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## The Model Employment Termination Act: A Welcome Solution to the Problem of Disparity among State Laws

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THE MODEL EMPLOYMENT TERMINATION ACT: A WELCOME  
SOLUTION TO THE PROBLEM OF DISPARITY AMONG  
STATE LAWS

I. INTRODUCTION

The emergence of common-law wrongful dismissal doctrines has created a wide disparity in the levels of protection afforded to employees across the United States.<sup>1</sup> These doctrines have significantly eroded the common-law Employment-at-Will Rule, which presumes that an employee is terminable at the will of the employer.<sup>2</sup> The Employment-at-Will Rule permits an employer to “dismiss an at-will employee for a good reason, a bad reason, or for no reason at all.”<sup>3</sup> States have recog-

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1. See Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 (1980) (“Employees in the United States enjoy dramatically disparate levels of protection against the risk of wrongful discharge by employers.”). For a discussion of the impact of the lack of uniformity among state termination laws, see *infra* notes 7-8 and accompanying text. For a discussion of the common-law wrongful dismissal doctrines, see *infra* notes 42-125 and accompanying text.

2. See Note, *supra* note 1, at 1816 (common-law rule presumes terminable at will employment); see also HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* (1987). The erosion of the Employment-at-Will Rule began in the early 1970s. *Id.* at 2. Prior to this period, an employee who was terminated for no reason had no remedy unless the employer had violated a statute prohibiting discrimination. *Id.*

3. PERRITT, *supra* note 2, at 1 n.1. The Employment-at-Will Rule has been similarly defined by a number of commentators. See, e.g., Lawrence E. Blades, *Employment-At-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLO. L. REV. 1404, 1416 (1967) (“[I]n the absence of a statute or agreement specifically limiting the right of discharge, the employer may discharge his employee at any time for any reason.”); Donald H.J. Hermann & Yvonne S. Sor, *Property Rights In One's Job: The Case for Limiting Employment-At-Will*, 24 ARIZ. L. REV. 763, 763 (1982) (“[A]bsent either a contractual or statutory provision, any employment relationship is one at will which is terminable by either party, employer or employee, for cause or no cause.”); Theodore J. St. Antoine, *The Revision of Employment-at-Will Enters a New Phase*, 36 LAB. L.J. 563, 563 (1985) (“[A]n employment contract of indefinite duration can be terminated by either party at any time for any reason.”); Comment, *Employment-at-Will—Employers May Not Discharge At-will Employees for Reasons that Violate Public Policy—Wagenseller v. Scottsdale Memorial Hospital*, 1986 ARIZ. ST. L.J. 161, 161 (“[E]mployers may discharge an at-will employee ‘for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of a legal wrong.’” (quoting *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985))). A Tennessee Supreme Court case is often cited in support of the Employment-at-Will Rule. Gary E. Murg & Clifford Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 329 n.1 (1982) (citing *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884), *overruled on other grounds* by *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915)). The Tennessee Supreme Court stated:

[M]en must be left, without interference to buy and sell where they

(1527)

nized three common-law wrongful dismissal doctrines as exceptions to the Employment-at-Will Rule.<sup>4</sup> Depending on the state, an employee who has been terminated at the will of an employer may recover damages resulting from termination based on theories of implied covenant of good faith and fair dealing, implied contract or public policy.<sup>5</sup> Although these doctrines have progressively eroded the Employment-at-Will Rule, a presumption of legal dismissal remains and is rebuttable only upon a showing of a violation of one of these doctrines.<sup>6</sup>

The emergence of these common-law wrongful dismissal doctrines and the resulting lack of uniformity among the states have created much confusion for both employees and employers.<sup>7</sup> The employment rela-

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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.

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

4. See PERRITT, *supra* note 2, at 2. Employees may obtain legal redress under one of the three doctrines if they can show that the factual circumstances of their dismissals fit within the scope of a given doctrine. *Id.* The theories of recovery under these doctrines rest in tort or in contract. See ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 11 (1987) ("Judicial erosion of the common law employment-at-will rule . . . rests primarily on application of either 'contract' or 'tort' theories to circumvent application of the at-will rule.").

5. See PERRITT, *supra* note 2, at 2-3; see also Fred Strasser, *Employment-At-Will: The Death of a Doctrine?*, NAT'L L.J., Jan. 20, 1986, at 6. For a discussion of each of these doctrines, see *infra* notes 42-125 and accompanying text.

The existence of the doctrines has caused the business community to take measures to protect itself against wrongful discharge damage suits:

Many corporations . . . now require new employees to sign a disclaimer stating they understand they've been hired on an at-will basis with no claims on job security. And after an employee joins the company, his personnel file will receive far more attention than in the past, with an eye toward how a jury might see it in the future.

. . . "Employers are less quick on the trigger in making decisions today. Rather than pre-emptorily firing someone, many clients now have a human resources manager review the case to determine if there are really sound reasons. There is a greater element of fairness to the relationship."

Strasser, *supra*, at 6-7 (quoting Joseph W. Ambash, management lawyer with Foley, Hoag & Eliot in Boston and executive editor of *Employment-at-Will Reporter*).

6. PERRITT, *supra* note 2, at 2. ("The law in no American jurisdiction requires private employers to demonstrate just cause for terminating an employee.").

7. See MODEL EMPLOYMENT TERMINATION ACT 1 (1991) [hereinafter MODEL ACT] (prefatory note). One legal scholar has noted that the modifications to the Employment-at-Will Rule have produced a "flood of wrongful dismissal litigation." PERRITT, *supra* note 2, at 37 (citing *Cox v. Resilient Flooring Div.*, 638 F. Supp. 726 (C.D. Cal. 1986)). In *Cox v. Resilient Flooring Division*, a district court noted the large volume of wrongful termination cases and suggested that the solution must come from the legislature, not the judiciary. *Cox v. Resilient Flooring Div.*, 638 F. Supp. 726, 736 (C.D. Cal. 1986). The court stated: "Rules

tion is intertwined with commerce, which is inevitably interstate commerce in today's economy. Moreover, people in the work force commonly travel across state lines to reach their place of employment. For example, the Philadelphia work force draws residents from Delaware and New Jersey as well as Pennsylvania. Therefore, because an employee may be hired in one state, work in another, and be fired in a third, both employers and employees are uncertain as to their substantive rights and obligations.<sup>8</sup>

In response to the growing disparity among the states' wrongful dismissal laws, the National Conference of Commissioners on Uniform State Laws met in August 1991 and approved the Model Employment Termination Act (Model Act).<sup>9</sup> The primary purpose of the Model Act is to provide uniformity in employment termination law among the states that adopt it.<sup>10</sup> The Model Act is also intended to remedy the inadequate protection of employee rights under existing wrongful dismissal doctrines.<sup>11</sup>

The Model Act most likely will be strongly supported by the states for two reasons. First, the general topic of employment relations affects nearly everyone in the country because most people are either employees or employers.<sup>12</sup> More significantly, the success of other acts promulgated by the Uniform Law Commissioners, such as the Uniform Commercial Code<sup>13</sup> and the Uniform Partnership Act,<sup>14</sup> suggests that the Model Act will be adopted by a great number of states.

This Comment will begin by examining the historical framework of the Employment-at-Will Rule. After addressing the historical development, the discussion will concentrate on the development of the exceptions to the Employment-at-Will Rule. Next, the Comment will focus on

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designed for general application in this regard must come from the legislature so that everyone simultaneously is made aware of and becomes subject to the same requirements." *Id.* For a further discussion of the need for legislation in the area of wrongful dismissal, see PERRITT, *supra* note 2, at 493-95.

8. See MODEL ACT, *supra* note 7, at 1, 7 (prefatory note) (discussing desirability of uniformity regarding employees' substantive rights).

9. *Id.* §§ 1-14 app.

10. *Id.* at 7 (prefatory note).

11. *Id.* at 4 (prefatory note).

12. *Id.* A recent survey conducted by Professor Stuart Henry of Eastern Michigan University demonstrated that "40 out of 45 responding states and territories have had bills introduced in their legislatures in the past decade concerning 'employment termination, at-will employment, or a related subject.' The subject is plainly a matter of intense current interest." *Id.*

13. UNIF. COMMERCIAL CODE, 1 U.L.A. 1 (1992). The Uniform Commercial Code (U.C.C.) governs commercial transactions, including "sales, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, other documents of title, investment securities, and secured transactions, including certain sales of accounts, chattel paper, and contract rights." 1 U.L.A. at 3. All of the states have adopted the U.C.C. *Id.* at 1-2.

14. UNIF. PARTNERSHIP ACT, 6 U.L.A. 1 (1992). All of the states except Louisiana have adopted the Uniform Partnership Act. 6 U.L.A. at 1-2.

the current differing approaches to wrongful termination found at the state level. The Model Act will then be analyzed. Finally, this Comment will conclude that the Model Act provides a welcome solution to the disparity among state laws and should therefore be adopted by the states.

## II. BACKGROUND

### A. Historical Framework

During the nineteenth century, Anglo-American employment law was grounded in the theory that the employment relationship was a master-servant relationship.<sup>15</sup> The relationship was looked upon as a status relationship in which the master and servant owed reciprocal duties to one another.<sup>16</sup> The master was obligated to provide for the servant's physical and moral well-being,<sup>17</sup> while the servant was obligated to work diligently and to obey the master.<sup>18</sup>

These obligations were not defined by any contractual agreement but instead by public policy and custom.<sup>19</sup> In nineteenth-century England, the law presumed that a general hiring meant a hiring for one year.<sup>20</sup> If the employment lasted beyond one year, the employment was

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15. Hermann & Sor, *supra* note 3, at 769. The law of master and servant was firmly established in a society where "subordination to legitimate authority was thought to be a natural, inevitable, and even welcome accompaniment of moral grace and practical virtue." PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 123 (1980). The master-servant relationship was characterized as a "domestic relation," with the household serving as its model. Hermann & Sor, *supra* note 3, at 769; *see also* SELZNICK, *supra*, at 123 ("The old law of master and servant looked to the household as a model and saw in its just governance the foundations of orderly society."). The worker was deemed a member of the master's household and usually stayed with the same master for life. *Id.*

16. PERRITT, *supra* note 3, at 6; *accord* Ellen R. Peirce et al., *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1, 3-4 (1982) (describing status-based master-servant relationship with reciprocal rights and responsibilities); Claude D. Rohwer, *Terminable-At-Will Employment: New Theories for Job Security*, 15 PAC. L. J. 759, 760-61 (1984) (same); Note, *supra* note 1, at 1824 (same).

17. SELZNICK, *supra* note 15, at 128. The master was obligated to provide the servant with subsistence, adequate lodging and moral guidance. *Id.* If a servant was injured on the job, the master also had to provide medical care, and he "could not discharge a servant for an incurable illness." *Id.* (quoting RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 18 (1946)).

18. PERRITT, *supra* note 2, at 6.

19. SELZNICK, *supra* note 15, at 123; *see also* PERRITT, *supra* note 2, at 6 ("The obligations on both sides were not matters of contract . . . [but rather] were obligations imposed on each by the common law as a matter of public policy, and therefore the law gave little emphasis to the subjective intent of the parties as to what their relationship should be." (footnote omitted)). The terms of employment were predominantly implied by law; "it was not contemplated that the parties would design their own relationship." SELZNICK, *supra* note 15, at 123 (emphasis omitted).

20. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340

terminable only at the end of an additional year.<sup>21</sup> While American courts often applied this one-year-presumption rule in cases involving domestic or agricultural workers, they departed from it when dealing with other indefinite hirings.<sup>22</sup>

With the advent of the Industrial Revolution in America, the principle of freedom of contract became a powerful force that contributed to the movement of the employment relationship from the "traditional domestic setting into a commercial context."<sup>23</sup> In accordance with the

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(1974). In 1771, Blackstone summarized the English rule of a one-year presumption of employment as follows:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well as when there is work to be done, as when there is not.

HILL, *supra* note 4, at 2 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (Bell ed. 1771)); accord Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-20 (1976) (noting fairness in Blackstone's rule that employers be required to hire at-will employees for full year, not just for planting and harvest seasons); Daniel A. Mathews, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1439 (1975) (noting that Blackstone's rule recognized obligations placed on both parties); Peirce et al., *supra* note 16, at 3-4 (noting effect of feudal attitudes on at-will employment).

Blackstone's rule was based on equitable principles. Inequity would result if "masters could have the benefit of servants' labor during planting and harvest seasons but discharge them to avoid supporting them during the unproductive winter' . . . [or if] servants who were supported during the unproductive winter season 'could leave their masters' service when their labor was most needed.'" HILL, *supra* note 4, at 2-3 (citing Jay M. Feinman, *The Development of the Employment-At-Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976)). Under the English approach, the presumption of one-year employment was applied to all classes of workers. *Id.* at 3.

21. Note, *supra* note 20, at 340 (citing *Beeston v. Collyer*, 130 Eng. Rep. 786 (C.P. 1827)).

22. HILL, *supra* note 4, at 3. The law of employment in America was unsettled from the early to mid-nineteenth century on the issue of indefinite hiring, as shown in treatises and case law during this period. *Id.* For instance, Connecticut did not recognize Blackstone's rule. Feinman, *supra* note 20, at 122-23 (citing TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY* 347 (1846)). New York, however, did give effect to the one-year presumption rule. HILL, *supra* note 4, at 3 (citing *Davis v. Gorton*, 16 N.Y. 255 (1857)). Some commentators have attributed this confusion to the "fact that master and servant law was traditionally classified as a domestic relation, and as such was characterized by a personal and familial atmosphere." *Id.* at 4 (citing Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-25 (1980)); see also SELZNICK, *supra* note 15, at 123 (discussing use of domestic household as model for employment relationships); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 90-91 (1982) (discussing master-servant relationship as basis for early employment law).

23. HILL, *supra* note 4, at 4. Freedom of contract provided a method by

spirit of contractual freedom, the customary presumption of one-year employment was repudiated. In its place, the courts adopted a new rule which presumed indefinite hirings to be terminable at will.<sup>24</sup> The new American rule was first articulated by Horace Wood, who proclaimed that a "general or indefinite hiring is *prima facie* a hiring at will."<sup>25</sup> Wood's rule served as the foundation of the Employment-at-Will Doctrine from which all subsequent exceptions and modifications were created.<sup>26</sup>

A period of laissez-faire economic development was prevalent toward the end of the nineteenth century.<sup>27</sup> The attendant principles of freedom of contract and mutuality of obligation instilled legitimacy in

which parties could design their own relationships and have them enforced by courts of law. *Id.* Some commentators assert that the principle of freedom of contract caused the shift in American law away from the one-year rule toward the Employment-at-Will Rule. *Id.*

24. Note, *supra* note 1, at 1825. Most American jurisdictions adopted this new rule. PERRITT, *supra* note 2, at 9-10. California went one step further and codified the rule in its statutory code. HILL, *supra* note 4, at 7 (citing CAL. LAB. CODE § 2922 (West 1989)). Some American courts, however, continued to rely on the customary presumption of a one-year hiring. Note, *supra* note 1, at 1825 n.51. For an articulation of this rule, see *infra* note 25 and accompanying text.

25. PERRITT, *supra* note 2, at 9 (quoting HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877)). More specifically, the rule stated the following:

With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

HILL, *supra* note 4, at 5 (quoting HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272-73 (2d ed. 1886)); accord Alfred W. Blumrosen, *Employer Discipline: U.S. Report*, 18 RUTGERS L. REV. 428, 432 (1964) ("The result of a rigorous application of this rule was that most employment contracts were held to be 'at will.'"); Feinman, *supra* note 20, at 126 (finding Wood's rule inadequate and without legal or policy support); Mathews, *supra* note 20, at 1439; ("In the absence of a written contract for a specific term, the employment was at will, and the employer's freedom to discharge was absolute."); Murg & Scharman, *supra* note 3, at 334-35 (noting shift of burden of proof under Wood's rule from employer to employee); Peirce et al., *supra* note 16, at 5 ("This at will rule enunciated by Wood conforms to the free market model of maximum freedom for individual action."); Note, *supra* note 20, at 341 (noting lack of support cited by Wood for his rule).

26. HILL, *supra* note 4, at 5.

27. Hermann & Sor, *supra* note 3, at 770 n.42. The term "laissez-faire," which originated in France, means "let things proceed without interference." *Id.* at 770 n.42 (quoting HARRY S. SLOAN, DICTIONARY OF ECONOMICS 191 (1961)). The principle of laissez-faire was based on the notion that the individual is most productive when permitted to pursue his own self-interest freely. *Id.* Adam Smith adopted the term "laissez-faire" during the first half of the eighteenth century to describe the strength of the individual:

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of

the new Employment-at-Will Rule.<sup>28</sup> During the early twentieth century, the United States Supreme Court utilized this laissez-faire approach to conclude that governmental regulation of the employment relationship infringed upon the freedom of contract.<sup>29</sup> In *Adair v. United States*,<sup>30</sup> the Court articulated the following rule: “[T]he right of the [employee] to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such [employee].”<sup>31</sup> The Court held that an employer is not under a legal obligation to retain an employee in the absence of a contract fixing a length of service and controlling the parties’ conduct.<sup>32</sup>

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carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions . . . .

*Id.* (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book IV, at 508 (E. Cannan ed., 1937)). The doctrine of laissez-faire laid the groundwork for a free market system in which “labor was perceived as a commodity subject to exchange.” *Id.*; see also *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897))).

28. Comment, *supra* note 3, at 165. The freedom of contract theory presumes that an employee has an implied right to quit and that an employer can “discharge employees without liability at any time.” *Id.* The principle of mutuality of obligation means that the promises made by both parties to a contract are legally binding. *Id.*; see also Hermann & Sor, *supra* note 3, at 771 (“Contract theory provided for and validated the mutual rights and obligations of ‘free’ parties bargaining in permitted transactions.”). An employment contract allowed an employee to quit at a moment’s notice. Comment, *supra* note 3, at 165. The contract, however, was unenforceable because a court could not force employees to work without “violat[ing] the prohibition against involuntary servitude in the thirteenth amendment to the United States Constitution.” *Id.* Courts thus found that if an employee could quit at any time, an employer had a right to fire an employee at any time. *Id.*; see also Murg & Scharman, *supra* note 3, at 336-37 (“As a result of the principles of mutuality of obligation and mutuality of remedy, employment contracts for life were interpreted to be in effect for an indefinite period and unenforceable.”).

29. Note, *supra* note 1, at 1826; see also Blades, *supra* note 3, at 1416. In the early 1900s, the United States Supreme Court held that an employer’s right to discharge employees was a constitutionally protected property right. *Id.*; see *Coppage v. Kansas*, 236 U.S. 1, 10 (1915); *Adair v. United States*, 208 U.S. 161, 173 (1908). For example, in *Adair* the Court held that due process was violated by any law which interfered with “the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.” *Adair*, 208 U.S. at 174. For a discussion of these cases, see *infra* notes 30-35 and accompanying text.

30. 208 U.S. 161 (1908).

31. *Id.* at 174-75.

32. *Id.* at 175. In *Adair*, the Court examined the constitutionality of a federal statutory provision that made the discharge of an employee by an interstate carrier a criminal offense if the employee’s membership in a labor organization was the basis for the discharge. *Id.* at 168-69. The Court concluded that the statutory provision under which the defendant-employer was convicted was un-



The Court reiterated this holding seven years later in *Coppage v. Kansas*.<sup>33</sup> The *Coppage* Court recognized that “inequalities of fortune” would necessarily result from the exercise of private property rights and the freedom of contract.<sup>34</sup> The Court, however, followed its *Adair* precedent and held that the right of the employer to discharge an employee was a constitutionally protected property right.<sup>35</sup>

The mid-1930s marked a retreat from laissez-faire principles.<sup>36</sup> State and federal legislation gave employees the right to organize collectively and to force their employers to negotiate for improved employment conditions, which included protections against wrongful discharge.<sup>37</sup> The Court upheld such federal legislation in *NLRB v. Jones & Laughlin Steel Corp.*<sup>38</sup> In this case, the Court implied that employers enjoyed disproportionate power in employment relationships and could use this power to coerce employees.<sup>39</sup> The Court therefore rejected the strict freedom of contract approach taken in *Adair* and *Coppage* and concluded that Congress was obligated to protect employees’ rights through statutory protection.<sup>40</sup> As a result of this decision, transactions between employers and employees are now governed by standards of fairness, reasonable behavior and consistency with important policies.<sup>41</sup>

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constitutional because it arbitrarily interfered with the defendant’s personal liberty and property rights guaranteed by the Fifth Amendment. *Id.* at 180.

33. 236 U.S. 1 (1915).

34. *Id.* at 17.

35. *Id.* The Court stated:

[T]he Fourteenth Amendment, in declaring that a State shall not “deprive any person of life, liberty or property without due process of law,” gives to each of these an equal sanction; it recognizes “liberty” and “property” as co-existent human rights, and debars the States from any unwarranted interference with either.

*Id.*

36. PERRITT, *supra* note 2, at 13.

37. *Id.* The purpose of this legislation was to ameliorate the imbalance in the bargaining positions between the employer and the employee. *Hermann & Sor*, *supra* note 3, at 774. The legislation’s restrictions on the employer’s right to fire employees were designed to strengthen the employees’ bargaining position. *Id.*

38. 301 U.S. 1 (1937).

39. *Id.* at 45-46.

40. *Id.* at 33-34. In this case, the Supreme Court upheld the constitutionality of the National Labor Relations Act of 1935, which set forth the rights of employees and established protection for them through collective bargaining. *Id.* at 24, 49. The Court explained that the Act did not compel employers and employees to reach agreements, but rather fostered negotiation between the parties. *Id.* at 45. The Court found that the Act did not interfere with an employer’s normal exercise of its right to discharge an employee. *Id.* The Act, however, prohibited the employer from intimidating or coercing an employee “under cover of that right” with respect to the employee’s rights of self-organization and representation. *Id.* at 45-46.

41. Note, *supra* note 1, at 1826 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-93 (1937); *Nebbia v. New York*, 291 U.S. 502, 523 (1934); *Coppage v. Kansas*, 236 U.S. 1, 27 (1915) (Day, J., dissenting)). Expectations of

B. *Common-Law Protection for Private Employees: The Development of Exceptions to the Employment-at-Will Rule*

In the mid-1970s, protection of private sector employees against wrongful dismissal expanded under the common law.<sup>42</sup> In an attempt to redress the inequality in bargaining power between the employee and employer, state courts created three exceptions to the Employment-at-Will Rule.<sup>43</sup> These exceptions were first developed under contract theory and then later under tort theory.<sup>44</sup>

1. *Implied-in-Law Covenant of Good Faith and Fair Dealing Exception*

The development of the exceptions began with the doctrine of the implied covenant of good faith and fair dealing.<sup>45</sup> This doctrine "encompasses an obligation to refrain from interfering with the one party's right to receive the benefits of the contract."<sup>46</sup> With respect to recovery under this exception, the judiciary is split as to whether an employee may recover under tort or contract theory.<sup>47</sup> Generally speaking, a dismissed employee must show: "(1) Existence of an employment relationship; (2) [t]ermination of the employment; and (3) [s]ome aspect of the

both parties have changed during recent years. Blumrosen, *supra* note 25, at 433. Today, "employees and employers . . . expect fair treatment and fair dealing, proof before discipline, and uniform enforcement of reasonable rules of conduct and discipline." *Id.* (footnote omitted).

42. PERRITT, *supra* note 2, at 14.

43. Comment, *supra* note 3, at 166-67; *see also* Wagner v. City of Globe, 722 P.2d 250 (Ariz. 1986) (discussing development of three exceptions to Employment-at-Will Rule). For a further discussion of the development of these exceptions, *see generally* HILL, *supra* note 4, at 16-37; PERRITT, *supra* note 2, at 15-16; St. Antoine, *supra* note 3, at 563-65.

44. PERRITT, *supra* note 2, at 14.

45. *Id.* at 15; *see also* Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 23-26 (1984) (noting that covenant of good faith and fair dealing used in employment-at-will cases to prohibit termination upon evidence of bad faith, malice, retaliation and denial of commissions, wages or benefits); Murg & Scharman, *supra* note 3, at 361-67 (indicating that covenant of good faith and fair dealing applied to prevent employer from discharging employee in order to deprive employee of "prior earned benefits").

46. HILL, *supra* note 4, at 34 (quoting William L. Mauk, *Wrongful Discharges: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 245 (1985)); *see also* Comment, *supra* note 3, at 167 ("The implied covenant provides that neither party will do anything that will injure the right of the other to receive the benefit of their agreement." (citing *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977))). Courts will typically imply a covenant of good faith and fair dealing in wrongful discharge cases "to prevent automatic losses or forfeitures" of employees' rights. HILL, *supra* note 4, at 34.

47. HILL, *supra* note 4, at 34 (comparing *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) with *Rees v. Bank Bldg. & Equip. Corp. of America*, 332 F.2d 548 (7th Cir.), *cert. denied*, 379 U.S. 932 (1964)); *see also* Comment, *supra* note 3, at 167 (noting that "courts have held employers liable based on contract and/or tort theories for breach of an implied-in-law covenant of good faith and fair dealing.").

termination that was unfair or in bad faith."<sup>48</sup>

The seminal case in the development of modern wrongful dismissal actions for breach of an implied-in-law covenant is the California case of *Petermann v. International Brotherhood of Teamsters*.<sup>49</sup> In *Petermann*, the plaintiff alleged that he had been discharged for refusing to follow his employer's instruction to make false statements in his testimony to a state legislative committee.<sup>50</sup> Although the employment contract had no fixed duration, the court held that "in order to more fully effectuate the state's declared policy against perjury, the civil law . . . must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury."<sup>51</sup> In so holding, the court implied a promise on the part of the employer not to discharge employees for reasons that are contrary to public policy.<sup>52</sup> The court found that the plaintiff was entitled to recovery because the defendant had breached the implied covenant of good faith.<sup>53</sup>

A second significant case applying the implied covenant of good faith and fair dealing exception is *Monge v. Beebe Rubber Co.*<sup>54</sup> In this case, the New Hampshire Supreme Court was confronted with a plaintiff's claim that she was discharged by her foreman because she refused to go on a date with him.<sup>55</sup> The court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract."<sup>56</sup> The court found that sufficient evidence sup-

48. PERRITT, *supra* note 2, at 3. Subsequent to such a showing, a jury would then decide whether the employee was dismissed unjustly and in bad faith. *Id.* There is, however, a substantial divergence of judicial opinion with respect to the elements of the implied covenant of good faith and fair dealing exception. *Id.*

49. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

50. *Id.* at 26. The plaintiff alleged that he was fired the day after he refused to commit perjury at the behest of his employer. *Id.*

51. *Id.* at 27. The court noted that "public policy" is "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* (quoting *Safeway Stores v. Retail Clerks Int'l Ass'n*, 261 P.2d 721, 726 (Cal. 1953)).

52. *Id.* at 27-28; PERRITT, *supra* note 2, at 192-93.

53. *Petermann*, 344 P.2d at 28. The court noted that "[w]hen one, who has been employed for such time as his services are satisfactory, is discharged it is 'well settled that the employer must act in good faith.'" *Id.* (citation omitted).

54. 316 A.2d 549 (N.H. 1974).

55. *Id.* at 550.

56. *Id.* at 551 (citing *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973)). In arriving at this holding, the court balanced the employee's interest in continuing his employment with the employer's interest in running his business as he saw fit. *Id.* The court justified its position by stating that its holding provides an employee with stability of employment without interfering with the employer's interest in running his business efficiently. *Id.* at 552.

ported the jury's conclusion that the employee's discharge had been maliciously motivated and that the defendant had therefore breached the employment contract.<sup>57</sup>

A few years later, the Massachusetts Supreme Judicial Court had the opportunity to address the implied covenant exception in *Fortune v. National Cash Register Co.*<sup>58</sup> In this case, the employer discharged the plaintiff in order to deprive him of commissions earned while he was an employee.<sup>59</sup> The court permitted recovery under a breach of contract theory and held that even though the employment contract was terminable at will, the contract contained an implied covenant of good faith and fair dealing.<sup>60</sup> The court concluded that the employer discharged the employee in bad faith and that the employer was therefore in breach of the employment contract.<sup>61</sup>

57. *Id.* at 552.

58. 364 N.E.2d 1251 (Mass. 1977).

59. *Id.* at 1253-55.

60. *Id.* at 1255-56. The court recognized the employer's need for substantial control over its employees but found that when "commissions are to be paid for work performed by the employee, the employer's decision to terminate its at-will employee should be made in good faith. [The employer's] right to make decisions in its own interest is not . . . unduly hampered by a requirement of adherence to this standard." *Id.* at 1256.

61. *Id.* at 1257-58. The court concluded that a principal acts in bad faith when it terminates an agent's employment contract just before the completion of a sale in order to deprive the agent of his full compensation or any portion of it. *Id.* at 1257.

For a case resembling *Petermann, Monge* and *Fortune* but varying factually, see *Cleary v. American Airlines*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980). In *Cleary*, the plaintiff alleged that he was hired pursuant to an oral employment contract for an indefinite period and was discharged after working for the employer for eighteen years. *Id.* at 724-25.

In its analysis, the California court found two factors to be significant. First, the court looked at the longevity of plaintiff's service and found that "[t]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts." *Id.* at 729. The *Cleary* court concluded that this covenant imposed a duty on the employer to refrain from interfering with the plaintiff's benefits of the employment bargain, which had accrued during the period of employment. *Id.*

Second, the court noted the existence of the employer's expressed policy regarding employee grievances and discharges. *Id.* The court found that the existence of this policy proved that this employer "had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to all of its employees." *Id.*

The court concluded that, because of the length of the plaintiff's service and the employer's expressed policy, the plaintiff could not be terminated without good cause. *Id.* The *Cleary* court noted that once the plaintiff's burden of proof is met, the plaintiff will have a cause of action under both contract and tort theories. *Id.* "*Cleary* subsequently has been construed to imply a covenant of good faith and fair dealing only when (1) longevity of employment is present, or (2) the employer has promulgated a policy for adjudicating employee disputes." PERRITT, *supra* note 2, at 194 n.82 (citing *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613, 619 (Cal. Ct. App. 1984)).

## 2. *Implied-in-Fact Contract Exception*

The second wrongful dismissal doctrine created by common law is the implied-in-fact contract exception.<sup>62</sup> This exception “permits a plaintiff to recover for breach of contract when the employer dismisses the employee in violation of promises of employment tenure made orally or implied from a course of conduct or from employee policies or handbooks.”<sup>63</sup>

Unlike the implied covenant of good faith and fair dealing exception, the implied-in-fact contract exception only allows employees to recover under contract principles.<sup>64</sup> In order to recover, the plaintiff-employee must prove the following: “1. The employer made a promise of employment security; 2. The employee gave consideration for the promise in the form of detrimental reliance or otherwise; [and] 3. The employer breached the promise by dismissing the employee.”<sup>65</sup> Implied-in-fact promises may be derived from employer representations as well as from an employee’s length of service and conduct.<sup>66</sup>

In two leading cases which have applied this doctrine, employer representations of employment tenure were made to the employee both orally and in a personnel handbook.<sup>67</sup> For example, in *Toussaint v. Blue Cross & Blue Shield of Michigan*,<sup>68</sup> one of the plaintiffs alleged that he was discharged in violation of his employment contract.<sup>69</sup> The employer had orally assured the plaintiff of job security and had given him an em-

62. PERRITT, *supra* note 2, at 15. For a further discussion of this exception, see generally Lopatka, *supra* note 45, at 17-22; Murg & Scharman, *supra* note 3, at 367-72.

63. PERRITT, *supra* note 2, at 2 (footnote omitted). This exception has been similarly defined by other commentators. See, e.g., St. Antoine, *supra* note 3, at 564 (“[A]n employer’s statement of policy as set forth in personnel manuals or employee handbooks, or an employer’s oral or written assurances to employees at the time of hiring, could be found to constitute an express or implied contract that an employee would not be discharged except for ‘just cause.’” (citing Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917 (Cal. Ct. App. 1981))); Comment, *supra* note 3, at 167 (“[T]he employment contract may incorporate the terms of a personnel manual, thereby limiting an employer’s ability to discharge employees. Under this approach, assurances of job security in employee manuals or personnel policy statements may be terms of an employment contract.” (footnotes omitted)).

64. Comment, *supra* note 3, at 167.

65. PERRITT, *supra* note 2, at 2.

66. *Id.* at 181. Although promises of job security are often implied from employer representations in employee handbooks, oral assurances by employers may also constitute actionable promises. *Wagner v. City of Globe*, 722 P.2d 250, 254 n.5 (Ariz. 1986). Thus, “absence of a personnel manual or the presence of disclaiming language in its policies may not absolutely insulate an employer from liability.” *Id.*

67. PERRITT, *supra* note 2, at 183.

68. 292 N.W.2d 880 (Mich. 1980).

69. *Id.* at 883.

ployee handbook reinforcing this oral assurance.<sup>70</sup> The handbook stated that employees would be dismissed “for just cause only.”<sup>71</sup> The Supreme Court of Michigan found that this provision in the manual constituted an enforceable promise and that the plaintiff was permitted to recover for his employer’s breach of contract.<sup>72</sup> The court held that “an employer’s express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract.”<sup>73</sup> The court thus concluded that an employee in such a situation may maintain an action for wrongful discharge if dismissed without just cause.<sup>74</sup>

Another leading employer representation case is the New York decision of *Weiner v. McGraw-Hill, Inc.*<sup>75</sup> In this case, as in *Toussaint*, the employer, McGraw-Hill, assured the plaintiff of job security through an oral promise and a personnel handbook.<sup>76</sup> The handbook stated that employees would not be terminated without “just and sufficient cause.”<sup>77</sup> The Court of Appeals of New York held that, although there was no fixed term of employment, the plaintiff relied on these employer representations of job security and therefore had a valid claim for breach of contract against his employer for dismissing him without just

70. *Id.* at 884. The plaintiff testified that his employer, Blue Cross and Blue Shield of Michigan, orally assured him of job security when it told him that “he would be with the company ‘as long as [he] did [his] job.’ ” *Id.* The plaintiff had worked for Blue Cross in a middle management position for five years before being discharged. *Id.* at 883.

71. *Id.* at 884.

72. *Id.* at 897. The court stated: “Breach of the employer’s uniformly applied rules is a breach of the contract and cause for discharge. In such a case, the question for the jury is whether the employer actually had a rule or policy and whether the employee was discharged for violating it.” *Id.* (footnote omitted). The court found that the question of cause for discharge was proper for the jury and remanded the case to the trial court with instructions to reinstate the jury verdict in favor of the plaintiff. *Id.* at 897 & n.39.

73. *Id.* at 890. The court noted that Blue Cross had established such a company policy to dismiss only for just cause, and that this fact was a “separate basis . . . sufficient to overcome the presumptive construction that the [employment] contract was terminable at will.” *Id.* at 892. The court held that such a provision was enforceable even though the contract was not for any definite term. *Id.* at 890. The court further stated that “[i]f there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place.” *Id.* at 895.

74. *Id.* at 890.

75. 443 N.E.2d 441 (N.Y. 1982).

76. *Id.* at 442.

77. *Id.* After McGraw-Hill orally promised the plaintiff job security, the plaintiff signed a form that indicated that he would be subject to the provisions of a personnel handbook. *Id.* A pertinent provision stated that “[t]he company will resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed. However, if the welfare of the company indicates that dismissal is necessary, then that decision is . . . carried out forthrightly.” *Id.*

cause.<sup>78</sup>

The issue of the enforceability of provisions in a personnel handbook in the absence of oral promises by the employer was addressed by the Supreme Court of Minnesota in *Pine River State Bank v. Mettille*.<sup>79</sup> In this case, the plaintiff was hired pursuant to an entirely oral employment contract of indefinite duration.<sup>80</sup> Subsequent to the plaintiff's hiring, his employer distributed a personnel handbook to all of its employees that contained provisions on disciplinary policy and job security.<sup>81</sup> The plaintiff alleged that he was dismissed without cause and in violation of handbook provisions on disciplinary procedures.<sup>82</sup>

Even absent an oral promise, the Minnesota court held that "where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude handbook provisions on job security from being enforceable, whether they are proffered at the time of the original hiring or later, when the parties have agreed to be bound thereby."<sup>83</sup> For personnel handbook provisions to be binding as part of the original employment contract, however, the court stated that they must satisfy the requirements for the formation of a unilateral contract.<sup>84</sup> The *Pine River* court concluded that the handbook provisions on disciplinary procedures satisfied these requirements. The provisions therefore were binding as part of the original employment contract, and the employer's failure to comply with these provisions when dismissing the plaintiff was a breach of this contract.<sup>85</sup>

78. *Id.* at 445.

79. 333 N.W.2d 622, 625 (Minn. 1983).

80. *Id.* at 624. The parties did not discuss the permanency of the plaintiff's position nor the length of service to be provided. *Id.*

81. *Id.* The defendant-employer argued that it never intended the handbook to become part of an employment contract; rather, the purpose of the handbook was merely to inform employees of bank procedures and the availability of vacation time. *Id.*

82. *Id.* at 625. In response to the plaintiff's argument that the defendant breached his employment contract by the wrongful dismissal, the defendant mainly argued that it had an unqualified right to terminate the plaintiff because the plaintiff's contract was at-will. *Id.*

83. *Id.* at 629-30.

84. *Id.* at 627. A binding unilateral contract may be created if the handbook language constitutes an offer, that offer is communicated to the employee, and the employee accepts the offer, and consideration is furnished. *Id.* at 626-27. The offer must be definite in form and may be communicated by the dissemination of the handbook to the employee. *Id.* at 626. The retention of employment by an at-will employee with knowledge of new or changed conditions constitutes acceptance. *Id.* at 627.

85. *Id.* at 631. The court found that the disciplinary provisions in the personnel handbook became part of the plaintiff's employment contract, thereby restricting the defendant's right to discharge the plaintiff at will. *Id.* at 630.

Interestingly, the handbook provisions on job security in this case were not found to be enforceable. *Id.* The court stated that these provisions were merely general statements of policy and therefore did not meet the contractual requirements of an offer. *Id.* An example of such a general statement, provided by the

Implied-in-fact promises may not only be derived from employer representations, but also from an employee's length of service and conduct.<sup>86</sup> Several courts have looked to "the totality of the course of dealing between employer and employee to determine if a promise of employment tenure could be inferred."<sup>87</sup> For example, the United States Supreme Court implied a promise of employment tenure from the length of an employee's service in *Perry v. Sindermann*.<sup>88</sup> In this case, the plaintiff was dismissed from a teaching position at a state college after ten years of employment.<sup>89</sup> The plaintiff alleged that he had employment tenure under the school's *de facto* tenure program.<sup>90</sup> He further alleged that he relied on a provision in the school's faculty guide which encouraged a "faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory."<sup>91</sup>

The Court held that the plaintiff must be given an opportunity to "justify his legitimate claim of entitlement to continued employment absent 'sufficient cause.'"<sup>92</sup> The Court further recognized that the plaintiff might prove his claim by showing relevant facts of the circumstances of his service, such as the number of years that he had held the position.<sup>93</sup> The *Perry* Court also noted that an agreement may be implied from "the promisor's words and conduct in the light of the surrounding circumstances."<sup>94</sup>

Several private sector cases have also taken the "totality of the

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court, is an employer's invitation to consider the employee's job a "career situation." *Id.* at 626 (citing *Degen v. Investors Diversified Servs., Inc.*, 110 N.W.2d 863 (Minn. 1961)).

86. PERRITT, *supra* note 2, at 181.

87. *Id.* at 187-88 ("Length of service has been viewed as establishing a course of dealing from which a promise can be implied in fact or as a factor influencing application of an implied covenant of good faith." (citing RESTATEMENT (SECOND) OF CONTRACTS § 18 (manifestation of mutual assent), § 19 (conduct as manifestation of assent), § 24 (offer defined) (1981))).

88. 408 U.S. 593 (1972).

89. *Id.* at 594.

90. *Id.* at 600. The plaintiff alleged that although there was no formal agreement, the college administration had fostered a binding understanding of employment tenure. *Id.* at 599-600.

91. *Id.* at 600. The plaintiff relied on guidelines promulgated by the school, which provided that "a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure." *Id.*

92. *Id.* at 602-03.

93. *Id.* at 602. The Supreme Court noted that a teacher, like the plaintiff in this case, might be able to show an "unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id.* The Court suggested that such implied promises may be shown from rules, the existence of understandings and the length of the employee's service. *Id.*

94. *Id.* (quoting 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 562 (1960)). The Court further noted that "[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past." *Id.* (quoting 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 562 (1960)).



course of dealing” approach when considering the issue of an implied-in-fact promise derived from length of service and conduct.<sup>95</sup> In the Tennessee case of *Delzell v. Pope*,<sup>96</sup> the plaintiff was dismissed after working for his employer for thirteen years.<sup>97</sup> The plaintiff sought damages for an alleged breach of an employment contract.<sup>98</sup> In considering the surrounding circumstances of the parties, the Supreme Court of Tennessee noted that there was a period of continued employment without interruption and that there was a fixed annual salary.<sup>99</sup> According to the court, these circumstances indicated that “it would be most unreasonable to infer that he was employed upon a month to month basis and was subject to dismissal on a moment’s notice.”<sup>100</sup> The court concluded that there was an “implied understanding based upon a course of conduct between the complainant and the [employer], and was of sufficient duration to bind the parties.”<sup>101</sup>

The California Court of Appeal also considered a case of implied employment tenure in *Pugh v. See’s Candies, Inc.*<sup>102</sup> In *Pugh*, the court noted that employers do not have an absolute right to terminate employees.<sup>103</sup> Rather, the court held that “a contract for permanent employment . . . cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary.”<sup>104</sup> The court then identified certain factors to be evaluated when determining whether an implied-in-fact promise for continued employment exists. These factors include “the personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.”<sup>105</sup>

In *Pugh*, the company president generally refused to terminate ad-

95. PERRITT, *supra* note 2, at 187-89.

96. 294 S.W.2d 690 (Tenn. 1956).

97. *Id.* at 691.

98. *Id.*

99. *Id.* at 694. The court noted that many courts view the surrounding circumstances of the parties as controlling. *Id.* In *Delzell*, the court found controlling the fact that the plaintiff’s employment continued for a period of five years without interruption and at a fixed salary paid annually. *Id.*

100. *Id.* at 693.

101. *Id.*

102. 171 Cal. Rptr. 917 (Cal. Ct. App. 1981).

103. *Id.* at 922. The court stated: “The mere fact that a contract is terminable at will does not give the employer the absolute right to terminate it in all cases.” *Id.* (quoting *Patterson v. Philco Corp.*, 60 Cal. Rptr. 110, 111 (Cal. Ct. App. 1967)).

104. *Id.* at 925 (quoting *Drzewiecki v. H & R Block, Inc.*, 101 Cal. Rptr. 169, 174 (Cal. Ct. App. 1972)). The court explained that a contract for “permanent” employment is “an agreement that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer’s dissatisfaction with the employee’s services or the existence of some ‘cause’ for termination.” *Id.* at 924.

105. *Id.* at 925-26 (footnotes omitted).

ministrative personnel without good cause.<sup>106</sup> The plaintiff, however, was dismissed without any reason after working for the employer for thirty-two years.<sup>107</sup> The court considered the totality of the parties' relationship and the factors mentioned above in order to determine whether an implied-in-fact promise for continued employment existed.<sup>108</sup> After considering the facts in evidence, the court concluded that the jury could determine the existence of such a promise and therefore reversed the nonsuit granted by the trial court.<sup>109</sup>

### 3. *Public Policy Exception*

The public policy exception is the final common-law development of wrongful dismissal.<sup>110</sup> This doctrine is usually based on tort theory and "recognizes a cause of action for retaliatory discharge when an employer discharges an employee for a reason that is contrary to an important public policy."<sup>111</sup>

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106. *Id.* at 919. When the plaintiff began his employment, the president at the time often told him: "[I]f you are loyal to [See's] and do a good job, your future is secure." *Id.*

107. *Id.* at 918. When the plaintiff asked the president why he was discharged, the president merely told him that "he should 'look deep within [him]self' to find the answer, and that '[t]hings were said by people in the trade that have come back to us.'" *Id.* at 919.

108. *Id.* at 927. The court noted the duration of the plaintiff's employment, the employer's policies, the praises, assurances and promotions that the plaintiff received, and the absence of any direct criticism of the plaintiff's work. *Id.*

109. *Id.* The court provided some guidance to the trial court on remand. *Id.* The court found that the plaintiff had demonstrated a prima facie case of wrongful termination. *Id.* The court explained that because the plaintiff had done so, the burden shifted to the employer to come forward with evidence of the employer's reason for the termination. *Id.* The court explained that after the employer comes forward with a reason, the plaintiff could then attack it "either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy . . .), or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles." *Id.* The court stressed that the plaintiff "bears . . . the ultimate burden of proving that he was terminated wrongfully." *Id.*

110. PERRITT, *supra* note 2, at 15. For a further discussion of this exception, see generally Lopatka, *supra* note 45, at 6-17; Murg & Scharman, *supra* note 3, at 343-55.

111. Comment, *supra* note 3, at 166. Most courts base the public policy exception on tort theory. *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988). At least one state, Alabama, has refused to recognize a public policy exception to the Employment-at-Will Rule. See *Howard v. Wolff Broadcasting Corp.*, 1992 Ala. LEXIS 1276, at \*13 (Ala. Feb. 8, 1992). In *Howard*, the Supreme Court of Alabama provided three reasons for its refusal to recognize this exception: "(1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule well-established employment law; and (3) 'contrary to public policy' is too vague or nebulous a standard to justify creation of a new tort." *Id.* at \*16 (quoting *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131-32 (Ala. 1977)). The *Howard* court explained that the Alabama legislature, not the courts, should re-

A majority of courts allow both contract and tort recovery under the public policy exception.<sup>112</sup> In order to recover, the plaintiff must plead and prove the following elements:

1. The existence of a clear public policy manifested in a state or federal constitution, statute or administrative regulation, or in the common law
2. That dismissing employees for conduct like that of the plaintiff would jeopardize the public policy
3. That the plaintiff's dismissal was motivated by conduct related to the public policy [and]
4. That the employer lacked overriding legitimate business justification for the dismissal.<sup>113</sup>

The public policy exception typically arises when an employee is dismissed for one of three reasons.<sup>114</sup> The first reason is when an employee is discharged for "refusing to commit an unlawful or wrongful act."<sup>115</sup> Courts, for example, have applied the public policy exception to discharges for refusing to violate consumer credit and protection laws,<sup>116</sup>

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spond "to perceived injustices that can result by a strict application of the long-standing doctrine of employment 'at-will.'" *Id.* at \*18-19. In fact, previous cases decided by the Supreme Court of Alabama have been overruled by specific statutory provisions, which create limited public policy exceptions to the at-will rule. *Id.* at \*16; *see, e.g.,* ALA. CODE § 25-5-11.1 (1992) (overruling *Meeks v. Opp Cotton Mills, Inc.*, 459 So. 2d 814 (Ala. 1984), in which court declined to recognize public policy exception for discharge resulting from filing of workmen's compensation claim).

112. Comment, *supra* note 3, at 166 n.65. Some courts, however, permit a plaintiff to recover only contract damages. *Id.* For example, Arkansas bases its public policy exception exclusively on contract theory. *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988); *see also* *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983) (basing public policy exception exclusively on contract theory). Arkansas, however, does allow tort damages on a cause of action for outrage "[i]f an employer's conduct in breaching a contract of employment is sufficiently egregious or extreme." *Sterling Drug*, 743 S.W.2d at 385.

113. *PERRITT*, *supra* note 2, at 3.

114. Comment, *supra* note 3, at 166-67.

115. *Id.* at 166 (footnote omitted). For a further discussion of this type of discharge, *see* generally *HILL*, *supra* note 4, at 28-30.

116. *See, e.g.,* *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 276 (W. Va. 1978). In *Harless*, the plaintiff alleged that he was discharged for requiring his employer to comply with the state and federal consumer credit and protection laws. *Id.* at 272. The plaintiff was summarily fired without being given a reason. *Id.* at 273. The defendant-employer asserted that the plaintiff had been an at-will employee with no fixed duration of employment and thus it had a right to terminate without giving any reason for doing so. *Id.*

The Supreme Court of Appeals of West Virginia recognized that "the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." *Id.* at 275. The court concluded that there was a "clear and

for refusing to violate state food labeling laws,<sup>117</sup> and for refusing to participate in illegal price-fixing schemes.<sup>118</sup>

The public policy exception may also arise when an employee is dismissed for "performing a public obligation."<sup>119</sup> For instance, courts have applied this exception to dismissals caused by serving on jury duty<sup>120</sup> or by reporting the criminal conduct of a fellow

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unequivocal public policy" that consumers obtaining credit are to be extended protection under legislation. *Id.* at 276. The court opined that such "manifest public policy" should not be frustrated by refusing to extend a cause of action to a discharged employee of a lending institution who seeks to ensure compliance with federal and state consumer credit and protection laws. *Id.* Accordingly, the *Harless* court sustained the cause of action. *Id.*

117. *See* *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (Conn. 1980). In this case, the plaintiff, a quality control director and operations manager, alleged that he had been discharged for reporting to the employer deviations from the Connecticut Uniform Food, Drug and Cosmetic Act (Act). *Id.* at 388. The Act prohibits a person from selling mislabeled food and imposes criminal sanctions on those that violate it. *Id.* Thus, the plaintiff might have been criminally prosecuted for violating the Act because of his position as quality control director and operations manager. *Id.* The Supreme Court of Connecticut noted that the purpose of the Act was to protect public health. *Id.* (citing CONN. GEN. STAT. §§ 19-211 (1975)). The *Sheets* court concluded that the plaintiff had a valid cause of action for wrongful discharge, thereby recognizing an exception to employment-at-will when a discharge violates public policy. *Id.* at 386-89. The court clarified its position by stating that it would not "decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. . . . For today, it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." *Id.* at 389.

118. *See, e.g., Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980). In *Tameny*, the California Supreme Court evaluated a discharge in which the plaintiff was allegedly dismissed by his employer for refusing to participate in an illegal price-fixing scheme. *Id.* at 1330-31. The plaintiff alleged that upon refusing to participate in such a scheme, he was told that his dismissal was imminent, and that shortly thereafter he was discharged. *Id.* at 1332. The court found that the plaintiff had a valid cause of action in tort for wrongful discharge. *Id.* at 1337.

The *Tameny* court held that an employee may bring a tort action against an employer and recover if the employer discharged the employee in violation of public policy. *Id.* at 1335 & n.11. The court found that "an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act . . . reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." *Id.* at 1335 (citation omitted).

119. Comment, *supra* note 3, at 167. For a further discussion of this type of discharge, see generally HILL, *supra* note 4, at 30-31.

120. *See, e.g., Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975). In *Nees*, the court noted that unless there is a contract or legislation to the contrary, "an employer can discharge an employee at any time and for any cause. Conversely, an employee can quit at any time for any cause. Such termination by the employer or employee is not a breach of contract and ordinarily does not create a tortious cause of action." *Id.* at 514-15. The court noted, however, that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done." *Id.* at 515.

worker.<sup>121</sup> Finally, the public policy exception may arise when an employee is dismissed for “exercising a legal right or privilege.”<sup>122</sup> Courts, for example, have applied the exception to discharges for filing a workmen’s compensation claim,<sup>123</sup> for exercising pension plan

The court found that such circumstances existed in *Nees*. The plaintiff alleged that she was discharged because she went on jury duty. *Id.* at 513. The Supreme Court of Oregon held that jury duty is an important public interest and that the employer’s discharge of the plaintiff for performing this public obligation caused the employer to be liable. *Id.* at 516. The court opined that “[i]f an employer were [sic] permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.” *Id.*

121. *See, e.g.*, *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 386 (Ark. 1988) (“[T]he public policy of the state is contravened if an employer discharges an employee for reporting a violation of state or federal law.”); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981). In *Palmateer*, the plaintiff alleged that he was discharged in retaliation for telling local law enforcement authorities about a co-worker’s possible violation of the state criminal code and for agreeing to assist in the investigation and trial of the employee. *Palmateer*, 421 N.E.2d at 877. The court found that the plaintiff stated an actionable claim for retaliatory discharge. *Id.* at 880. The court recognized that there are limits on the employer’s authority to discharge an employee when the discharge would be injurious to the public’s well-being. *Id.* at 878-80. Accordingly, the *Palmateer* court held that the basis of the retaliatory discharge tort is the protection of public policy, which “favor[s] [the] investigation and prosecution of criminal offenses.” *Id.* at 880. In so holding, the court emphasized the important public policy implications of protecting the lives and property of citizens. *Id.* at 879. The court suggested that its holding would encourage the reporting of crimes and thereby protect the public welfare. *Id.* at 880.

122. Comment, *supra* note 3, at 167. For a further discussion of this type of discharge, see generally HILL, *supra* note 4, at 31-33.

123. *See, e.g.*, *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425, 427-28 (Ind. 1973). In *Frampton*, the plaintiff alleged that she was discharged by her employer for filing a workmen’s compensation claim. *Id.* at 426. The plaintiff was discharged one month after she received a settlement as a result of the claim that she had filed. *Id.* According to the complaint, the employer gave no reason for her discharge. *Id.* The Supreme Court of Indiana found that the plaintiff stated a claim for which relief could be granted. *Id.* at 428. The court recognized that “[r]etaliatory discharge for filing a workmen’s compensation claim is a wrongful, unconscionable act and should be actionable in a court of law.” *Id.* The court found that a plaintiff proving such a discharge would be entitled to full compensation in damages. *Id.* The court held that an employee has a statutorily conferred right to workmen’s compensation that may not be interfered with by employers. *Id.* at 427. The court stated that the Indiana Workmen’s Compensation Act “creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation.” *Id.* The court found that unless employees are able to exercise their rights without fear of reprisal, the goals of the Indiana Workmen’s Compensation Act would be thwarted and public policy would be undermined. *Id.*

rights,<sup>124</sup> and for exercising the constitutional right of free speech.<sup>125</sup>

### C. *Current Status of the States*

The fifty states continue to differ in their approaches to the discharge of employees.<sup>126</sup> More than three-fourths of the states have refused to apply the Employment-at-Will Rule with strict adherence.<sup>127</sup> Instead, they have adopted one or more of the common-law wrongful dismissal exceptions to the Employment-at-Will Rule.<sup>128</sup> Six states,

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124. *See, e.g., Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822, 826-27 (E.D.N.Y. 1980). In *Savodnik*, the plaintiff received frequent promotions and annual wage increases. *Id.* at 823. The plaintiff and his employer had agreed that the plaintiff would receive a pension fund as part of his compensation and that these pension rights would vest after 15 years of covered service. *Id.* at 825-26. The plaintiff alleged that he had been fired after 13 years of service in order to avoid the vesting of his pension fund. *Id.* at 823. The employer did not dispute that the plaintiff's termination was solely for this purpose. *Id.* at 826. The employer, in fact, agreed that the plaintiff was discharged to deprive him of his benefits under the pension plan but argued that its conduct was not illegal. *Id.* The United States District Court for the Eastern District of New York held that an employer who discharges a model employee for the purpose of avoiding the vesting of pension plan rights violates a strong public policy and thus may be liable for abusive discharge. *Id.* at 826-27.

The *Savodnik* court found a strong public policy in protecting the interests of participants of pension plans. *Id.* at 826. The court stated that "[t]his policy is not one of vague origin, or arguable statutory construction—its basis is the Constitution of the State (Art. 5, § 7)." *Id.* The court recognized that the employer may not violate this public policy "under the guise of the employment at will doctrine." *Id.*

125. *See, e.g., Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898 (3d Cir. 1983). In *Novosel*, the plaintiff alleged that he was discharged for refusing to assist his employer in a lobbying effort to support no-fault insurance legislation. *Id.* at 896. The plaintiff claimed that he was wrongfully discharged in violation of public policy. *Id.* The United States Court of Appeals for the Third Circuit applied Pennsylvania law and held that an employee who has been dismissed in violation of a "significant and recognized public policy" may maintain a cause of action for wrongful discharge. *Id.* at 898. The *Novosel* court found that notions of political and associational freedoms under the United States Constitution and state constitutions create a "cognizable expression of public policy" that is implicated whenever terms of employment are used to control an employee's political activities. *Id.* at 899 & n.6. The Third Circuit defined a "clearly mandated public policy" as one that "strikes at the heart of a citizen's social right, duties and responsibilities." *Id.* at 899 (quoting *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981)). The court concluded that there was no legitimate and plausible reason for the discharge stated in plaintiff's complaint and that his discharge was in violation of an important public policy. *Id.* at 900.

126. For a discussion of the states' current approaches, see generally PERRITT, *supra* note 2, at 23-30 & nn.48-99 and PERRITT, *supra* note 2 (Supp. 1990).

127. *Id.* at 23.

128. The drafters of the Model Act noted that these exceptions are not adequate to protect employee rights. MODEL ACT, *supra* note 7, at 4 (prefatory note). In general, only the most serious public policy violations by an employer are actionable in tort. *Id.* Furthermore, implied-in-fact contract suits based on an employer's oral or written promises can be ineffective where the employer

however, still honor the Rule.<sup>129</sup>

### III. ANALYSIS OF THE MODEL EMPLOYMENT TERMINATION ACT

In August 1991, the National Conference of Commissioners on Uniform State Laws approved the Model Employment Termination Act.<sup>130</sup> The Model Act applies to terminations of employment occurring after its effective date,<sup>131</sup> although it does not apply to a termination at the end of an express, specified period.<sup>132</sup> Under the Model Act, the word "terminations" generally includes dismissals, suspensions or layoffs for more than two consecutive months, or the quitting or retiring by an employee that was induced by an intolerable act or omission by the employer.<sup>133</sup> If the termination at issue qualifies,<sup>134</sup> the Model Act generally displaces all common-law rights against the employer.<sup>135</sup> The employee, however, retains all common-law rights if the termination is not subject to a good cause requirement<sup>136</sup> or a specified duration

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simply disclaims such promises or removes just-cause provisions from its personnel handbook. *Id.*

129. PERRITT, *supra* note 2, at 29. These states are Delaware, Florida, Georgia, Louisiana, Mississippi and Rhode Island. *Id.* According to Perritt, "[t]he highest courts in many of the states still apparently honoring the Employment-at-Will Rule either have not considered the matter recently, or have expressed some willingness to recognize exceptions to the rule in an appropriate case." *Id.* at 30.

130. MODEL ACT, *supra* note 7, §§ 1-14 app.

131. *Id.* § 2(a).

132. *Id.* § 2(b). Section 2(b) states that the Model Act "does not apply to a termination at the expiration of an express oral or written agreement of employment for a specified duration, which was valid, subsisting, and in effect on the [effective] date of this [Act]." *Id.*

133. *Id.* § 1(8). In order to constitute a "termination" under the Act, a quitting or retiring must be "induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire." *Id.* § 1(8)(iii). Section 1(8)(iii) incorporates the doctrine of "constructive discharge," which is not a violation of the Model Act in and of itself; rather, it constitutes a termination that becomes a violation if there is a lack of good cause. *Id.* § 1(8)(iii) cmt.

134. The termination qualifies if it "requires good cause under Section 3(a), is subject to an agreement for severance pay under Section 4(c), or is permitted by the expiration of an agreement for a specified duration under Section 4(d)." *Id.* § 2(c).

135. *Id.* The Act does not, however, displace rights or claims arising under the following: "state or federal statutes or administrative rules or regulations having the force of law [or local ordinances valid under state law], a collective-bargaining agreement between an employer and a labor organization, or an express oral or written agreement relating to employment which does not violate this [Act]." *Id.* § 2(e). These rights or claims generally do not limit rights under the Model Act. *Id.*

136. For a discussion of the requirement of good cause, see *infra* notes 145-71 and accompanying text.

agreement,<sup>137</sup> and if the employee is not a party to a severance pay agreement.<sup>138</sup>

The Model Act will provide uniformity among states with respect to wrongful dismissal law.<sup>139</sup> Although there is also a lack of uniformity in other areas of the law such as tort law, the problem is particularly acute in the employment area. An employer's work force may consist of residents from different states, particularly in nationwide companies. In such cases, the diverse state employment laws create uncertainty with respect to the substantive rights of both employers and employees.<sup>140</sup>

The Model Act is designed to lend efficiency and predictability to employment termination law through uniformity. The Model Act takes on great importance when applied to national companies because they "obviously benefit from being able to have standardized personnel policies" that would be effective beyond state lines.<sup>141</sup> Smaller firms that have employees working in different states would also benefit.<sup>142</sup> Both employers and employees would have the advantage of knowing that their mutual rights and obligations would no longer be determined by the location of a hiring or firing or where a job was performed.<sup>143</sup> The Model Act would thus ameliorate the confusion caused by the disparity among state employment laws.<sup>144</sup> The remainder of this Comment will address selected pertinent provisions of the Model Act.

#### A. The "Good Cause" Requirement

The passage of the Model Act represents a remarkable change in the level of protection afforded to employees against wrongful discharge by their employers. Before the Model Act, employees could recover for wrongful discharge only if an employer breached an implied covenant of good faith and fair dealing or an implied-in-fact promise or violated an important public policy, depending on the state in which the discharge occurred.<sup>145</sup> The Model Act, if adopted by the states, would provide

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137. MODEL ACT, *supra* note 7, § 2(d). For a discussion of the specified duration agreement, see *infra* notes 188-92 and accompanying text.

138. MODEL ACT § 2(d). For a discussion of the severance pay agreement, see *infra* notes 184-87 and accompanying text.

139. The express purpose of the Model Act is "to minimize diversity and improve the law." MODEL ACT, *supra* note 7, at 7 (prefatory note). For a discussion of the lack of uniformity among state laws, see *supra* notes 7-8 and accompanying text.

140. See MODEL ACT, *supra* note 7, at 7 (prefatory note).

141. *Id.*

142. *Id.*

143. *Id.*

144. See PERRITT, *supra* note 2, at 493-95 (indicating need for legislation to simplify litigation and to unify existing wrongful dismissal protections). For further discussion of the favorable aspects of uniformity, see *infra* notes 167-71 and accompanying text.

145. For a discussion of the current status of the states with respect to the



employees with greater protection by elevating the standard under which an employer may discharge an employee.

The core of the Model Act is section 3, which sets forth this new standard. This section provides that, as a general rule, "an employer may not terminate the employment of an employee without *good cause*."<sup>146</sup> In order to come within the definition of "employer" or "employee" under the Model Act, a person must meet certain qualifications and conditions.<sup>147</sup> An "employer" is defined, in part, as a nongovernmental "person"<sup>148</sup> employing five or more employees per working day.<sup>149</sup> An "employee" is "an individual who works for hire, including

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application of the three common law wrongful dismissal doctrines, see PERRITT, *supra*, note 2 at 23-30.

146. MODEL ACT, *supra* note 7, § 3(a) (emphasis added). There are two exceptions to the requirement of "good cause" that relate to a severance pay agreement and a specified duration agreement. *Id.* § 4(c)-(d). For a discussion of these exceptions, see *infra* notes 183-96 and accompanying text.

147. For a discussion of these qualifications and conditions, see *infra* notes 148-51 and accompanying text.

148. "Person" is defined by the Model Act as "an individual, corporation, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity [, excluding government or a governmental subdivision, agency, or instrumentality]." MODEL ACT, *supra* note 7, § 1(7).

149. *Id.* § 1(2). Employees, whether or not protected under the Model Act, are counted in determining whether someone constitutes an "employer" within the meaning of the Act. *Id.* § 1(2) cmt. These employees must be employed "for each working day in each of 20 or more calendar weeks in the two-year period next preceding a termination or an employer's filing of a complaint pursuant to Section 5(c)." *Id.* § 1(2). Section 5(c) permits an employer to file a complaint and an arbitration demand under the Model Act to determine whether there was good cause for an employee's discharge. *Id.* § 5(c).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988), was used, in part, as a basis for the language in the Model Act defining "employer." *Id.* § 1(2) cmt. The minimum number of employees under Title VII, however, is 15, and they must have worked "in each of [20] or more calendar weeks in the current or preceding calendar year." Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (emphasis added). Unlike Title VII, the Model Act requires the minimum number of five employees, and the 20 qualifying weeks may be spread out over a two-year period. MODEL ACT, *supra* note 7, § 1(2). The reason for these differences, according to the Uniform Law Commissioners, is the existence of the general view that "state law should apply more broadly than federal law." *Id.* § 1(2) cmt.

For purposes of defining "employer," the following employees are excluded: "a parent, spouse, child, or other member of the employer's immediate family or of the immediate family of an individual having a controlling interest in the employer." *Id.* § 1(2). This language, which excludes the immediate family, is drawn from the Fair Labor Standards Act. *Id.* § 1(2) cmt.

The Model Act only applies to nongovernmental entities. *Id.* § 1(2). According to the Commissioners, the reason why the Model Act does not apply to governmental employers is because these entities generally do not hire employees from multiple states, and therefore the need for uniform treatment of employees is not as great as in the private sector. *Id.* § 1(2) cmt. Moreover, many public employees are already protected against termination through civil service systems. *Id.*

an individual employed in a supervisory, managerial, or confidential position, but not an independent contractor.”<sup>150</sup> Even if a person qualifies as an employee under the Act, however, the “good cause” protection only applies if the employee “has been employed by the same employer for a total period of one year or more” and “has worked for the employer for at least 520 hours during the 26 weeks next preceding the termination.”<sup>151</sup>

The Model Act provides that good cause may arise when either one of the following exists:

- (i) a reasonable basis related to an individual employee for termination of the employee’s employment in view of relevant factors and circumstances, which may include the employee’s duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or
- (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.<sup>152</sup>

150. *Id.* § 1(1).

151. *Id.* § 3(b). The Act provides a one-year probationary period before imposing the “good cause” requirement on the employer. *Id.* § 3(b) cmt. To the extent that the Act requires the employee to work an average of 20 hours or more per week during the designated 26 week period, part-time employees are not covered. *Id.*

In determining whether the employee has been employed for one year, layoffs or “breaks in service” are not counted. *Id.* § 3(b). A break in service “includes any time not actually spent on the job except periods, like vacations or sick leaves or ‘personal days,’ when an employee is entitled to be away from the job on the basis of the employer’s contract, policy, or special permission.” *Id.* § 3(b) cmt. In order for seasonal workers to qualify, they must ordinarily be employed for more than one twelve-month calendar period. *Id.* If a break in service is one year or less, then it is considered a temporary break, which does “not necessarily destroy the status of a nonprobationary employee.” *Id.*

The Model Act also addresses the possibility of “tacking” employment periods as follows:

An individual’s periods of employment with two separate legal entities may be “tacked” or combined to meet the one-year probationary requirement if both legal entities meet the definition of “employer” (*e.g.*, employing five or more employees) and if the predecessor and the successor are deemed the “same person” because the successor is an “alter ego” of the predecessor, has assumed the legal obligations of the predecessor, etc.

*Id.*

152. *Id.* § 1(4). The term “good cause” does not include terminations that are prohibited by state or federal law, such as terminations based upon race, sex or religion. *Id.* § 3(a) cmt. The Model Act permits consideration of findings and

Alternatively, employers and employees may make an express agreement that specifically states what will constitute "good cause" for termination.<sup>153</sup> They may provide that "the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination in proceedings under this [Act]."<sup>154</sup> Thus, employees and employers may agree on performance standards, but this option is available only when it has been enforced consistently and when it has not been applied disparately to an employee in the absence of justification.<sup>155</sup> The agreement also imposes a good faith duty on the respective parties.<sup>156</sup>

The Model Act's good cause requirement obviates the need for the common-law wrongful dismissal doctrines.<sup>157</sup> For example, the implied covenant of good faith and fair dealing was created to protect employees against discharges made in bad faith.<sup>158</sup> The good faith requirement renders the common-law implied covenant unnecessary because the Model Act now provides employees with statutory protection against bad faith terminations.<sup>159</sup>

With respect to the implied-in-fact contract exception, the Model Act expressly invalidates it by stating that "[c]ontract actions based on

conclusions made in other forums in proceedings under the Model Act with respect to "public policy" and "good cause." *Id.* A finding in another tribunal that an employer did not discriminate on the basis of race or sex does not "preclude a charge that a termination of an employee by the employer was, nonetheless, a termination without good cause under this Act. That an employer has not discriminated does not necessarily mean that it had justifiable grounds for the discharge." *Id.*

153. *See id.* § 4(b). If such agreements were not entered into, then an arbitrator would make the determination of what constitutes "good cause" when confronted with an individual employee's termination. *Id.* § 4(b) cmt.

154. *Id.* § 4(b). Although the Act provides flexibility in making the agreement, there can be no duress or overreaching by the parties. *Id.* § 4(b) cmt.

155. *Id.* § 4(b). If the agreement gives the employer the authority to change the prohibitions or standards, these changes must be communicated to the employee in clear terms. *Id.*

156. *Id.* § 4(g). This duty of good faith extends to the agreement's "formation, performance, and enforcement." *Id.*

157. For a discussion of the common-law wrongful dismissal doctrines, see *supra* notes 42-125 and accompanying text.

158. For a discussion of the implied covenant of good faith and fair dealing exception, see *supra* notes 45-61 and accompanying text.

159. *See* MODEL ACT, *supra* note 7, § 1(4). "Good faith" is defined under the Model Act as "honesty in fact." *Id.* § 1(5). An employer who is accused of discharging an employee in bad faith might argue that the reasons for discharge were the employer's business needs and external economic conditions. *See id.* at 8 (prefatory note). Although these appear to be legitimate grounds for termination, the employee might try to prove pretext—e.g., that the employer's economic status was not the real reason for the discharge. The employee might prove pretext by presenting evidence relating to the employer's financial records, the size of the work force, and any economic forecasts. *See id.* § 1(4).

terminations under implied-in-fact employment agreements are . . . abolished for employees protected by this Act.”<sup>160</sup> The legislators probably abolished this common-law action because it would otherwise have been duplicative of the statutory cause of action provided for in the Model Act. For instance, courts have used the implied-in-fact contract exception to allow recovery when an employer has breached an express promise in an employee handbook to terminate “for just cause only.”<sup>161</sup> The Model Act now provides for a good cause requirement, thereby rendering the common-law exception unnecessary.<sup>162</sup>

The public policy exception is also no longer necessary under the Model Act because an employer violating an important public policy would not be able to meet the good cause requirement in the Act.<sup>163</sup> For example, prior to the Act, if an employee of a nuclear power plant was discharged solely for reporting regulatory violations to governmental authorities, the employee would have been protected only in a state that had adopted the public policy exception.<sup>164</sup> Under the Model Act, if the sole reason for discharge was the reporting of regulatory violations, the employee would be protected because the discharge of an employee for such reason would not constitute good cause.<sup>165</sup> Thus, a public policy exception is also unnecessary; the good cause requirement of the Model Act protects against this type of discharge.<sup>166</sup>

The Model Act’s good cause requirement promotes uniformity in employment termination law and is therefore a positive step in enabling both employers and employees to better understand their rights and ob-

160. *Id.* § 2(c) cmt.

161. *See, e.g., Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 890 (Mich. 1980). For a discussion of *Toussaint*, see *supra* notes 68-74 and accompanying text. *See also Leikvold v. Valley View Community Hosp.*, 688 P.2d 170, 174 (Ariz. 1984) (holding that employer’s representations in personnel manual may become terms of employment contract limiting employer’s ability to discharge employees); *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987) (holding that language in employee handbook providing that employee could be discharged only after written notice was sufficient to modify employee’s at-will contract); *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1264 (N.J. 1985) (holding that employment manual contained implied promise that employee would be fired only for just cause and was enforceable even though employment was “at will” and for an indefinite term).

162. MODEL ACT, *supra* note 7, § 3(a).

163. For a discussion of the public policy exception, see *supra* notes 110-25 and accompanying text.

164. *See Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (public policy tort claim exists for employee dismissed after supplying information to local law-enforcement agency indicating possible violation by fellow worker of state criminal code and for agreeing to assist in investigation and prosecution of suspected crime).

165. Legitimate grounds for termination which satisfy the “good cause” requirement under the Model Act include employee misconduct or incompetence, or employer business needs or external economic conditions. MODEL ACT, *supra* note 7, at 8 (prefatory note).

166. *See id.* § 1(4) (defining “good cause”).

ligations. Some, however, may question why the Model Act changes the common law so drastically by requiring good cause, and whether such a requirement is desirable.<sup>167</sup> For example, some opponents of the Model Act might make the traditional, laissez-faire argument that an employer should be able to fire employees at any time because employees may quit at any time.<sup>168</sup> They might continue to argue that the Model Act thus unfairly imposes an obligation on the part of the employer to retain an employee unless there is good cause for a discharge, but imposes no comparable obligation on the employee's part.<sup>169</sup>

This view, however, contravenes social policy. An employer, by doing business with society, reaps great benefits and profits. In return, an employer owes a duty to society to treat employees, as members of that society, with dignity. Employees should not be merely discarded at the whim of powerful employers. The drafters of the Model Act recognized this social policy and worked not only to achieve uniformity but also to provide employees with greater job protection.<sup>170</sup> The good cause requirement thus serves as a socially desirable means of achieving uniformity in employment termination law.<sup>171</sup>

The good cause requirement, however, is likely to provoke resistance to the Model Act by labor unions. If the Act is adopted, employees may be less likely to join unions for protection against unfair treatment by the employer. Rather than relying upon the unions for protection, workers may be able to rely upon the Model Act's good cause requirement and therefore avoid paying union dues. Thus, the new Act may have a negative impact on union membership.

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167. No state has imposed such a blanket requirement on employers when discharging their employees. While the minority of states still follow a strict employment-at-will approach, the majority of states will only allow the plaintiff to recover for wrongful discharge if the discharge falls within one of the common-law wrongful dismissal doctrines, which were developed as exceptions to the Employment-at-Will Rule. PERRITT, *supra* note 2, at 23. For a discussion of the current status of the states, see *supra* notes 126-29 and accompanying text.

Although the states have not imposed a good cause requirement as found in the Model Act, several legal scholars had proposed the requirement in a 1982 Villanova Law Review article. See Peirce et al., *supra* note 16, at 45-46 ("[W]e propose that a Uniform Model Act be enacted and adopted by the individual states . . . [to] limit an employer's right to terminate an employee . . . to 'just cause.'" (footnotes omitted)).

168. For a discussion of this laissez-faire argument, see *supra* note 27 and accompanying text.

169. For a further discussion of the Supreme Court's constitutional argument with respect to compelling the retention of personal services of another, see *supra* notes 28-32 and accompanying text.

170. See MODEL ACT, *supra* note 7, at 4, 7-8 (prefatory note).

171. For a discussion of the favorable effect of uniformity among the states, see *supra* notes 167-71 and accompanying text.

### B. *Jurisdictional Requirements*

Although the Act provides employees with more protection, its jurisdictional provisions may seem inappropriate when compared to several federal discrimination laws. In order for the Act to apply and thus trigger the "good cause" protection, a "person"<sup>172</sup> must have "employed [five] or more employees for each working day in each of [twenty] or more calendar weeks in the two-year period next preceding a termination or an employer's filing of a complaint."<sup>173</sup> In comparison, both Title VII of the Civil Rights Act of 1964<sup>174</sup> and the Americans with Disabilities Act of 1990<sup>175</sup> apply to a "person"<sup>176</sup> with *fifteen or more* employees,<sup>177</sup> and the Age Discrimination in Employment Act of 1967<sup>178</sup> covers a "person"<sup>179</sup> with *twenty or more* employees.<sup>180</sup> The jurisdictional provisions of the Model Act will therefore produce the curious result of applying to more businesses than federal laws which address significant issues of discrimination.

The jurisdictional requirement of the Model Act, however, may be beneficial to an employee bringing an action based on discrimination. An employee coming within the jurisdictional provisions of an applicable federal discrimination statute, such as Title VII, will automatically have available a cause of action under the Model Act because the Act requires an employer to have a fewer number of employees than Title VII.<sup>181</sup>

172. For the definition of "person" under the Model Act, see *supra* note 148.

173. MODEL ACT, *supra* note 7, § 1(2) (emphasis added).

174. 42 U.S.C. § 2000e (1988). Title VII is a federal statute which makes it unlawful for an employer to discriminate against an individual with respect to the terms of employment because of the individual's race, color, sex, religion, or national origin. *Id.* § 2000e-2(a).

175. 42 U.S.C. § 12111 (1990).

176. Title VII defines "person" as including "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers." 42 U.S.C. § 2000e(a). The Americans with Disabilities Act (ADA) defines "person" in the same manner as Title VII. *See* 42 U.S.C. § 12111(7).

177. 42 U.S.C. § 2000e(b). The ADA, however, has a phase-in provision which provides that the 15 employee requirement will not be in effect until after 1994. From 1992 to 1994, the ADA will apply only to a "person" with 25 or more employees. 42 U.S.C. § 12111(5)(A).

178. Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988 & Supp. 1990).

179. The Age Discrimination in Employment Act (ADEA) defines "person" as meaning "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." *Id.* § 630(a).

180. *Id.* § 630(b).

181. While Title VII requires an employer to have 15 or more employees,

Nonetheless, the jurisdictional requirement seems inappropriate when applied to employers with smaller businesses. For instance, Title VII's objective in covering those with fifteen or more employees was to prevent smaller businesses, such as family-owned restaurants, from being required to retain employees against the businesses' will. Similarly, the Model Act should give smaller businesses more discretion in discharging employees by not subjecting them to the good cause requirement. This result could easily be accomplished by raising the required number of employees under the definition of "employer" to a number comparable to that required under Title VII.<sup>182</sup> States adopting the Model Act should therefore make this revision in the interest of employers with smaller businesses.

### C. *Exceptions to the Good Cause Requirement*

Under the Model Act, good cause is generally required to discharge an employee except in either one of two circumstances.<sup>183</sup> First, the Model Act allows employers and employees to "dispense with the requirement of good cause altogether as long as a minimum schedule of graduated severance payments is provided."<sup>184</sup> Thus, an employer and employee may waive the good cause requirement mutually through an express written agreement if the employer agrees to provide severance pay upon the termination of the employee for any reason except the employee's willful misconduct.<sup>185</sup> If such payments are provided, the employment becomes "at will" because the employer now has the discretion to discharge an employee at any time and for any reason.<sup>186</sup> A

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the Model Act requires only five or more employees. See 42 U.S.C. § 2000e(b); MODEL ACT, *supra* note 7, § 1(2).

182. See 42 U.S.C. § 2000e(b) (requiring 15 or more employees).

183. See MODEL ACT, *supra* note 7, § 4(c), (d).

184. *Id.* § 4 cmt. The severance pay must be an amount "equal to at least one month's pay for each period of employment totaling one year, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay in effect immediately before the termination." *Id.* § 4(c). The employer may pay a lump sum or make monthly installment payments. *Id.* Neither types of payment, however, "may be less than one month's pay plus interest on the principal balance." *Id.* The employer must pay the lump sum or begin the monthly payments within a 30-day period following the employee's termination. *Id.*

185. *Id.* § 4(c). If a severance pay agreement is reached, any disputes over the employee's entitlement to severance pay or the nature of the termination will be subject to the procedures and remedies of the Model Act. *Id.* An agreement results in a waiver by the parties of their rights to a civil trial, including a jury trial. *Id.*

186. *Id.* § 4(c) cmt. The provision for a severance pay agreement, however, is likely to apply only to key professionals, management personnel and other individuals who are not subject to periodic layoff. *Id.* The reason for this exclusive application is to prevent the employer from taking the risk that an employee who is laid off for more than two months will treat the layoff as a "termination" under § 1(8)(ii) and demand severance pay under a severance pay agreement. *Id.* Section 1(8)(ii) defines termination in part as an employee's layoff or suspen-

severance pay agreement, however, imposes a good faith duty in its "formation, performance, and enforcement."<sup>187</sup>

The second exception to the good cause requirement relates to an employment agreement of a specified duration.<sup>188</sup> More specifically, "[t]he requirement of good cause for termination does not apply to the termination of an employee at the expiration of an express oral or written agreement of employment for a specified duration related to the completion of a specified task, project, undertaking, or assignment."<sup>189</sup> For example, seasonal employees, even if covered under the Act, would ordinarily come within this exception and therefore may be lawfully discharged upon the completion of their tasks.<sup>190</sup> An agreement for a specified duration imposes the same duty of good faith on the parties as the agreement for severance pay.<sup>191</sup> The good cause requirement, however, will be imposed with respect to an agreement for a specified duration if the employment continues after the agreement's expiration, unless a new express oral or written agreement is entered into by the parties.<sup>192</sup>

Although the employment agreement of a specified duration is a legitimate qualification of the statutory rights accorded employees

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sion caused by an employer that lasts for more than two consecutive months. *Id.* § 1(8)(ii). If the employee decided to treat the layoff as a termination and claim his severance pay, the employee would forfeit all recall rights. *Id.* § 4(c) cmt.

187. *Id.* § 4(g). Valid severance pay agreements will be enforced in proceedings under the Model Act. *Id.* § 4 cmt.

188. *See id.* § 4(d).

189. *Id.* The Act provides the following illustrations:

[A] skilled craftsman may be hired to help install the plumbing in a new office building or a university professor may be invited to visit at another school and offer a certain set of courses.

Even though each assignment takes over a year of full-time work, neither employee has a claim to continued employment upon the completion of the respective undertakings.

*Id.* § 4(d) cmt.

A specified duration agreement will be "enforceable through the usual processes of law in the courts (or through private arbitration, if so provided) unless the parties expressly agree to use the procedures and remedies provided by this Act." *Id.* § 4 cmt.

190. *Id.* § 4(d) cmt. Seasonal employees, however, are treated the same as other employees with respect to other types of terminations. *Id.* For example, if the employees satisfy the conditions under § 3(b), they may assert their "good cause" rights by filing complaints under the Model Act if there are any other terminations. *Id.* For a discussion of § 3(b), see *supra* note 151 and accompanying text. Under §§ 2(c) and (d), seasonal employees "retain . . . their full common-law rights until the period of their employment qualifies them for ['good cause'] protection under [s]ection 3(a)." MODEL ACT, *supra* note 7, § 4(d) cmt.

191. *Id.* § 4(g). "It is the intent of [s]ection 4 not to allow so-called 'contracts of adhesion' to be used to waive or otherwise circumvent employees' rights under the Act." *Id.* § 4 cmt.

192. *Id.* § 4(d). The period of employment under an agreement of a specified duration counts toward the minimum employment periods required under section 3(b). *Id.*



under the Act, the provision for a severance pay agreement creates a public policy issue. Prior to the Model Act, employers generally could discharge employees without giving severance pay unless the employer violated an important public policy, in which case many states allowed employees to recover for wrongful discharge under the public policy exception.<sup>193</sup> The Model Act does not specifically address the situation in which an employer provides severance pay after discharging an employee for a reason that violates an important public policy.<sup>194</sup> Therefore, if the reason for termination violates an important public policy, the agreement waiving the good cause requirement should not be upheld. In such cases, employees should be allowed to recover under the Model Act for their discharge without good cause.<sup>195</sup> Such recovery would serve the public interest of society.<sup>196</sup>

#### D. Arbitration

In addition to the good cause and jurisdictional requirements, the Model Act provides for a system of arbitration.<sup>197</sup> A discharged employee may file a complaint and demand for arbitration under the Act with a designated public agency provided that the employee's filing is timely.<sup>198</sup> An employer who discharges an employee must "mail or de-

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193. For cases applying the public policy exception and finding wrongful termination, see *supra* notes 112-25 and accompanying text.

194. See MODEL ACT, *supra* note 7, § 4(c).

195. For a discussion of the possible remedies under the Model Act, see *infra* notes 205-15 and accompanying text.

196. See, e.g., *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981). An employee who is retaliatorily discharged for reporting a fellow worker's possible criminal violations should be able to recover even though a severance pay agreement was made. To do otherwise would contravene an important public policy. As the *Palmateer* court significantly recognized:

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. "Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused."

*Id.* at 880 (quoting *Joiner v. Benton Community Bank*, 411 N.E.2d 229, 231 (Ill. 1980)).

197. MODEL ACT, *supra* note 7, § 5(a). Sections five through eight of the Model Act provide an arbitration system. See *id.* §§ 5-8. The Act provides that a public agency, such as "a state department of labor, labor relations commission, mediation service, or unemployment compensation bureau," should be responsible for the appointment of arbitrators. *Id.* § 6(a) cmt. The drafters reasoned that a public agency should be charged with this responsibility because "the right to protection against discharge without good cause" is a "public right." *Id.*

198. *Id.* § 5(a). The employee must file "not later than 180 days after the effective date of the termination, the date of the breach of an agreement for severance pay under [s]ection 4(c), or the date the employee learns or should have learned of the facts forming the basis of the claim, whichever is latest." *Id.*

liver to the terminated employee a written statement of the reasons for the termination and a copy of this [Act] or a summary approved by the [Commission; Department; Service].”<sup>199</sup> An employer also has the opportunity to file a complaint and demand for arbitration for the purpose of determining whether there is good cause to fire the named employee.<sup>200</sup> The employer, however, must notify the discharged employee and list the alleged factors constituting good cause for his termination.<sup>201</sup> The employee must then respond to this action by filing an answer.<sup>202</sup>

The complainant, whether the employee or employer, has the burden of proof.<sup>203</sup> Section 6(f) of the Model Act states that “[i]f an employee establishes that a termination was motivated in part by impermissible grounds, the employer, to avoid liability, must establish by a preponderance of the evidence that it would have terminated the employment even in the absence of the impermissible grounds.”<sup>204</sup>

The Model Act empowers arbitrators to make certain awards when they find that an employer has violated the Act’s provisions.<sup>205</sup> The available awards include one or more of the following: reinstatement, backpay and reimbursement for lost fringe benefits, a lump-sum sever-

199. *Id.* § 5(b). Such statement must be mailed or delivered within 10 business days after a termination. *Id.*

200. *Id.* § 5(c).

201. *Id.* The intention to file and the alleged factors must appear in a written statement and be mailed or delivered to the employee at least 15 business days before the filing of the complaint and demand for arbitration. *Id.*

202. *Id.* § 5(d). The answer must be filed within 21 days after receiving the complaint. *Id.* Conversely, if the respondent is the employer, the answer must contain a copy of the statement of the reasons for the termination given to the employee. *Id.*

203. *See id.* § 6(e). Section 6(e) expressly sets the following burdens of proof: “A complainant employee has the burden of proving that a termination was without good cause or that an employer breached an agreement for severance pay under [s]ection 4(c). A complainant employer has the burden of proving that there is good cause for a termination.” *Id.*

204. *Id.* § 6(f). Section 6(f) generally incorporates the principles of “dual motive” set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). MODEL ACT, *supra* note 7, § 6(f) cmt. In this case, the United States Supreme Court considered the burdens of proof of a plaintiff and a defendant in a Title VII suit where it had been shown that the employer’s decision to terminate an employee was motivated by both legitimate and illegitimate considerations. *Price Waterhouse*, 490 U.S. at 232. The Court held that when a plaintiff shows that gender was a motivating factor in an employment decision, the defendant may avoid being held liable if it can prove, by a preponderance of the evidence, that it would have made the same decision even if it had not taken the plaintiff’s gender into consideration. *Id.* at 258; *see also* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (1992) (incorporating principles of dual motives).

205. *See* MODEL ACT, *supra* note 7, § 7. The drafters noted that emotionally charged and unpredictable juries impose unreasonably high judgments against employers under existing laws. *Id.* at 4 (prefatory note). It is common for jury awards to exceed \$1 million, typically due to the addition of punitive damages. *Id.* at 3 (prefatory note).

ance payment if reinstatement is not awarded, and attorney's fees.<sup>206</sup> An employee who has been discharged without good cause may also be awarded a "declaratory judgment" award in certain circumstances.<sup>207</sup> The awards for a violation of an agreement for severance pay may include either or both of the following: attorney's fees and the enforcement of the severance pay provision and other applicable provisions of the agreement.<sup>208</sup>

An arbitrator may not award damages other than those listed above for violations of the Act or of a severance pay agreement.<sup>209</sup> In other words, no damages may be awarded for "pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award."<sup>210</sup> As a result, the Model Act will likely ameliorate the problem of unreasonably high judgments against employers by its severe limitations on the range of available remedies.<sup>211</sup>

The Model Act allows either party to an arbitration to seek vacation, modification or enforcement of the arbitrator's award upon complying with applicable procedures.<sup>212</sup> A vacation or modification will be granted only if the award was procured by improper means,<sup>213</sup> there was evident misconduct by the arbitrator,<sup>214</sup> the powers of the arbitrator

206. *Id.* § 7(b). The preferred remedy for terminations under the Model Act is reinstatement. *Id.* § 7(b)(3) cmt. If this remedy is not feasible "because of the personal relations between the employer and the employee, changes in the employer's business, or other appropriate grounds, severance pay may be awarded instead." *Id.* Back pay may be awarded regardless of whether an employer is reinstated. *Id.* § 7(b)(2) cmt. Therefore, back pay may be provided even if a severance payment is ordered instead of reinstatement. *Id.*

The Model Act's language with respect to the award of attorney's fees to prevailing employees or employers "deliberately tracks the language of Title VII of the 1964 Civil Rights Act and of Supreme Court decisions interpreting Title VII." *Id.* § 7(b)(4), (c)(2), (e), (f) cmt. (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)).

207. *Id.* § 7(b) cmt. Such judgment may be awarded when the employer did not have just cause for firing an employee, but neither severance pay, reinstatement nor backpay is appropriate or warranted. *Id.*

208. *Id.* § 7(c).

209. *Id.* § 7(d). Under section 7(d), any recovery by the employee in other forums relating to the same conduct of the employer shall be deducted from the arbitrator's award in order to prevent multiple recovery for the same claim. *Id.*

210. *Id.*

211. *Id.* at 4 (prefatory note).

212. *Id.* § 8(a). "An application for vacation or modification must be filed within [90] days after issuance of the arbitrator's award. An application for enforcement may be filed at any time after issuance of the arbitrator's award." *Id.* § 8(b).

213. *Id.* § 8(c)(1). Corruption or fraud, for example, would constitute improper means. *Id.*

214. *Id.* § 8(c)(2). Such misconduct would include partiality, which would prejudice a party's rights. *Id.*

were exceeded, "the arbitrator committed a prejudicial error of law," or "another ground exists for vacating the award under the [Uniform Arbitration Act]" or the applicable state arbitration act.<sup>215</sup>

### E. *Alternatives to Arbitration*

The Model Act provides that a state may select one of two alternatives to the arbitration system described in the previous section.<sup>216</sup> Alternative A provides that the enforcement of the Act will be handled through administrative proceedings.<sup>217</sup> The remedies that may be awarded under this alternative are identical to those provided under the arbitration system,<sup>218</sup> however, the designated public agency is responsible for the granting of remedies rather than the arbitrator.<sup>219</sup> Alternative B provides that the enforcement of the Act would be left to the civil courts.<sup>220</sup> The remedies are identical to those under the arbitration system and Alternative A, except that a court would be responsible for granting them.<sup>221</sup>

The alternatives, as well as the arbitration system under the Model Act, provide basically the same type of remedies afforded under certain federal discriminatory statutes such as Title VII<sup>222</sup> and the Americans With Disabilities Act.<sup>223</sup> All of these statutes afford a successful plaintiff the opportunity to receive backpay, reinstatement and attorney's fees.<sup>224</sup>

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215. *Id.* § 8(c)(3)-(5). The court may award a prevailing employee reasonable attorney's fees and costs, in an application for vacation, modification or enforcement of the arbitrator's award. *Id.* § 8(d). The court may award a prevailing employer reasonable attorney's fees and costs in an application for vacation, modification or enforcement of an arbitrator's award "if the court finds the employee's application is frivolous, unreasonable, or without foundation." *Id.*

216. *Id.* app.

217. *Id.* This alternative is provided for states that may believe that it will be less costly to employ governmental personnel, such as full-time civil service, as hearing officers. *Id.* app. cmt.

218. For a discussion of the remedies provided under the arbitration system, see *supra* notes 205-11 and accompanying text.

219. See MODEL ACT app.

220. *Id.* Although it is the most complex, expensive and time-consuming procedure, Alternative B is available for states whose constitutions may preclude the use of other forums. *Id.* app. cmt.

221. *Id.* app. The preferred method, however, for affording statutory protection to employees who are wrongfully discharged is the use of professional arbitrators. *Id.* app. cmt. They have the "requisite skill, training, and experience to understand the special problems of the workplace, and are most likely to be acceptable to the management and employee communities. Their efficiency in resolving disputes over discharge and discipline may also reduce the time and expense of the proceedings." *Id.*

222. 42 U.S.C. § 2000e-5(g) (1992).

223. 42 U.S.C. § 12117(a) (1992).

224. See MODEL ACT, *supra* note 7, § 7; see also ADEA, 29 U.S.C. § 626(b) (1985); ADA, 29 U.S.C. § 12117(a) (1992); Title VII, 42 U.S.C. § 2000e-5(g), (k) (1992).

## IV. CONCLUSION

The cases examined in this Comment illustrate the wide disparity among states' employment laws with respect to wrongful dismissal.<sup>225</sup> The Model Employment Termination Act will provide a much needed solution to the problems caused by this disparity. The Model Act will lessen the confusion caused to an employer and employee when the employer is situated in one state and its employees reside in different states.<sup>226</sup> In addition, "[i]nterstate competition for 'favorable business climates' may also be reduced by establishing uniform standards for employment termination."<sup>227</sup> Finally, the Model Act will afford additional job security to employees by providing a general rule prohibiting an employer from terminating an employee without good cause.<sup>228</sup> In adopting this Model Act, the states will further promote the important principle that evolved through the modern wrongful dismissal common law: fairness in the employment relationship.

*Debra Drew Cyranoski*

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225. For a discussion of this disparity, see *supra* notes 126-29 and accompanying text.

226. For a discussion of this confusion, see *supra* notes 7-8 and accompanying text. See also PERRITT, *supra* note 2, at 493-95.

227. MODEL ACT, *supra* note 7, at 7 (prefatory note).

228. A comparison of the Model Act to common-law trends indicates that the drafters intended to give employees further protection against wrongful dismissal. If the intent of the Model Act was solely to provide uniformity, the Commissioners could have drafted and approved a Model Act that honored the Employment-at-Will Rule. Instead, the Model Act protects employees by requiring good cause for their termination under § 3. For a discussion of this "good cause" requirement, see *supra* notes 145-71 and accompanying text.