuse of right doctrine may prove useful if the maritime judiciary decides to extend the retaliatory discharge action beyond the ambit of protection provided by the duty of good faith performance. For example, an admiralty court may be asked to protect a seaman who, without a statutory obligation to do so, "blows the whistle"\textsuperscript{96} on his employer's unlawful activity. Good faith would not prohibit the discharge because a disloyal employee has a reasonable expectation that he will be fired.\textsuperscript{97} Yet, the policies contravened by the employer may best be served by protecting the reporting employee from retaliatory discharge. If a court made the policy decision to protect the seaman, a return to tort principles could provide a basis for liability. However, the absence of maritime locality would again present the jurisdictional difficulties discussed previously.\textsuperscript{98} The doctrine of abuse of rights might provide a viable alternative to a tort theory of recovery in such a situation. The admiralty court could hear an abuse of rights claim under a simple flavor test without challenging the "locality plus flavor" standard for jurisdiction over maritime torts.\textsuperscript{99}

In Smith, the Fifth Circuit properly recognized the need to protect a seaman's personal injury claim from his employer's power to discharge at will. The safeguard afforded by the Jones Act is meaningless unless the seaman's personal injury claim is insulated from the threat of retaliatory discharge. However, the court's classification of retaliatory discharge as a maritime tort presents problems because the claim possesses the flavor but not the locality required by the "locality plus flavor" test for tort jurisdiction. Resort to a simple flavor test would raise uncertainty as to both the application and

\textsuperscript{95} Cueto-Rúa, supra note 93, at 991, 995 n.92.

\textsuperscript{96} See Comment, Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy, 1977 Wis. L. Rev. 777.

\textsuperscript{97} See id. at 778-79.

\textsuperscript{98} See text at notes 55-62, supra.

\textsuperscript{99} Arguably, an abuse of right claim should be recognized in admiralty only when the right abused and the interest affected are maritime in nature. This limited application of the doctrine would confine admiralty jurisdiction to abuse of rights claims involving parties who expect maritime law to govern their relationships.
the extent of admiralty jurisdiction over torts. By implying the obligation of good faith performance to the at-will employment contract, the court could have classified retaliatory discharge as a breach of contract. Jurisdiction over the cause of action would have arisen under the accepted principle that a claim for a breach of a maritime contract is cognizable in admiralty. In this manner, the court could have mitigated the "inequities inherent" in the at-will rule without raising the problems presented by a simple flavor test for jurisdiction over maritime torts.

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100. 653 F.2d at 1063.