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# Safeguarding the Interest of At-Will Employees: A Model Case for Arbitration

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## SAFEGUARDING THE INTERESTS OF AT- WILL EMPLOYEES: A MODEL CASE FOR ARBITRATION

*Mary A. Bedikian*†

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This article represents the personal conclusions of the author and does not, in any way, reflect the policy, views or philosophies of the American Arbitration Association.

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## INTRODUCTION

Until the last several decades, courts have been reluctant to disturb or regulate the relationship between employer and employee. It was viewed in much the same way as a marriage — a private relationship, subject to internal controls. Today the pendulum has begun to swing in the opposite direction as the common law doctrine of employment-at-will<sup>1</sup> develops into an emerging and controversial issue in labor relations.

Through judge-made exceptions and legislative enactments, the principle of employment-at-will has been substantially eroded. Nevertheless, as an analysis of the cases will show, these responses have been, for the most part, improbable, spasmodic or unpredictable, engendering little consensus on the feasibility of or approach to safeguarding the interests of unprotected employees.<sup>2</sup> Disturbing questions regarding judicial jurisdiction and consideration of legislation intended to protect employees from the adverse effects of unjust termination have yet to be adequately decided.

Legislative attempts to resolve the problem have not encountered much success. An effort was made in 1980 when the Corporate Democracy Act was introduced in Congress.<sup>3</sup> The bill, which would have amended the National Labor Relations Act, sought to protect employees in the security of their employment by limiting the right of employers to discharge freely.<sup>4</sup> Proponents viewed the

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1. "Employment-at-will" means that employment relationships of unspecified duration are presumed to be at the will of either the employee or the employer. Either party may terminate the relationship without notice or cause.

2. Workers covered by collective bargaining agreements or individual employment contracts are generally afforded adequate protection through grievance and arbitration procedures.

3. H.R. 7010, 96th Cong., 2d Sess. (1980).

4. The proposed amendatory language incorporated into Title IV of the bill, "Rights of Employees," stated that it was a policy of the United States to "protect employees in the

legislation as a vehicle through which a more complete form of justice would be extended to employees not protected by collective bargaining grievance procedures. The opposition characterized the proposed legislative solution as an unacceptable encroachment on the employer's unrestrained right to terminate. This coalition effectively combined to swiftly defeat the bill at the end of the 96th Congress.

From the reception this bill has received in Congress, few legislators seem willing to impose limitations on entrepreneurial freedom by supporting measures which curtail the employer's right to terminate at-will employees.<sup>5</sup> Nor is it likely that this situation will change as federal legislation in this area does not appear imminent. In 1982 the International Labor Organization,<sup>6</sup> the United Nation's tripartite organization, passed a Convention<sup>7</sup> that protected nonunionized employees from discharge absent just cause.<sup>8</sup> The United States Government, favoring a non-binding approach to the termination of employment problem, joined employer delegates from other industrialized countries to defeat the Convention. They succeeded in obtaining a watered-down version of the original recommendation.<sup>9</sup> Although the Convention eventually passed, the failure to provide an enforcement mechanism rendered the

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security of their employment" by precluding dismissals predicated on the exercise of a legal, civil or constitutional right, or the failure to engage in unlawful conduct as a condition of employment.

5. Although experts' views differ, the weight of authority suggests that such legislation would not have calamitous consequences for the labor union movement. European countries which have employment-at-will legislation generally have strong union forces. The likelihood of federal or state legislation in the United States may ultimately turn on whether the union movement combines with other prevailing forces to extend job security rights to the unprotected private sector.

6. The principal purpose of the International Labor Organization, an arm of the United Nations, is to develop and monitor international labor relations. It also serves as a network base for training and providing technical assistance to employers and unions.

7. There are two types of measures on which ILO delegates vote. The nonbinding type, called a Recommendation, is intended to be strictly advisory, guiding national policy, legislation and practice. The other measure, a Convention, is binding, and has the effect of a formal treaty under national law.

8. BUREAU OF NATIONAL AFFAIRS, INC., 1982 SPECIAL REPORT ON THE EMPLOYMENT-AT-WILL ISSUE 121 (1983).

9. The original text placed the burden of proof on the employer to justify the termination. The ensuing compromise imposed the burden of proof on the employer only if a valid reason for the termination could not be established. Managerial employees were also excluded from the scope of coverage.

compromise provisions virtually ineffective.

These setbacks on the federal level reflect the mood of the state legislatures as well. Between 1981 and 1983, Colorado, Michigan, Wisconsin and Pennsylvania introduced legislation which restricted the right of employers to terminate employees where just cause did not prevail. The fierce battle between vested interests predestined the defeat of the legislation; these states were unable to surmount the obstacles created by the coalition of business and labor interests.

While legislative efforts to codify just cause terminations have failed, state courts have attempted to dismantle the at-will doctrine on public policy and implied contract grounds. To counteract this recent tide of judicial activism, employers are making changes in the workplace. Employee handbooks are being edited to ensure that statements regarding continued employment are omitted. Internal grievance procedures are being established to resolve employee termination disputes. Prospective employees are also being asked to sign agreements before hire, stating their understanding of the at-will nature of the employment relationship and agreeing to forego any litigation regarding termination.<sup>10</sup> Finally, when termination does result, employees are being offered substantial severance packages to dissuade them from challenging the termination in court. It appears, however, that these developments provide only a reaction, not a remedy, to the at-will conundrum. Private employee job rights thus remain tertiary at best.

Commentators and scholars who have addressed this subject maintain fundamental philosophical differences regarding the applications, exceptions and limitations of the employment-at-will doctrine.<sup>11</sup> The legal theories proposed to remove the sting of the doctrine's strict enforcement include: (a) implied contract (implicit

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10. *Ledl v. Quick Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984).

11. For a more extensive discussion of the employment-at-will principle see generally: Blades, *Employment-at-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employment Power*, 67 COLUM. L. REV. 1404 (1967); Estreicher, *At-Will Employment and the Problem of Unjust Dismissal: The Appropriate Judicial Response*, 54 N.Y. ST. B.J. 146 (1982). Howlett, *Due Process for Nonunionized Employees: A Practical Proposal*, 32 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 64 (1980); Robins, *Unfair Dismissal: Emerging Issue in the Law of Arbitration as Dispute Resolution Alternative for the Nonunion Workforce*, 12 FORDHAM URB. L.J. 437 (1984); Steiber, *Employment-at-Will: An Issue for the 1980's*, 36 PROC. ANN. MEETING INDUS. REL. RESEARCH A. (1983); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

in each employment relationship is a promise of continued employment, with termination requiring cause); (b) tortious conduct (abusive or oppressive discharges triggered by retaliation are contrary to public policy); and (c) constitutional safeguards (state action attaches to the corporate exercise of economic power, satisfying the requirement necessary to sustain a violation of free speech and associational rights under the first amendment). However, most of the proposals have either been rejected outright or utilized only on a limited basis. As a result, the courts have failed to adopt a unified approach, managing only to carve out isolated exceptions, fearful of straying too far into unfamiliar territory.

This Article provides an overview of the origins, modification and refinement of the traditional employment-at-will doctrine by highlighting and analyzing decisional law. Legislative attempts to bridge the innumerable gaps created by this case law, and to eradicate the harshness of the strict application of the at-will doctrine, are reviewed. With the "expectation" that the "pro-employee movement" will solidify, if not expand, in the next several years, the author presents and elaborates on an arbitration scheme, paralleling the collective bargaining archetype, to be used in the resolution of unfair dismissal cases. Finally, perspectives and speculations are offered regarding the future of the employment-at-will doctrine.

## I. THE COMMON LAW DOCTRINE OF EMPLOYMENT-AT-WILL: EARLY DEVELOPMENT

In 1884, a Tennessee court described the concept of employment-at-will:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.<sup>12</sup>

This brief but cogent summary of the termination option, in the absence of collective or individual contracts, elucidates the under-

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12. *Payne v. Western & Alt. R.R.*, 81 Tenn. 507, 518-19 (1884)(overruled on other grounds by *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915)).

lying philosophy and legal effect of the employment-at-will doctrine. In upholding the doctrine, the court reinforced the basic rule of mutuality of obligation — neither party is contractually bound to maintain the employment relationship. Termination by either party could occur with impunity.<sup>13</sup> This rule survived for decades after it was first articulated, rendering the employment relationship impervious to any form of external regulation.

The employer's unrestrained freedom to discharge was given renewed life in *Adair v. United States*,<sup>14</sup> a case which reaffirmed the rationale of mutuality and cloaked the employer's freedom to terminate at-will employees with constitutional protection. The Court found unconstitutional a congressional act which made it a criminal offense for a carrier engaged in interstate commerce to discharge an employee because of union membership. Justice Harlan, speaking for the majority, observed that "[t]he act [was] a bold attempt to regulate an ordinary relation of life — of master and servant — one hitherto supposed to be entirely within state control."<sup>15</sup> The Court further stated:

'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.'<sup>16</sup>  
(emphasis added.)

According to the Court, the legislation disturbed the mutuality of obligations theory, and represented "an arbitrary interference with the liberty of contract which no government [could] legally justify in a free land."<sup>17</sup> "[T]he liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."<sup>18</sup>

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13. The mutuality of obligation theory is an outgrowth of the bilateral contract where reciprocal promises which are legally sufficient are deemed binding and enforceable. Contract law does not regard the mutuality of obligation as a separate requirement for establishing a valid contract but rather as a test of consideration for mutual promises. Thus, if the employee has rendered services in excess of his regular and required services, an agreement will be enforced on behalf of the employee though he maintains the continuing right to terminate the relationship at any time.

14. 208 U.S. 161 (1908).

15. *Id.* at 163.

16. *Id.* at 173.

17. *Id.* at 175.

18. *Id.* at 174.

In reaching its decision that the act infringed upon the employer's personal liberty and right of property arising under the fifth amendment of the federal Constitution, the court vested the property right in the employer and not in the employee.<sup>19</sup> Thus, Congress could not, under the guise of regulating interstate commerce, control the employment relationship as well. The Court spoke decisively when it stated, in the final paragraphs of the opinion, that arbitrary actions which illegally invade the personal liberty and property rights of the employer would not be tolerated.<sup>20</sup>

The Harlan opinion reveals a basic sensitivity to economic liberty and freedom of enterprise. Admittedly, the historical and political setting of the times enhanced the Court's vulnerability toward elevating the freedom of contract to a constitutional property right. Traced to the *Magna Carta*, the due process terminology of the fifth amendment was, in early judicial history, frequently invoked to determine procedural questions. The notion that due process could be used to limit the exercise of legislative authority in protecting substantive rights assumed recognition and prominence after the legislative police power concept developed. Thus, any social legislation which imposed arbitrary or unreasonable restrictions by the government constituted a substantive due process violation, and hence it was unconstitutional.

Blunting the effect of the majority opinion was a compelling dissent by Justice McKenna. Observing that the liberty guaranteed by the fifth amendment "is not a liberty free from all restraints and limitations, and this must be so or government could not be beneficially exercised in many cases,"<sup>21</sup> he argued that the liberty of forming business relationships was indeed subject to the commerce clause authority of Congress. He also submitted that, where deemed in the public interest, the exercise of authority under the commerce clause assumed predominance over the provisions of the fifth amendment.

In his discussion of the purpose of the statute, Justice McKenna noted that the act contained an arbitration scheme for the adjustment of employee grievances which would "prevent strikes and the public disorder and derangement of business that may be conse-

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19. *Id.* at 180.

20. *Id.*

21. *Id.* at 182.



quent upon them . . . .”<sup>22</sup> This, he concluded, was a proper and legitimate legislative purpose, falling squarely within the rubric of Congress’ power to legislate interstate commerce.

The rigidity of the Supreme Court’s decision in *Adair* was tempered by the enactment of the National Labor Relations Act in 1935.<sup>23</sup> The centerpiece provision of the Act, section 7, encouraged collective bargaining and protected the workers’ exercise of freedom of association and self-organization. Dismissals predicated on the exercise of section 7 rights were repugnant to the tenets of the Act. Had *Adair* been decided subsequent to the passage of the Act, the result probably would have been different. The union membership could have been viewed as the primary, if not exclusive basis for discharge, and as such, a clear violation of section 7 rights. Nevertheless, the passage of the National Labor Relations Act symbolized the increased recognition that eliminating the cause of obstruction to the free flow of commerce arising out of industrial strife<sup>24</sup> was in the public interest.

The NLRA was the first chip from the bedrock of the employment-at-will doctrine, confirmed when the Supreme Court repudiated the constitutional protection of the employer’s absolute right to discharge by declaring the Wagner Act constitutional in *NLRB v. Jones & Laughlin Steel Corp.*<sup>25</sup> The mutuality of obligations theory which balanced the rights of employers and employees to terminate the employment relationship was no longer applicable without limitation. The protections afforded an employee by the Wagner Act mandated continuation of the employment relationships if it could be shown that the primary basis for employee termination was anti-union animus. Legislation was beginning to impinge on the employment-at-will doctrine and redefine, albeit under limited circumstances, its boundaries.

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22. *Id.* at 184.

23. Otherwise known as the Wagner Act, 29 U.S.C. §§ 151-68 (1970)(amended 1947 and 1959). The two amendments to the original Act, the Labor-Management Relations Act of 1947 (Taft-Hartley Act) and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) have enhanced and clarified the protected rights set forth in the original legislation.

24. Wagner Act, 29 U.S.C. § 151 (1970)(amended 1947 and 1959).

25. 301 U.S. 1 (1937). In upholding the constitutionality of the Act, the Court distinguished between the “normal” exercise of the right of discharge and the use of the right of discharge to coerce and intimidate employees from engaging in collective bargaining, holding that the purpose of the legislation was to preclude only the latter.

The common law doctrine was revisited in *Geary v. United States Steel Corp.*<sup>26</sup> The plaintiff, a tubular products salesman, filed an action against his former employer, seeking compensatory and punitive damages. Framed as a wrongful discharge, the employee contended that his termination was retaliatory, caused by his expressed reservations regarding the unsafe nature of the employer's product.<sup>27</sup>

Acknowledging that the power of an employer to terminate at-will was explicitly recognized in the Restatement of Torts,<sup>28</sup> and in general accord with the weight of authority, the Supreme Court of Pennsylvania conceded that economic conditions had radically changed since the employment-at-will doctrine had come into existence. The broader question presented by the factual matrix was whether the time had come to judicially restrict the employer's unfettered right to discharge his employees.

In its consideration of the case, the court did not focus on whether the employer knew or should have known the probable harmful consequences of the discharge, but whether the employer's conduct *constituted specific intent* to harm or accomplish an ulterior purpose.<sup>29</sup> The court's conclusion produced yet another interesting permutation of case law:

The most natural inference from the chain of events recited in the complaint is that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house. This hardly amounts to an 'ulterior purpose' much less to 'disinterested malevolence' . . . .<sup>30</sup>

Although a public policy argument was made regarding the employer's efforts to protect the public from unsafe products, the court disposed of it by concluding that the employee did not possess expertise in this area,<sup>31</sup> nor did his responsibilities include making judgments about the safety of products entering the stream of commerce.<sup>32</sup> For a justifiable claim to prevail, a clear mandate of public policy had to be violated.

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26. 456 Pa. 171, 319 A.2d 174 (1974).

27. *Id.* at 174, 319 A.2d at 175.

28. *Id.* at 177, 319 A.2d at 179.

29. *Id.* at 175, 319 A.2d at 177.

30. *Id.* at 177, 319 A.2d at 179.

31. *Id.* at 178, 319 A.2d at 179.

32. *Id.*

The seeds of what would soon become a public policy exception, however, took shape in the dissenting opinion.<sup>33</sup> Forcefully articulating the hazards of the majority opinion, Justice Roberts expressed the desirability of balancing the employer's right to discharge with the public interest. An employee who seeks "to protect his employer's reputation by requesting withdrawal of a defective and dangerous product . . . [should not have] his loyalty challenged and acknowledged by a dismissal."<sup>34</sup> Moreover, "the majority . . . fails to perceive that the prevention of injury is a fundamental and highly desirable objective of our society."<sup>35</sup> Where public interest is so overwhelmingly at stake, the right to freely discharge cannot be strictly enforced.

One of the principal concerns raised in the majority opinion was that by allowing a public policy exception, the inexorable result — an avalanche of lawsuits — would bear heavily on the judicial system. The increased caseload would be compounded by a shifting burden of proof requirement, rendering more difficult the decision-making function of the courts. The resultant body of law would be amorphous and ill-defined, incapable of providing more than a small measure of solace to the displaced worker.

The court's temerity in disturbing the employer's absolute right to discharge save for clear public policy violations has been examined by a number of commentators. Professor Summers, in one of the authoritative articles in the field,<sup>36</sup> states that "mutuality, as used in the court decision's context is a spurious concept, neither required as a legal principle nor acceptable as a social principle, and it can scarcely explain the courts' decisions. The more plausible explanation is that the courts are genuinely fearful of the 'uncharted territory'.<sup>37</sup> The court's recalcitrance in permitting a damage remedy for employees subject to the overreaching tactics

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33. Justice Roberts dissenting, declared: "It is a public policy which here qualifies the right. When a seemingly absolute right or the conditions of an existing relationship are contrary to public policy, then a court is obligated to qualify that right in light of current reality." *Id.* at 182, 319 A.2d at 183.

34. *Id.* at 180, 319 A.2d at 181.

35. *Id.*

36. Summers, *Protecting All Employees Against Unjust Dismissal*, 58 HARV. BUS. L. REV. 132 (1980).

37. *Id.* at 137. Summers concluded that the burden of proof problems and the increase in the number of cases render unlikely the passage of legislation to protect against arbitrary or abusive dismissals. *Id.* at 139.

of the abusive employer suggests the viability of the theory.

Despite the court's misgivings in extending protection to at-will employees, the *Geary* case represented an important development for those advocating limitations on the employer's unbridled right to terminate. The majority opinion conceded that the sacrosanct relationship between employee and employer was a proper subject of inquiry and regulation for the courts. A slight, but clear shift toward protecting the job rights of unorganized workers had occurred. The path was now clear for further development and refinement.

## II. THE EROSION OF THE DOCTRINE

### A. The Public Policy Exception

One of the most recognized legal theories modifying the at-will doctrine and extending the boundaries of employee rights is public policy.<sup>38</sup> This exception is triggered when termination contravenes clearly mandated or fundamental public policy.

Public policy, however, is an elusive term, causing several courts to reject it as an exception altogether, characterizing it "too vague."<sup>39</sup> But for courts which have been able to define the acceptable contours of public policy, the majority of cases fall into three categories: 1) discharge for whistle-blowing; 2) discharge in retaliation for exercising a vested or statutory right; and 3) discharge in retaliation for refusing to commit an illegal act. In each instance, the philosophical underpinning of the courts is that the employer's action constitutes the kind of egregious conduct which undermines legislative intent, and thus cannot be judicially sanctioned.

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38. The following states recognize this exception to the at-will doctrine: California, Connecticut, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Texas, Virginia (federal bankruptcy court), Washington, West Virginia.

39. *Hinrichs v. Tranquillaire Hosp.*, 352 So. 2d 1130 (Ala. 1977) *See also* *Bender Ship Repair v. Stevens*, 379 So. 2d. 594 (Ala.1980) (upholding the termination of an employee for serving on a jury); *Catanoa v. Eastern Airlines*, 381 So. 2d. 265 (Ala.1980) (rejecting a public policy argument as too general to permit analysis); *Scrogan v. Kraftco Corp.*, 551 S.W. 2d 811 (Ky.1977) (rejecting the argument that education was an established public policy by holding that law school attendance was a private concern best left to the legislature to determine otherwise).

### 1. *Discharge for Whistle-blowing*

This cause of action includes a broad spectrum of circumstances<sup>40</sup> where the employee discloses an employer's violation of criminal and civil law. As the name connotes, this exception more so than the others is a legislative creation. A few states, including Michigan,<sup>41</sup> have passed statutes which protect employees from being discharged for exposing the legal violations of others.

Jurisdictions with no legislative guidelines have taken differing positions on the issue of protection for the at-will employees. While equitable arguments such as unequal bargaining power and constitutional questions involving due process and adequate notice play a limited role in the judicial decision-making process of these courts, the majority hold that a strict construction of public policy interests, as enunciated by the legislature, is mandated.

Not only have these courts declined to stray from the public policy path, they have also refused to set it. *Murphy v. American Home Products Corp.*,<sup>42</sup> typifies the rationale behind the judicial hesitancy to usurp the legislative prerogative of formulating public policy. The New York Court of Appeals concluded that those jurisdictions which no longer support the common law at-will rule have done so merely to avoid or alleviate harsh results, and "if the rule of non-liability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan argu-

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40. In addition to Title VII of the Civil Rights Act of 1964 which protects employees from discharge for opposing an employer's discriminatory actions, other examples include: *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980)(objecting to an employer's mislabeling of his own products); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978)(uncovering the criminal activities of a management employee); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978)(reporting to the authorities an employer's violation of banking laws).

41. MICH. COMP. LAWS ANN. §§ 15.361-369 (1981 & Supp. 1985). Under the Whistleblowers' Protection Act which applies to private and public employers, employees must establish by clear and convincing evidence that they were discharged as a direct result of their reporting a violation or suspected violation of the law.

The only other states which have statutes modifying the at-will doctrine are New York (N.Y. LAB. LAW §§ 740-1 to 740-7 (McKinney 1985)) and South Dakota (S.D. COMP. LAWS ANN. § 60-1-3 (1978)) (establishing a presumption that employment is to continue for a period of time defined by the pay interval).

42. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

ments of individual adversarial litigants."<sup>43</sup>

However, where the at-will doctrine impinges on the political and associational freedoms guaranteed by state and federal constitutions, courts may be more inclined to rely on public policy dictates to protect first amendment rights, even though they are not clearly mandated. In *Novosel v. Nationwide Insurance Co.*,<sup>44</sup> the United States Court of Appeals found the discharge of a private employee who refused to support his employer's lobbying efforts actionable, reaffirming that "free communication is one of the most invaluable rights of man."<sup>45</sup> Public policy took on a less immutable appearance when the court concluded that conduct which "strikes at the heart of a citizen's social rights, duties and responsibilities," implicates public policy.<sup>46</sup>

The requirement of state action was adroitly circumvented by the court, noting that "the protection of important political freedoms . . . goes well beyond the question whether the threat comes from state or private bodies."<sup>47</sup> Corporations which have derived their status from the state cannot use their economic power to exact concessions from employees or coerce them to conform their opinions to the "corporate political agenda."<sup>48</sup>

Absent the interplay of constitutional freedoms, or a special whistleblowers' statute, judicial protection is rarely afforded. A recent Maryland case exemplifies the troublesome questions which the courts must tackle. In *Adler v. American Standard Corp.*,<sup>49</sup> the Maryland Court of Appeals held that an employee who was discharged in retaliation for articulating the improper and illegal practices of the employer, did not make out a claim for wrongful discharge. Although the court agreed that a strict interpretation of the at-will doctrine was no longer economically feasible, it declined to extend protection in this case because plaintiff did not factually document the averments in his complaint.

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43. *Id.* at 298, 448 N.E.2d at 90, 461 N.Y.S.2d at 238.

44. 721 F.2d 894 (3d Cir. 1983).

45. *Id.* The court used the federal Constitution and state constitution as the sources of authority to establish the "cognizable expression of public policy." *Id.* at 899.

46. *Id.* at 899.

47. *Id.* at 900. The court found the implication of "important public policy wherever the power to hire and fire is utilized to dictate the terms of employee political activities." *Id.* at 900.

48. *Id.* at 901.

49. 291 Md. 31, 432 A.2d 464 (1981).

Despite the conclusion reached by the court, an interesting analysis of the competing interests in a wrongful discharge case was offered:

[A]n at-will employee's interest in job security, particularly when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty, is deserving of recognition. Equally to be considered is that the employer has an important interest in being able to discharge an at-will employee whenever it would be beneficial to his business. Finally, society as a whole has an interest in ensuring that its laws and important public policies are not contravened. Any modification of the at-will rule must take into account all of these interests.<sup>50</sup>

## 2. *Exercising a Vested or Statutory Right*

It is well-settled that the employment-at-will doctrine cannot be used to defeat certain individual rights which have been guaranteed by the legislature. Perhaps the most obvious of these is the freedom from discharge grounded on sex, race or religion. Despite the court's general reliance on explicit legislative statements protecting employees who pursue a statutory right or duty, when the legislative intent is subverted by exercising the at-will aspect of the employment relationship, some courts will imply a cause of action for wrongful discharge.

This rationale has been primarily used in the workers' compensation context, first articulated and adopted in Indiana in *Frampton v. Central Indiana Gas Co.*<sup>51</sup> The Indiana Supreme Court held that a termination prompted by an employee's filing of a workers' compensation claim represented "an intentional wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages."<sup>52</sup> In so holding, the court likened the retaliatory discharge of employees to the retaliatory evictions of tenants, stating that an eviction caused by the tenant's reporting of housing code violations undermines statutory policy objectives. Under such circumstances, contract rights are subordinated to public policy considerations.

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50. *Id.* at 42, 432 A.2d at 470.

51. 260 Ind. 249, 297 N.E.2d 425 (1973).

52. *Id.* at 251, 297 N.E.2d at 428.

The law established in Indiana invaded other jurisdictions, with Michigan adopting the exception in *Sventko v. Kroger Co.*<sup>53</sup> The Michigan Court of Appeals held that an employee's termination predicated on the filing of a workers' compensation claim is fully actionable.<sup>54</sup> In reaching this decision, the court recognized that the Michigan common law rule applied, except where it could be shown that the employer's intention was to circumvent or defeat the public policy of the state.<sup>55</sup> Forcefully advanced, the court's decision precluded an employer from frustrating legislative policies which infiltrated the domain of public welfare by using the ultimate weapon of retaliation, involuntary termination.

Eight years later, the Court of Appeals extended *Sventko*, holding that a workers' compensation claim filed against a *previous* employer and not disclosed to the *present* employer did not defeat the allegation of unlawful or retaliatory discharge.<sup>56</sup> Indeed, the policy against hampering the filing of workers' compensation claims was so compelling that the court explicitly refused to formulate any limitations on the exception. "Discouraging the fulfillment of the legislative policy [to provide financial and medical benefits to the victims of work-connected injuries in an efficient, dignified, and certain form] by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy of our State."<sup>57</sup>

The *Sventko* rationale was further extended in *Hrab v. Hayes - Albion Corp.*,<sup>58</sup> when the appellate court found that an employee presented a valid claim for wrongful discharge if prompted by an intention to forestall the filing of a workers' compensation claim.

Cases which fall outside the realm of workers' compensation claims have been given a mixed review. That courts are typically reluctant to digress from established terrain is most notably exemplified by *Price v. Carmack Datsun*.<sup>59</sup> The Illinois Supreme Court

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53. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

54. *Id.* at 647, 245 N.W.2d at 153.

55. *Id.*

56. *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1984). The Illinois Supreme Court likewise expanded the doctrine of retaliatory discharges by an identical holding in *Darnell v. Import Industries, Inc.*, 105 Ill. 2d 158, 160, 473 N.E.2d 935, 938 (1985).

57. 131 Mich. App. at 191, 347 N.W.2d at 188.

58. 103 Mich. App. 90, 302 N.W.2d 606 (1981).

59. 124 Ill. App. 3d 979, 464 N.E.2d 1245 (1984).



held that an employee who intended to file for health care benefits, and was terminated, did not have an actionable tort for wrongful discharge.<sup>60</sup> Unlike *Novosel*, the conduct complained of did not “strike at the hearts of a citizen’s societal rights, duties, and responsibilities,”<sup>61</sup> thus failing to entangle public policy considerations.

On a fundamental level, the decision of the court to not tamper with the employer’s prerogative to terminate was unavoidable. A *right* conferred by statute, seeking legal redress for work-related injuries, can be distinguished from a *benefit* redounding to the employee by virtue of the employment relationship. The filing of health insurance claims falls within the ambit of a benefit.<sup>62</sup> A right affects society, a benefit represents a private and purely individual concern. The court was not prepared to expand the parameters of this narrow public policy exception. For a discharge to be considered arbitrary or abusive, it must contravene a statute or be repugnant to legislated public policy.

Other cases involving statutory rights include discharges of an employee for serving on a jury or filing legal action against the employer. While the majority of courts recognizing a public policy exception do not support an employee’s discharge for fulfilling a civic duty, the courts have not been so uniformly inclined when employee lawsuits have been involved.<sup>63</sup>

Apart from the workers’ compensation claim area, the treatment given to the vested or statutory right line of cases by the courts is not homogeneous. Ostensibly, the law remains in a state of flux.

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60. *Id.* at 982, 464 N.E.2d at 1247.

61. 721 F.2d at 900.

62. Only one court has recognized a wrongful discharge claim when the discharge was instituted to prevent the plaintiff from securing pension benefits. *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980).

63. A number of courts have addressed the issue of whether a cause of action for wrongful discharge is sustained when an employee sues his employer. *See Becket v. Welton Becket & Assoc.*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974)(employee discharged for refusing to desist from pursuing a shareholders’ derivative action). *De Marco v. Publix Super Markets, Inc.*, 360 So. 2d 134 (Fla. 1978), *aff’d*, 384 So. 2d 1253 (Fla. 1980)(employee discharged for failing to drop the daughter’s negligence action against the employer); *Kavanaugh v. KIM Royal Dutch Airlines*, 566 F. Supp. 242 (N.D. Ill. 1983) (employee properly discharged over a wage dispute which escalated into a threat of litigation).

### 3. *Refusal to Commit an Illegal Act*

Conceptually, there is little difficulty in treating this type of retaliatory discharge as a public policy exception. When an employee is faced with making a choice between violating the law or risking termination, the interplay of public policy considerations is evident. As early as 1959, the California Court of Appeals unanimously held that a union's discharge of its business agent for refusal to provide false testimony before a legislative committee was repugnant to the spirit of the law, thus contrary to public policy mandates.<sup>64</sup> The court refused to have a hand in conduct which impaired the administration of justice.

However, as previously noted, courts have often declined to sustain a cause of action absent legislative guidance, especially when the motives of the employer are not necessarily in bad faith. This judicial hesitance to infringe upon the legislative domain was apparent in *O'Neill v. ARA Service Inc.*<sup>65</sup> There an employee who was discharged for accusing company executives of defrauding the company was denied a claim for wrongful discharge, absent a showing of specific intent to do harm to the employee or to interfere with the fulfillment of a public policy objective.<sup>66</sup> Judicial activism would not be used to create new causes of action. Rather, this function would be relegated to the legislative arm of the government.

The above analysis indicates that the most difficult task of the courts is to determine what constitutes public policy. When dealing with Title VII of the Civil Rights Act of 1964, or OSHA statutes, courts are able to act expeditiously and decisively as the public policy considerations, shaped by legislative history, are clear-cut. And the courts may intercede, as *Novosel* exemplifies, when

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64. The landmark case which first established a public policy exception to the at-will doctrine is *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). In reversing the trial court's decision, the appellate court held that an employer may not discharge an employee who refused to perjure himself before a legislative investigatory committee. The court noted that to hold otherwise would condone illegal acts:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

*Id.* at 187, 344 P.2d at 27.

65. 457 F. Supp. 182 (E.D. Pa. 1978).

66. *Id.*

public policy implications interface with constitutionally guaranteed liberties.<sup>67</sup>

Courts are palpably reluctant to declare a discharge as against public policy when the legislature has not made a definitive public policy declaration. Reporting the questionable accounting practices of an employer,<sup>68</sup> or the criminal activities of fellow employee to an employer,<sup>69</sup> will generally not suffice. Neither will allegations unsupported by extensive factual documentation.<sup>70</sup> Nebulous philosophical or equitable arguments will not survive. Courts generally refuse to extrapolate from other sources of the authority which should emanate from the legislature. As of this writing, the majority of jurisdictions so hold.

## B. The Implied Contract Exception

Although less recognized than the public policy exception, another substantive legal theory on which courts rely to protect employees from unjust dismissals is the implied contract exception.<sup>71</sup> The exception is principally derived through the interpretation of employee handbooks, personnel manuals and oral representations made by the employer regarding an employee's longevity of ser-

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67. Relying on the federal Constitution and state constitution as the sources of public policy, and not a state statute, the court deftly applied state action proscriptions of governmental employees to private employers. Finding that "the right of political expression of a corporation enjoys a transcendent constitutional position regardless of other societal or constitutional interests," the court expanded public policy dictates to preclude discharge by private entities. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983). However, a perceptible and predictable retrenchment from *Novosel* occurred in *Staats v. Ohio Nat'l. Life Ins. Co.*, 118 L.R.R.M. 3242 (W.D. Pa. 1985). The plaintiff, a male, was discharged when a woman other than his spouse accompanied him to the company's national convention. Citing *Novosel* as germane authority, plaintiff alleged that his discharge violated public policy because it abridged his right of expression and free association. The court conceded that while the freedom of association is an important social right, it is not a significant and recognized violation of public policy considerations.

68. *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).

69. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

70. *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981). The Maryland Court of Appeals held that "'bold allegations' (falsification of corporate documents and other illegal practices) which were not factually documented would not provide adequate grounds upon which to have a decision of *undeclared* public policy of this state." (emphasis added.)

71. The following states recognize the implied contract theory: California, Connecticut, Idaho, Maine, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma and Washington.

vice. Whether a promise regarding job security can be inferred from these circumstances is pivotal in determining the formation of a contract. The parties' intentions, indispensable to effectuating the terms of their understanding, is controlling on the issue of whether an inference of continued employment is proper.<sup>72</sup>

The implied contract exception was shaped initially in a Michigan case, *Toussaint v. Blue Cross/Blue Shield*.<sup>73</sup> Holding that a supervisory employee had reasonable and legitimate expectations that discharge would occur only for cause,<sup>74</sup> the Michigan Supreme Court observed:

The question whether the terminations of the plaintiffs' employment was in breach of the contract, i.e. whether the terminations were for cause and in compliance with the defendants' procedures, was also one for the jury. A declaration that the employee was discharged for unsatisfactory work is subject to judicial review: the jury may decide whether the employee was, in fact, discharged for unsatisfactory work. The promise to terminate employment for cause only would be illusory if the employer would be permitted to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the employer's decision if the "cause" contract is to be distinguished from the "satisfaction" contract.<sup>75</sup>

The scope of the implied contract exception, firmly established in *Toussaint*, was broadened considerably in *Novosel v. Nationwide Insurance Co.*<sup>76</sup> Adopting a doctrine historically applied to collective bargaining agreements,<sup>77</sup> the appellate court held that a contractual just cause requirement could be fashioned from an employer's custom or practice. Although the constitutional considera-

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72. If the parties in an employment relationship expressly agree to not impose any limitations on the right to terminate, the at-will doctrine would be applicable.

73. 408 Mich. 579, 292 N.W.2d 880 (1980).

74. *Toussaint* established that when oral promises or written representations of job security are made, the burden of proof then shifts to the employer to prove that the discharge was motivated by sufficient and well-documented cause.

75. 408 Mich. 483, 292 N.W.2d 883 (1980).

76. 721 F.2d 894 (3rd Cir. 1983). See *supra* note 45 and accompanying text.

77. The doctrine of past practice is significant in labor-management relations, particularly as it affects the arbitration process. Defined as an overlay to the express terms of the collective bargaining agreement, a superstructure of understanding which gives meaning and practical significance to the expressions in the contract, these practices and customs become embodied in the agreement, and are thus as enforceable as the written provisions. Most arbitrators who have rendered decisions on past practice contend that to be binding, it must be unequivocal, enunciated and pursued as a course of action, and firmly established for a fixed period of time

tions discussed in section A played a significant role in the court's decision, the additional rationale combined with the constitutional issues to further obscure the court's formulation of public policy. Thus, *Novosel* appears to extend the parameters of the implied contract theory beyond those of many jurisdictions by permitting recovery if a custom or practice prevails, as opposed to mere reliance on implied statements in handbooks, or oral representations.

Despite *Novosel* and subsequent cases,<sup>78</sup> courts have made it clear that they do not wish to create a uniform just cause requirement for all discharges. Instead, the courts may be seizing on existing causes of action to branch out into other areas. In the last several years, Michigan courts and others have developed a new cause of action as a logical outgrowth of the implied contract case, holding that an employee may maintain a *tort* action against his employer for *negligent* breach of an implied contract. A recent Michigan case illustrates this development.

In *Chamberlain v. Bissell, Inc.*,<sup>79</sup> the federal district court expanded the remedial scope of an implied contract breach by holding that an employer who did not establish a breach through his actions may nevertheless be liable in tort for the negligent performance of the contract. Thus, the employer is held to a duty of fair dealing in the evaluation of an employee, and the breach of that duty can expose him to substantial monetary damages.<sup>80</sup>

In looking at the underlying reasoning of the decision, a desire to alleviate an otherwise harsh result seems to have been the rationale behind the court's thinking, rather than an attempt to alter the employer-employee relationship. This is particularly apparent when considered in light of *Valentine v. General American Credit, Inc.*,<sup>81</sup> a case which caused a slight retrenchment in the deviation of the at-will doctrine. Although an express employment contract was involved, the plaintiff claimed a right to exemplary damages

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78. See *Banas v. Matthews Int'l Corp.*, 116 L.R.R.M. 3110 (Pa. 1984) (an employee manual which becomes part of the parties' employment contract does not give an at-will employee a definite length of employment.) Compare with *Wolk v. Saks Fifth Ave. Inc.*, 728 F.2d 221 (3rd Cir. 1984) (while employee handbooks can create just cause requirements, Pennsylvania courts did not intend to create a "uniform just cause requirement for all discharges.") (Emphasis added.) *Id.* at 225.

79. 547 F. Supp. 1067 (W.D. Mich. 1982).

80. *Id.*

81. 420 Mich. 256, 332 N.W.2d 591 (1984).

based on mental distress.<sup>82</sup> The court, relying on the general rule denying recovery for mental distress damages, held that “absent allegations and proof of tortious conduct existing independent of the breach,”<sup>83</sup> exemplary damages may not be awarded in common law actions brought for breach of a commercial contract.

The implied agreement cases as a group are difficult for the courts to review. Courts must look at general principles of contract law, and objectively determine the parties’ intentions, enforcing job security assurances where it can be ascertained from the surrounding circumstances that the parties did not desire an at-will employment relationship. The extent to which the courts elect to pierce the protective shield of the employer-employee relationship depends, by and large, on the equities — length of employment, nature and practice of the industry and the background and employment track of the employee. It would seem that while courts may be loath to dictate that an employment relationship continue where it is the intention of the employer to sever it, courts also feel compelled to protect traditional contract principles, ensuring that where essential in preventing harm or abusive displacement, they will strike down the at-will doctrine.

### C. The Good Faith and Fair Dealing Exception

Recently, several courts have recognized an implied covenant of good faith and fair dealing in employment contracts, even though the employment relationship is at-will.<sup>84</sup> This covenant assumes that neither party will do anything which will injure the rights of the other to receive the benefits of the contract.

Confusion emanates as to whether violations of the covenant sound in tort or contract. Employer actions which mislead an employee, and constitute fraud, have been held to violate the implied covenant of good faith and fair dealing.<sup>85</sup> Since such actions sound

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82. *Id.* at 258, 332 N.W.2d at 592.

83. *Id.* at 263, 332 N.W.2d at 593.

84. This exception is recognized in only three states - California, Massachusetts and Montana.

85. In *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The court suggested that longevity of service coupled with the internal procedures for adjudicating employee disputes, creating a form of promissory estoppel which required just cause to sustain a termination. “The covenant of good faith and fair dealing by the employer . . . insure that neither contracting party will do anything which would injure the

in tort, punitive damages are awardable for the most egregious of cases, broadening the scope of remedies typically available to at-will employees.

The most recent and expansive treatment of the covenant was achieved in *Crenshaw v. Bozeman Deaconess Hospital* where the Montana court extended its application to probationary employees.<sup>86</sup> The groundwork for this case was laid in *Gates v. Life of Montana Insurance Co.*,<sup>87</sup> where the court held that this covenant exists independent of the terms of the agreement of the parties. Any violation of this covenant is a tort which qualifies for punitive damages.

While three jurisdictions recognize the viability of the good faith and fair dealing doctrine, Michigan does not. Nor does it appear to be on the verge of extending formal recognition. The Michigan Court of Appeals, operating in a judicial vacuum spawned by *Prussing v. General Motors Corp.*,<sup>88</sup> is visibly reluctant to enter the changing frontier of the law. In *Schwartz v. Michigan Sugar Co.*,<sup>89</sup> the panel refused to sustain plaintiff's action grounded in contract, for . . . if it [the doctrine of implied good faith and fair dealing] is to be judicially mandated that change should come from the Supreme Court."<sup>90</sup>

Courts have generally treated this nebulous employment-at-will exception quixotically; they do not view it to be within their authority to penalize employers who act in good faith. Only where it can be shown that an employer has acted vindictively or maliciously are the courts likely to intercede and imply an enforceable duty to deal in good faith.

The most perplexing aspect in this area of wrongful discharge law is the courts' inconsistent and erratic treatment of the facts. An implied covenant of fair dealing and good faith, which purports to exist independent of any other contractual obligation of the parties, and a breach of the covenant, should sound in contract. Yet several courts, taking the lead from Montana, have characterized

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rights of the other to receive the benefits of the contract. It is unconditional and independent." *Id.* at 453, 168 Cal. Rptr. at 728.

86. \_\_\_\_\_ Mont. \_\_\_\_\_, 693 P.2d 487 (1984).

87. 196 Mont. 178, 638 P.2d 1063 (1982).

88. 403 Mich. 366, 269 N.W.2d 181 (1978).

89. 106 Mich. App. 471, 308 N.W.2d 459 (1981).

90. *Id.* at 473, 308 N.W.2d at 463.

the covenant as a duty, permitting them to conclude that a breach represents tortious conduct. This may well be the legal stepping-stone for allowing punitive damages. The theoretical confusion becomes even more obfuscating when the courts, not knowing whether to label the doctrine a duty or a covenant, conclude that its violation is both a breach of contract *and* tort, qualifying for compensatory as well as punitive damages.

It is understandable that the majority of courts consider this area to be a radical departure from the common law, and avoid it entirely. Clear legal analysis of the issues is hampered by the vacillation of the courts who have elected to intercede to protect employee rights. For the majority of courts, however, this type of modification of the at-will doctrine remains the prerogative of the state legislature, not the judiciary.

#### D. Other Considerations Triggering an Exception

Some of the more enterprising jurisdictions have entertained new ideas regarding the restrictions applicable to the at-will doctrine. These formulations, divergent at best, proceed along two lines: where independent consideration is provided by the employee in addition to performance of services in exchange for wages,<sup>91</sup> and where a corporation, which yields substantial economic power over employees, compels them to engage in conduct jeopardizing the public interest.<sup>92</sup>

The few jurisdictions<sup>93</sup> which have carved out exceptions to the

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91. See *Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942) (termination of a plaintiff who had relinquished all interest in his established business to accept employment with the defendant constituted a breach of contract.) Compare *Weber with Orsini v. Trojan Steel Co.*, 219 S.C. 272, S.E.2d 878 (1951) (moving one's family and quitting a job was not sufficient independent consideration to warrant sustaining a breach of contract claim.)

92. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) The court permitted a cause of action in tort for retaliatory discharge of an employee who had provided information to the authorities regarding the criminal conduct of a fellow employee. The supreme court noted that "[t]here is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a state's criminal code . . . . There is no public policy more important or more fundamental than one favoring the effective protection of the laws and property of citizens." *Id.* at 129, 421 N.E.2d at 879.

93. Florida: *Chatelier v. Robertson*, 118 So. 2d 241 (Fla. 1960)(employee provided additional consideration for this employment in exchange for a guarantee of lifetime employment); Illinois: *Milton v. Illinois Bell Tel. Co.*, 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981)(court sustained an employee's emotional distress claim against an employer who had required the employee to falsify work reports used in billing customers); Minnesota: *Com-*



at-will rule on the basis of "other considerations" seem to focus their attention on the extent of the detriment to the employee (an extension of the promissory estoppel doctrine in contract law), unequal bargaining power between employer and employee, and occasionally, the employee's longevity of service. This area is otherwise too novel and not widely recognized; any other comments or conclusions would be premature.<sup>94</sup>

### III. THE LEGISLATIVE RESPONSE: THE NEED FOR STATUTORY GUIDELINES

The inchoate body of law created by judicial interpretation has refueled the debate regarding the type of remedial measures most likely to provide meaningful protection to discharged unorganized workers. Even though courts are not permitted to legislate, some have engaged in judicial activism. The case law analysis in section II reveals the flaws of those courts who have been persuaded by equitable considerations to penetrate the otherwise impregnable wall of the employment-at-will doctrine.

To fill the gaps left by judicial vicissitudes, inadequate unionization, and corrective but insubstantial voluntary employer action,<sup>95</sup>

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*pare* *Albers v. Wilson Co.*, 184 F. Supp. 812 (Minn. 1960)(it was determined that the subject contract was not supported by extra consideration) *with* *Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 200 N.W.2d 155 (1972) (opposite result was achieved based upon an exchange of property valued at \$350,000.00); North Dakota: *Sjaastad v. Great N. Ry. Co.*, 155 F. Supp. 307 (N.D. 1957) (the court held that a railroad employee subject to a collective bargaining agreement is not an at-will employee).

94. Although beyond the scope of this Article, a limitation on the subject of unjust dismissals is federal pre-emption. Sources of pre-emption include: 1) § 301 of the Labor-Management Relations Act; 2) the National Labor Relations Act; and 3) the Employee Retirement Income Security Act (ERISA). For a more detailed discussion on this subject, see C. BAKALY & J. GROSSMAN, *MODERN LAW OF EMPLOYMENT CONTRACTS - FORMATION, OPERATION, AND REMEDIES FOR BREACH* (1984) and Sulichem & Lewis, *Recent Developments in Michigan Wrongful Discharge Law*, 64 MICH. B.J. 1086 (1985).

95. Professor Stieber has ably discussed the ramifications of these unpalatable alternative courses of action. See Stieber *supra* note 11. As to the process of unionization, Professor Stieber observes that if not expressly exempt from the National Labor Relations Act, military, supervisory and railroad employees, then the likelihood of organizing for the purpose of engaging in collective bargaining is not substantial. Characterizing the union movement response as "an oversimplification and an illusory solution," he notes that many workers who join unions do not receive the benefits of unionization because they represent a minority of the bargaining unit in which they are employed. Resort to voluntary programs developed by responsive employers, while available, rarely occurs. And finally, reliance on the judiciary to provide the solution is, as the case law discussion suggests, ill-placed. Even

some states have endeavored to devise statutory guidelines, providing a more concrete and uniform approach in extending job security protection. These statutes were to supplement the legislation abrogating the mutuality doctrine in certain instances — civil rights acts, OSHA statutes, fair employment practices, whistleblower protective legislation and public employment acts. This section of the Article highlights the response of several legislatures<sup>96</sup> in their efforts to pass just cause legislation.

### Michigan

Largely intended to build on the law of *Toussaint*,<sup>97</sup> on June 17, 1982, House Bill 5892 was introduced and referred to the Committee on the Judiciary. The bill prohibited the unfair discharge of certain groups of employees and established procedures for resolving disputes.

The Michigan bill prohibited discharges except for just cause, but it did not provide a statutory definition of the threshold requirement. Seemingly, its parameters were to be developed by the arbitration process, borrowing the criteria and standards employed in the unionized sector. A “two-tiered structure” for claim resolution was established in Section 5 of the bill. The aggrieved employee, upon the filing of a complaint, would have the matter submitted to mediation. The mediation process would continue for a period of thirty days. If mediation did not yield a settlement, arbitration could be invoked.

Comprehensive in scope, the Michigan bill formulated elaborate procedures for the selection and payment of arbitrators, prescribed

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though the courts have interceded where employer conduct has bordered the egregious or vindictive, they remain “laissez faire.” *Id.* at 24-25.

96. Just-cause legislation was also considered, but not enacted, in the following states: Colorado (Colorado H.R. 1485 (1981)); Connecticut (Gen. Assembly 38 (1973), 5179 (1974) and 5151 (1975)); New Jersey (Gen. Assembly 1832 (1980)).

97. Although the bill did not provide a definition of just cause, it did contain a procedure for notification to a discharged employee. Within fifteen days after the discharge, the employee was to receive a written notice identifying all reasons prompting the termination, and informing him of his right to request arbitration if he wished to grieve the action. The author contends that the reason a just cause definition was omitted is because Michigan, a heavily organized state, has a solid body of law created by arbitrators over the last 30-40 years. Standards defining just cause are firmly enshrined in the law of arbitral jurisprudence. For a more extensive assessment of the Michigan bill, see Mennemeier, *Protection From Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982).

rules for oral hearings, identified limitations on arbitral authority, and established a broad review and enforcement mechanism, paralleling, except for one exception, the Michigan General Court Rules on general contractual arbitration.<sup>98</sup> Despite all the merits, the proposed legislation on unjust discharge was defeated in December of 1982, upon conclusion of the legislative term. The bill was never reported out of committee.

Apart from general resistance by vested interests opposed to altering the *status quo*, there was specific resistance voiced during the bill's pendency. Employers were reluctant to support a bill which would erode managerial authority and personnel decision-making. Unions, on the other hand, were opposed to the legislation because they felt it provided the type of protection which only the collective bargaining process could achieve. As one commentator recently noted on this subject: "[L]ittle support for such a proposal can be expected from unions, as it would not be in their self-interest to advocate legislation which would eradicate part of the incentive for workers to join and form unions."<sup>99</sup>

### *Pennsylvania*

The Pennsylvania House bill, introduced and referred to the Committee on Labor Relations in July of 1981,<sup>100</sup> closely paralleled the Michigan legislation,<sup>101</sup> with mediation constituting the first step in the remedies process. Failure to resolve the dispute during the thirty days after the commencement of mediation entitled the employer and the terminated employee to proceed to arbitration, which is final and binding.

The proposed measure was comprehensive in coverage. The legislation described the effect of a final and binding arbitration procedure, and then proceeded to address the limited right of judicial review, citing all bases upon which courts could disturb an arbitra-

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98. *Id.* Section 13 of the bill authorized a court of appropriate jurisdiction to review the arbitrator's award if it was not "supported by competent, material, and substantial evidence on the whole record." This expansive standard is used by the courts to review administrative decisions. *Id.*

99. *See* Steiber, *supra* note 11, at 25.

100. H.R. Res. 1742.

101. The Pennsylvania bill did not provide a just-cause definition. The amendatory language only indicated that an employer could not discharge an employee except for just cause.

tor's award.<sup>102</sup> Absent such circumstances, arbitrators' remedies would be sustained.<sup>103</sup> The politics associated with statutory reform interceded; the Pennsylvania bill was defeated at the end of the legislative term.

### *California*

The California bill of 1984, similar more in substance to that of Michigan,<sup>104</sup> closely adhered to the recommendations of the Special Committee of the State Bar of California. Over vociferous employer dissent, the legislation was introduced. The bill, unlike Michigan's and Pennsylvania's, established a fund for employer and employee contributions to defray the costs of administering the act, and permitted the prevailing party to collect attorney fees and costs associated with the "med/arb" system if the wrongful discharge was based on harassment.

The California legislature's attempt to infuse some accountability and balance in the historic relationship between employer and employee was unsuccessful. The original bill underwent major revisions during the deliberation stage. Some of the advocates of the legislation withdrew their support, contending that the amendments were "antithetical to the recommendations (of the State Bar of California) and made a mockery of any attempt to arrive at a balanced approach which would take into account the interests of both employer and employee."<sup>105</sup>

Two bills were reintroduced in the legislature in 1985 in response to the defeat of the 1984 package, with neither surviving the end of the session.<sup>106</sup> Failure to enact such legislation leaves California with the common law.

Despite the need for more predictability in resolving wrongful

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102. Most general arbitration statutes provide for a limited right of judicial review. Section 9 of the Pennsylvania bill dealing with judicial review was restrictive in scope; enforcement or deference to an arbitrator's award would be achieved except where an arbitrator was without or exceeded his jurisdiction, or where the award was procured by fraud, collusion or other unlawful means.

103. Permissible remedies included: a) sustaining the discharge; b) reinstating the employee with no partial or full back pay; or c) a severance payment.

104. Assembly Res. 3017 (1984).

105. Letter from Professor Gould to Members of the Labor and Employment Committee, May 2, 1984.

106. Assembly Res. 1400 (1984); S. Res. 1348 (1984).

discharge actions, the above overview of legislative endeavors suggests that statutory protection remains, for the moment, elusive. If legislation is to be enacted, the interaction and political leanings of specific groups will be instrumental. These groups comprised of employees, employers, trade union and the organized bar, are clearly influenced by a number of different factors:

*Employees* in the nonunionized private sector are in a precarious and vulnerable position, subject to the arbitrary actions of management. These employees would benefit from the passage of just cause legislation providing a more secure work status.

*Employers* have historically been opposed to measures which would restrict their absolute right to terminate. Despite the large jury verdicts in isolated instances where employer conduct was considered oppressive, the majority of jurisdictions extend employee protection only under limited bases. The public policy exception discussed earlier, an outgrowth of tort theory, is recognized as a viable defense in only 20 jurisdictions.<sup>107</sup> Employers must either risk jury verdict excesses or begin to support legislation which contains a mediation or arbitration component.

*Trade unions* generally present dichotomous views. On the one hand, they do not wish to support legislation which protects employees from wrongful discharge, the very protection they have, through the negotiation and collective bargaining process, provided to their membership. Their ability to organize is proportionately related to their ability to protect employees from arbitrary dismissal. On the other hand, they are often regarded as the "theoretical spokesmen for workers," thus favoring legislation which extends new rights to employees.

*The legal profession* has ambivalent reactions toward wrongful discharged legislation. The plaintiffs' bar advocates no limitations on an employee's right to seek legal recourse while the defense bar does not wish to increase the legal exposure of defendants by legislation which creates new causes of action. However, if courts continue to grope for ways to extend protection to unorganized employees, attorneys as a group would probably support legislation as long as it contained an alternative form of dispute resolution — mediation, arbitration or a combination of the two processes.

A shift in movement by any of these interest groups could dra-

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107. See *supra* note 38.

matically alter the prospects for the enactment of legislation. Likelihood of passage may also be enhanced if the legislature does not attempt to statutorily define just cause, relying instead on the unique body of industrial jurisprudence to supply the standard and application.

Despite the failures of states to modify the employment-at-will rule by legislation, the demand and need for protective legislation remains. Courts may not be able to provide the type of judicial review such wrongful discharge cases often require. Substantively, courts lack the expertise and legal redress does not always adequately deal with the concerns inherent in the common law of the shop.

These deficiencies suggest the inevitability of legislation to reduce the philosophical cleavage left by the decisional law. The next section of the Article will address the means of extending substantive and procedural protections to at-will employees through a state mandated arbitration scheme.

#### IV. AN ARBITRATION MODEL FOR THE AT-WILL DISCHARGE

##### A. The Arbitration Process

Legal writers who have addressed the doctrine of employment-at-will within the context of legislative reform have proposed several alternative procedures<sup>108</sup> in lieu of litigation to resolve wrongful discharge disputes. Although all of these procedures are protective of employee rights, the procedure evoking the most acclaim is arbitration.<sup>109</sup>

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108. See Cox, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245 (1963); Mennemeier, *Protection From Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982). See also *supra* note 11.

109. Two of the alternatives proposed are fact-finding and mediation. Fact-finding is an investigative process involving a neutral or impartial third-party who determines and studies the facts and relative positions of each party in an impasse, and focuses on major issues. Sometimes the fact-finder is only required to report his/her determinations of facts and hope the facts are so clear as to provide the parties with an answer to their dispute. Frequently, the impartial third-party is empowered to make recommendations on the basis of the facts presented. However, these recommendations are not binding on the parties. They are designed to serve as the basis for further negotiations and subsequent agreement. Mediation, on the other hand, is a process that provides for the intervention of an acceptable neutral or impartial third party who assists and persuades the contesting parties in reaching a mutually acceptable settlement of their differences through appropriate means of reconciliation, interpretation, clarification, suggestion and advice. This process is purely voluntary.

Arbitration for years, the mechanism for resolving collective bargaining impasses and rights grievances, has long been accepted as an effective non-combative method of dispute resolution. Pundits of history have traced its roots to the ancient Babylonian empire under Hammurabi. When Hammurabi revised the legal codes in Babylonia, his new system was partially superceded by a civil procedure which, in form and substance, conformed to arbitration.<sup>110</sup> Under the code, the plaintiff would apply directly to a functionary called the *mashkin* for dispute resolution.<sup>111</sup> The functionary's role was to settle the case without invoking the legal process.<sup>112</sup> A judge was not permitted to disturb the "arbitrator's" sentence once it was recorded in writing.<sup>113</sup> If the dispute was not settled through this process, the matter was then submitted to the regular civil courts presided over by "professional judges."<sup>114</sup> This code ultimately influenced the civilization of near Eastern countries, molding the contours of their legal systems.

The early Anglo-Norman period contains glimmerings of the use of arbitration. Although the historical literature does not make the distinction between jury determinations and arbitration proceedings, both systems involved a submission whereby the parties might "put themselves upon (*ponunt se super*) a jury or upon one or more men as arbitrators of a dispute."<sup>115</sup>

The idea that arbitration, not the courts, could be used to settle civil disputes gained further recognition in the Kentish laws of Aethelberht (circa 602-603) which mentioned the use of a voluntary impartial tribunal.<sup>116</sup>

A less skeletal perspective on the arbitration process was revealed in the laws of Hlothere and Eadric (circa 673-685) where this description of an arbitration proceeding is found:

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At any time in the process, either party can reject further participation by the mediator, who has no formal tenure and is completely subject to the desires of the parties. The mediator has no power to make decisions or to force the parties to accept any suggestions or recommendations which the mediator might make for the settlement of the dispute.

110. C.L. WOOLLEY, *THE SUMERIANS* 93 (1961).

111. *Id.*

112. *Id.* at 94.

113. *Id.*

114. *Id.*

115. See Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 *ARB. J.* 193 (1962).

116. *Id.* at 195.

If one man charges another, after the other has provided him with a surety, then three days later they shall attempt to find an arbitrator, unless the accuser prefers a longer delay. Within a week after the suit has been decided by arbitration, the accused shall render justice to the other and satisfy him with money, or with an oath, whichever he [the accused] prefers. If, however, he is not willing to do this, then he shall pay 100 shillings, without [giving] an oath, on the day after arbitration.<sup>117</sup>

The early exponents of arbitration subscribed to the view that a private tribunal functioning outside the aegis of the formal judicial system was more responsive to the needs of the populace,<sup>118</sup> a view circumscribed in "The Anglo-Saxon Courts of Law, Essays in Anglo-Saxon Law." In the words of the authors:

In a society which has no confidence either in its judges, its judicial process, or its very law itself, — which could devise no system of reform in the practice, nor of equitable protection against the evils, of that law, — it was certainly not surprising that men should seek a remedy outside the public tribunals . . .<sup>119</sup> (emphasis added.)

This populist assessment of the role of arbitration was embraced by the English in the period succeeding the Norman Conquest. However, the widespread use of arbitration under the developing English common law was undermined by traces of judicial animosity. Many courts, maintained that arbitration would oust them of their jurisdiction, refused to enforce executory agreements to arbitrate, concluding that they were repugnant to public policy.

The elimination of the ecclesiastical courts and concomitant burgeoning court dockets, however, perpetuated a greater reliance on arbitration. Jurisdictional rivalries all but disappeared in the period following the Norman Conquest. Adopted by the Royal Courts as an adjunct to court proceedings, arbitration was finally recognized as another form of dispute resolution, intended to supplement, not supplant, the judicial process.

Although George Washington established an arbitration provision in his will,<sup>120</sup> arbitration in the United States remained fairly dormant during the years following the American Revolution. The Bill of Rights, the guarantor of rights deemed sacrosanct to a nation which had newly acquired its independence, was seemingly

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117. *Id.*

118. *Id.* at 204.

119. *Id.* at 205.

120. F. ELKOURI & E.A. ELKOURI, *HOW ARBITRATION WORKS* 2 (4th ed. 1985).



antithetical to arbitration — the right to a jury trial was too important to the overall concept of justice to be frivolously relinquished.

But as the nation progressed, and the jurisdictional parameters of the courts became better defined, state legislatures began to encourage the use of other methods of dispute resolution. With the passage of the first modern arbitration act in New York in 1920,<sup>121</sup> the remaining vestiges of judicial hostility and fear dissolved. Unlike the common law process where courts were reluctant to enforce arbitration agreements, modern arbitration acts permitted judicial enforcement of all agreements, with no distinction made between future disputes and existing disputes. Such enforcement was an important development in the evolution of the process. This historical overview was given by one court:

Arbitration has had a long and troubled history. The early common law courts did not favor arbitration, and greatly limited the powers of arbitrators. But in recent times, a great change in attitude and policy has taken place . . . [A]rbitration has become an acceptable and favored method of resolving disputes, praised by the courts as an expeditious and economical method of relieving overburdened civil calendars. (citations omitted.)<sup>122</sup>

Today, forty-three states have modern arbitration statutes,<sup>123</sup>

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121. M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* 28 (1985).

122. *Madden v. Kaiser Found. Hosp.*, 17 Cal. 3d 699, 706, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (quoting *Crofoot v. Blair Holdings Corp.*, 119 Cal. App. 2d 156, 183-84, 260 P.2d 156, 172 (1953)).

123. These states have enacted modern arbitration acts: Alaska: ALASKA STAT. § 09.43.010 (1983); Arizona: ARIZ. REV. STAT. ANN. § 12-1501 (1981); Arkansas: ARK. STAT. ANN. § 34-511 (1985 Supp.); California: CAL. CIV. PROC. CODE § 1280 (West 1982); Colorado: COLO. REV. STAT. § 13-22-201 (1985 Supp.); Connecticut: CONN. GEN. STAT. ANN. § 52-408 (West 1966); Delaware: Del. Code Ann. TIT. 10 § 5701 (1975); Florida: Fla. Stat. Ann. § 682.01 (WEST SUPP. 1985); Hawaii: Haw. Rev. Stat. § 658-1 (1976); Idaho: Idaho Code § 7-901 (1979); Illinois: Ill. Ann. Stat. CH. 10, § 101 (1975); Indiana: Ind. Code Ann. § 34-4-2-1 (WEST 1983); Iowa: Iowa Code § 679A.1 (1950); Kansas: Kan. Stat. Ann. § 5-401 (1982); Kentucky: 1984 KY. ACTS 278; Louisiana: La. Rev. Stat. Ann. § 9:4201 (WEST 1983); Maine: Me. Rev. Stat. Ann. TIT. 14, § 5927 (1980); Maryland: Md. Cts. & Jud. Proc. Code Ann. § 3-201 (1984); Massachusetts: Mass. Ann. Laws CH. 251, § 1 (MICHLE/LAW. COOP. 1980); Michigan: Mich. Comp. Laws § 600.5001 (1979); Minnesota: Minn. Stat. Ann. § 572.08 (WEST SUPP. 1985); Missouri: Mo. Ann. Stat. § 435.350 (VERNON SUPP. 1986); Montana: Mont. Code Ann. § 27-5-101 (1985); Nebraska: Neb. Rev. Stat. § 25-2103 (1973); Nevada: Nev. Rev. Stat. § 38.015 (1985); New Hampshire: N.H. Rev. Stat. Ann. § 542:1 (1974); New Jersey: N.J. Stat. Ann. § 2A:24-1 (WEST 1952); New Mexico: N.M. Stat. Ann. § 44-7-1 (1976); New York: N.Y. Civ. Prac. Law § 7501 (McKINNEY 1980); North Carolina: N.C. Gen. Stat. § 1-567.1 (1983); Ohio: Ohio Rev. Code Ann. § 2711.01 (PAGE 1981); Oklahoma: Okla. Stat. Ann. TIT.

permitting courts to compel arbitration if a party is recalcitrant in participating in arbitration proceedings. In addition, these statutes require a court to defer to an arbitrator's award, and enforce the final decision if the parties do not self-effectuate it.

Through these statutes, the legislative objective of fostering arbitration is apparent. The judicial process was to be primarily, if not exclusively used to assist arbitration, ensuring that it remain an autonomous adjudicatory process. Only when procedural or substantive irregularities prevail, which jeopardize or prejudice the rights of a party, will the courts intercede. Otherwise, arbitration is regarded as a crucial and effective complement to, and equal partner with, the judicial process.

## B. The Application of the Process to the At-Will Employee

Dichotomous views have been presented by commentators on what type of employee should be covered in a statutory scheme. Most have argued that arbitration, which protects masses of blue collar workers, should include all white collar workers, specifically managerial employees. Several, however, have urged limitations on certain classes of white collar employees.

This divergence of views was well-reflected in the just cause legislation introduced in Michigan, Pennsylvania and California.<sup>124</sup> The Michigan legislation excluded confidential and managerial employees and those who did not work for an employer for not less than fifteen hours per week for six months.<sup>125</sup> Although the California bill defined an employee more narrowly than the Michigan

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15 § 801 (WEST SUPP. 1985); OREGON: Or. Rev. Stat. § 33.210 (1981); PENNSYLVANIA: Pa. Stat. Ann. TIT. 42, § 7301 (PURDON 1981); RHODE ISLAND: R.I. Gen. Laws § 10-3-1 (1970); SOUTH CAROLINA: S.C. Code Ann. § 15-48-10 (LAW CO-OP. 1985); SOUTH DAKOTA: S.D. Codified Laws Ann. § 21-25A-1 (1979); TENNESSEE: Tenn. Code Ann. § 29-5-302 (1980); TEXAS: Tex. Rev. Civ. Stat. Ann. ART. 2224 (VERNON 1973); UTAH: Utah Code Ann. § 78-31-1 (1977); VERMONT: Vt. Stat. Ann. TIT. 12, § 5651 (1985 SUPP.); VIRGINIA: Va. Code § 8.01-577 (1984); WASHINGTON: Wash. Rev. Code Ann. § 7.04.010 (1961); WISCONSIN: Wis. Stat. Ann. § 788.01 (WEST 1981); WYOMING: Wyo. Stat. § 1-36-101 (1977). THE FOLLOWING STATES DO NOT HAVE A MODERN ACT BUT HAVE SOME STATUTORY FORM OF COMMON LAW ARBITRATION; ALABAMA: Ala. Code § 6-6-1 (1977); DISTRICT OF COLUMBIA: D.C. Code Ann. § 16-4301 (1985 SUPP.); GEORGIA: GA. Code Ann. § 9-9-1 (1985 SUPP.); MISSISSIPPI: Miss. Code Ann. § 11-15-1 (1972); NEBRASKA: Neb. Rev. Stat. § 25-2103 (1973); NORTH DAKOTA: N.D. Cent. Code § 32-20-01 (1976); WEST VIRGINIA: W. Va. Code § 55-10-1 (1984). THE ABOVE CITATIONS DO NOT INCLUDE PUERTO RICO.

124. Mich. H. Res. 5892 (1982), Penn. H. Res. 1742 (1981) and Cal. Assembly Res. 3017 (1984).

125. Mich. H.B. No. 5892 § 3(1)(1982).

bill, neither California's nor Pennsylvania's legislation excluded employees on the basis of their employment classification.<sup>126</sup> Those not covered by a collective bargaining agreement, an individual employment contract, or civil service tenure guidelines would qualify for the mediation or arbitration system.

Those who have argued against an expansive application of the arbitration process have done so forcefully and cogently, citing rationale which revives the theory undergirding the traditional at-will doctrine. The conduct of management personnel can directly affect corporate profitability or demise. In as much as the relationship between a manager and owner is most closely likened to a partnership, (or marriage) it is imperative from the employer's perspective, that managerial and confidential employees not be cloaked with protection. The business relationship is supported by trust, and to a lesser, but nevertheless significant extent, intellectual compatibility. To require the relationship to continue when one party desires a separation would adversely affect the free enterprise system by impermissibly intruding upon managerial prerogatives.

Most personnel handbooks contain exculpatory language, reaffirming that the probationary employee can be discharged without cause and generally without notice at any time prior to a transformation in status. The reason for excluding new employees is to allow the employer an opportunity to assess an employee's attitude and work performance level. It is basically a trial period for both parties involved in the employment relationship.

Although the just cause legislation surveyed did not contain exclusionary language for probationary employees, those who have recommended a statutory solution to the at-will problem have suggested that probationary employees be excluded from the thrust of the legislation. Probationary employees are considered transients. As a point of comparison, collective bargaining agreements do not, in the main, extend grievance and arbitration protection to probationary employees.

In Mennemeier's article on unjust discharge, several additional reasons are identified for refusing to extend dismissal protection to probationary employees: a) such employees are not entitled to accrue insurance benefits and medical coverage until an initial proba-

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126. See *supra* note 124.

tionary period is satisfied;<sup>127</sup> b) individuals with non-exemplary work histories or criminal records would assume a disproportionately harsh burden;<sup>128</sup> and c) intangible factors such as overall compatibility with other employees, and level of comfort within the particular environment are essential and legitimate bases for determining continued employability and can not be immediately ascertained.<sup>129</sup> These factors are too vague to be subjected to an arbitrator's evaluation and decision.

A preferred approach to any statutory scheme should follow the collective bargaining model, excluding managerial and probationary personnel from consideration.

### C. Arbitrator Selection Procedures and Governing Body of Rules

A noted advantage in arbitration is the ability of the parties to select their decision-maker. Most of the unjust discharge legislation provides specific language on the arbitrator selection process. The Michigan and Pennsylvania bills established elaborate procedures to be followed once an employee elected arbitration.<sup>130</sup>

The proposed legislative scheme should establish a specific procedure for selecting an arbitrator, or reference a neutral administrative agency such as the American Arbitration Association, a Public Employment Relations Board or the Federal Mediation and Conciliation Service,<sup>131</sup> all of which have their own sets of rules and procedures. These associations also maintain national panels of arbitrators who have been selected based on experience, competence, and above all, impartiality.<sup>132</sup> When an administrative entity is referenced in legislation, the entity is authorized to submit a list of arbitrators to the employer and the employee. Basic information regarding each arbitrator is appended to the list.<sup>133</sup> The parties are

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127. See Mennemeier, *Protection From Unjust Discharges: An Arbitration Scheme*, 19 Harv. J. On Legis. 49, 82 (1982).

128. *Id.*

129. *Id.*

130. See *supra* note 124.

131. Many of these administrative agencies provide an educational function to supplement the systematic framework contained in the rules.

132. Sanctions, including arbitrator removal, are imposed on those who do not discharge their responsibilities fairly and judiciously; the requirement to serve the parties as a judge is continuous.

133. Submission of biographical information will be particularly beneficial to the employee who does not generally have as much information regarding an arbitrator's back-

given a specified number of days<sup>134</sup> to study the lists, delete names objected to, and number the remaining names in preferential order. If a mutual choice is not achieved on the initial list, most of the administrative agencies will submit additional lists, or appoint a neutral from their national panel, without further input from the parties.

Once the arbitrator is selected, the parties will require a set of rules by which the arbitration proceeding will be governed. The model *Employment Dispute Arbitration Rules*, set forth in the *Appendix*, provide an excellent reference point.

A packaged procedure, similar to what is commonly found in arbitration generally, is provided by these rules. The only exception pertains to the inclusion of a discovery procedure. In arbitration, there is no formal discovery device — this allows the parties maximum discretion in establishing their own guidelines, fashioning a proceeding with which they feel most comfortable. Alleged abuses or lack of cooperation may be referred to the courts.

A discovery provision in the employment arbitration context is intended to reduce the lawyer's discomfort with the process and to ensure that all relevant materials necessary to provide a full and fair consideration of the issues is furnished. The arbitrator is the sole judge of the relevancy and materiality of the evidence, and any discovery concerns are referred to the arbitrator for a ruling. These rulings will be final and binding, not appealable to the courts because they are considered interlocutory in nature. Thus, the parties are not permitted to unduly or unnecessarily delay the proceedings.

#### D. Burden and Sufficiency of Proof

The rules of evidence generally are not applicable in arbitration. Under the proposed employment arbitration rules, the state or local rules of evidence and the court rules can be used as reference points at the discretion of the arbitrator.

Affecting the substance of the evidence, however, is the burden of proof. The procedural informality of arbitration in juxtaposition to the more stringent procedural requirements of litigation deter-

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ground and general reputation in the community as does the employer.

134. AAA rules generally allow a response time of seven (7) days, with extensions granted for cause.

mines and molds the contours of the burden of proof concept. Several definitions of burden of proof have evolved. C. Updegraff notes: "[B]urden of proof affects the responsibilities of the parties in producing evidence: 'primarily, it refers to the duty of proof that is logically cast upon any party to establish the basic facts it asserts as a basis of claiming belief.'"135

Others have spoken out against the use of burden of proof concepts in arbitration (except in certain types of discharge cases) and have observed: "To insist that the complaining party carries the burden of proof is manifestly absurd. Neither side has a burden of proof or disproof, but both have an obligation to cooperate in an effort to give the arbitrators as much guidance as possible."<sup>136</sup>

Still others, not explicitly recognizing the concept of burden of proof, have recognized, as a minimum, that *elements* of proof need to be established: "Of course somebody must prove something to the satisfaction of the arbitrator or he will have no alternative but to dismiss the complaint or grievance and place the parties where he found them. It is more appropriate to say that both parties to an arbitration run the risk of non-persuasion."<sup>137</sup>

Generally, where arguments relative to burden of proof prevail, they speak only to which party has the ultimate burden of persuasion as opposed to the burdens of producing evidence or pleading. In discharge and discipline cases in the collective bargaining arena, for example, it is an acceptable practice to require the employer to move ahead with the production of proofs as it is often only management that maintains the information needed.<sup>138</sup>

The minority viewpoint advances the proposition that in discharge and discipline cases the complainant has the burden of proving there was not proper cause to engage in the questioned conduct.<sup>139</sup> This viewpoint is a by-product of the philosophy which dictates that management maintains an inherent right to discipline.

Given the varied points of view which already prevail in arbitration concerning the burden of proof requirement, these fundamen-

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135. C. Updegraff, *Arbitration of Labor Disputes* 220 (1970).

136. Aaron, *Some Procedural Problems in Arbitration*, 10 *Vand. L. Rev.* 733, 740-42 (1957).

137. L. Beatty *Labor Management Arbitration Manual* 60 (1960).

138. Scheinman, *supra* note 136, at 9.

139. *Id.* at 10.

tal differences must be addressed if at-will disputes are to be disposed of through arbitration. Just cause legislation is not likely to incorporate burden of proof requisites.

Parties could include in their internal personnel management documents a "definition" and "scope of application" provision which would govern arbitration proceedings conducted in accordance with a statutory mode, or alternatively, they could permit the selected arbitrator to use his/her discretion in employing the burden formula. This may be the better approach because arbitrators are selected on the basis of their expertise and the reasoned judgment they bring to bear on each case. This definition by nature includes the arbitrator's mental thought processes regarding the allocation of the burden of proof requirement.

#### E. Just Cause Requirement

As previously indicated, a large body of arbitral precedent exists regarding the requirement of just cause. Some commentators have suggested that these criteria, though developed and applied in the union setting, can be used to resolve wrongful discharge cases.<sup>140</sup> A concern which arises, however, is whether the labor arbitration model can, without modification, be effectively utilized in the employment dispute setting. Are different standards of criteria needed for executive and professionals? If so, these standards of review and other limitations will have to be formulated and incorporated into the personnel manuals of the employer so that arbi-

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140. The seminal arbitration case addressing and defining the just cause concept of termination involved a unionized situation where management's conduct in discharging an employee was deemed unjustified. The arbitrator developed a seven-pronged test to be used in determining whether discipline, including discharge, was proper: 1. Did the company give to the employee warning of the possible or probable disciplinary consequences of the employee's conduct? 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee? 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? 4. Was the company's investigation conducted fairly and objectively? 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company? *Enterprise Wire Co.*, 46 LA 359, 362-65 (1966).

trators can apply them accordingly. Absent such limitation, and the unlikely event that the statute would provide substantive assistance, arbitrators would have the authority to apply whatever principles they deemed essential to a fair resolution of the dispute.

#### F. Arbitral Remedies and Penalties

One of the most unique and salient characteristics of the arbitration process is the ability of an arbitrator to fashion remedies based on the equities and practical considerations of a case. These remedies are not necessarily akin to those achieved through court proceedings.<sup>141</sup> Operating on the likely assumption that the legislation will not impose limitations on an arbitrator's remedial powers, several remedies can be formulated. To make this determination, the arbitrator would have to look to the reasonableness of the disciplinary penalty in light of the character and gravity of the conduct.<sup>142</sup>

An arbitrator may:

- a) fully reinstate the employee with full or partial pay back. Reinstatement need not be unconditional. Arbitrators prefer a cautious approach to discharge cases — if essential to ensure a just result, a conditional reinstatement order may be embodied in the award;<sup>143</sup>
- b) reduce the penalty to a disciplinary suspension, reprimand or warning. This form of remedial power is comparable to an intermediate penalty, with arbitrators guided by a conscience of equity. Based on the facts, management's decision to terminate an employee may be considered excessive, and thus unjust;<sup>144</sup>
- c) award loss of benefits coupled with reinstatement, forced apologies<sup>145</sup>

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141. See, e.g., Robins, *supra* note 11, at 452.

142. See F. Elkouri & E.A. Elkouri, *supra* note 120, at 651.

143. A case instructive on this point is City of Flint and Teamsters Local Union No. 214, No. 54-39-1603-76 (Am. Arb. Ass'n. 1977) (Law Enforcement Division). The grievant, a police officer with the City of Flint, was involved in a shooting accident. She was thereafter charged with a crime. Subsequent to her acquittal, she received notice from the Flint Police Department that she would be discharged by the City as a consequence of her dismissal from the Kalamazoo Regional Police Training Academy. The Arbitrator fashioned a reinstatement which restored grievant's full seniority. However, he simultaneously noted that should the grievant be subject to further withdrawals from the School, she would be deemed discharged. Conditional reinstatement normally occurs when an employee is discharged for misconduct associated with physical or psychological disability. Arbitrators may require an examination by the discharged employee to re-qualify for his position.

144. See F. Elkouri & E.A. Elkouri, *supra* note 120, at 651.

145. *Id.* See also Four Wheel Drive Auto Co., 20 Lab. Arb. (BNA) 823, 826 (1953) (RAUCH, ARB.); CRAWFORD CLOTHES, INC., 19 LAB. ARB. (BNA) 475, 481-82 (1952) (KRAMER,



or unrecorded suspension.<sup>146</sup>

The question of what remedies are appropriate for wrongful discharge cases remains unanswered. The model rules of the American Arbitration Association indicate that an arbitrator is free to grant any remedy or relief deemed just and equitable. Unless proscribed by statute, any limitations on the scope of the arbitrator's remedy must be contained in the employer's handbooks and personnel manuals. How much authority is given to an arbitrator may determine the likelihood of the passage of just cause legislation. From a realistic perspective, it is unlikely that an employer would support a statutory scheme that provides carte blanche parameters to an arbitrator. Wholesale acceptability of the process and consistency in arbitral decision-making may require that remedies be limited to reinstatement and ancillary monetary damages.

#### G. Effect of the Award — The Right of Judicial Review

At the heart of the arbitration process is the concept of finality. Most awards are self-enforcing, with the parties voluntarily acting out the mandates. The few not properly acknowledged by the parties do not result in *de novo* review on the merits for "plenary review by a court [of the merits] would make meaningless the provisions that the arbitrator's decision is final, for in reality, it would almost never be final."<sup>147</sup>

As in traditional arbitration, the just cause legislation reviewed in Part III provided for limited judicial supervision of awards. With one exception, an arbitration award would be set aside only:

1. Where procured by corruption, fraud or undue means;
2. Where the arbitrators are guilty of misconduct, prejudicing the rights of any party; and,
3. Where the arbitrator has exceeded his jurisdiction.

These bases deal with procedural irregularities which affect due process and the right to a fair hearing before an impartial tribunal. Failure to adhere to the basic guidelines violates guarantees of due

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ARB.).

146. See F. Elkouri & E.A. Elkouri, *supra* note 120, at 651. See also *Fort Pitt Bridge Works*, 30 Lab. Arb. (BNA) 633, 635 (1958) (LECHOCZKY, ARB.); *IRONITE, INC.*, 28 LAB. ARB. 394 (1956) (HAUGHTON, ARB.).

147. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960).

process and taints the proceeding and, of course, the resulting award. Courts will not tolerate any flagrant abuses, and will intercede if justice so demands.

Awards can also be vacated if they “manifestly disregard the law.” This ground has been defined by the federal courts, and recently, by the Michigan Court of Appeals. Only a legal error *which has led to a substantially different award can be vacated.*<sup>148</sup>

While lack of verbatim records or formal fact-finding and conclusions of law make review of an arbitration award without speculation difficult or impossible, a reviewing court does not possess the authority to unravel the arbitrator’s thought process on mere speculation since there could be several feasible explanations for the results. If from the face of the award it can be shown that the arbitrators stated the applicable law, and then chose to ignore the law in their deliberations, the result represents an abuse of the arbitration process which, if permitted to stand, undermines the legitimacy of arbitral jurisprudence. In this instance, courts have the authority to intervene to correct the substantive error.

The author recognizes that the proposed legislative scheme varies from traditional labor arbitration because, unlike the latter, it is not a ‘bargained for’ result. If arbitration is to have any significance, the same standard of review should apply to the wrongful discharge case. Both the Michigan and Pennsylvania bills on wrongful discharge contained a provision for final and binding arbitration. Judicial review was limited to the common law grounds. These bills even went one step further and established a contempt procedure — if an employer or employee “willfully” disobeyed or refused to adhere to an enforcement order, the court was authorized to establish a fine.

In addition, the Michigan bill established a new test for determining the viability of arbitral awards. Section thirteen authorized review of an award if “not supported by competent, material and

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148. In *Hayman Co., v. Brady Mechanical, Inc.*, 139 Mich. App. 185, 362 N.W.2d 243 (1984), the appellate court held that the review standard outlined in *Detroit Automobile Inter-Ins. Exchange v. Gavin*, 419 Mich. 407, 331 N.W.2d 418 (1982) is applicable to all statutory arbitration and not limited to auto insurance. The court felt that the standard of review set out in GCR 1963, 769 (that a statutory arbitration award can be vacated if “the arbitrators exceed their power”) required clarification and adopted the “substantial error rule” set out in *Howe v. Patrons’ Mut. Fire Ins. Co.*, 216 Mich. 560, 183 N.W. 864 (1921).

substantial evidence on the whole record.”<sup>149</sup> The introduction of this new layer of review suggests that a number of residual concerns prevail regarding the use of the process. Nevertheless, inasmuch as arbitration is perceived as, and treated, as an essentially equivalent adjudicatory process as that of litigation, it must be allowed to remain, by and large, free from judicial regulation.

#### V. SPECULATIONS ON THE FUTURE OF EMPLOYMENT-AT-WILL

Legal scholars in the field have articulated many predictions regarding the immediate future of the employment-at-will doctrine. Most of these commentators share the opinion that the traditional common law doctrine has been emasculated by the judge made exceptions addressed in Section II of the Article.

Other points on which there is philosophical unanimity:

1. The divergence of views espoused by the courts suggest the need for a uniform legislative scheme which would protect nonunionized employees from arbitrary and retaliatory discharge;
2. Arbitration, or some other private form of dispute resolution, should be invoked as opposed to litigation which is expensive, protracted, and emotionally traumatizing.

For this section the author contacted several scholars who have published writings on this subject, requesting that they provide some thoughts on at-will employment. These “thoughts” follow:

##### 1. *Theodore J. St. Antoine*<sup>150</sup>

The courts, at least in the more progressive states, have gone about as far with unjust discharge actions as they are going to go. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word not to fire except for good reason. But ordinarily they will not im-

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149. See *supra* note 125. This standard of review is employed by the courts in evaluating the decisions of administrative agencies such as the Michigan Employment Relations Commission and the National Labor Relations Board.

150. AB, Fordham College, 1951; JD, University of Michigan, 1954. James E. & Sarah A. Degan Professor of Law, University of Michigan since 1981; faculty member, U-M Law School since 1965; Dean, U-M Law School 1971-78. Past Secretary, ABA Labor Law Section; past Chairperson, Michigan Bar Labor Law Section. Current member, Council of ABA Labor Law Section and Board of Governors, National Academy of Arbitrators. These comments were excerpted from *The Revision of Employment-at-Will Enters A New Phase*, 35 L LJ 563, 565-66, 567 (1985).

pose an affirmative obligation on employers to prove just cause to support a discharge. They will not subject nonunion firms, as a matter of common law, to the same requirement exacted contractually from nearly every employer party to a collective bargaining agreement. The next move is therefore up to the legislatures . . . .

Employers now are also practicing preventive law. I have mentioned the possibility of their purging personnel manuals of potentially troublesome policy statements. Some go so far as to note explicitly on job applications that any contract entered into will be terminable at any time at the employer's sole and absolute discretion. Another device increasingly favored is the severance pay settlement. A discharged employee will be offered a reasonably generous severance payment, in return for which the worker must waive all future claims based on his employment or its termination. My assumption is that all these approaches, if not unconscionably overreaching in a particular situation, will be sustained . . . .

Protection against unjust discharge is fast acquiring the force of a moral and historical imperative. Statutory relief for this long-neglected abuse of the unorganized worker should now become a top item on the agenda of conscientious legislators and the whole industrial relations community. The prevention of arbitrary treatment of employees may not only be the humane approach; it may also be good business. We lavish attention on the Japanese way of management, on the almost paternal relationship between Japanese employers and their employees, and the lifelong careers guaranteed many workers in Japanese companies. We should be prepared to entertain the proposition that there may be a marked correlation between a secure work force and high productivity and quality output. It would be a fine irony if justice was simply the frosting on the cake.

## 2. *Jack Stieber*<sup>151</sup>

This year, as we celebrate the fiftieth anniversary of the *Na-*

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151. CCNY (BSS-40); UNIV. OF MINNESOTA (MA-48); HARVARD UNIV. (PHD-56); PROF. & FORMER DIR., SCHOOL OF LABOR AND INDUSTRIAL RELS., MICHIGAN STATE UNIV. FORMERLY: EXEC., SECY., PRESIDENT'S LABOR-MGMT. ADVISORY COMMITTEE, 1962; CHRMN., GOVERNOR'S TASK FORCE ON LABOR, 1959; FACULTY, HARVARD BUS. SCHOOL, 1954-56; EXEC. ASST., CIO MEMBERS, WAGE STABILIZATION BD. THESE COMMENTS WERE EXCERPTED FROM *Legislation: The Best Approach to Unjust Dismissal*, presented to the National Conference on Employment-at-Will and Unjust Dismissal (Oct/Nov 1985).

*tional Labor Relations Act*, it is appropriate to look at what the *Act* did not do as well as areas of labor management relations that the *Act* did attempt to regulate. One of the subjects omitted from the *Act* has become the hottest issue in industrial relations, namely "wrongful discharge" or "unjust dismissal" of nonunionized employees.

It is not surprising that the issue of discharge for reasons other than union activity was not considered in the *National Labor Relations Act* of 1935. The idea that an employer should not be able to discharge an employee except for just cause would have been regarded in 1935 as a gross invasion of management's right to hire and fire. Furthermore, consideration of this issue would have violated the self-imposed prohibition by Congress against dealing with the substance as opposed to the procedural aspects of collective bargaining.

But this is 1985 not 1935 and times have changed. One indication of extent to which the courts have changed in their approach to the employment-at-will doctrine is the recent decision of the Texas Supreme Court in *Sabine Pilot Service Inc. v. Hauck*. Having steadfastly refused to vary from an 1888 decision holding "employment for an indefinite term may be terminated at will and without cause," the concurring opinion, signed by two of the three Texas judges sitting in *Sabine* said: "Absolute employment-at-will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law."

This was not the court of California, Michigan, New York or other so-called liberal states. This was the Supreme Court of Texas speaking. Times have certainly changed! But they have not changed enough. Furthermore, the change that has occurred in court attitudes towards employment-at-will is less significant than many commentators would have us believe. In my opinion, the courts have gone just about as far as they are prepared to go in modifying this century-old common law doctrine. From now on we must look to another forum, if we are to do away entirely with employment-at-will. *That forum is the legislative arena.* (emphasis added.)

3. *Robert S. Rosenfeld, Esq. (A Management Perspective)*<sup>152</sup>

Maintaining a union-free work force requires both reasonable remuneration and fair treatment of employees. To clarify to rank and file employees not represented by a labor organization that their employment is "at-will" and can be terminated at any time with or without notice and with or without cause and without outside review likely would raise grave risks of job security concerns on the part of those employees. Job security concerns are a major factor leading to union representation.

This result can be avoided by advising such employees that after a probationary period they can be terminated from employment only for cause. This statement alone, however, subjects the employer's decision to discharge to review by judges and juries in Michigan. Such review entails costly litigation defense; second-guessing about the adequacy of the employer's "cause" by a jury both untrained in employee relations and presumably sympathetic to the discharged employees; disclosure of company records through pre-trial discovery; a delayed filing of the action during the statute of limitations for a breach of contract claim; and, in lieu of reinstatement, the risk of damages including lost future wages and benefits to an expected retirement age in addition to damages for lost past wages and benefits and for pain and suffering. Such damages frequently accumulate to significant six-figure awards.

Providing for independent arbitral review avoids the risks attendant litigation. By emulating the union model, arbitration avoids the risk of job security concerns and reduces the likelihood of unionization on that account. Review by a professional arbitrator of whether cause exists permits greater predictability of the test to be applied and of success by the employer; reinstatement replaces lost future wages and, if awarded, fortifies the employer's credibility about desiring to be fair to employees; the remedy is more prompt and is less expensive. There is no pre-trial discovery.

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152. \*\*Since 1964, a partner in the Troy, Michigan law firm of Keywell and Rosenfeld, which provides labor law services to management clients. He holds a BSE in Industrial Engineering, 1954, and an LLB, 1957, from the University of Michigan and an LLM Degree from Georgetown University, 1960. From 1960 to 1964, he was an Assistant General Counsel of the International Union, UAW. From 1964 to 1975, he served on the labor arbitration panels of both the American Arbitration Association and the FMCS.

Pertinent time limits and the measures of damages can be defined by the employer, as can the rules that would apply in the arbitration.

Presuming rejection of establishing a non-reviewable "at-will" employment relationship for rank and file employees, the arbitral review of cause is, for these reasons, preferred to the litigation review. Under Michigan law, the arbitral review avoids the judicial review.

#### 4. *Robert Howlett, Esq.*<sup>153</sup>

The American Common Law "at will" employment doctrine was a departure from our English heritage. The rule, originally enunciated at the time of the Black Death in the mid-fourteenth century (1 W. BLACKSTONE, COMMENTARIES 425 (Sharswood ed. 1908)), recognized the doctrine of "reasonable cause" for termination of an employee. Early American Courts adopted the English rule. But in the late 1880's American law departed from the English rule by developing its own version of "at-will" employment.

In 1877, H.J. Wood wrote a treatise on "Master and Servant" in which he spelled out the at-will rule, which has been followed by the courts until recently. Wood's theory was that there was no consideration for the employer-employee contract, therefore no mutuality. Either employer or employee could terminate the relationship for any reason at any time.

The concept that an employee could be terminated for any reason was consistent with the philosophy of most employers at that time, i.e., an employee was part of the framework of an enterprise and no different than machinery or equipment.

Today, sixty to sixty-five percent of all American employees are hired on an at-will basis; twenty to twenty-two percent are union-

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153. \*\*Northwestern Univ. (BS '29); Northwestern Univ. Law Sch. (JD '32). Of counsel, Varnum, Riddering, Schmidt & Howlett. Arbitrated since 1953; Member, Fed. Service Impasse Panel, 1982. Formerly: Chrmn., Fed. Serv. Impasse Panel, 1982-84 & 1976-78; Chrmn., Mich. Employment Rels. Comm., 1964-76; Visiting Prof., Sch. of Indus. Rels., Mich. State Univ., 1972-75; Special Asst. Atty. Gen., Mich. Dept. of Aeronautics, 1957-61; Gov's. Comm. Consumers Power Co., 1955; Chrmn., Gov's Sp. Comm., Grand Rapids City Coach Lines, 1955; Presidential Emergency Bd. 176 (Railway Labor Act); Ship Bldg., Comm., NWLB. Former Chrmn. & now Pub. Member, Foreign Service Impasse Disputes Panel. Dir., American Arbitration Ass'n. since 1975. Member, Nat'l Academy of Arbitrators (Bd. of Gov's. - 3 yrs.).

ized; fifteen percent are government employees, the latter having both constitutional and statutory protection. Other legislation protects employees from "unjust" situations: Title VII of the Civil Rights Act (42 USC 2000e); Veterans Reemployment Rights (38 USC 2021); Section 507 of the Regional Railway Reorganization Act of 1973 (45 USC 797m) (45 USC 701 *et seq.*) which extends the right to file grievances over employee protection to unrepresented employees; the Occupational Safety and Health Act which prohibits the discharge of employees who exercise their rights under the Act; and the Whistle Blower Statute (5 USC 1206 (A) (3)).

Many state statutes provide similar protection including the Michigan Elliott-Larsen Act, 37 MCLA 2101 *et seq.* and the Michigan Whistle Blower Statute, MCLA 15.363.

It is not fair and equitable to provide for all employees the same "just cause" protection provided in collective bargaining contracts and in statutes directed at specific abuses? Is not discharge for "no cause" or "cause morally wrong" or "an unfair reason" a civil right or a human right? Is not such a right a proper role for statutory enactment?

The United States of America prides itself as a leading proponent of human rights throughout the world. The record in the employment relationship does not support our claim. In 1982, the International Labor Organization adopted a convention on the termination of at-will employees. Representatives of employers from only six of the 126 countries involved voted against the convention. The United States was the only country among the 126 whose government representatives voted against the convention. The United States objected to the convention for, among other reasons, because it required post-discharge appeal to an impartial body where the employer has to put forward some reason for discharge. We pride ourselves on support of human rights and castigate Russia and its satellites for their failure to do so. Just how far behind are we in this country?

Courts do not provide for reinstatement as do collective bargaining contracts and statutes. It is preferable to have "just cause" and the procedures to enforce that principle in a statute rather than dependency on the sometimes inconsistent rulings of the state courts. Would not employers be better off to know the rules rather than to risk a lawsuit each time an employee is terminated? Would not it be better to have a quasi-judicial procedure by an adminis-



trative agency or arbitration rather than lengthy, costly litigation.

Many "unjust discharges" occur in small enterprises, enterprises which unions are not interested in organizing for soley economic reasons. Larger employers tend to be more sophisticated in their treatment of non-supervisory employees. Many have established grievance procedures, a few provide for full fledge arbitration. If we believe in human rights or civil rights should government not provide for justice to persons who are treated unfairly?

##### 5. *Sheldon Stark, Esq. (An Individual Perspective)*<sup>154</sup>

The decision of the Supreme Court of Michigan in *Toussaint v. Blue Cross & Blue Shield*, 408 Mich 579 (1980), limiting the employment-at-will doctrine, added a significant new weapon to the arsenal protecting the rights of individuals in the work place. At last, nonunion employees were afforded an effective remedy against arbitrary discharge despite the absence of invidious discrimination, "whistleblowing" or public policy violations by the employer.

In the five and a half years since the unabridged employment-at-will doctrine "fell", the courts have struggled with establishing the contours of the cause of action recognized in *Toussiant*. On the one hand, the remedy has been limited: damages for mental and emotional distress in this jurisdiction are not available. On the other hand, employers have had their defeats as well: the burden of proof has been placed squarely on the employer to establish that just cause existed for the discharge.

While significant issues have been resolved, significant issues remain. Does the employer's need for an economic cut-back—perceived or real—constitute "just cause" for the termination of any specific employee? Does a reduction in force constitute

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154. \*\* Partner in the Detroit law firm of Stark and Gordon. He specializes in the handling of wrongful discharge, employment discrimination and individual rights cases. He is a member of the Committee on Equal Employment Opportunity Law of the Section of Labor and Employment Law, American Bar Association; Chairman of the Employment Law and Intentional Tort Sub-Committee of the Michigan Supreme Court Committee on Standard Jury Instructions; a Hearing Referee with the Michigan Department of Civil Rights; Secretary to the Fund for Equal Justice; and a Board Member, Detroit Metropolitan Chapter, American Civil Liberties Union.

\*\* The materials for footnotes 152-54 are not available to or through the DETROIT COLLEGE OF LAW REVIEW.

an implied exception to the employer's promise to its employees that termination will be for cause only? Will the doctrine of "good faith and fair dealing" be extended to any other jurisdiction? What is the future of "negligent evaluation" as a theory of liability? Will "failure to warn" claims be separated out to become an independent tort cause of action?

The employer is entitled to develop policies concerning reductions in force, to publish them in company manuals, and to disseminate such policies to its employees. It can make the employees aware that reductions in force may occur; it can advertise its willingness to act in good faith and with fairness to all; and it can adopt a performance appraisal system tied to improving performance whenever such a policy appears to be in its own interests. Accordingly, the courts are likely to resolve the suggested issues on the basis of the burdens and obligations the employer places or fails to place on itself. Many employers will choose to act in ways that will limit liability by making no promises or insisting upon draconian employment application language. Others will choose to enhance employee loyalty, productivity and dedication by making promises despite the possibility of litigation. The courts are likely to continue requiring that employers simply live up to the promises made to the work force.

Attorneys representing individual employees have welcomed the fall of the doctrine of employment-at-will. Unlike union attorneys who fear the impact just cause promises will have on union organizing drives, individual rights attorneys feel the *Toussaint* case fills a terrible void in the legal environment in which their clients work and live.

### CONCLUSION

In speaking some years ago about the landmarks of the law, Benjamin Cardozo observed: "No absolutist is so intrasigent as to assert that there can be literal adherence to a standard of equality or liberty. Some compromise is inevitable."<sup>155</sup> The genesis, evolution and demise of the employment-at-will doctrine exemplifies the nature of this compromise. The doctrine, at one time given constitutional sanctity, presumably a reflection of the turbulent political

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155. Selected Writings of Benjamin Nathan Cardozo 128 (M. HALL ED. 1947).

era during which it was judicially affirmed, today survives in a myriad of forms, absent a constitutional patina.

It was primarily during the last decade, however, that courts began to more carefully reflect on the vested interests and competing values implicated in the at-will employment issue, endeavoring to balance the harm of the displaced employee with the harm to managerial autonomy and the free enterprise system. These judicial reflections and meanderings prompted the courts to recognize legitimate exceptions to the strict enforcement of the doctrine.

But these exceptions have serious limitations. Despite the strides which nonunionized employees have achieved through decisional law, as one scholar recently noted “[t]here is not a square holding by any court that an employer may not fire an employee without a positive showing of just cause, unless there is a provision to that effect.”<sup>156</sup>

It does not appear that increased unionization or voluntary employer action are likely palliatives to counteract the limited judicial activism we have witnessed. The labor movement has been stagnating for many years, with a steady decrease in membership since 1975. Voluntary employer action is simply too revolutionary a change in the workplace. Employers are not accustomed to dealing with encroachments or intrusions on their managerial prerogatives and decision-making.

This situation makes it imperative that just cause legislation be enacted to completely eradicate or reduce the philosophical cleavage created by judge made law. Although institutional and other vested interest groups may interpose obstacles which could hamper the immediate passage of legislation, the already overburdened courts will find it neither pragmatic nor expeditious to render substantive decisions concerning wrongful discharge. The volume of cases will steadily rise. Courts will become even more paralyzed in their efforts to render “complete justice” — the net result may be an even greater “emasculatation” of the law.

Just cause legislation with an arbitration component will enable the vast majority of workers to have their dismissals reviewed before a fair, impartial tribunal. This type of system would go a long way toward ensuring that the many injustices associated with wrongful discharge are rectified by a meaningful process which ex-

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156. St. Antoine, 35 Proceedings Ann. Meeting Indus. Rel. Research A. 564 (1985).

tends not only the perception - but the reality - of equity and justice.

## APPENDIX

### AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT DISPUTE ARBITRATION RULES

#### 1. *Initiation of Arbitration*

Any party may institute arbitration by filing a complete demand for arbitration. That document should stipulate the identity of the parties involved, the issues to be determined by the Arbitrator, the available remedies, and such other provisions as will assist the Arbitrator in reaching a fair result pursuant to the submission agreement. If an offer of settlement has been made, the offer must either be rejected or the period of time provided in the offer for acceptance or rejection must elapse prior to filing the demand.

#### 2. *Change of Claim*

Should any party desire to amend their claim, or make a new or different claim arising out of the same set of facts against any party to the arbitration after filing a claim, such claim shall be filed in writing with the AAA, and a copy thereof shall be mailed to the other parties who have a period of twenty (20) days from the date of such mailing within which to file an answer with the AAA. After the Arbitrator is appointed, such amendments may not be filed without their consent.

#### 3. *Panel of Arbitrators*

The AAA shall maintain a special panel of Arbitrators for proceedings held pursuant to these Rules, and shall appoint Arbitrators therefrom as hereinafter provided.

#### 4. *Qualifications of Arbitrator*

If the submission agreement of the parties names an Arbitrator or specifies a method of selection, the named Arbitrator or the Arbitrator so selected shall be appointed to serve. If the parties have not specified a method of selection, the AAA shall submit names to them for their mutual selection. If the parties are unable to mutually select an Arbitrator, the AAA will appoint an Arbitrator, subject to challenge for justifiable cause.

#### 5. *Disclosure and Challenge Procedure*

Prior to accepting an appointment, the prospective Arbitrator shall disclose to the AAA any circumstances likely to prevent a

prompt hearing or to create a presumption of bias, including any past or present relationship with the parties or their counsel. In such cases, the AAA may vacate the appointment, in its discretion.

#### 6. *Vacancy*

If a vacancy occurs or if an appointed Arbitrator is unable to serve promptly, a substitute Arbitrator shall be selected in the manner set forth for selection of the original Arbitrator.

#### 7. *Time and Place*

Unless stipulated in the submission agreement, the Arbitrator shall set the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

#### 8. *Representation by Counsel*

Any party may be represented at the hearing by counsel or other representative.

#### 9. *Discovery*

The right to discovery may be afforded to the parties to the same extent that would have been available to the parties had the claims been filed in court. If the parties are unable to agree as to the scope of discovery, the Arbitrator shall be authorized to rule on such questions, bearing in mind the need to provide a full and fair consideration of the relevant and material facts of the case. Appropriate safeguards of the confidentiality of information discovered may be imposed by the Arbitrator.

#### 10. *Attendance at Hearings*

The parties and their attorneys are entitled to attend hearings. The Arbitrator may require the retirement of any witness during the testimony of other witnesses. Other persons shall be excluded from the hearings at the request of a party.

#### 11. *Adjournments*

The Arbitrator may take adjournments upon the request of a party or upon the Arbitrator's own initiative but must take such adjournment when all parties agree thereto.

#### 12. *Oaths*

Before proceeding with the first hearing, the Arbitrator shall take an oath of office. The Arbitrator shall require witnesses to testify under oath.

#### 13. *Stenographic Record*

Either party may request a stenographic record and make ar-

rangements for same through the AAA. A copy of the transcript must be made available to the Arbitrator, and to the other party for inspection. If the parties both request such a record or if the record is requested only by the employer, the cost of the record shall be borne by the employer. If the record is requested only by the claimant, the cost of the record shall be borne equally by the parties.

#### 14. *Order of Proceedings*

A hearing shall be opened by the filing of the oath of the Arbitrator and by the recording of the place, time and date of the hearing and the presence of the Arbitrator, parties and counsel, and by the receipt by the Arbitrator of the submission agreement containing a description of the controversy.

The Arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party shall then present claims, proofs, and witnesses, who shall submit to questions or other examination. The Arbitrator may vary this procedure, but shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator.

The names and addresses of all witnesses, and exhibits in order received, shall be made a part of the record.

The Arbitrator shall retain records of the proceedings. For good cause shown, the Arbitrator may schedule additional hearings.

#### 15. *Arbitration in the Absence of a Party*

The arbitration may proceed in the absence of any party who, after due notice, fails to be present. An award shall not be made solely on the default of a party. The Arbitrator shall require the attending parties to submit supporting evidence.

#### 16. *Evidence*

Unless the parties provide otherwise in their submission agreement, the Arbitrator shall be the sole judge of the relevancy and materiality of the evidence offered. The Federal Rules of Evidence shall be used as a guide by the Arbitrator in that connection, but shall not be binding.

#### 17. *Evidence by Affidavit and Filing of Documents*

The Arbitrator may receive and consider evidence in the form of an affidavit, but shall give appropriate weight to any objections

made. All documents to be considered by the Arbitrator shall be filed at the hearing or pursuant to arrangements set forth at the hearing which allow review and rebuttal by the opposing side.

#### 18. *Close of Hearings*

The Arbitrator shall ask whether the parties have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare and note the hearing closed.

#### 19. *Briefs*

Unless the parties have waived the right to file written briefs, they may be filed within seven days of the close of the hearing unless the parties mutually agree upon a different schedule.

#### 20. *Extensions of Time*

The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefore.

#### 21. *Waiver of Rules*

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with, and who fails to state objections thereto in writing, shall be deemed to have waived the right to object.

#### 22. *Serving of Notices*

Any papers or process, necessary or proper for the initiation or continuation of an arbitration under these Rules, for any court action in connection therewith, or for the entry of judgment on an award made thereunder, may be served upon such party by mail addressed to such party or its attorney at its last known address, or by personal service, or in any manner permitted by law.

#### 23. *Time of Award*

The award shall be rendered promptly by the Arbitrator and, unless otherwise mutually agreed by the parties, not later than thirty (30) days from the date of the closing of the hearing.

#### 24. *Scope of Award*

The Arbitrator may grant any remedy or relief that a court having jurisdiction of the matter could grant, provided it is within the scope of the parties' submission agreement. However, unless the parties specifically provide otherwise in their submission agreement:

- (a) The relief granted must be for the direct benefit of the claim-

ing party only.

(b) Relief may not be awarded for the benefit of any similarly situated individual(s), groups, or classes.

(c) No punitive or exemplary damages may be awarded.

Unless the submission to arbitration otherwise provides, the Arbitrator is authorized to determine as part of the award whether the employer should pay a prevailing claimant's reasonable attorney's fees and expenses for representation in the arbitration.

#### *25. Form of Award*

The award shall be in writing and shall be signed by the Arbitrator. Unless the parties otherwise provide in their submission agreement, the award of the Arbitrator shall be final and binding, the parties shall comply with its terms forthwith, and a judgment of a court having jurisdiction may be entered upon the award.

#### *26. Award Upon Settlement*

If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

#### *27. Delivery of Award to Parties*

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to a party at its last known address, or to its attorney, or personal service of the award, or the filing of the award in any manner which may be permitted by law.

#### *28. Release of Documents for Judicial Proceedings*

The AAA shall, upon the written request of a party, furnish to such party, at the party's expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

#### *29. Applications to Court and Exclusion of Liability*

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any Arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgement upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof.

(d) Neither the AAA nor any Arbitrator shall be liable to any



party for any act or omission in connection with any arbitration conducted under these Rules.

**30. *Expenses***

The expenses of witnesses shall be paid by the party producing such witnesses.

**31. *Interpretation and Application of Rules***

The Arbitrator shall interpret and apply these Rules insofar as they relate to the Arbitrator's power and duties. All other Rules shall be interpreted and applied by the AAA.