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Wrongful Discharge: Historical Evolution, Current Developments And A Proposed Legislative Solution

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"Without question, the subject of wrongful discharge in at-will employment has become one of the major legal issues, if not the major issue, of employment law in this country."¹

Many countries in Europe "restrict an employer's ability to terminate workers at will"² and provide for job security in a number of ways.³ In contrast, the American labor scene has been governed by the employment-at-will doctrine.⁴ Under this doctrine, "the worker serves at the employer's pleasure, and dismissal is held to be the unilateral privilege of the employer. No reasons need to be given for termination and workers have no right to protest the dismissal."⁵

This Article examines the employment-at-will doctrine and the

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1. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 205 (1985).

2. E. LAZEAR, *JOB SECURITY PROVISIONS AND EMPLOYMENT* 3 (1989).

3. E. LAZEAR, *EMPLOYMENT-AT-WILL, JOB SECURITY, AND WORK INCENTIVES* 1 (1986). "Workers who believe that they have been dismissed for unjust reasons often have access to friendly courts. Frequently, explicit severance pay formulas are dictated by the state so that workers who are laid off are entitled to some lump-sum compensation." *Id.*

4. *Id.*

5. *Id.*

emergence of a competing doctrine that permits employees to pursue wrongful discharge actions against their employers. The Article is divided into three parts. Section I traces the employment-at-will doctrine from its 19th century origins, through its dominance during the first half of the 20th century, to its increased erosion in recent decades by both the legislative and judicial branches. Section II reviews some significant current developments in this area. Specifically, Section II reviews: (1) two significant California Supreme Court decisions⁶ that suggest that the trend toward increasing judicial permissiveness of wrongful discharge suits may have reached its high-water mark, and (2) a decision by the Montana Supreme Court⁷ that upheld a statute expanding the ability of employees to bring wrongful discharge actions, but sharply limiting the damages they may recover—the first test case of this closely-followed statutory recourse. Finally, Section III proposes a legislative solution to the current uncertainty in the wrongful discharge area and explores some of the issues likely to be confronted in the 1990's in the struggle to reach an appropriate accommodation between the sound policies that underlie the employment-at-will doctrine and the circumstances that have prompted recognition of the wrongful discharge action.

I. HISTORICAL EVOLUTION

The emergence of the employment-at-will doctrine in the United States was a departure from the common law of England.⁸ In England, from the enactment of the Statute for Laborers in the fourteenth century, until its repeal in the mid-eighteenth century, an employer could discharge an employee only "on reasonable cause."⁹ Thereafter, the English courts perpetuated the spirit of the Statute of Laborers in the common-law presumption that a general hiring was intended as an employment contract for one year, which, unless terminated at the end-of-the-year period, was presumed renewed for an additional year on an evergreen basis.¹⁰

The doctrine of at-will employment is sometimes referred to as "Wood's Rule." Although earlier American treatises had reflected the English common law presumption that a general hiring was for

6. *Foley v. Interative Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592 (1989).

7. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989).

8. See, e.g., Comment, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 205-06 (1982); Mauk, *supra* note 1, at 203.

9. 2 W. BLACKSTONE, COMMENTARIES 425-26 (2d ed. 1969).

10. *Id.*

one year,¹¹ H.G. Wood, in his 1877 treatise on masterservant relationships, asserted otherwise:

[W]ith the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party. . . .¹²

Wood's Rule was quickly accepted. In 1884, the Tennessee Supreme Court held that employers "may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹³ In 1885, New York followed suit. Borrowing from Wood's treatise, the New York Supreme Court held that "the rule is inflexible that a general or indefinite hiring is, *prima facie*, a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."¹⁴ The employment-at-will doctrine "soon became the general rule in all jurisdictions."¹⁵

In 1908, the vitality of the employment-at-will doctrine in the law reached its apex in *Adair v. United States*.¹⁶ The *Adair* Court, after stating the general rule that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee," held that federal legislation that disturbs such equality by compelling one person to retain the personal services of another is "an invasion of the personal liberty as well as of the right of property guaranteed by [the 5th] Amendment."¹⁷ Thereafter, the

11. C. SMITH, TREATISE ON THE LAW OF MASTER AND SERVANT 53-57 (1852).

12. H. WOOD, MASTER AND SERVANT 272 (1877).

13. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884).

14. *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895).

15. Mauk, *supra* note 1, at 203. See also *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99 (1888) (overruled by *Sabine Pilot Service Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985)); *Henry v. Pittsburg & Lake Erie R.R.*, 139 Pa. 289, 21 A. 157 (1891); Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Discretionary Powers, United States Report*, 18 RUTGERS L. REV. 428, 432 (1964).

16. 208 U.S. 161 (1908) (overruled by *Texas & N.O.R. Co. v. Brotherhood of R. & S.S. Clerks*, 281 U.S. 548 (1930)).

17. 208 U.S. at 172. The Court held that Section 10 of the Erdman Act, 30 Stat. 424, is unconstitutional. The Act made it a crime for certain common carriers to discharge an employee because of membership in a labor union. *Id.* at 169. .

employment-at-will doctrine flourished and was applied rigorously against employees until the 1940's.¹⁸

During the 1950's and into the 1960's, the courts became "more willing to consider the entire relationship of the parties, and to find that facts and circumstances establish a contract which cannot be terminated by the employer without cause."¹⁹ However, the early inroads against the employment-at-will doctrine were legislative, not judicial. With the New Deal came legislation to provide workers with added protection in their dealings with their employers. For example, the National Labor Relations Act (NLRA) was signed into law in 1935.²⁰ Under the NLRA, an employee may not be discharged for participating in any lawful union activity. Federal and state legislation followed, prohibiting discharge of employees based on such factors as race, color, creed, national origin, or age.²¹ Over a quarter of a century ago, these developments prompted one observer to report:

The principle that the employer is presumptively free to discipline is still formally in force, but the restraints on that freedom are now so extensive that the principle itself is in question, and the United States' legal system may be moving toward a general requirement of just cause and fair dealing between employer and employee.²²

Despite this movement, there were many people, particularly those in academic circles, who felt that the erosion of the employment-at-will doctrine had not progressed far enough or fast enough. Perhaps

The Supreme Court abandoned the constitutional basis for the employment-at-will doctrine in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941); *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 177, 319 A.2d 174, 180 (1974).

18. Blumrosen, *supra* note 15, at 432.

19. *Id.*

20. 29 U.S.C. § 151 (1947).

21. Such legislation has since become pervasive. As noted in Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relation*, 36 BAYLOR L. REV. 667, 669 (1984) (footnotes omitted):

Under certain circumstances, federal and state legislation restricts an employer's right to discharge his employee arbitrarily. For example, federal law prohibits the discharge of an employee because of age, race, religion, sex, color, or national origin, because of union activity, service on a petit or grand jury, or to prevent his attaining vested pension rights. Federal law also prohibits a private employer from discharging an employee who exercises his rights to statutory minimum wage and overtime and to a safe workplace. Finally, employees who institute proceedings, cause proceedings to be instituted, or testify against their employers for violations of various federal acts are statutorily protected against retaliatory discharge.

In addition to the restrictions placed on the doctrine by federal statutes, some states have enacted legislation that closely parallels federal legislation in the area of civil rights, jury service, and worker's compensation.

See also M. SHEEHAN & J. WILNER, *WRONGFUL DISCHARGE UNDER ILLINOIS LAW*, at i-iii (1988) (lists 33 federal and 15 Illinois statutes restricting an employer's right otherwise to discharge an at-will employee).

22. Blumrosen, *supra* note 15, at 428.

foremost among these critics of the employment-at-will doctrine was Professor Lawrence Blades. In what one defender of at-will contracts has characterized as an "early and influential attack,"²³ Blades asserted that "there has been a blind acceptance of the employer's absolute right of discharge."²⁴ Noting that a "dismissal has been called 'a kind of organizational equivalent of capital punishment,'"²⁵ Blades urged that the "philosophy of the employer's dominion over his employee . . . is incompatible with these days of large, impersonal, corporate employers" and argued that the "philosophical underpinnings" of the rule that permitted employee discharge at will "have fallen into decay."²⁶

Blades cataloged a series of potentially abusive discharges by employers.²⁷ He noted that "[h]ow frequent or widespread such abuses are is open to question. Undoubtedly many employers would not think of engaging in such practices."²⁸ However, Blades stressed that "[w]hat is important is that such abuses, however common or uncommon, should not go unremedied."²⁹

Blades continued to argue that, "as a matter of constitutional principle, the traditional rule can no longer be justified. The industrial revolution made an anachronism of the absolute right of discharge by destroying the classical ideal of complete freedom of contract upon which it is based."³⁰ As an alternative to the traditional rule, Blades urged that employees be given a right of action against their employers in the event of an "abusive" discharge.³¹

23. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 949 (1984).

24. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1435 (1967).

25. *Id.* at 1406, n.11 (quoting W. MOORE, *THE CONDUCT OF THE CORPORATION* 28 (1962)).

26. Blades, *supra* note 24, at 1416.

27. *Id.* at 1406-09. Among the potentially abusive discharges listed by Blades are threats of discharge to impair an employee's political choice or his right to speak, to secure his participation in immoral or unlawful activity, to prevent him from giving testimony unfavorable to the employer, to coerce him to give up a lawful claim against the employer, or to force him "not to deal with a particular business concern." *Id.*

28. *Id.* at 1410.

29. *Id.*

30. *Id.* at 1418.

31. Blades argues:

The existing sources of protection for the employee are patently inadequate. The question arises whether any other kind of sanction might be used. An appropriate legal response would be to confer on the afflicted employee a personal remedy for any damage he suffers when discharged as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment. For convenience, a discharge so moti-

Blades recognized that an employee can protect himself or herself from unwarranted invasion of personal rights by means of an individually negotiated contract but argued that “individual employees are simply not in a position to exact such contracts from their employers.”³² Indeed, after noting the technical difficulties and limited damages available in an action under contract theory, Blades asserted that “it seems reasonable to bypass the law of contracts” altogether.³³ Instead of a *contract* action, Blades urged that employees should be permitted to bring a *tort* action. “If the employer invades legally protected rights of the employee, for instance by the infliction of bodily injury or defamation, the existence of the employment ‘contract’ does not stand in the way of determining the employee’s rights under the law of torts.”³⁴ Blades concluded that, while an employer’s right to discharge should not be unduly encumbered, an employer should not be allowed under the law to discharge an employee for an ulterior and improper motive:

[A]s with any individual’s right to bring legal action, the law should not allow the employer to exercise his right of discharge in order to effectuate a purpose ulterior to that for which the right was designed. Just as the use of legal processes as a means of extortion gives rise to a damage remedy, so too should the oppressive use of the right of discharge.³⁵

Anticipating Blades, a 1959 California decision became “the seminal authority for the principle that the discharge of an employee for refusing to commit an unlawful act is actionable.”³⁶ In “the first and most notable declaration of the public policy exception”³⁷ to the employment-at-will doctrine, the court in *Petermann v. International Brotherhood of Teamsters, Local 396*³⁸ held that an employee discharged for refusing to commit perjury had a cause of action against an employer for wrongful discharge.³⁹ Similar decisions followed. For example, courts upheld wrongful discharge actions against employers when employees were discharged for filing a worker’s compensation claim,⁴⁰ and for performing jury duty.⁴¹

vated might be termed an “abusive” discharge.

Id. at 1413. Blades goes on to argue that “the fear of lawsuits would have the salutary effect of discouraging improper attempts to interfere with the employee’s freedom or integrity, even when the employer does not intend to discharge the employee for refusing to submit to his desires.” *Id.* at 1414.

32. *Id.* at 1411.

33. *Id.* at 1422.

34. *Id.*

35. *Id.* at 1424 (footnote omitted). Consistent with this view, Blades also urges that, in keeping with general tort law principles, “[t]he assessment of punitive damages in cases of abusive firings would be fitting and desirable.” *Id.* at 1427 (footnote omitted).

36. Mauk, *supra* note 1, at 232.

37. *Id.* at 230.

38. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

39. Mauk, *supra* note 1, at 232.

40. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

Two particularly significant decisions were handed down in the mid-1970's in New England: *Monge v. Beebe Rubber Co.*⁴² and *Fortune v. National Cash Register Co.*⁴³ The reason for their special importance is that both opinions, specifically citing to Professor Blades' 1967 article, spoke in broad, open-ended and imprecise language. This broad language all but invited discharged employees who were unhappy with the circumstances of their termination to file suit and test the outer limits of the newly-emerging action for wrongful discharge.

In *Monge*, a female employee who had been discharged after rebuffing her foreman's sexual overtures was found to have a cause of action for wrongful discharge.⁴⁴ Drawing an analogy to the changes in property rights since the "ancient feudal system," the New Hampshire Supreme Court stated that the "law governing the relations between employer and employee has similarly evolved over the years to reflect changing legal, social and economic conditions."⁴⁵ The court went on to express its view that "[i]n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."⁴⁶ Then, in very broad language, the court ruled as follows:

We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract.⁴⁷

In *Fortune*, a terminated salesman sued to recover certain commissions he alleged were due him for selling his employer's cash registers. The salesman claimed that the employer had discharged him in order to avoid having to pay him the commissions. At trial, a jury found that the salesman's termination had been in bad faith and awarded him substantial damages even though the salesman had a written contract that expressly provided that his employment was

41. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

42. 114 N.H. 130, 316 A.2d 549 (1974).

43. 373 Mass. 96, 364 N.E.2d 1251 (1977).

44. While the *Monge* case has generally become accepted as a straightforward sexual harassment case, the dissent in *Monge*, as well as Epstein, *supra* note 23, at 971 points out, "throws a very different light on the case." See also *Monge*, 114 N.H. at 134-36, 316 A.2d at 552-53 (Grimes, J., dissenting).

45. *Monge*, 114 N.H. at 132, 316 A.2d at 551.

46. *Id.* at 133, 316 A.2d at 551.

47. *Id.*

terminable at will and without cause. The Massachusetts high court framed the following question: "The central issue on appeal is whether this 'bad faith' termination constituted a breach of the employment-at-will contract. Traditionally, an employment contract which is 'at will' may be terminated by either side without reason."⁴⁸ The court agreed with the jury's factual finding that the employer had acted in bad faith, stating that, where "the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith. . . ."⁴⁹

Turning to the legal issue, the court observed that "[g]ood faith and fair dealing between parties are pervasive requirements in our law. . . ."⁵⁰ Quoting extensively from the *Monge* case, the court further noted that "[r]ecent decisions in other jurisdictions lend support to the proposition that good faith is implied in contracts terminable at will."⁵¹ The *Fortune* court noted that the contract was "a classic terminable at will employment contract" and that it explicitly reserved to the parties the power to terminate it without cause.⁵² Then, as the heart of its opinion, the court ruled as follows:

However, *Fortune* argues that, in spite of the literal wording of the contract, he is entitled to a jury determination on NCR's motives in terminating his services under the contract and in finally discharging him. We agree. We hold that NCR's written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract.⁵³

The emerging trend toward expanding the legal remedies for wrongful discharge was "greeted with wide approval in judicial, academic, and popular circles."⁵⁴ However, these early victories did not satisfy critics of the at-will doctrine. Academic commentators, desirous of further erosion of the employment-at-will doctrine, believed that the doctrine was an "archaic relic that should be jettisoned along with other vestiges of nineteenth-century laissez-faire."⁵⁵ As one student Note put it: "[a] veritable avalanche of scholarly opinion has, with near unanimity, come down in favor of abolishing the at-will rule."⁵⁶ The common theme of these writings was that even

48. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 100, 364 N.E.2d 1251, 1255 (1977).

49. *Id.* at 104-05, 364 N.E.2d at 1257.

50. *Id.* at 102, 364 N.E.2d at 1256.

51. *Id.* at 103, 364 N.E.2d at 1257.

52. *Id.* at 101, 364 N.E.2d at 1255.

53. *Id.* at 101, 364 N.E.2d at 1255-56.

54. Epstein, *supra* note 23, at 982.

55. *Id.* at 948 (examples are cited at *Id.* n.4).

56. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 (1983) (examples are cited at *Id.* n.3); see also Decker, *At-will Employment: A Proposal For Its Statutory Regulation*, 1 HOFSTRA LAB. L.F. 187, 187 n.8 (1983).

though the at-will employment doctrine might have been viable in the nineteenth century, it is no longer acceptable given modern day economic, technological, and sociological realities,⁵⁷ and that "the courts should recognize the public's interest in eliminating the power of employers to discharge their employees without just cause."⁵⁸

Throughout the 1980's, the courts continued to provide employees with an expanding right to pursue wrongful discharge actions against their employers. Some recoveries have been grounded in the law of contracts.⁵⁹ Others have rested on principles found in the law of torts.⁶⁰ Many decisions blur their grounds, however, providing the reader with little guidance as to whether they are based on contract theory, tort theory, or some amorphous amalgam of the two.⁶¹

As summarized by one Comment, the contract law theories generally fall "into one of two categories: first, a duty of good faith and fair dealing inherent in the contractual relationship, and second, an implied contract right emanating from an employer's policy statements, handbooks, or conduct."⁶² Similarly, courts "that recognize a tort cause of action for wrongful discharge do so under one of two primary categories: intentional torts and the public policy exception."⁶³ Of these two, "the public policy exception is the more widely accepted. . . ."⁶⁴

Those jurisdictions willing to allow recovery under intentional tort theories generally recognize three types of pure tort actions: "(1) a prima facie tort; (2) intentional interference with the performance of

57. Comment, *The At Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 688 (1984).

58. Note, *supra* note 56, at 1933.

59. See, e.g., *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314 (1987) (collecting cases).

60. See, e.g., *Tameny v. Atlantic Richfield*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (disapproved by *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988)); *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977).

61. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 456, 168 Cal. Rptr. 722 (1980) (disapproved by *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988)).

62. Comment, *supra* note 57, at 670. A number of states "hold employers to a judicially mandated standard of good faith and fair dealing in their employment contracts." *Id.* at 671-72. See also Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980). In those states, an employer may in certain circumstances be held liable for violating this implied covenant if he discharges an employee in bad faith. *Id.* at 1817, 1821.

63. Comment, *supra* note 57, at 675-76.

64. *Id.* at 676.

a contract; and (3) intentional infliction of emotional distress.”⁶⁵ Likewise, the public policy exception can generally be classified into

three broad categories: exercising a specifically conferred statutory right; refusing to violate a law or a statutory or ethical obligation, including ‘whistleblowing;’ and exercising a right or meeting an obligation not specifically conferred or mandated by statute, but which is nevertheless condoned by public policy.⁶⁶

Even the most ardent advocates of an expansive wrongful-discharge doctrine recognize that, while the judicial decisions to date “indicate an increasing dissatisfaction with the at will doctrine . . . , no consistent rationale for restricting the employer’s power to terminate has emerged.”⁶⁷ Indeed, as one recent article put it: “[w]hat has resulted has been a maze of seemingly inconsistent and often illogical opinions which only compound the uncertainty facing employers in an often hostile or volatile climate.”⁶⁸

In light of this confusion, the question of whether the judiciary or the legislature is best suited to modify the at-will rule is subject to debate.⁶⁹ Some commentators have urged that courts should take the lead:

Courts possess the legitimate heritage of common law innovation that develops new principles to accommodate changing values, and are therefore an appropriate forum for the creation of job security rights. Because courts have considerable experience with similar employment relations problems, they possess sufficient expertise to resolve wrongful discharge disputes. Thus, courts need not await legislative initiative to effect doctrinal change

65. *Id.*

66. *Id.* at 679. Other commentators have generally followed similar categorization. Thus Mauk, *supra* note 1, at 232 (footnote omitted) states:

Commentators have classified the various violations of public policies with headings such as whistle-blowing, retaliatory discharge, refusal to do illegal acts and discharge for conduct which public policy would encourage. For analysis these cases can be divided into four categories where employees are discharged: (1) for refusing to commit unlawful or unethical acts; (2) for performing public obligations; (3) for exercising statutory rights or privileges; and (4) for reporting an employer’s unlawful conduct.

Similarly, Note, *supra* note 56, at 1936-37 (footnotes omitted) states:

Although the public policy exception is still evolving, courts have so far found it to apply to discharges involving three broad categories of motives.

1. Refusing to Commit an Unlawful Act. — The most typical cases are those of employees fired for refusing to give false testimony at a trial or administrative hearing.

2. Performing an Important Public Obligation. — Several states have recognized a cause of action for employees fired for serving jury duty, for ‘blowing the whistle’ on illegal conduct by their employers or for refusing to violate a professional code of ethics.

3. Exercising a Statutory Right or Privilege. — A third category of cases involves employees fired for filing workers’ compensation claims or refusing to take polygraph tests.

67. Note, *supra* note 62, at 1824.

68. Cosgrave & Zwick, *Identifying Public Policy in Retaliatory Discharge Cases in Illinois*, 1988 ILL. B.J. 506, 506.

69. Comment, *supra* note 57, at 685.

in the employment-at-will area. Courts themselves created the at-will rule; it is therefore entirely appropriate that they now take the lead in modifying it.⁷⁰

In contrast, other commentators are of the view that courts "are likely to be long on generalization and short on detail"⁷¹ and therefore urge a legislative approach. Some of those who would otherwise favor a judicial approach have taken the position that some kind of legislative action is necessary because of the courts' reluctance to modify the common law at-will doctrine.⁷² Most recently, some of those who favor legislation have concluded that it "is unlikely that there will be substantial change providing for comprehensive wrongful discharge legislation in the foreseeable future."⁷³ Because of their belief that "the new common law of wrongful discharge has provided employer and employee with the worst of all possible worlds,"⁷⁴ these commentators have urged that arbitration is the best approach.⁷⁵

Against this historical backdrop, the California Supreme Court recently handed down its two important and widely discussed decisions in *Foley*⁷⁶ and *Newman*,⁷⁷ and the Montana Supreme Court addressed the viability of a new legislative approach in its *Meech*⁷⁸ decision.

II. CURRENT DEVELOPMENTS

A. *Judicial Refinement of Wrongful Discharge: The Foley and Newman Decisions in California*

1. *Backdrop of Foley and Newman*

In 1983, the highest courts in thirty-six states had each considered challenges to at-will employment based on common law theories of tort and contract. Of those, twenty-five had either modified the at-

70. Note, *supra* note 62, at 1838.

71. Decker, *supra* note 56, at 199.

72. Comment, *supra* note 57, at 687.

73. Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 423 (1987-88).

74. *Id.* at 413.

75. *Id.* at 415. See also *Arbitration Seen as Possible Answer to New Wrongful Discharge Theories*, DAILY LAB. REP. (BNA) No 216, at A-1 (1988).

76. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

77. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592 (1989).

78. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989).

will rule or demonstrated a willingness to do so in the future.⁷⁹ By 1987, the situation had progressed to the point that:

[s]carcely a day goes by during which some employee does not file suit in state or federal court against his or her employer, protesting a dismissal—the basis for it, the way in which it was done, or the circumstances surrounding it. Although there are no precise statistics available, it is clear that wrongful discharge litigation, which was hardly known in the 1970s, is increasing geometrically. . . .⁸⁰

One commentator proclaimed that “[t]he outcome of these recent wrongful termination cases suggests that the 1980s will be remembered as the decade in which judges forged the idea that employees have a property interest in their job.”⁸¹ But if courts across the country were scrambling to jump on the wrongful-discharge bandwagon, California was clearly in the vanguard.⁸² As one scholar put it: “To borrow from the musical *Oklahoma*, California, like Kansas City, has gone about as far as they can go.”⁸³

Not only had a California court fashioned the 1959 “seminal authority” for the public-policy exception to the employment-at-will doctrine in *Petermann*,⁸⁴ but also thereafter the California courts led the way in rapidly expanding the range of employer actions that were held to provide the terminated employee with a viable wrongful discharge action. The recognized theories included tort causes of action for discharges in violation of public policy;⁸⁵ contract causes of action for breach of implied-in-fact covenants to discharge for only good cause;⁸⁶ and causes of action for tortious breach of the implied covenant of good faith and fair dealing inherent in all contracts.⁸⁷

A host of intermediate California appellate court decisions and *dicta* in California Supreme Court and federal cases may have led commentators and lower courts to conclude that certain of these wrongful discharge theories—such as tort recovery for breach of the implied covenant of good faith—were “well established in Califor-

79. Note, *supra* note 56, at 1931.

80. Gould, *supra* note 73, at 405.

81. *Id.*

82. “[I]n the 1980s, courts throughout the country fashioned numerous exceptions to the at-will principle. California courts . . . led the way.” Gould, *State’s High Court Takes Wrong Turn on Job Rights*, L.A. Times, Jan. 8, 1989, pt. 5, at 3.

83. Gould, *supra* note 73, at 406.

84. *See supra* text accompanying notes 37-39.

85. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (termination for refusal to participate in illegal price fixing scheme).

86. *See, e.g.*, *Pugh v. See’s Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (arbitrary termination of 32-year employee despite implied promise by the employer that he would not discharge arbitrarily).

87. *See, e.g.*, *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722, 729 (1980) (arbitrary termination, despite a written policy to the contrary, provides “a cause of action for wrongful discharge that sounds in both contract and in tort”).

nia."⁸⁸ However, the California Supreme Court did not squarely address many of these issues until *Foley* and *Newman*.

The California Supreme Court decisions in *Foley*⁸⁹ and *Newman*⁹⁰ reflected a deeply divided court. In each case, the vote was four to three. In each case, both the majority and minority opinions were sharply critical of each other. Moreover, these decisions were widely reported as a major setback for would-be plaintiff-employees in wrongful discharge actions. Thus, in reporting on the *Foley* decision, the *New York Times* stated that "[i]n a major victory for employers, the California Supreme Court today sharply narrowed the right of dismissed employees to bring suit on the basis of wrongful dismissal."⁹¹ Similarly, in response to the *Newman* decision, the *Wall Street Journal* reported that, "[t]he state that helped pioneer the right of fired workers to sue former employers for large damages took another step toward killing that legal concept."⁹²

2. *Foley v. International Data Corp.*

In *Foley*,⁹³ the plaintiff-employee had been hired as an assistant product manager for computer-based decision-support services. He received a steady series of salary increases, promotions, bonuses, awards, and superior performance evaluations. His complaint alleged that he had been orally assured of job security so long as his performance remained adequate, but that he was terminated shortly after reporting to his employer that his new supervisor was under investigation by the FBI for embezzlement from his former employer.⁹⁴ *Foley's* complaint sought recovery from his employer under three separate and distinct theories: (1) a tort cause of action alleging a discharge in violation of public policy; (2) a contract cause

88. Mauk, *supra* note 1, at 249.

89. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

90. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592 (1989).

91. Fisher, *California Court Limits Suits by Dismissed Employees*, N.Y. Times, Dec. 30, 1988, § 1, at 1, col. 1. See also Hager, *Justices Limit Damages in Fired Workers' Suits; Boon for Employers Seen in State Supreme Court Decision Against Emotional, Punitive Awards*, L.A. Times, Dec. 30, 1988, pt. 1, at 1; Schlender, *California Ruling Curtails Damages in Dismissal Suits*, Wall St. J., Dec. 30, 1988, at B6.

92. Schmitt, *California Court Further Restricts Right of Fired Workers to Sue Ex-Employers*, Wall St. J., May 26, 1989, at A3.

93. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

94. In fact, after *Foley's* discharge, the supervisor pleaded guilty to a felony count of embezzlement. *Id.* at 664 n. 1, 765 P.2d at 375 n.1, 254 Cal. Rptr. at 213 n.1.

of action for breach of an implied-in-fact promise to discharge for good cause only; and (3) a cause of action alleging a tortious breach of the implied covenant of good faith and fair dealing.⁹⁵ The court examined each of Foley's theories individually.

a. Tortious Discharge in Contravention of Public Policy

In a portion of the opinion in which six of the seven justices concurred, the *Foley* court reaffirmed the wrongful discharge tort theory that "the employer's right to discharge an 'at will' employee is still subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal."⁹⁶ The court emphasized that, because it was allowing recovery under a tort theory based on overriding public policy considerations, it made no difference whether the discharged employee had a contract terminable at will or a contract terminable only after a specified length of time. The court quoted with approval the rationale of *Koehrer v. Superior Court*:⁹⁷

[T]here is no logical basis to distinguish in cases of wrongful termination for reasons violative of fundamental principles of public policy between situations in which the employee is an at-will employee and [those] in which the employee has a contract for a specified term. The tort is independent of the term of employment.⁹⁸

The court reasoned that permitting tort recovery does not enforce the employment contract; it vindicates public policy:

When such a termination occurs, the nature of the employee's relationship with the employer, whether at-will or contractual, is essentially irrelevant. What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy.⁹⁹

The court reserved some issues for later determination, stressing that "[w]e do not decide in this case whether a tort action alleging a breach of public policy . . . may be based only on policies derived from a statute or constitutional provision or whether nonlegislative sources may provide the basis for such a claim."¹⁰⁰ Still, the court held that "[r]egardless of whether the existence of a statutory or constitutional link is required . . ., disparagement of a basic *public*

95. *Id.* at 654, 765 P.2d at 374, 254 Cal. Rptr. at 212.

96. *Id.* at 665, 765 P.2d at 376, 254 Cal. Rptr. at 214.

97. 181 Cal. App. 3d 1155, 1166, 226 Cal. Rptr. 820, 826 (1986).

98. *Foley*, 47 Cal. 3d at 667, 765 P.2d at 377, 254 Cal. Rptr. at 215.

99. *Id.* at 667 n.7, 765 P.2d at 377-78 n.7, 254 Cal. Rptr. at 215-26 n.7.

100. *Id.* at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217.

policy must be alleged . . ."¹⁰¹

Turning to *Foley's* factual situation, the court stated that "[w]hether or not there is a statutory duty requiring an employee to report information relevant to his employer's interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty."¹⁰² Accordingly, *Foley* was denied recovery under this theory, with the court emphasizing that "[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the . . . [breach-of-public-policy exception to the employment-at-will doctrine tort] cause of action is not implicated."¹⁰³

b. Breach of Employment Contract

All seven justices joined the second part of the *Foley* decision. That part addressed *Foley's* claim that his employer's conduct and personnel policies had given rise to an "oral contract" not to fire him without good cause. The lower court had rejected this claim, but the California Supreme Court reinstated and remanded it for trial to determine whether *Foley* could support his claim with credible evidence. If so, the court held that *Foley* could recover, although it expressly left unresolved the issue of the proper "measure of damages in a wrongful discharge action based on breach of contract."¹⁰⁴ Although the court remanded this claim, it continued to discuss the theory of a contract cause of action for breach of an implied promise not to discharge except for good cause.

The court noted that a review of other jurisdictions "reveals a strong trend in favor of recognizing implied contract terms that modify the power of an employer to discharge an employee at will."¹⁰⁵ The court concluded that the decision of a California appellate court in *Pugh v. See's Candies, Inc.*¹⁰⁶ had "correctly applied basic contract principles in the employment context." The *Pugh*

101. *Id.*

102. *Id.* at 670, 765 P.2d at 380, 254 Cal. Rptr. at 218.

103. *Id.* at 670-61, 765 P.2d at 380, 254 Cal. Rptr. at 218. Only Justice Mosk dissented from this portion of the *Foley* decision, stating that "[i]t is my opinion that such action—i.e., advising a state-created corporation of the employ in a supervisory position of a person chargeable with a potential felony—is in the best interests of society as a whole, and therefore covered by the public policy rule." *Id.* at 724, 765 P.2d at 418, 254 Cal. Rptr. at 256. (Mosk, J., dissenting).

104. *Id.* at 682 n.24, 765 P.2d at 388 n.24, 254 Cal. Rptr. at 226 n.24.

105. *Id.* at 676, 765 P.2d at 384, 254 Cal. Rptr. at 222.

106. See *supra* note 86 and accompanying text.

court allowed recovery for the wrongful discharge of an employee who had been employed by a candy company for thirty-two years. The employee had been told “if you are loyal . . . and do a good job, your future is secure’” on the ground that this created an implied-in-fact contract that he would be discharged only for good cause.¹⁰⁷

The *Foley* court began its own analysis “by acknowledging the fundamental principle of freedom of contract: employer and employee are free to agree to a contract terminable at will or subject to limitations.”¹⁰⁸ The court noted that California’s Labor Code¹⁰⁹ established a statutory presumption that employment is at-will in the absence of express oral or written agreement covering length of employment or grounds for termination. The court held that “[t]his presumption may, however, be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer’s power to terminate would be limited in some way, e.g., by a requirement that termination be based only on ‘good cause.’”¹¹⁰

The court went on to explain that:

[t]he absence of an express written or oral contract term concerning termination of employment does not necessarily indicate that the employment is actually intended by the parties to be ‘at will,’ because the presumption of at-will employment may be overcome by evidence of contrary intent. Generally, courts seek to enforce the actual understanding of the parties to a contract, and in so doing may inquire into the parties’ conduct to determine if it demonstrates an implied contract.¹¹¹

The court noted in this regard that courts, over the years, had “increasingly demonstrated their willingness to examine the entire relationship of the parties to commercial contracts to ascertain their actual intent”¹¹² and stated that judicial recognition of resulting “enforceable expectations” did not “diminish the force” of contractual or legal obligations.¹¹³ Rather, the court suggested, “[p]ermitt[ing] proof of and reliance on implied-in-fact contract terms does not nullify the at-will rule, it merely treats such contracts in a manner in keeping with general contract law.”¹¹⁴

107. *Foley*, 47 Cal. 3d at 676, 765 P.2d at 384, 254 Cal. Rptr. at 222.

108. *Id.* at 677, 765 P.2d at 385, 254 Cal. Rptr. at 223.

109. Cal. Lab. Code § 2922 (West 1989).

110. *Foley*, 47 Cal. 3d at 677, 765 P.2d at 385, 254 Cal. Rptr. at 223.

111. *Id.*

112. *Id.* at 679, 765 P.2d at 386, 254 Cal. Rptr. at 224.

113. *Id.* at 680, 765 P.2d at 387, 254 Cal. Rptr. at 225.

114. *Id.* at 681, 765 P.2d at 387, 254 Cal. Rptr. at 225.

c. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

The third part of the *Foley* decision was the focus of the court's division and bitterness and is generally of the greatest interest and importance. The court held that "contractual remedies" were the "sole available relief for breaches of the implied covenant of good faith and fair dealing in the employment context,"¹¹⁵ thus foreclosing punitive damages as well as damages for emotional distress.

The court began its analysis by noting the widespread judicial, legislative, and scholarly acceptance of the proposition that every contract, employment or otherwise, imposes on each party an obligation of good faith and fair dealing in the performance and enforcement of the contract.¹¹⁶ The court stressed that "[b]ecause the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies."¹¹⁷ The court considered whether an exception to this general rule should be made in the case of employment contracts—as had been done in the case of insurance contracts. The majority of the court concluded that an exception should not be created.

The minority asserted that the majority's decision was "a radical attempt to rewrite California law"¹¹⁸ and that "there are eight unanimous [California] Court of Appeal decisions permitting a tort action for bad faith discharge, plus dictum approving such an action in" two prior California Supreme Court cases and in a decision by a California federal appeals court.¹¹⁹ The majority made two points in response. First, the majority emphasized that, whatever encouragement the earlier *dictum* in California Supreme Court rulings may have given to proponents of a tort action for wrongful discharge, the dictum should have also "highlighted" for the lower courts "that this question remained to be decided by this court:" there has "clearly and indisputably, been no holding by *this* court that such a cause of action exists."¹²⁰

Second, the majority criticized the reasoning of the eight California lower court rulings and observed that "the clear majority of ju-

115. *Id.* at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

116. *Id.* at 683, 765 P.2d at 389, 254 Cal. Rptr. at 227.

117. *Id.* at 684, 765 P.2d at 389, 254 Cal. Rptr. at 227.

118. *Id.* at 701, 765 P.2d at 402, 254 Cal. Rptr. at 240 (Broussard, J., dissenting).

119. *Id.* at 705-06, 765 P.2d at 405, 254 Cal. Rptr. at 243 (Broussard, J., dissenting).

120. *Id.* at 688-89 nn.27-28, 765 P.2d at 392-94 nn.27-28, 254 Cal. Rptr. at 230-32 nn.27-28.

risdictions [elsewhere] have either expressly rejected the notion of tort damages for breach of the implied covenant in employment cases or impliedly done so by rejecting any application of the covenant in such a context.”¹²¹ In a lengthy footnote, the majority added that “[i]n only three cases outside of California have courts held that a breach of the covenant of good faith and fair dealing gives rise to tort damages,” and that “almost every court considering the issue outside of California has either totally rejected applying the covenant of good faith and fair dealing to employment contracts, or has limited recovery for breaches of the covenant to contract damages.”¹²²

The court found that the analogy to breach of insurance contracts was not sufficiently persuasive to warrant recognition of a tort action for employment contract breach. In support of its finding, the court emphasized two factors: (1) after the breach an employee can get another job, but an insured cannot get another policy to cover his past loss; and (2) the interests of the insurer and the insured are “financially at odds,” while those of the employer and employee “are most frequently in alignment.”¹²³

The court also stated that there was not a “special relationship” between employer and employee that would justify imposition of tort liability for breach of the implied covenant in the employment context.¹²⁴ In this regard, the court quoted with approval the following passage from Putz & Klippen:¹²⁵ “[t]he fundamental flaw in the ‘special relationship’ test is that it is illusory. It provides a label to hang on a result but not a principled basis for decision The qualifying contracts cannot be identified until the issue has been litigated, which is too late.”¹²⁶

The *Foley* court also highlighted the fact that allowing recovery of compensatory tort damages and punitive damages for breach of the implied covenant would produce “the anomalous result that henceforth the implied covenant in an employment contract would enjoy protection far greater than that afforded to express and implied-in-fact promises, the breach of which gives rise to an action for contract damages only.”¹²⁷ By way of footnote, the court added that “with regard to an at-will employment relationship, breach of the implied covenant cannot logically be based on a claim that a discharge was made without good cause. If such an interpretation applied, then all

121. *Id.* at 686, 765 P.2d at 391, 254 Cal. Rptr. at 229.

122. *Id.* at 686-87 n.26, 765 P.2d at 391-92 n.26, 254 Cal. Rptr. at 229-30 n.26.

123. *Id.* at 693, 765 P.2d at 396, 254 Cal. Rptr. at 234.

124. *Id.* at 690-93, 765 P.2d at 394-96, 254 Cal. Rptr. at 232-34.

125. Putz & Klippen, *Commercial Bad Faith: Attorney Fees—Not Tort Liability—Is The Remedy for “Stonewalling”*, 21 U.S.F. L. REV. 419, 478-79 (1987).

126. *Foley*, 47 Cal. 3d at 691, 765 P.2d at 395, 254 Cal. Rptr. at 233.

127. *Id.* at 698, 765 P.2d at 400, 254 Cal. Rptr. at 238.

at-will contracts would be transmuted into contracts requiring good cause for termination."¹²⁸ The court went on to quote with approval the following observation by the Arizona Supreme Court: "[w]hat cannot be said is that one of the agreed benefits to the at-will employee is a guarantee of continued employment or tenure."¹²⁹

Ultimately, the *Foley* court concluded that the question of whether a tort remedy should be allowed for breach of the implied covenant, as well as the parameters of any such remedy, should be left for the legislature. The court reviewed the substantial body of judicial and scholarly writing on this question and the diversity of views presented, commenting that "[t]hese various approaches on the one hand suggest a widespread perception that present compensation is inadequate, but on the other hand vividly demonstrate substantial disagreement about the propriety or even the potential form of tort remedies for breaches of contractual duties of covenants."¹³⁰ The court concluded:

The issue is how far courts can or should go in responding to these concerns regarding the sufficiency of compensation by departing from long established principles of contract law. Significant policy judgments affecting social policies and commercial relationships are implicated in the resolution of this question in the employment termination context. Such a determination, which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decisionmaking.¹³¹

The court added that "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties may present evidence and express their views."¹³² Notably, the court began this part of its opinion by stressing that "predictability about the cost of contractual relationships plays an important role in our commercial system" and ended it by underscoring that "of primary significance, we believe that focus on available contract remedies offers the most appropriate method of expanding available relief for wrongful terminations. The expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community."¹³³

128. *Id.* at 698 n.39, 765 P.2d at 400 n.39, 254 Cal. Rptr. at 238 n.39.

129. *Id.* (quoting *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985)).

130. *Foley*, at 696, 765 P.2d at 398, 254 Cal. Rptr. at 236.

131. *Id.* at 694, 765 P.2d at 397, 254 Cal. Rptr. at 235.

132. *Id.* at 694 n.31, 765 P.2d at 397 n.31, 254 Cal. Rptr. at 235 n.31.

133. *Id.* at 683, 699, 765 P.2d at 389, 401, 254 Cal. Rptr. at 227, 239.

In its conclusion, the court summarized: “we hold that tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant.”¹³⁴

3. *Newman v. Emerson Radio Corp.*

In *Newman*,¹³⁵ the California Supreme Court addressed an issue not considered in *Foley*: whether the *Foley* decision—and, in particular, the third portion of *Foley* holding that there was no tort cause of action for breach of the implied covenant of good faith and fair dealing in an employment contract—would apply prospectively only or whether it would be applied retroactively to all pending cases as well. The *Foley* decision expressly left this issue open for future resolution, stating “[w]e do not reach the issue of the retroactive or prospective application of our opinion. The parties have not briefed or argued the question and we will deal with the matter in a later case when we have the benefit of the views of counsel.”¹³⁶ In *Newman*, the California Supreme Court, dividing 4-3 along exactly the same lines as it had on the critical third part of *Foley*, resolved that open issue by holding that the *Foley* decision was fully retroactive.¹³⁷

As in *Foley*, the opinions in *Newman* reflected the sharp division of the court. Thus, the minority characterized the majority opinion as a “convoluted analysis” that was “riddled with problems.”¹³⁸ For its part, the majority all but accused the minority of being duplicitous. Noting that the dissenting justices had been in the vanguard of the movement to provide retroactive application when *extending* the reach of tort law, the majority chided that “[i]t is difficult to draw a principled distinction depriving tort defendants of the benefits of the now-controlling rule of law, when in the past we have routinely retroactively accorded to plaintiffs the benefits of changes in tort law.”¹³⁹ Then, to drive home the point, the majority quoted at length, and with a healthy dose of sarcasm, from a prior opinion by the author of the minority opinion in *Newman*:

Justice Broussard, writing for the majority, persuasively explained: ‘*California courts have routinely applied overruling decisions retroactively even though such decisions redefined the duty owed, thus the conduct prohibited.* [Citations.] Although one could draw a distinction between expansion of liability for compensatory damages and increasing punishment by im-

134. *Id.* at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239.

135. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592 (1989).

136. *Foley*, 47 Cal. 3d at 700 n.43, 765 P.2d at 402 n.43, 254 Cal. Rptr. at 240 n.43.

137. *Newman*, 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592.

138. *Id.* at 994, 772 P.2d at 1073, 258 Cal. Rptr. at 606 (Broussard J., dissenting).

139. *Id.* at 984, 772 P.2d at 1066, 258 Cal. Rptr. at 599.

sition of punitive damages, the effect is the same: exposure to a form of damages for which the defendant was not previously liable. . . . [I]n this instance, *the increased liability is merely a change in the remedy for enforcing defendant's obligation to refrain from drunk driving, not a change in the nature of the obligation itself.*¹⁴⁰

Similarly, *Foley* did not change the nature of an employer's obligation under the contract, including adherence to the implied covenant of good faith and fair dealing. The employer remains bound by all express and implied terms of the contract, and any breach thereof is still actionable. *Foley* simply changed *the nature of the remedy* available for the breach.¹⁴¹

In support of its ruling, the court stated that "[t]he general rule that judicial decisions are given retroactive effect is basic in our legal tradition" and observed in this regard that "virtually all of this court's previous ground-breaking tort decisions have been applied retroactively, even when such decisions represented a clear change in the law. Exceptions have been rare and we will find no reason to add to that short list in this case."¹⁴²

Perhaps the most interesting aspect of *Newman* is its further elaboration of *Foley*. The *Newman* opinion opens with a succinct summary of the three rulings in *Foley*:

In *Foley* . . . , we held that in the context of an alleged wrongful discharge from employment (i) a plaintiff may seek tort damages based on a claim that he was discharged in violation of a fundamental public policy, (ii) the statute of frauds does not bar contract relief based on breach of an oral or implied-in-fact contract not to terminate an employee except for good cause, and (iii) an employee may not obtain tort relief for breach of the implied covenant of good faith and fair dealing in an employment contract; the covenant is a contract term and relief for its violation accordingly is limited to contract damages.¹⁴³

Later, in seeking to use the underlying rationale in *Foley* as further support for retroactive application, the court stated that "[o]ur *Foley* holding on the covenant of good faith and fair dealing issue had two primary motivations and goals."¹⁴⁴ The court identified as its first concern "the distinction between tort and contract remedies and the importance of giving effect to the true expectations of the parties to a contract."¹⁴⁵ The court explained that "*Foley's* reaffirmation that the focus of implied covenant of good faith and fair dealing actions rests in the expectations of the parties is fully consistent with retroactive application of our decision to contracts entered

140. *Peterson v. Super. Ct.*, 31 Cal. 3d 147, 161-62, 642 P.2d 1305, 1313, 181 Cal. Rptr. 784, 792 (citation omitted; italics added).

141. *Newman*, 48 Cal. 3d at 991, 772 P.2d at 1071, 258 Cal. Rptr. at 604.

142. *Id.* at 978-79, 772 P.2d at 1062, 258 Cal. Rptr. at 595.

143. *Id.* at 975-76, 772 P.2d at 1060, 258 Cal. Rptr. at 593.

144. *Id.* at 988, 772 P.2d at 1069, 258 Cal. Rptr. at 602.

145. *Id.*

into before that decision was filed.”¹⁴⁶

The court identified as a second major concern expressed in *Foley* that “permitting tort remedies for breach of the covenant tended to undermine ‘predictability of the consequences of actions related to employment contracts.’”¹⁴⁷ Again, the court found that retroactive application would “generally ameliorate” this concern.¹⁴⁸

4. *Response to Foley and Newman*

In assessing the significance of *Foley* and *Newman*, most observers have treated them as “a far-reaching victory for business.”¹⁴⁹ Some, however, have claimed that these rulings “will actually aid fired workers.”¹⁵⁰ Focusing on the “‘three totally distinct bases on which an employee may sue’” that were upheld in *Foley*—and not merely on the damage restrictions found in the third portion of *Foley*—these observers believe that *Foley* “‘opens the door to a potentially expansive use’ of suits by employees who believe that they were fired improperly.”¹⁵¹ As they see it, “‘[t]he extent of damages is limited, but the legitimacy of the claims is more clear.’”¹⁵²

However, most observers see *Foley* and *Newman* as putting a damper on both the number of future wrongful discharge cases and the potential liability exposure. “[O]ne big effect of the two decisions may be to deprive middle-income and lower-income employees of their days in court because attorneys will be less inclined to bring cases where compensatory damages are relatively small.”¹⁵³ Where the potential recovery is small, the potential contingent fee for the employee’s lawyer will not provide much incentive to file suit. As one observer summarized, “‘the effect of these two cases will be to make plaintiffs’ lawyers much more circumspect in the kinds of cases that

146. *Id.* at 989, 772 P.2d at 1069, 258 Cal. Rptr. at 602. Still bitter over the earlier *Foley* ruling, the minority’s retort in *Newman* to the resurrection of this point was that “[t]he retroactive application of *Foley* does not give effect to the parties’ expectations; it gives the employer an immunity from tort damages he did not expect, and takes from the worker a remedy he thought he possessed.” *Id.* at 998, 772 P.2d at 1076, 258 Cal. Rptr. at 609 (Broussard, J., dissenting).

147. *Id.* at 989, 772 P.2d at 1069, 258 Cal. Rptr. at 602 (quoting *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696, 765 P.2d at 373, 398, 254 Cal. Rptr. 211, 236).

148. *Newman*, 48 Cal. 3d at 989, 772 P.2d at 1070, 258 Cal. Rptr. at 603. Responding, the minority claimed that this concern “clearly points to a prospective application.” *Id.* at 998, 772 P.2d at 1076, 258 Cal. Rptr. at 609 (Broussard, J., dissenting). The minority observed that nothing “can alter or facilitate past predictions” and said that *Foley* would simply disappoint most past predictions since it was counter to prior California rulings. *Id.* (Broussard, J., dissenting).

149. Hager, *supra* note 91, pt. 1, at 1.

150. Groves & Williams, *Some Believe Ruling Will Actually Aid Fired Workers*, L.A. Times, Dec. 30, 1988, pt. 1, at 29.

151. *Id.* (quoting W.C. Quackenbush).

152. *Id.*

153. Schmitt, *supra* note 92, at A7.

they are willing to take.'¹⁵⁴

Foley's limitation on damages available for wrongful discharge contract claims may spur counsel for discharged employees to scrutinize the circumstances of each discharge for facts that would support tort claims such as defamation, false light, and intentional infliction of emotional harm. Such claims may permit employees, if successful, to recover damages not available under *Foley* for emotional distress or punitive damages. Counsel for employers, on the other hand, should advise their clients to handle discharges in a manner that avoids conduct that would support such alternative or supplemental tort theories.

B. Legislative Refinement of Wrongful Discharge: The Meech Decision in Montana

1. Montana's Wrongful Discharge From Employment Act

In 1987, Montana enacted the Wrongful Discharge From Employment Act ("Act"). The Act is briefly summarized as follows:

Under the terms of the Montana statute, employees who don't belong to a union or have individual contracts gain broad protections from arbitrary dismissals. The law forbids firing without showing 'good cause,' as determined by a court.

But in exchange for this benefit, the law limits damages to no more than four years of back pay and benefits and excludes any recovery for emotional distress. Punitive damages, awards designed to punish a defendant rather than compensate the plaintiff, are barred except in cases where the employer demonstrated fraud or malice.¹⁵⁵

After the Act became effective, an employee sued his employer for wrongful discharge in the Montana federal district court.¹⁵⁶ The employee claimed that the employer had made an implied promise that if the employee performed satisfactorily, he could keep his job for the rest of his career, and that he had been fired in breach of this promise. The employee's suit sought damages for emotional distress, wages for approximately 20 years, and punitive damages. The employer said that the discharge had been part of a corporate restructuring and moved to dismiss the case on the grounds that, regardless of the employer's motivation for discharge, the Act precluded the employee's common-law claims. The federal court certified two questions to the Montana Supreme Court for ruling:

154. *Id.*

155. Dockser, *Wrongful-Firing Case in Montana May Prompt Laws in Other States*, Wall St. J., Jul. 3, 1989, at 11.

156. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989).

(1) Is the . . . Act . . . unconstitutional in that it serves to wrongfully deprive an individual falling within the purview of the Act from his or her right to "full legal redress" within the meaning of . . . the Montana Constitution?

(2) Are those provisions of the . . . Act which expressly prohibit recovery of noneconomic damages, and limit the recovery of punitive damages, violative of an individual's right to "full legal redress" within the meaning of . . . the Montana Constitution?¹⁵⁷

By a 4-3 vote, the Montana Supreme Court answered both questions in the negative, holding that the Act did not run afoul of the Montana Constitution.¹⁵⁸ As in *Foley* and *Newman*, there were sharp differences among the justices, with the principal dissenter proclaiming that "[t]his is the blackest judicial day in the eleven years that I have sat on this Court. Indeed it may be the blackest judicial day in the history of the state."¹⁵⁹

Meech was closely followed by management and labor because at least a dozen states—including California, New York, and Illinois—had similar legislation pending. The Montana law was also being considered as a basis for proposed model legislation.¹⁶⁰

The three principal operative sections of the Montana Act have been codified as 39-2-904, 39-2-905, and 39-2-913, which provide as follows:

39-2-904. ELEMENTS OF WRONGFUL DISCHARGE. A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause¹⁶¹ and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.¹⁶²

39-2-905. REMEDIES. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904.

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, ex-

157. *Id.* at 488-90.

158. *Id.* at 488, 490.

159. *Id.* at 507 (Sheehy, J., dissenting opinion).

160. Dockser, *supra* note 155, at 11.

161. 39-2-903(5) defines "good cause" to mean "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." MONT. CODE ANN. § 39-2-903(5) (1989).

162. *Id.* § 39-2-904 (1989).

cept as provided for in subsections (1) and (2).¹⁶³

39-2-913. PREEMPTION OF COMMON-LAW REMEDIES. Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.¹⁶⁴

2. *The Act Does Not Violate the Full Legal Redress Provision*

In its analysis of whether the Act violated the Montana State Constitution's "full legal redress" provision, the *Meech* court placed particular emphasis on "the general rule that no one has a vested interest in a rule of common law. . . ."¹⁶⁵ Citing to Oliver Wendell Holmes, the court stressed that, like courts, "[l]egislatures in the Anglo-American system have long been held to possess the authority to expand or reduce claims and remedies available at common law."¹⁶⁶ Noting further that "[t]he Constitution does not freeze common law rights in perpetuity,"¹⁶⁷ the court proceeded to examine the constitutional provision at issue, Article II, Section 16, which states as follows:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character. *No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.* Right and justice shall be administered without sale, denial, or delay.¹⁶⁸

Examining in detail both prior cases and the history surrounding the language inserted in 1972 (debates, explanatory pamphlets, etc.), the court found that the delegates had "narrowly drafted" the amendment to accomplish a "single purpose."¹⁶⁹ "Specifically, the addition prevents lawmakers, that is both the courts and the legislature, from denying workers' compensation claimants a *cause of action* against negligent third parties for job related injuries. The amendment did not seek to define 'full legal redress' as a fundamental right which could not be altered by the legislature."¹⁷⁰ The court

163. *Id.* § 39-2-905 (1989).

164. *Id.* § 39-2-913 (1989).

165. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 496 (Mont. 1989).

166. *Id.* (citing O.W. HOLMES, *THE COMMON LAW* 112 (1881)).

167. *Meech*, 776 P.2d at 496 (quoting *Reeves v. Ille Electric Co.*, 170 Mont. 104, 113, 551 P.2d 647, 652 (1986)).

168. *Meech*, 776 P.2d at 496 (quoting MONT. CONST. art. II, § 6 (1889, amended 1972). The language in italics was added to Montana's 1889 Constitution by the Constitutional Convention of 1972.

169. *Meech*, 776 P.2d at 497.

170. *Id.* at 499.

overruled three prior Montana Supreme Court decisions “insofar as they hold that Article II, § 16 of the Montana Constitution guarantees a fundamental right to full legal redress.”¹⁷¹ Holding that there was no such fundamental right to full legal redress, the court went on to quote with approval the general rule that:

[a] constitutional provision that courts of justice shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, is not intended as a limitation upon the legislative branch of the government where the legislation involved deals with rightful subjects of legislation.¹⁷²

3. *The Act's Limitation on Damages Does Not Violate the Full Legal Redress Provision*

Turning next to the question of whether, under any circumstance, the Act's limitations on noneconomic damages, punitive damages and the like violated the “full legal redress” provision, the *Meech* court held that they did not. Initially, the court reframed the issue as follows: “[d]o the limitations on the recovery of certain damages in the Act violate equal protection because the Act unconstitutionally burdens a class of claimants seeking damages for wrongful discharge?”¹⁷³ The court held that they did not. The court first decided to use a “rational basis test” in determining whether the limitations were permissible.¹⁷⁴ Then the court stated as follows:

Until recently, the fundamental body of law governing available damages in the employment area has been contract law. Courts, by virtue of their power to alter the common law, have expanded employers' liability by recognizing tort claims in the employment context. The legislature has now acted to reverse this trend by restricting damages for wrongful discharge. This decision to limit liability “emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate ‘the burdens and benefits of economic life.’” *Duke Power Co. v. Carolina Environmental Study Group* (1978), 438 U.S. 59, 83, 98 S. Ct. 2620, 2636, 57 L. Ed. 2d 595, 617-18. A statutory “limitation on recovery is a classic economic regulation, . . . [which] must be upheld if it is reasonably related to a valid legislative purpose.” *Boyd v. Bulala* (W.D. Va. 1986), 647 F. Supp. 781, 786 (finding heightened scrutiny inappropriate for reviewing liability-limitation under requirements of Virginia's remedy guarantee).

The Court in *Duke Power* pointed out that use of the rational basis test harmonizes with the rule that the legislature may alter the common law:

Our cases have clearly established that “[a] person has no property, no vested interest, in any rule of the common law.” [citation omitted]. The “Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible state *object*,” [citation omitted], despite the fact that “otherwise settled expectations” may be upset thereby. *Duke Power*, 438

171. *Id.* at 491.

172. *Id.* at 500 (quoting 16A AM. JUR. 2D *Constitutional Law* § 616, at 564 (1979) (emphasis added)).

173. *Meech*, 776 P.2d at 502.

174. *Id.*

U.S. at 88, n.32, 98 S. Ct. at 2638, n.32.¹⁷⁵

Quoting the general rule that “[t]here is no vested right to exemplary damages and the legislature may, at its will, restrict or deny the allowance of such damages,”¹⁷⁶ the court held the “Act’s provision on punitive damages is constitutional.”¹⁷⁷ Additionally, the court held that the Act’s other damage restrictions must also pass “equal protection muster.”¹⁷⁸ The court found that “[t]he legislative history of the Act demonstrates that lawmakers perceived an unreasonable financial threat to Montana employers from large judgments in common-law wrongful discharge claims,” and that they perceived as well that these threats “could discourage employers from locating their businesses in Montana. The Act’s limitation on damages is intended to alleviate these threats.”¹⁷⁹ The *Meech* court found further that the Act also provides benefits for employees that “are not illusory.”¹⁸⁰ These include restrictions on employers’ ability to discharge “without cause,” prejudgment interest, and recovery for fringe benefits as well as lost wages.¹⁸¹ Taken together, the various tradeoffs between the interests of the employer and those of the employee reflected in the Act were held to be “in no sense irrational” and met the “rational basis test” for constitutionality.¹⁸²

4. *Dissenting Opinion*

In a dissent that was perhaps more emotional than analytical, the minority challenged the claim that the Act “provided great new rights for discharged workers”.¹⁸³ Instead, the minority stated that “[t]he legislature, in effect, has converted the tort of wrongful discharge into a sort of contract action by the adoption of the Wrongful Discharge From Employment Act. The legislature refused, nonetheless, to provide all the elements of the damages allowable for breach of contract.”¹⁸⁴ In effect, the minority asserted, a “legislature purporting to give a wronged employee some rights, instead, took away

175. *Id.* at 502-03.

176. *Id.* at 504 (quoting 22 AM. JUR. 2D *Damages* § 239, at 326 (1965)).

177. *Meech*, 776 P.2d at 504.

178. *Id.*

179. *Id.*

180. *Id.* at 506.

181. *Id.*

182. *Id.* at 505.

183. *Id.* at 507 (Sheehy, J., dissenting).

184. *Id.* at 509 (Sheehy, J., dissenting).

any possible right of meaningful recovery."¹⁸⁵

Finally, turning to the majority's "rational basis test," the minority charged that "it is not a legitimate state purpose to protect employers from their unscrupulous acts as against the traditional rights of individuals to earn their livelihood," and that "no case can be made on a rational basis to sustain a law the principal purpose of which is to subsidize, protect or enhance the acts of wrongdoers."¹⁸⁶ According to the minority, the "only basis for the Act," was that "as between business and the workers, the legislature discriminately prefers business. That is not a constitutional basis on which to found a statute."¹⁸⁷

5. *The Impact of Meech*

The primary impact of the *Meech* decision may well be to encourage legislatures in other states to pass "compromise" legislation such as the Montana Act. As reported in the *Wall Street Journal*, "'The Montana decision has cleared the way legally for [other legislatures] in terms of the broad constitutional challenge,' said Theodore J. St. Antoine, a professor at the University of Michigan Law School and a draftsman of the proposed model bill."¹⁸⁸

III. LEGISLATIVE SOLUTION: AN ANALYSIS

The 1980's witnessed a continual erosion of the employment-at-will doctrine and a concomitant increase in the acceptance of the wrongful-discharge doctrine. However, the recent developments on the judicial and legislative fronts discussed in the preceding section, suggest that perhaps the pendulum has begun to swing the other way. These recent developments may well signal an end to the expansion of the wrongful discharge theory at the expense of the employment-at-will doctrine.¹⁸⁹

As noted, legislation similar to that in Montana is under active consideration in more than a dozen states, including several of the largest, and work is underway to draft a model bill that could serve as a framework for any state.¹⁹⁰ Additionally, a number of scholars have waded in with their own statutory proposals.¹⁹¹ The remainder of this Article argues that there is a need for legislation concerning wrongful discharge, while acknowledging that obstacles exist to a

185. *Id.* at 510 (Sheehy, J., dissenting).

186. *Id.* at 516 (Sheehy, J., dissenting).

187. *Id.* at 517 (Sheehy, J., dissenting).

188. Dockser, *supra* note 155, at 11.

189. See Note, *supra* note 62, at 1834.

190. See *supra* text accompanying note 160.

191. See, e.g., Decker, *supra* note 56.

legislative solution. Despite these obstacles, we propose our own "model" wrongful discharge legislation.

A. *Problems With Judicial Resolution of the Wrongful Discharge Issue*

Well over a century ago, it was observed that "hard cases . . . make bad law."¹⁹² That has certainly been true in the wrongful discharge area. Most of the leading cases in which the wrongful discharge cause of action is rooted involved particularly offensive conduct by the employer that led the court to bend or break the employment-at-will doctrine—firing employees for refusing to commit perjury, for performing jury service, and the like.

*Savodnik v. Korvettes, Inc.*¹⁹³ is a classic example. In *Savodnik*, "a model employee" was terminated "solely to deprive him of his pension benefits."¹⁹⁴ Putting the employment-at-will doctrine to the test in the worst possible context, the employer seemed to the court "to agree" that it discharged the employee "for this very purpose," and merely urged the court that "however contemptible such behavior may be, it is simply not illegal." After noting that "no case in New York has yet recognized the tort of abusive discharge," the court bristled that "[t]o allow an employer to avoid the vesting of rights in a pension plan after thirteen years of service by a model employee, under the guise of the employment at will doctrine, does not sit well with this Court."¹⁹⁵ Perhaps not surprisingly, given the context, the court recognized a wrongful discharge action under New York law, stating:

If ever there were a case to invoke the doctrine of abusive discharge, this is it. Courts cannot hide in ivory towers ignoring the economic and social realities of modern society, for it is that very society we are here to serve. As that society changes, so must our thinking. We are convinced New York courts would recognize the abusive discharge doctrine on the facts of this

192. *Ex parte Long*, 3 W.R. 19 (1854). A half-century later, Holmes elaborated on this theme as follows:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

193. 488 F. Supp. 822 (E.D.N.Y. 1980).

194. *Id.* at 826.

195. *Id.*

The problem is that in providing a wrongful discharge action remedy to employees in these extreme cases, the courts have too often spoken in broad language that has opened a wide door for future actions by discharged employees in far less offensive situations. *Palmateer v. International Harvester Co.*¹⁹⁷ is a good example. In *Palmateer*, an employee was fired for supplying the police with information concerning illegal activities by a fellow employee. While the court found that this conduct was against the specific and well-recognized public policy of encouraging citizens to cooperate with the police, the court went on to define public policy in extremely broad terms, stating that it “concerns what is right and just and what affects the citizens of the State collectively.”¹⁹⁸

More recently, courts in a number of jurisdictions have tried to temper the overly broad language of their initial rulings in the wrongful discharge area.¹⁹⁹ As noted in *Foley*, the New Hampshire Supreme Court has now “confined *Monge* to cases in which the employer’s actions contravene public policy.”²⁰⁰ And four years after its *Fortune* decision, “[i]n *Gram v. Liberty Mutual Insurance Co.*,²⁰¹ the Massachusetts Supreme Court declined to adopt a rule equating the absence of good cause for a discharge with the absence of good faith If good faith means good cause, it is argued, then the doctrine of at-will employment is meaningless.”²⁰²

The ebb and flow of these cases demonstrates the uncertainty that characterizes the common law. Accordingly, a resolution is needed in the wrongful discharge area. As Professor Coase has emphasized, “while ‘the delimitation of rights is an essential prelude to market transactions . . . the ultimate result (which maximizes the value of production) is independent of the legal decision.’ This is the essence

196. *Id.* at 826-27 (footnote omitted).

197. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

198. *Id.* at 130, 421 N.E.2d at 878.

199. See, e.g., *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981); *Howard v. Don Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980). These more recent decisions suggest that employers will fare better in court when, instead of a rote incantation of the employment-at-will doctrine, they (1) provide at least a plausible, non-offensive rationale for the specific discharge at issue, and (2) spell out in detail the sound policy reasons SUPPORTING the employment-at-will doctrine. It should be noted in the latter regard that not all scholars have subscribed to the erosion of the employment-at-will doctrine by the courts. As one particularly persuasive article puts it, “there is no principled reason of fairness or utility to disturb the common law’s long-standing presumption in favor of the contract at will.” Epstein, *supra* note 23, at 977.

200. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 686, 765 P.2d 373, 391, 254 Cal. Rptr. 211, 229 (citing *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980)).

201. 384 Mass. 659, 429 N.E.2d 21 (1981).

202. Mauk, *supra* note 1, at 252.

of the Coase Theorem.”²⁰³ Once the legal ground rules are clearly established (whatever they are), private negotiation will lead to the arrangement between the parties that maximizes overall wealth. Absent such clear ground rules, the market uncertainty caused by the existing common law will result in less than optimal arrangements.

Likewise, in the absence of definite legal rules, individual employers must take into account the risk and expense of a lawsuit in virtually every contemplated discharge—even that of an at-will employee. Litigants and the bar face continued unpredictability and, in many jurisdictions, the unfathomable irony that a person discharged as a result of intentional race or sex discrimination may not be able to recover punitive damages, while a person discharged without “good cause” can.²⁰⁴ Thus, it appears that legislation such as that which we propose is needed to quell the tide of uncertainty faced by both employees and employers.

B. *Obstacles to the Legislative Approach*

Legislative proposals, however, face significant hurdles. For example, we have seen the close and sharp divisions on the Supreme

203. R. COASE, *THE FIRM, THE MARKET AND THE LAW* 158 (1988) (citing R. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 25 (1959) (footnote omitted)); see also R. COASE, *THE FIRM, THE MARKET AND THE LAW* 174-75 (1988); E. LAZEAR, *supra* note 3, at 17 (“The rhetoric that surrounds contrast between employment-at-will and job security may be just that. The issue may be one that depends more on implicit prices induced by the unemployment compensation system than on court doctrine.”). “[I]n a perfect world, any mandated transfer from employer to worker can be undone by an efficient contract.” E. LAZEAR, *supra* note 3, at 23.

204. Wrongful discharge plaintiffs may, in some states, recover punitive damages. See, e.g., *Carter v. Catamore Co.*, 571 F. Supp. 94, 97 (N.D. Ill. 1983) (applying Rhode Island law) (“Since violation of [the duty of good faith and fair dealing] sounds in contract” as well as “in tort, punitive damages may sometimes be obtainable.”); *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364, 1373 (1987) (upholding an award of punitive damages for the firing of a tenured employee in order to save having to pay him retirement benefits); MONT. CODE ANN. § 39-2-905(2) (1989) (authorizing claims for punitive damages when the employee established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge). In contrast, plaintiffs suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1981) — which makes it unlawful to discharge any individual because of his “race, color, religion, sex, or national origin” — cannot recover punitive damages. E.g., *Boddy v. Dean*, 821 F.2d 346, 352 (6th Cir. 1987) (“It is settled beyond dispute in this circuit that a plaintiff may not recover either compensatory or punitive damages in a Title VII action.”); *Shah v. Mt. Zion Hospital and Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981) (“The great weight of authority denies . . . punitive damages under Title VII.”).

Courts in California²⁰⁵ and Montana.²⁰⁶ The same divisions are likely to be present elsewhere throughout the country. More importantly, those judicial divisions mirror the divisions that will be seen in the community generally as these issues are addressed in the future. Those divisions present a substantial obstacle to the enactment of legislation concerning wrongful discharge.

Will workers support such legislation? Unions have long been able to bargain successfully to secure protection for union members from discharge without good cause.²⁰⁷ Moreover, the general desire of unions to provide workers with protections not otherwise available has meant that "traditionally, unions have been ambivalent, if not downright hostile, to the idea of legislation instituting arbitration of dismissal claims outside the collective bargaining context."²⁰⁸ In February of 1987, however, the AFL-CIO Executive Council adopted a statement "that calls for legislation establishing employee protection against 'arbitrary' employer conduct and provision of 'safeguard . . . against discharges without cause' for *all workers*," a protection that "should be available to *all workers* 'as a basic labor standard' that is the 'hallmark of a decent society.'"²⁰⁹

Will employers support such legislation? In discussing legislative proposals more permissive than the Montana Act, Blades observed more than two decades ago that "[o]ne need not be an extreme cynic to say that employers would not favor such legislation."²¹⁰ Others, however, take the view that "[i]nstead of opposing legislation, the prudent employer should welcome a statutory scheme as providing an orderly legal remedy outside of the courtroom."²¹¹ This would seem particularly true, since, as has been suggested, "[u]nder existing guidelines, the boundaries of these actions are defined only by the imagination of the plaintiff's attorneys."²¹²

However, as one scholar recently noted:

[t]he current debate about a better system has resulted in a legislative standoff in California and other states. It is complicated by the conservative view, articulated by the Chicago school of economists, that all attempts to limit employer authority by legislation or common-law litigation are misguided in that they interfere with the market.²¹³

"Employee-rights lawyers say that although they favor legislation

205. See *supra* notes 88-141 and accompanying text.

206. See *supra* notes 158-87 and accompanying text.

207. "Over ninety percent of collective bargaining agreements in the United States limit the employer's power to discharge." Note, *supra* note 62, at 1832.

208. Gould, *supra* note 73, at 417.

209. *Id.* at 404 (footnote omitted) (emphasis added, emphasis in original, respectively).

210. Blades, *supra* note 24, at 1434.

211. Decker, *supra* note 56, at 202.

212. Comment, *supra* note 8, at 228 (footnote omitted).

213. Gould, *supra* note 73, at 420.

that requires 'good cause' for firing, they object to limits on awards. And lawyers for management argue that the law has greatly restricted their right to dismiss employees without penalty."²¹⁴

C. *Proposed Model Legislation*

The prospects for a return to the employment-at-will doctrine are remote in light of the trend of judicial decisions and business practices and mores over the past half century. We believe that a legislative compromise can accommodate these opposing views. Such legislation would provide that an employee without an individual written employment contract can be discharged only for a legitimate business reason, but that a discharged employee in a wrongful discharge action can recover only limited damages for lost earnings and benefits—we suggest a maximum of four years, plus attorneys' fees. We believe that wrongful discharge legislation also should include an incentive for employers to review discharge decisions carefully and to afford the affected employee an opportunity fully to express the employee's position during that review.

In exchange for implementation of an internal review procedure, we propose that an employer's decision, if upheld upon internal review, be given deference by the courts. Specifically, we propose that if an employer shows that an employee discharge was reviewed under an internal review procedure and affirmed by a review committee of disinterested employees, the employer's final decision be given a prima facie presumption of validity. The presumption could be rebutted only by clear and convincing evidence that the discharge was not for a legitimate business reason. To allay potential employer concerns, the proposed model act also allows employers to challenge internal review committee decisions, subject to the same clear and convincing evidence standard.

By exempting employees who have written employment contracts with their employers that include express provisions governing termination, our proposal allows for arbitration. However, arbitration is possible only if the employer and the employee have entered into a written employment contract in which they have agreed to submit such disputes to binding arbitration. The Montana Act establishes a framework (and an incentive) for voluntary arbitration,²¹⁵ and others have urged that "[a]ny statute should take the initial handling of

214. Dockser, *supra* note 155.

215. Meech v. Hillhaven West Inc., 776 P.2d 488, 490-91 (Mont. 1989).

these matters out of the court's jurisdiction. Instead, *all* employee termination disputes should be handled by arbitrators."²¹⁶

We believe that providing an incentive for thorough and balanced internal reviews through the approach that we suggest is preferable to arbitration. Such internal review procedures— including an opportunity for the affected employee to be heard— provide a powerful incentive for both immediate supervisors and reviewing managers to make careful and fair decisions based upon legitimate reasons. These internal review procedures will guard against the kind of harsh employer decisions that were sufficiently offensive to prompt courts to develop the wrongful-discharge doctrine initially. Affording the employee an opportunity to be heard also enhances both the probability of balanced employer decisions and the likelihood that affected employees will accept the ultimate decision. Thus, we believe that encouraging formal internal employer review will reduce the number of wrongful discharge claims that result in litigation. Arbitration in contrast, would simply offer a different, although perhaps less costly, method of litigating discharge claims.

The suggested legislative approach eliminates the employment-at-will doctrine and substitutes a requirement of a legitimate business reason for an employee's discharge. Although such a proposal undoubtedly will prompt objections from employers, our experience persuades us that such objections would not be reflective of contemporary employer-employee relations.

Like it or not, the inescapable reality is that the doctrine of employment-at-will has been eroded by contemporary business practices, as well as by the judicial wrongful-discharge doctrine. We have found that most employers with relatively few employees do not understand that the employment-at-will doctrine might permit them to discharge employees without reason. Larger employers generally have personnel policies and procedures calculated to require legitimate business reasons for discharges. Our proposal would simply impose upon existing business practices a degree of formality intended to discourage truly "wrongful" discharges and to enhance the likelihood that ultimate discharge decisions will be accepted by both the employer and the employee.

The suggestion to give those employer decisions upheld upon internal review *prima facie* validity undoubtedly will provoke objections from employee advocates. Nevertheless, we believe that it is sound public policy to give employers some latitude to make decisions about employees in exchange for abolition of employment-at-will. Interestingly, Blades, one of the earliest and strongest advocates of the wrongful-discharge doctrine, recognized that "the employer's prerog-

216. Decker, *supra* note 56, at 200 (emphasis added).

ative to make independent, good faith judgments about employees is important in our free enterprise system” and that the wrongful-discharge doctrine carried with it the possibility of “vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion.”²¹⁷ Blades recognized as well that “[i]f the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained.”²¹⁸

In light of these concerns, Blades urged that employees should be held to a particularly high standard of proof in wrongful-discharge cases. Thus, Blades argued that employees “should be required in all cases” to prove their claims “by affirmative and substantial evidence.”²¹⁹ Indeed, Blades went so far as to suggest that “[t]he employee might even be held to a higher burden of proof than that normally required in civil actions.”²²⁰ While courts recognizing the wrongful-discharge doctrine have been quick to cite other passages from Blades—the balancing restraints he urged in his article have gone unnoticed, or at least uncited—our proposal addresses all the concerns articulated by Blades, by giving a presumption of validity to employer-reviewed decisions and by requiring employees to rebut that presumption by clear and convincing evidence.

Any disadvantage to employees from the higher burden of proof is offset by a statutory requirement imposed on employers of a legitimate business reason for discharge. In addition, we include an attorney’s fees provision in our proposal to give employees and their lawyers an incentive and the wherewithal to challenge employee dismissals sincerely believed not to be based on legitimate reasons. The attorney’s fee provision also contemplates awards in favor of employers as a disincentive to frivolous cases.

The final important feature in our proposal is a limitation on damages. We justify this limitation by an overriding need to bring more certainty to the consequences of wrongful discharges, and by our belief that in virtually all discharge cases, the harm for which a legal remedy should be provided is the loss of income—not emotional distress, slander, or invasion of privacy. Moreover, the strong incentive for formal internal review of discharges provides a vehicle for discouraging the kind of employer conduct that otherwise would give

217. Blades, *supra* note 24, at 1428.

218. *Id.*

219. *Id.* at 1429.

220. *Id.*

rise to these torts. Recognizing that some supervisors will engage in abusive conduct irrespective of existing legislation, we propose that liquidated damages be allowed if an employee shows by clear and convincing evidence that the employer was motivated by fraud or actual malice. The Montana Act follows this approach.

There are other potential legislative issues, but they are less central to our proposal than those addressed above. These include the appropriate statute of limitations. Montana chose one year. This seems realistic. Most genuine grievances will prompt the discharged employee to assert legitimate rights within one year. Prejudgment interest seems warranted in order to make a discharged employee whole.

Another issue is the degree to which interim earnings or income that could have been earned should be an offset to any recovery.²²¹ Our proposal provides an offset only for actual interim earnings. Litigating the issue of what an employee should have earned does not justify the time, effort and expense involved, especially if damages are limited to four years' earnings. Our experience also strongly suggests that employers who lose on the merits rarely prevail on mitigation of damages issues.

IV. CONCLUSION

In the judicial and legislative battles ahead, one thing seems clear: the decisions by the California Supreme Court in *Foley* and *Newman* and the Montana Supreme Court in *Meech* will have a major influence. Because of the California court system's size and influence, the weight of those decisions extends far beyond the state's borders.²²² *Foley* should help shape debate in cases pending in many other states. As one commentator noted, "[*Foley*] has become sort of mandatory law-school reading."²²³

It remains to be seen, of course, whether courts and legislatures across the land will take their cues from the rationales underlying the recent decisions by the California and Montana Supreme Courts, or whether those decisions are but temporary departures from the historic trend toward ever-enlarged wrongful-discharge theories at the expense of the employment-at-will doctrine.

We are persuaded that *Foley*, *Newman*, and *Meech* represent tem-

221. Many states, including Illinois, hold that, at common law, "the employee has the duty to mitigate damages by seeking other employment" and that, after a reasonable period of time, the employee "must accept suitable employment even if it pays less." M. SHEEHAN & J. WILNER, *WRONGFUL DISCHARGE UNDER ILLINOIS LAW 75-76* (The Cambridge Institute 1988).

222. Schmitt, *California High Court Makes Mark On Law By Limiting Damages*, *Wall St. J.*, Jul. 11, 1989, A1, col. 1 (eastern Ed.).

223. *Id.* at A14, col. 2.

porary respites in the ferment of wrongful discharge litigation. These decisions show that strong disagreements over many issues still exist and will likely continue to exist for the foreseeable future. Accordingly, a prompt and decisive resolution is needed. Thus, we propose a legislative solution and offer the model act described above and set forth in the following appendix.

APPENDIX A: MODEL EMPLOYMENT DISCHARGE ACT

Section 1: Title: This Act shall be known as the "Model Employment Discharge Act".

Section 2: Policy: It is the public policy of this state to provide for peaceful and stable labor relations; to protect employees not covered by collective bargaining contracts against wrongful discharges; to recognize the legitimate interest of employers in not having undue impediments to their conduct of their businesses; to prevent the uncertainty associated with arbitrary and unduly large damage awards; and to provide for an expeditious and efficient method of resolving disputes arising from the discharge of an employee. This Act shall be construed to effectuate this policy.

Section 3: Definitions: Unless the context requires otherwise, as used in this Act:

(a) "Person" shall mean one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, attorneys, agents, trustees in bankruptcy or receivers, or any other organization.

(b) "Employer" refers to any employer with fifteen or more full-time employees and shall include any agents of the employer.

(c) "Employee" refers to any individual employed by an employer as defined by this Act. The term "Employee" shall not include any person whose relationship with the employer is that of an independent contractor.

(d) "Labor Organization" shall mean any organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with an employer on the matters concerning wages, hours and other terms and conditions of employment, including the settlement of grievances.

(e) "Discharge" shall mean dismissal of any employee by an employer, including any layoff or suspension for a period of time greater than six months. The term "Discharge" shall include a constructive discharge. The term "Discharge" shall not include resignation, retirement, elimination of the job, layoff for lack of work, or any other cutback in the number of employees for a legitimate business reason.

(f) "Constructive Discharge" shall mean the termination of employment by the employee which was proximately caused by a situation, created by an act or omission of the employer, that a reasonable person would find so intolerable that termination of employment is the only reasonable alternative. A constructive discharge shall not result solely from a failure to promote or to improve wages.

Section 4: Scope: This Act shall apply to employees covered by a collective bargaining agreement between an employer and a labor

organization, except where the collective bargaining agreement expressly provides otherwise. This Act shall not apply to any municipal corporation, governmental agency or other governmental unit where civil service rules or regulations govern the employee's discharge. This Act shall also not apply to any employee who has freely entered into a written employment contract with an employer that includes express provisions governing termination.

Section 5: Action For Wrongful Discharge: The doctrine of employment-at-will does not apply to employees covered by this Act. An employer may discharge an employee covered by this Act only for a legitimate business reason. A discharge in retaliation for participating in the exercise of any right under this Act shall be considered a discharge for other than a legitimate business reason.

Section 6: Discharge Review Committees: (a) An employer may establish a "Discharge Review Committee" ("DRC") to review discharges of its employees. A DRC established pursuant to this Act shall consist of at least three persons who are directors, officers or employees of the employer. The procedures of an employer DRC shall include, as a minimum, the procedures set forth in subsections (b) through (g) of this Section.

(b) If an employer has established a DRC, any employee who contends that the employee's discharge violated the provisions of this Act may appeal the discharge to the DRC. Any person who had direct supervisory authority over a discharged employee at the time of the discharge or who was directly and materially involved in the decision to discharge may not serve as a member of a DRC for that employee's appeal.

(c) The employee shall commence such an appeal by providing the employer with written notice of the employee's intention within fifteen days of being notified of the employer's decision to discharge.

(d) Within fifteen days after the employer receives notice from the employee of the employee's intention to appeal the discharge, the DRC shall review the circumstances of the discharge to determine whether the discharge violated the provisions of this Act. The employee shall have a reasonable opportunity to present evidence to the DRC orally or in writing or both, at the employee's option, to support the appeal.

(e) Within ten days after reviewing the circumstances of the discharge, the DRC shall prepare a written statement setting forth the DRC's conclusions concerning whether the discharge violated this Act. The statement of the DRC shall be signed by each member of

the DRC and shall be delivered to both the employer and the employee by United States mail or personal delivery to their last known addresses.

(f) If the DRC determines that the discharge was wrongful under the provisions of this Act, the employee shall be reinstated in the employee's former position, or in another comparable position if appropriate. The employer shall also pay the employee any wages and fringe benefits that the employee did not receive as a result of the wrongful discharge. If the employer challenges the DRC's decision in accordance with Section 7(e) of this Act, the employer may place the employee on leave until the challenge is concluded but shall provide the compensation and benefits that the employee was receiving at the time of the discharge.

(g) Employers that establish DRC's shall maintain written descriptions of the DRC and its procedures, and shall furnish copies to all employees.

Section 7: Judicial Proceedings: (a) An employee may apply to any court of competent jurisdiction to enforce any of the provisions of Section 6 of this Act.

(b) An employee may bring a private civil cause of action for wrongful discharge for violations of Section 5 of this Act in any court of competent jurisdiction. If the employer had established a DRC meeting the requirements of this Act prior to the initial decision to discharge, such a cause of action may not be commenced unless the employee has appealed to the DRC by filing the written notice required by Section 6(c), and such cause of action may not be commenced until the time for the issuance of the statement required by Section 6(e) has expired.

(c) The employee shall have the burden of proving that the discharge violated this Act. If the employer, at the time of the discharge, had not established a DRC, the employee can prove a violation by a preponderance of the evidence. If the discharge was upheld by a DRC in accordance with the provisions of this Act, the employer's discharge shall be given a *prima facie* presumption of validity, and the employee may recover for wrongful discharge only if the employee proves by clear and convincing evidence that the discharge violated the Act.

(d) Any action for wrongful discharge shall be commenced within one year from the date of discharge, or within one year from the date that the DRC issues its written statement, whichever occurs later.

(e) An employer may apply to any court of competent jurisdiction to set aside a DRC decision and to allow the discharge by commencing an action within one year from the date that the DRC issues its statement as provided in Section 6(e). A DRC decision finding a

discharge to be wrongful, shall be given a *prima facie* presumption of validity, and may be set aside only if the employer proves by clear and convincing evidence that the discharge was for a legitimate business reason.

Section 8: Remedies: If a court determines that a discharge was wrongful, it may award the following relief:

(a) The employee may be awarded actual lost earnings and fringe benefits, together with interest thereon; provided, however, that under no circumstances shall the period for which such earnings and benefits are awarded exceed 4 years from the date of discharge. Actual interim earnings and fringe benefits must be deducted from the amount awarded for lost wages.

(b) An employee may recover as liquidated damages an amount not to exceed the amount awarded under Subsection 8(a) if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of Section 5 of this Act.

(c) In any action brought under the Act, the court may award the prevailing employer or employee reasonable expenses, including reasonable attorney's fees and costs.

(d) There is no right under any legal theory to damages for wrongful discharge for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in Subsections 8(a) - (c) of this Act.

Section 9: Preemption of Common-Law Remedies: Except as provided for by this Act, no claim of wrongful discharge may arise from tort or express or implied contract.

Section 10: Act Not Retroactive: This Act applies only to discharges subsequent to the effective date of this Act.

Section 11: Construction of Act: This Act shall be so construed as to effectuate its general purpose. Nothing contained in this Act shall be construed to diminish or otherwise limit the right of a labor organization or employee or group of employees to engage in any activity protected by existing law, state or federal.

