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COMMENTS

EMPLOYMENT AT-WILL IN THE UNIONIZED SETTING

The American employment at-will doctrine holds that either the employer or the employee may terminate an employment relationship upon giving notice to the other.¹ Unless there is an employment contract expressly specify-

1. The employment at-will doctrine was first enunciated as a rule of evidence in Horace Grey Wood's treatise, *MASTER AND SERVANT* (1877).

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.

H. WOOD, *MASTER AND SERVANT* § 134 (1877).

Wood's Rule was pronounced without analysis and was purportedly supported by four American cases: *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. (13 Wall.) 254 (1872); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); and *De Briar v. Minturn*, 1 Cal. 450 (1851). None of these cases directly supports Wood's Rule.

De Briar concerned the ejection of a discharged bartender from his tavern lodgings after notification by his landlord, who was incidentally his former employer. The narrow holding of the case dealt with the tavernkeeper's rights, not the employer's. *Tatterson* supports Wood's Rule only by proving the exception. The Massachusetts court found that the jury did not err in implying from the parties' oral and written communications, practices of the trade, and other surrounding circumstances, that a contract for a definite term existed. *Franklin Mining* likewise proves the exception. The court found that employment of indefinite duration did not necessarily give the employer complete discretion to discharge. The employee, who had been promised stable employment, was discharged after eight months. The jury found that employment for a one-year term should be inferred from the facts and awarded the employee four additional months' pay. The inference of a one-year term is noteworthy in light of the English rule, which provided such a term for most workers. See *infra* notes 15-19 and accompanying text. Finally, *Wilder* had nothing to do with hiring or discharge; rather, it concerned a transportation contract. A group of entrepreneurs attempted to use an outdated contract and the exigencies of the situation to force the U.S. Army quartermaster to renegotiate for transportation of goods across Minnesota. The Supreme Court reversed the Court of Claims' decision that the entrepreneurs had a right to collect the additional fees because the statute of limitations on the claim had run.

Wood's Rule was accepted quickly by a majority of American jurisdictions. Approximately 30 years after its introduction, one American court, in adopting Wood's Rule, noted that it was supported by overwhelming authority, such that "the cases [were] too numerous to justify citation." *Harrod v. Wineman*, 146 Iowa 718, 720, 125 N.W. 812, 813 (1910). Commentators also noted the acceptance of Wood's Rule throughout the United States. 1 G. WILLISTON, *CONTRACTS* § 39 (1920); 1 C. LABATT, *MASTER AND SERVANT* § 159 (1913). The Supreme

ing a term of employment or otherwise governing conditions for dismissal or leaving employment, the employment can be said to be "at-will."² Collective bargaining agreements, however, generally provide unionized workers protection against dismissal except "for cause."³ Determination of whether a dismissal is "for cause" is left to the grievance procedures provided for in the collective bargaining agreement.⁴ Relief may also be sought for breach of a collective bargaining agreement through suit under section 301(a) of the Taft-Hartley Act.⁵ The Taft-Hartley Act, however, declared bargained-for

Court elevated the right of an employer to discharge to a constitutional right in *Adair v. United States*, 208 U.S. 161, 173-76 (1908) (statute prohibiting discharge of railroad employee for union membership unconstitutional). *Accord* *Coppage v. Kansas*, 236 U.S. 1, 10-11 (1915) (statute prohibiting employers from requiring employees to agree not to join unions unconstitutional). Although Wood's Rule was promulgated as a rule of evidence, courts in the late 19th and early 20th centuries apparently treated it as black letter law on the employment relationship itself. See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342 & nn.56-57 (1974) [hereinafter cited as Note, *Implied Contract Rights*] and cases cited therein.

Following the courts' interpretation of Wood's Rule as a rule of employment, student commentators have derided Wood's Rule as lacking authority or as the result of faulty analysis. See, e.g., Note, *Implied Contract Rights*, *supra*, at 342; Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.-[KENT L. REV. 697, 699-700 (1981); Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552, 555 & n.24 (1980). It is indeed difficult to see how the ejection of an out-of-work bartender in *DeBriar* and the attempt to bilk the United States Army in *Wilder* gave rise to an almost absolute right of discharge. *Tattersson* and *Franklin Mining*, however, by proving the exception, show that Wood's Rule works admirably as a rule of evidence, its intended purpose.

2. See Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107, 107 (1942).

3. Statements concerning dismissal "for cause" or "for just cause" are found in the vast majority of collective bargaining agreements. See 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) § 40:1 (1983); see also INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, CONSTITUTION, platform, § 2 (1985) (enunciating the goal of adopting a plan to provide stable and full employment for all members of the union). "Cause" for dismissal may be included in the language of the collective bargaining agreement and will usually include unauthorized striking, violation of company or safety rules, failure to meet work standards, intoxication, dishonesty, excessive absenteeism, and insubordination. 2 COLLECTIVE BARGAINING, *supra*, at § 40:1-3.

4. Grievance procedures were found in all of the collective bargaining agreements surveyed in one major study. 2 COLLECTIVE BARGAINING, *supra* note 3, at § 51:1. Of these, 97% called for binding arbitration as the last step of the grievance procedure. *Id.* § 51:5. Because of the number of grievance procedures that include binding arbitration as the final step, "grievance procedure" and "arbitration procedure" may be used interchangeably.

5. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 301(a), 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) (1982 & Supp. I 1983)), reads: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id. See also *infra* notes 130-36 and accompanying text.

grievance procedures to be the preferred method of settlement.⁶ With few exceptions,⁷ an employee must exhaust his grievance remedy before bringing suit for breach of contract.⁸ Judicial deference to arbitration decisions is almost absolute.⁹ This combination of exhaustion of grievance procedures as a prerequisite to suit, the number of such grievance procedures ending in arbitration, and judicial deference to arbitration have one practical result: the bargained-for grievance procedure is the unionized worker's exclusive remedy for any grievance, including breach of contract.¹⁰ Despite the fed-

6. "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Taft-Hartley Act § 203(d), 29 U.S.C. § 173(d) (1982 & Supp. I 1983). See also *infra* notes 172-202 and accompanying text.

7. See, e.g., *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) (trustees of multiemployer trust funds not bound to grievance procedures in the absence of intent on the part of the parties to so bind the trustees); *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324 (1969) (employee excused from exhaustion requirement where pursuit of the grievance would be futile); *Vaca v. Sipes*, 386 U.S. 171 (1967) (employee excused from exhaustion of grievance procedure requirement where employer's aggrieved conduct constituted a repudiation of the collective bargaining agreement or where a union processes the grievance in an arbitrary, discriminatory, or perfunctory manner, or in a manner evincing bad faith towards the grieving employee); see also *Anderson v. Alpha Portland Indus.*, 752 F.2d 1293 (8th Cir. 1985) (retired employees not required to exhaust grievance procedures before instituting suit under § 301 of the Taft-Hartley Act for enforcement of pension provisions). See also *infra* notes 153-68 and accompanying text.

8. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *Vaca*, 386 U.S. at 184. After exhaustion of the grievance procedures, a subsequent breach of contract action brought under § 301 will be dismissed by the federal district court. The district court will not hear an employee's § 301 claim because that employee is bound to the contractual grievance procedure. "[T]hat agreement [governs] the manner in which contractual rights may be enforced." *Vaca*, 386 U.S. at 184.

Maddox and *Vaca* purport to speak only to those situations where the grievance procedure is intended to be the exclusive means of dispute resolution. However, judicial deference to arbitration, enunciated most clearly in the *Steelworkers Trilogy*, discussed *infra* at notes 171-201 and accompanying text, operates in the following manner to imply that the grievance procedure is meant to be the exclusive means of dispute resolution whether the collective bargaining agreement is explicit or not. First, the courts will decline to review the merits of a grievance before it is arbitrated. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). Second, orders to arbitrate should not be denied "unless . . . the arbitration clause is not susceptible of an interpretation that covers" the grievance. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Finally, once a grievance is arbitrated, the courts will decline to review the arbitration award insofar as the award is within the power of the arbitrator as defined by the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960). Thus, nearly every dispute over the interpretation and administration of a collective bargaining agreement is within the scope of the grievance procedure. Once a dispute is within the scope of that procedure, the courts will not examine the dispute within the *Enterprise Wheel & Car* guidelines. The grievance procedure effectively becomes the exclusive means of dispute resolution. See *infra* notes 172-202 and accompanying text.

9. See *supra* note 8; see also *infra* notes 172-202 and accompanying text.

10. See *supra* note 8; see also *infra* notes 172-202 and accompanying text.

eral preference for arbitration over litigation in contract disputes, and federal preemption of most breach of contract suits that may arise,¹¹ some courts have recently allowed unionized workers to sue their employers in state court, asserting claims arising under certain judicially defined exceptions to the employment at-will doctrine.¹²

This Comment will examine the conditions under which such suits are allowed. The Comment will emphasize the development of federal labor law preemption and how recent cases have cultivated that development. The employment at-will doctrine will be discussed briefly as well. The Comment further will examine the impact of allowing state judicial remedies for wrongful discharge on the federal preference for arbitration. Finally, the Comment will discuss how this development may adversely affect collective bargaining as the preferred means of protecting workers against wrongful discharges as well as the Supreme Court's recent response to this development during the 1985 term.¹³

I. EMPLOYMENT AT-WILL

A. Common Law Development

The employment at-will doctrine is a peculiar American development of the late nineteenth century.¹⁴ Until that time, employment law in the United States had generally followed English precedent.¹⁵ English law addressing the subject of term of employment dates back to 1349, when both dismissal and quitting before the end of a term were proscribed.¹⁶ The general rule, noted by Blackstone, was that hiring without a specified term was a hiring for one year.¹⁷ Although Blackstone's one-year rule was applied in

11. See *infra* notes 130-36 and accompanying text.

12. See *infra* notes 30-47 and accompanying text.

13. See *Allis-Chalmers v. Lueck*, 105 S. Ct. 1904 (1985) (state tort claim preempted where adjudication of the claim required state court to interpret substantive terms of the collective bargaining agreement). See also *infra* notes 266-88 and accompanying text.

14. See *supra* note 1.

15. C. SMITH, *MASTER AND SERVANT* 40-42 (1852). Smith noted that, after Blackstone, America still followed the rule that a hiring without a specified term was presumed to be for one year. See *infra* note 17. The presumption was rebuttable by custom. The employment relationship could be terminated by mutual consent or, if customary, upon proper notice. C. SMITH, *supra*, at 47.

16. Statute of Labourers, 23 Edw. III, ch. 1 (1349); 5 Eliz., ch. 4 (1562) (setting the term at one year), *eased for some classes of workers*, Conspiracy and Protection of Property Act (Imp.) 38 & 39 Vict., ch. 86, sched. 17 (1875).

17. I W. BLACKSTONE, *COMMENTARIES* *425

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principal of natural equity, that the servants shall serve, and the master maintain him, throughout all the revolutions of the respective sea-

America to agricultural and domestic services,¹⁸ day laborers were terminable at will.¹⁹ In the mid-nineteenth century, American law began a startling move away from the English. Although both treatises and case law still applied Blackstone's rule,²⁰ it had already been noted that Connecticut did not agree.²¹ In 1877, Horace Gray Wood advanced the employment at-will doctrine as a rule of evidence.²² Although occasionally courts did invoke Wood's Rule as a rule of evidence,²³ it eventually became a black letter rule of employment relations in most jurisdictions.²⁴ One succinct pronouncement of the doctrine read: "All may dismiss their employes [sic] at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."²⁵ The authority Wood relied upon for his novel proposition, however, did not support the doctrine fully.²⁶ Nevertheless, Wood's Rule apparently served important societal interests during the

sons, as well as when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.

Id. (footnotes omitted).

Blackstone also provided for a three-month notice requirement for any discharge by the master or quitting by the servant, even when the termination occurs at the end of a term. *Id.* The notice requirement was dispensed with in all cases, though, "upon reasonable cause, to be allowed by a justice of the peace: but they may part by consent, or make a special bargain." *Id.* at *425-26. Thus, the rule of hiring for one year was not unduly burdensome on all parties.

18. R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 219 (1965).

19. 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* 258-59 (2d ed. 1832). The split between domestic servants and other kinds of laborers is also acknowledged in Blackstone. Apprentices, for example, though bound for a term of years, could be released upon reasonable cause at quarter sessions. W. BLACKSTONE, *supra* note 15, at *426. Day laborers were an entirely different class, hired by the day or week, and terminable at those intervals. *Id.* at *426-27.

20. C. SMITH, *MASTER AND SERVANT* (1852); *see, e.g.*, *Davis v. Gorton*, 16 N.Y. 255 (1857). *Davis* specifically relied on Blackstone's "seasonal" rationale to support the yearly hiring rule. *Id.* at 257.

21. T. REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURT OF CHANCERY* 347 (1846).

22. H. WOOD, *MASTER AND SERVANT* § 134 (1877). As written, the doctrine is a rule of evidence, placing the burden of proof on the employee to show that the hiring was not at will, but for a specified term. *See supra* note 1.

23. *See generally* Note, *Implied Contract Rights*, *supra* note 1, at 342 & nn.56-57.

24. C. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* § 159 (2d ed. 1913).

25. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). Despite its overruling, Tennessee courts still use *Payne* as authority for the employment at-will doctrine to this day. *See Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984) (exception to the general employment at-will doctrine created to give at-will workers cause of action for retaliatory discharge for filing workmen's compensation claim); *see also Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn. 1981).

26. *See supra* note 1.

Industrial Revolution²⁷ and became the majority rule in this country by the turn of the century.²⁸

27. The determination of those societal interests and how those interests were served is, of course, a political exercise. Most commentators agree that dominant laissez-faire economic doctrine is an understandable analysis for the functioning of the employment at-will rule. See, e.g., Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). Laissez-faire economics was played out in the employment at-will rule in the following manner: under the guise of freedom of contract, employer and employee were supposed to be able to strike the most equitable bargain possible for labor. The Supreme Court fully accepted the premise that bargaining power was equal between employer and employee in *Adair v. United States*, 208 U.S. 161 (1908). "It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employe [sic] of the railroad company upon the terms offered to him." *Id.* at 172-73.

At the same time, nonlegal minds realized that other forces operated in individual bargaining between employer and employee. Woodrow Wilson commented: "Men are cheap and machinery is dear You can discard your man and replace him; there are others ready to come into his place; but you can't without great cost, discard your machine and put a new one in its place." H. WASSERMAN, HARVEY WASSERMAN'S HISTORY OF THE UNITED STATES 34 (1972). This analysis by the 28th President of the United States runs parallel to that of Karl Marx, who wrote:

Further, as the *division of labour* increases, labour is *simplified*. The special skill of the worker becomes worthless. He becomes transformed into a simple, monotonous productive force that does not have to use intense bodily or intellectual faculties. His labour becomes a labour that anyone can perform. Hence, competitors crowd upon him on all sides, and besides we remind the reader that the more simple and easily learned the labour is, the lower the cost of production needed to master it, the lower do wages sink, for, like the price of every other commodity, they are determined by the cost of production.

K. MARX, *DAS CAPITAL*, ch. V., reprinted in *THE MARX-ENGELS READER* 214 (R. Tucker 2d ed. 1978) (emphasis in original). The obvious conclusion to this analysis is that, due to market forces, workers individually have no bargaining power. Arguably, without bargaining power, the freedom to contract is worthless. The employment at-will rule, therefore, can be viewed as a rule dealing with the employment relationship when the bargaining relationship has made an individual contract of employment for term superfluous. However, *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884), overruled on other grounds, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915), a case noted for its succinct pronouncement of the employment at-will doctrine, see *supra* note 25, treated the absence of contracts as controlling:

The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employes [sic] If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment.

Payne, 81 Tenn. at 520. See generally Blades, *supra* note 27. Blades called the absolute right of discharge "the prime source of the employer's power over his employee." *Id.* at 1405. See also Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AMER. BUS. L.J. 467, 467-68 & n.1 (1980); see generally Note, *The Employment at Will Rule*, 31 ALA. L. REV. 421 (1980).

28. See *supra* note 24 and accompanying text.

As societal attitudes toward policy restraints on employment relations and freedom of contract have changed,²⁹ exceptions to the at-will doctrine have emerged.

B. Emergence of Exceptions

Exceptions to the employment at-will doctrine have surfaced in three different areas: antidiscrimination legislation,³⁰ collective bargaining,³¹ and judicial decisions.³² Collective bargaining has, as one of its aims, the goal of providing a specific term of employment.³³ In this respect, collective bargaining agreements that contain express contract provisions for a term of employment should be outside the scope of this discussion. This Comment hopes to demonstrate, however, a particular application of certain at-will concepts to the unionized setting.³⁴ Judicial decisions since Wood's treatise have established the doctrine of employment at-will as much more than Wood's Rule; it is the entire body of case law allowing the employer absolute discretion to discharge, and those judicially defined instances where the employer may not exercise that discretion with impunity.³⁵

29. See, e.g., Blades, *supra* note 27. This seminal article christened the tort of "abusive discharge." See *id.* at 1413. For the purposes of this Comment, "abusive discharge" may be and is used interchangeably with "wrongful discharge."

30. See, e.g., title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982 & Supp. I 1983); ALASKA STAT. § 18.80.220 (1981); CAL. GOV'T CODE § 12940 (West Supp. 1985); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1985). These statutes all deal with discrimination based on race, color, religion, natural origin, or sex. In the same manner, the elderly are protected by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982); veterans by the Veterans Preference Act, 38 U.S.C. § 2021 (1982); debtors by the Consumer Credit Protection Act, 15 U.S.C. 1674(a) (1982); and jurors by the Jury System Improvement Act of 1978, § 6, 28 U.S.C. § 1875 (1982 & Supp. I 1983).

31. See National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (as amended by Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947), and Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 141-188 (1982 & Supp. I 1983)) (securing employees' rights to band together for mutual aid and protection and making it an unfair labor practice to discharge employees for exercise of those rights); see also *supra* note 3 (concerning "just cause" dismissal standards found in collective bargaining agreements).

32. See *infra* notes 36-47 and accompanying text; see also Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *Implied Contract Rights*, *supra* note 21; Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based on Determinants of Public Policy*, 1977 WIS. L. REV. 777.

33. See *supra* note 3 and accompanying text.

34. See *infra* notes 203-88 and accompanying text.

35. See generally Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S L. REV. 552 (1980) (overview to 1980 of development of exceptions to the employment at-will doctrine).

Historically, courts have been able to circumvent the harsh operation of the at-will doctrine, either by finding a contract for a definite period of time or by enforcing a contract purporting to make the employee permanent.³⁶ The leading state court case breaking from this circuitous method was *Petermann v. International Brotherhood of Teamsters, Local 396*.³⁷ Petermann, an at-will business agent of the Teamsters, alleged that he was discharged for refusing to commit perjury at his employer's behest. Brought as a breach of contract action, the case was adjudged on the pleadings in favor of the defendant.³⁸ The California District Court of Appeal reversed, relying on authority holding that the right to discharge an employee at-will may be limited by statute.³⁹ The court went further, however, and announced the proposition that the right to discharge may be limited "by considerations of public policy."⁴⁰

36. See *id.* at 560 n.57.

37. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

38. *Id.* at 187, 344 P.2d at 26.

39. *Id.* at 188, 344 P.2d at 27 (citing *Kouff v. Bethlehem-Alameda Shipyard*, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949)) (under California election code, at-will employee may not be discharged for absence from work due to position as election officer).

40. *Id.* at 188, 344 P.2d at 27. The court reiterated a definition of "public policy" used by the California courts: "By 'public policy' is intended 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.* at 188, 344 P.2d at 27 (quoting *Safeway Stores v. Retail Clerks Int'l Ass'n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953) (emphasis added by *Petermann* court)). The court was offended by the notion that an employer could hold such coercive power over its employees at the expense of the administration of justice. "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute." *Id.* at 188-89, 344 P.2d at 27. The court also considered whether the union had acted in good faith in discharging Petermann, noting that a good faith requirement is imposed upon employers. *Id.* at 189, 344 P.2d at 28.

In *Petermann*, the public policy considerations invoked by the court to restrain the employer's right of discharge were based on statutory provisions dealing with the felony of perjury. A statute need not specifically prohibit discharge in order to serve as a sufficient public policy bar to discharge. See *Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984) (California health laws provide a sufficient statutory basis to award damages for employee's dismissal for refusal to break those laws), *cert. denied*, 105 S. Ct. 2319 (1985); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (federal antitrust laws provide sufficient statutory basis to restrain employee's discharge for refusal to join in price-fixing scheme). Workmen's compensation statutes have been found to be a sufficient statutory basis of public policy in some states to preclude discharge that is implicitly in retaliation for the filing of a claim. See, e.g., *Smith v. Piezo Technology & Professional Adm'rs*, 427 So. 2d 182 (Fla. 1983) (cause of action implied from the comprehensive statutory scheme of workmen's compensation); *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (same); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (same); *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730 (Ky. 1984) (same); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (same); *Clanton v. Cain-Sloan Co.*, 677

While dictum in *Petermann* suggested that California might grant a broad public policy exception to the employment at-will doctrine, subsequent cases in California have sharply limited such exceptions.⁴¹ The California Labor Code currently contains a formal pronouncement of the employment at-will doctrine.⁴²

Similarly, courts in other jurisdictions have adopted the "public policy tort"⁴³ exception to the employment at-will doctrine. In those states, a cause of action will lie for employees who can show that their discharge violates public policy.⁴⁴ Compensatory and punitive damages may be made

S.W.2d 441 (Tenn. 1984) (same). Many more states expressly provide a cause of action for retaliatory discharge for filing a workmen's compensation claim. *See generally*, Annot., 32 A.L.R.4th 1221 (1984).

Petermann's second cause of action, although not relevant to this discussion of the employment at-will doctrine, was that he was arbitrarily issued a withdrawal card from the union and that the issuance of the card was done with the intent to harm him. *Id.* at 188, 344 P.2d at 26. The dismissal of the second cause of action was upheld because of Petermann's failure to exhaust the union's internal remedies before coming before the courts. Failure to exhaust internal union remedies figures prominently in this Comment's discussion of federal preemption of state tort claims for retaliatory discharge.

41. *See, e.g.*, *Becket v. Welton Becket & Assocs.*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (no cause of action arises for employee discharged for suing employer while employee was serving in his capacity of executor of an estate); *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (no cause of action arises for employee discharged for making herself available for jury duty). The *Becket* court's reasoning was that no cause of action arose because the duty that the employee owed to the estate was private in nature and was not a duty owed to the state. The state declined to extend its protection for employees who act out of duty to the state to those who act out of duty to others. *Accord* *Campbell v. Ford Indus.*, 274 Or. 243, 546 P.2d 141 (1976). A Ford employee who also owned common stock in Ford alleged that he was discharged for attempting to exercise his statutory right to inspect Ford's business records. The Oregon Supreme Court held that Campbell's interest was "private and proprietary" rather than based on a compelling state interest. Hence, Campbell could not claim that his discharge contravened public policy, even though it may have been in retaliation for his exercise of his statutory rights. 274 Or. 250, 546 P.2d at 145. *But cf.* *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) ("[U]nless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.").

42. "An employment, having no specified term, may be terminated at the will of either party on notice to the other." Employment for a specific term means employment for a period greater than one month. CAL. LAB. CODE § 2922 (West Supp. 1985).

43. *See Note, Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981).

44. In West Virginia, the Supreme Court of Appeals held 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." *Harless v. First Nat'l Bank*, 246 S.E.2d 270, 275 (W. Va. 1978). Harless' wrongful discharge claim was that he was terminated for reporting to the bank's own board of directors that the bank routinely violated the state's consumer protection laws. Harless sought compensatory and punitive damages.

In *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), the Oregon Supreme Court "created a

available whether or not there is a specific statutory codification of that policy.⁴⁵ Where there is no public policy designated by statute, courts have focused on the public nature of the defendant's conduct and the desirability of the effects of that conduct.⁴⁶ Unless the interests of the public are substantially implicated, courts are reluctant to intervene in the employment relationship.⁴⁷

II. LABOR LAW PREEMPTION

The employment at-will doctrine and exceptions to the doctrine are developed wholly within the states. To understand the peculiar application of the employment at-will doctrine in the unionized setting, we must first examine the manner in which federal law normally preempts state law in the collective bargaining process.

The doctrine of federal preemption of state law is enshrined in the supremacy clause of the United States Constitution.⁴⁸ Where Congress

right in plaintiff" to recover damages where "substantial 'societal interests'" are violated by an employee's discharge. *Id.* at 220, 536 P.2d at 516. Nees was able to recover compensatory but not punitive damages when she was discharged after serving jury duty. *Contra* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); *see supra* note 41.

45. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). Tameny alleged he was discharged for refusing to participate in a gasoline price-fixing scheme. While the price-fixing scheme would violate the Sherman Act, 15 U.S.C. §§ 1-7 (1982 & Supp. I 1983), the Cartwright Act, 1941 Cal. Stat. ch. 526, § 1 (codified at CAL. BUS. & PROF. CODE § 16,720 (West 1964)), and the consent decree entered in an antitrust prosecution against Atlantic Richfield, the California Supreme Court's analysis did not depend on specific statutory limitations on the employment relationship. Rather, the court noted that an employer's duty to refrain from firing an employee for refusing to commit a crime is a fundamental public policy. 27 Cal. 3d at 176-77, 610 P.2d at 1335-36, 164 Cal. Rptr. at 844-45. *See also* Petermann, 174 Cal. App. 2d 184, 244 P.2d 25 (1959), discussed *supra* at notes 37-41 and accompanying text. *But cf.* Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984), discussed *infra* at notes 238-60 and accompanying text (federal labor law and § 301(a) of the Taft-Hartley Act preempted state wrongful discharge action, in part, because only federal statutes were cited in the complaint as a public policy basis and the state had little interest in enforcing federal mine safety statutes).

46. *See supra* note 41.

47. *See, e.g.,* Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974) (cause of action not permitted without substantial public interest evidenced by statute); Note, *The Employment-At-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 DUQ. L. REV. 477 (1983).

48. Article VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

properly exercises its constitutional power,⁴⁹ contrary state law must yield; it is preempted.⁵⁰ Congress has exercised its authority to regulate private sector labor-management relations in several major statutes: the National Labor Relations (Wagner) Act (NLRA);⁵¹ the Labor Management Relations (Taft-Hartley) Act (LMRA), which incorporated and amended the Wagner Act;⁵² Title VII of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (LMRDA);⁵³ and the Railway Labor Act.⁵⁴

The functioning of this comprehensive statutory scheme governing private sector labor relations gives rise to two closely allied branches of preemption analysis. The branch first articulated is based upon the primary jurisdiction of the National Labor Relations Board (NLRB).⁵⁵ The second, clarified relatively recently, is based upon the supremacy clause.⁵⁶ The Taft-Hartley Act also provides the federal courts with jurisdiction in suits arising from breaches of collective bargaining agreements.⁵⁷ The preemptive operation of

49. See, e.g., U.S. CONST. art. I. Article I enumerates the powers of Congress. Article I, section 8 grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

Section 1 of the Taft-Hartley Act reads, in part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Labor Management Relations (Taft-Hartley) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1982 & Supp. I 1983)).

50. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (New York state law awarding exclusive franchise for ferry traffic between New York City and Elizabethtown, New Jersey, preempted by congressional power to regulate interstate commerce). The term "preemption" was not used by the Court in *Gibbons v. Ogden*.

51. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982 & Supp. I 1983)).

52. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

53. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.). The first three statutes cited herein, the National Labor Relations (Wagner) Act (NLRA), the Labor Management Relations (Taft-Hartley) Act (LMRA), and some sections of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (LMRDA), commonly known collectively as the Taft-Hartley Act, are codified as amended at 29 U.S.C. §§ 151-188 (1982 & Supp. I 1983) and generally govern private-sector labor relations. When considering the NLRA, the LMRA, and relevant sections of the LMRDA, this Comment shall refer to pertinent sections of the U.S. Code under their Taft-Hartley Act rubrics.

54. Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. I 1983)).

55. See *infra* notes 58-93, 115-29, and accompanying text.

56. See *infra* notes 94-114, 115-29, and accompanying text.

57. See *infra* notes 130-36 and accompanying text.

these provisions is discussed below *in seriatim*.

*A. Preemption by the Primary Jurisdiction of the NLRB:
Garner-Garmon-Sears*

In 1953, the Supreme Court issued its first major decision concerning conduct prohibited by the Taft-Hartley Act in *Garner v. Teamsters, Local 776*.⁵⁸ In *Garner*, the Teamsters picketed a nonunion trucking operation in Pennsylvania, demanding recognition as the exclusive bargaining agent for the firm's employees.⁵⁹ The picketing was allegedly unlawful under Pennsylvania law⁶⁰ and it also arguably constituted an unfair labor practice under section 8(b)(2) of the Taft-Hartley Act.⁶¹ The Supreme Court held that Congress had preempted the field through enactment of a comprehensive statutory scheme in the Taft-Hartley Act and that the Pennsylvania courts therefore lacked the power to enjoin the picketing.⁶² The Court maintained that the NLRB, not the courts, had the "duty of primary decision" in cases falling under the Taft-Hartley Act.⁶³ It emphasized that a single tribunal, the NLRB, with a single procedure and set of substantive rules governing labor relations within the Taft-Hartley Act, was the best guarantor of uniformity in the administration of the Act.⁶⁴ The *Garner* Court thus first articulated the rule that a state may neither invoke its own laws that duplicate the prohibitive provisions of the Taft-Hartley Act nor provide a remedy under either state law or the Taft-Hartley Act for conduct prohibited by the Act.⁶⁵

This primary jurisdiction branch of the preemption doctrine was rein-

58. 346 U.S. 485 (1953).

59. *Id.* at 487.

60. *Id.* at 487 n.3. The language of the Pennsylvania labor statute is similar to that of the NLRA. See *infra* note 60.

61. By picketing the Garner docks, the Teamsters induced other unions to curtail business with Garner. This, in turn, coerced Garner into encouraging the nonunion employees to join the Teamsters. 346 U.S. at 487. The Teamsters arguably were attempting to cause the employer to discriminate in regard to hire or tenure of employment on the basis of the employee's lack of union membership.

Section 8(b)(2) of the Taft-Hartley Act reads, in part: "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . ." 29 U.S.C. § 158(b)(2) (1982 & Supp. I 1983).

Section 8(a)(3) reads, in part: "It shall be an unfair labor practice for an employer . . . to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1982 & Supp. I 1983).

62. 346 U.S. at 490-91.

63. *Id.* at 489.

64. *Id.* at 490-91.

65. *Id.* at 489-91.

forced in *San Diego Building Trades Council v. Garmon*.⁶⁶ The California Supreme Court had affirmed the issuance of an injunction against picketing by the Teamsters and upheld a damage award to the employer for business lost during the picketing.⁶⁷ The United States Supreme Court remanded for reconsideration because of certain recent decisions concerning the NLRB's jurisdiction.⁶⁸ On remand, the California high court dissolved the injunction but sustained the award of damages.⁶⁹ The Supreme Court again granted certiorari.⁷⁰ Expanding the *Garner* preemption analysis, the Court held that both the states and the federal judiciary must defer to the expertise of the NLRB in the regulation of conduct arguably protected or prohibited by section 7⁷¹ or by section 8⁷² of the Taft-Hartley Act.⁷³ The Court reasoned that centralized administration of the Act by the NLRB alone would avoid conflict—especially state conflict—with national labor policy.⁷⁴ Thus, California courts were not permitted to pass judgment on whether the picketing was in fact an unfair labor practice prohibited by section 8(b)(2) of the Taft-Hartley Act.⁷⁵

The *Garmon* preemption analysis was refined nineteen years later in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.⁷⁶ Like *Garmon* and *Garner* before it, the case involved the peaceful picketing of a business. The employer filed suit to enjoin picketing that was taking place on its property.⁷⁷ In reviewing the state supreme court's decision that the suit was preempted,⁷⁸ the Supreme Court expressed concern that the *Garmon* preemption analysis, on its face, may overly impinge on state jurisdic-

66. 359 U.S. 236 (1959).

67. *Garmon v. San Diego Bldg. Trades Council*, 45 Cal. 2d 657, 291 P.2d 1 (1955).

68. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 29 (1957).

69. *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 615, 320 P.2d 473, 485 (1957).

70. *San Diego Bldg. Trades Council v. Garmon*, 357 U.S. 925 (1958).

71. 359 U.S. at 245. Section 7 of the Taft-Hartley Act protects employees' rights to organize and bargain collectively with employers, to engage in concerted activity for mutual aid and protection, or to refrain from organization, collective bargaining, and concerted activity for mutual aid and protection. 29 U.S.C. § 157 (1982 & Supp. I 1983).

72. 359 U.S. at 245. Section 8 of the Taft-Hartley Act delineates prohibited unfair labor practices. 29 U.S.C. § 158 (1982 & Supp. I 1983).

73. 359 U.S. at 245.

74. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*

75. *Id.* at 243.

76. 436 U.S. 180 (1978).

77. *Id.* at 182-83.

78. *Id.* at 184. The California Supreme Court held that the conduct was both arguably protected and arguably prohibited. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 17 Cal. 3d 893, 906, 553 P.2d 603, 613, 132 Cal. Rptr. 443, 453 (1976).

tion over conduct traditionally subject to state regulation, such as the property interests here.⁷⁹ The Court responded by developing a more complex preemption analysis. First examining whether the union's conduct was arguably prohibited by section 8 of the Taft-Hartley Act,⁸⁰ the Court inquired whether the focus of the state court would be the same as the focus of the NLRB if both were presented with the union's conduct. Here, Sears, Roebuck had challenged only the location of the picketing, claiming it was a trespass.⁸¹ Sears, Roebuck had not claimed that the picketing was an unfair labor practice. The state court, therefore, would not have to examine whether the picketing was protected or prohibited activity under the Taft-Hartley Act to determine whether a trespass had occurred.⁸² Conversely, had Sears, Roebuck filed unfair labor practice charges against the union, the NLRB would not have to examine whether a trespass had occurred under California law.⁸³ In short, there was no potential for conflict between the primary jurisdiction of the NLRB and the state-protected property interest before the California courts. On this "arguably prohibited" wing of the *Sears* analysis, the state claim was not preempted.⁸⁴

The *Sears* Court then examined the "arguably protected" aspect of the union's conduct⁸⁵ and found two distinct preemption concerns: (1) the primary jurisdiction of the NLRB, and (2) the possibility of state interference with federally protected rights under section 7 of the Taft-Hartley Act.⁸⁶ On the peculiar facts of *Sears*, the union involved could have invoked the jurisdiction of the NLRB to litigate whether its trespass was federally pro-

79. *Sears*, 436 U.S. at 190.

80. The California courts had considered that the union's conduct arguably was unlawful recognitional picketing in violation of § 8(b)(7)(C) of the Taft-Hartley Act, 29 U.S.C. § 158(b)(7)(C) (1982 & Supp. I 1983). That section prohibits picketing by a union for more than thirty days where the object of the picketing is to force the employer to recognize the union as the exclusive bargaining agent for its employees, if the union has not filed a petition with the NLRB requesting a representation election. *Id.*

The United States Supreme Court also indicated that the union's conduct might have been violative of § 8(b)(4)(D). If the union's object was to force the employer to shift work assignments from nonunion employees to union employees on the basis of union membership, the picketing would violate § 8(b)(4)(D). *See Sears*, 436 U.S. at 186 & n.9.

81. *Sears*, 436 U.S. at 185 & n.8.

82. *Id.* at 185, 198.

83. *Id.* at 185-87, 198.

84. *Id.* at 198.

85. *Id.* at 200-01. Arguably, the union's conduct was protected if its purpose was to publicize Sears, Roebuck's undercutting of prevailing area wages. This conduct would be concerted activity for mutual aid and protection within the meaning of § 7 of the Act. *See generally* Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321, 323 (1962) (discussing area standards picketing).

86. *Sears*, 436 U.S. at 199-200 & nn.29-30.

tected.⁸⁷ The employer, however, could not invoke the Board's jurisdiction to have the trespass declared unprotected.⁸⁸ If the union had invoked NLRB jurisdiction, the claim would be preempted through the primary jurisdiction rationale. Although it did not petition the NLRB, the possibility still existed that the California courts might prohibit activity that federal labor law protected.⁸⁹ This possibility of conflict could be sufficient to preempt the state court claim.⁹⁰ A further interest, however, interposed itself. If the state were precluded from acting and the union still did not invoke Board jurisdiction, then neither state nor federal forums would be available to the plaintiff, Sears, Roebuck.⁹¹ In effect, a state court would be required to weigh the danger of an erroneous ruling that the union's trespass was federally protected against the "anomalous consequence" of denying the plaintiff any forum.⁹²

After *Sears*, the focus of preemption analysis remained on the prohibited or protected nature of the conduct at issue.⁹³ In contrast, the second line of labor preemption, analytically distinct from the *Garner-Garmon-Sears* analysis, is concerned with conduct neither protected nor prohibited by the Taft-Hartley Act.

B. Unregulated Weapons of Economic Warfare and the Avoidance of Conflict with Federal Labor Law

The second branch of labor law preemption analysis rests on the premise

87. The union could have invoked the Board's jurisdiction by filing unfair labor practice charges against Sears, Roebuck. That charge might have been that Sears, Roebuck, in attempting to prevent union solicitation by nonemployees on company property (when there were no alternative means of communicating the union's message), was interfering with the Sears, Roebuck employees' free choice in the exercise of their § 7 right to organize. This restraint would violate § 8(a)(1) of the Act. The trespass, because of its strong nexus with the exercise of § 7 rights by the picketers, would be federally protected. See generally *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

88. See *supra* note 79. See also *Sears*, 436 U.S. at 185-86 & nn.9-10.

89. If the union's activity was area standards picketing, a state court injunction against the picketing would prohibit federally protected activity. *Sears*, 436 U.S. at 201 & n.32. See *supra* note 85.

90. 436 U.S. at 203.

91. *Id.* at 202-03.

92. *Id.* at 206-07. On the face of *Sears*, the Court saw no significant risk of the California courts prohibiting federally protected conduct. *Id.* at 207. Nevertheless, the Court was clear that this balancing test did not foreclose preemption of any state court action because "it might be reasonable to infer that Congress preferred the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction." *Id.* at 203.

93. See generally *Cox, Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980).

that in enacting the Taft-Hartley Act,⁹⁴ Congress sought to strike a balance of economic power between labor and management.⁹⁵ While federal labor law already eliminates certain tools of economic power,⁹⁶ there are certain activities that are weapons of economic warfare, but that nevertheless are not within the scope of section 7 or 8 of the Taft-Hartley Act—neither protected nor prohibited⁹⁷—and that, therefore, are not preempted under a *Garmon* analysis. Under the second branch of preemption analysis, however, these activities may be immune from state regulation.⁹⁸ In *Local 20, Teamsters v. Morton*,⁹⁹ the Supreme Court found that a suit under Ohio's secondary boycott law,¹⁰⁰ by providing damages for a secondary boycott not violative of section 303 of the Taft-Hartley Act, frustrated congressional intent.¹⁰¹ Congress, in the Court's view, had expressly authorized the recovery of damages by persons injured by secondary boycotts.¹⁰² Further, Congress had described "comprehensively and with great particularity"¹⁰³ the type of conduct prohibited. The Court determined that Congress, by not proscribing otherwise unprotected conduct, intended to leave that conduct within the arsenal of available economic weapons.¹⁰⁴ In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,¹⁰⁵ the Supreme Court explicitly acknowledged that this analysis

94. Pub. L. No. 80-101, 61 Stat. 136 (1947), incorporating National Labor Relations (Wagner) Act, 49 Stat. 449 (1935), together amended by Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 141-188 (1982 & Supp. I 1983)).

95. See Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972).

96. The conduct proscribed by § 8 of the Taft-Hartley Act, unfair labor practices, are all outlawed tools of economic power. For example, discharging a union sympathizer precisely for that sympathy, conduct clearly violative of § 8(a)(3), puts economic pressure on the sympathizer's fellow employees to refrain from union support, because of their fear of losing their jobs.

97. See *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

98. *Garmon*, 359 U.S. at 245-46.

99. 377 U.S. 252 (1964).

100. Simply put, a secondary boycott occurs when a striker appeals to a struck employer's customers or suppliers to stop doing business with the struck employer. Ohio's rule against secondary boycotts was a common law rule based on a conspiracy theory. See *Perko v. Local No. 207*, 168 Ohio St. 161, 151 N.E.2d 742 (1958) (outlining Ohio rule against secondary boycotts).

101. *Morton*, 377 U.S. at 259-60. Section 303 of the Taft-Hartley Act provides for suits against labor organizations for damages relating to activity that is an unfair labor practice under § 8(b)(4) of the Act. 29 U.S.C. § 187 (1982 & Supp. I 1983).

102. *Morton*, 377 U.S. at 258.

103. *Id.*

104. *Id.* at 259-60.

105. 427 U.S. 132 (1976).

constituted a second rationale for preemption.¹⁰⁶

In *Machinists*, union members refused to work overtime during a contract dispute.¹⁰⁷ The employer filed unfair labor practice charges with both the NLRB and the Wisconsin Employment Relations Commission. The NLRB regional director declined to issue a complaint because the union members' conduct was not regulated under the Taft-Hartley Act.¹⁰⁸ The Wisconsin labor commission, however, issued a cease and desist order pursuant to state law¹⁰⁹ and the Wisconsin Supreme Court affirmed.¹¹⁰

Upon review, the United States Supreme Court held that the Wisconsin state law was preempted because its enforcement would upset the balance of economic power between labor and management that Congress had intended to establish through its comprehensive statutory scheme.¹¹¹ The Court accepted that Congress, through the Taft-Hartley Act, recognized a system in which labor and management were permitted self-help¹¹² and that such economic weapons as the union members' refusal to work overtime were a natural part of the collective bargaining process.¹¹³ Under a *Machinists* preemption analysis, the crucial inquiry is whether the state regulation at issue frustrates the congressional intent to promote collective bargaining and, in turn, industrial stability.¹¹⁴

C. Exceptions to Garner-Garmon-Sears and Machinists Preemption

The *Garner-Garmon-Sears* preemption analysis does contain certain exceptions. States may regulate conduct despite interference with federal labor policy in three special circumstances. First, Congress, explicitly or implic-

106. *Id.* at 140.

107. *Id.* at 133-35.

108. *Id.* at 135.

109. *Id.* at 136.

110. *Lodge 76, Int'l Ass'n of Machinists*, 67 Wis. 2d 13, 226 N.W.2d 203 (1975).

111. *Machinists*, 427 U.S. at 148-49.

112. *Id.* at 148-50. The Court expressly overruled *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949) (*Briggs-Stratton*). *Machinists*, 427 U.S. at 141, 151, 154-55. *Briggs-Stratton* had stood for the proposition that the state could assert jurisdiction over activities "neither protected by § 7 nor prohibited by § 8 of the federal [Taft-Hartley] Act." *Machinists*, 427 U.S. at 141.

113. *Machinists*, 427 U.S. at 149-50.

114. *See id.* at 149-51. The inquiry is a difficult one, an "ongoing effort to decipher the presumed intent of Congress in the face of that body's steadfast silence." *Sears*, 436 U.S. at 188 n.12 (*per Stevens, J.*). Justice Stevens' apparent annoyance with the lack of guidance from Congress was a factor in his dissent from the majority opinion in *Machinists*, 427 U.S. at 156 (*Stevens, J., dissenting*). However, by the time he wrote for the plurality in *New York Tele. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), Justice Stevens had acquiesced to the Court's process of inference.

itly, has authorized the states to act in some cases.¹¹⁵ Second, there are certain areas of traditionally local responsibility and concern that cannot be preempted absent explicit congressional direction.¹¹⁶ An overriding state interest in regulating otherwise protected or prohibited conduct has been found sufficient to prevent preemption in cases of violence,¹¹⁷ threats of violence,¹¹⁸ mass picketing,¹¹⁹ malicious libel,¹²⁰ and intentional infliction of emotional distress.¹²¹ Finally, states may regulate conduct in instances where that regulation would be of merely peripheral concern to the effective administration of federal labor law.¹²²

These exceptions to the *Garner-Garmon-Sears* analysis have not been clearly applied to *Machinists* preemption. However, in *New York Telephone Co. v. New York State Department of Labor*,¹²³ a majority of the Court did use language indicating that a "local interests" exception could be employed

115. State courts may sit in judgment of claims arising under § 301 of the Taft-Hartley Act. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). See *infra* notes 130-36 and accompanying text. Suit in state court is also permitted under § 303 of the Taft-Hartley Act. See *supra* notes 99-104 and accompanying text.

Implicit authority for state action was found in *New York State Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979). The Court determined that the legislative histories of the Wagner Act and the Social Security Act of 1935, 42 U.S.C. §§ 301, 501-504 (1982 & Supp. I 1983), permitted the states to pay strikers unemployment benefits. *New York State Tel.*, 440 U.S. at 540-44.

116. As the Supreme Court stated in *Garmon*:

However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate . . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S. at 243-44 (footnote omitted). *Accord* *Belknap, Inc. v. Hale*, 463 U.S. 545 (1983); *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 296 (1977); *Machinists*, 427 U.S. 132, 135 (1976); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-90 (1971); *Local 20, Teamsters v. Morton*, 377 U.S. 252, 257 (1964).

117. *UAW v. Russell*, 356 U.S. 634 (1958); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) The *Laburnum* Court observed: "Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." 347 U.S. at 663-64.

118. *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956).

119. *UAW v. Russell*, 356 U.S. 634 (1958).

120. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

121. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977).

122. *Garmon*, 359 U.S. at 243-44.

123. 440 U.S. 519 (1979).

under a *Machinists* analysis.¹²⁴

Suits arising from breaches of collective bargaining agreements provide another exception to *Garner-Garmon-Sears* preemption. In *Local 174, Teamsters v. Lucas Flour Co.*,¹²⁵ the Supreme Court noted that because actions for breach of a collective bargaining agreement have a separate statutory base in section 301 of the Taft-Hartley Act,¹²⁶ the preemption principles of *Garmon*¹²⁷ are inapposite.¹²⁸ Even though the conduct underlying a section 301 action may be conduct otherwise preempted under *Garmon*, the courts are not required to yield to the primary jurisdiction of the NLRB.¹²⁹

D. Federal Preemption of State Law in Suits for Breach of a Collective Bargaining Agreement

Federal jurisdiction in suits for breach of a collective bargaining agreement is conferred by section 301(a) of the Taft-Hartley Act.¹³⁰ Section 301, however, is more than a simple jurisdictional statute. It also authorizes the development of a federal common law concerning enforcement of collective bargaining agreements.¹³¹ This is not to say that section 301 jurisdiction is exclusively federal. State courts may exercise concurrent jurisdiction.¹³² However, if a state court does assume jurisdiction, incompatible state law will be preempted by principles of federal labor law.¹³³ The Supreme Court so held in *Lucas Flour*,¹³⁴ determining that application of state laws of contract enforcement inevitably would disrupt the federally structured collective bargaining process to the detriment of that process.¹³⁵

There are several procedural prerequisites to bringing a section 301 suit.¹³⁶ The most significant is the requirement of exhaustion of contractual

124. See *id.* at 539-40 (dicta) (quoting the *Garmon* local interests test); *id.* at 550 (Blackmun, J., concurring) (quoting *Garmon*); *id.* at 559-60 & n.13 (Powell, J., dissenting).

There were four opinions in *New York Tel.*; one announcing the decision of the Court (*per* Stevens, J.), two concurrences, and one dissent.

125. 369 U.S. 95 (1962).

126. *Id.* at 101 & n.9; see *supra* note 5.

127. See *supra* notes 57-93, 115-22, and accompanying text.

128. 369 U.S. at 101 n.9.

129. *Id.*

130. 29 U.S.C. § 185(a) (1982); see *supra* note 5.

131. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 & n.2 (1957).

132. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

133. *Lucas Flour*, 369 U.S. at 103.

134. *Id.*

135. *Id.*

136. See, e.g., *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983) (six-month statute of limitations between breach of collective bargaining agreement and institution of § 301 suit).

remedies.

III. FEDERAL PREFERENCE FOR EXHAUSTION OF ARBITRATION AS AN EXCLUSIVE REMEDY

A. *The Exhaustion Prerequisite*

The Supreme Court addressed exhaustion of contractual remedies-grievance procedures, in *Republic Steel Corp. v. Maddox*.¹³⁷ Charlie Maddox brought suit in Alabama state court for breach of contract, alleging that he was owed a certain amount of severance pay under the terms of a collective bargaining agreement between Republic Steel and his union.¹³⁸ That agreement contained a three-step grievance procedure culminating in binding arbitration.¹³⁹

Upon eventual appeal, the Supreme Court in *Maddox* promulgated a general rule that employees with grievances must attempt to use the contractual grievance procedure unless the collective bargaining agreement otherwise provides.¹⁴⁰ Three justifications were given for this rule. First, by requiring the individual employee to have his claim processed by the union, a court enhances the union's position as exclusive bargaining agent.¹⁴¹ Second, the employer reduces the choice of remedies against him in contract disputes.¹⁴² Third, to the extent that the grievance procedure is established as the exclusive remedy, private dispute resolution becomes attractive, and the purpose of the Taft-Hartley Act, to promote collective bargaining, is carried forward.¹⁴³

The contract between Maddox's union and Republic Steel did not specify an available remedy other than the grievance procedure for breaches of the collective bargaining agreement.¹⁴⁴ In addition, the remedy sought by Maddox, severance pay, was within the power of the arbitrator to grant.¹⁴⁵ Maddox therefore was required to attempt to use the grievance procedure.¹⁴⁶ Once Maddox received a result from the grievance procedure, whether it be an arbitration award or a decision by the union not to proceed further with the grievance, any subsequent section 301 suit would have to be dis-

137. 379 U.S. 650 (1965).

138. *Id.* at 650-51.

139. *Id.* at 651.

140. *Id.* at 652-53.

141. *Id.* at 656.

142. *Id.*

143. *Id.* at 653.

144. *Id.* at 658-59.

145. *Id.* at 657.

146. *Id.*

missed.¹⁴⁷ Maddox, by attempting to use the grievance procedure, had received and "exhausted" his bargained-for remedy.

The contours of the *Maddox* rule, requiring exclusivity of remedy in the grievance procedures, were drawn more clearly in *Vaca v. Sipes*.¹⁴⁸ In *Vaca*, an employee was discharged for medical reasons.¹⁴⁹ The union processed the employee's grievance through the fourth step of a five-step process.¹⁵⁰ In the face of a settlement offer by the employer and medical evidence not supportive of the grievance,¹⁵¹ the union's executive board voted to halt the grievance before the fifth step, arbitration. The employee then demanded that his union process the grievance through arbitration. When the union refused, the employee brought suit in Missouri state court against the employer for breach of contract and against his union for refusing to take the grievance to arbitration.¹⁵²

The Supreme Court restated the union's statutory duty of fair representation¹⁵³ and announced two important exceptions to the *Maddox* exclusivity principle. First, the Court maintained that an employee should not be limited to the contractual grievance procedure if the employer's conduct giving rise to the grievance constituted a repudiation of the contract.¹⁵⁴ A contrary rule would allow an employer to raise the defense of the exclusivity of contractual procedures that the employer himself had repudiated.¹⁵⁵ Second, when the union controls processing the grievance and wrongfully refuses to do so, the employee must be allowed redress.¹⁵⁶ Whenever a union's conduct toward a member is arbitrary, discriminatory, or in bad faith, or if the union processes the grievance in a merely perfunctory manner, that conduct is a breach of the union's duty of fair representation.¹⁵⁷ The employee is then excused from *Maddox* exclusivity constraints.¹⁵⁸ The question of whether there was a breach of the union's duty of fair representation is criti-

147. *Id.* See *supra* note 8.

148. 386 U.S. 171 (1967).

149. *Id.* at 174-75.

150. *Id.* at 175. Sipes was the administrator of the estate of the employee, Owens. Owens suffered from high blood pressure, was discharged for that reason, and sought reinstatement. *Id.* at 174-75.

151. *Id.* at 175. The executive board of the union obtained an independent medical evaluation of Owens' condition and, upon receipt of this report, voted not to proceed with the grievance. *Id.* The employer had offered to send Owens to a rehabilitation clinic. *Id.* See *infra* notes 172-90 and accompanying text.

152. *Vaca*, 386 U.S. at 175-76.

153. *Id.* at 177-78; see *Humphrey v. Moore*, 375 U.S. 335, 342 (1964).

154. *Vaca*, 386 U.S. at 185.

155. *Id.*

156. *Id.* at 185-86.

157. *Id.* at 190.

158. *Id.* at 190-91.

cal to the determination of whether the section 301 action can stand, and the two alleged breaches must be litigated together.¹⁵⁹ If the union has breached its duty, suit is allowed because the finality of a grievance decision is destroyed.¹⁶⁰ In that case, an employer is unable to rely on the grievance decision as a bar to section 301 suits.¹⁶¹

Another exception to *Maddox* exclusivity, the "futility exception," was developed under the Railway Labor Act¹⁶² in *Glover v. St. Louis-San Francisco Railway*.¹⁶³ Petitioners brought an action against the railroad and their union, alleging racial discrimination and praying for legal and equitable relief.¹⁶⁴ Respondents defended, in part, by asserting that petitioners possessed remedies under the collective bargaining agreement and were limited to them, as required under *Maddox* and *Vaca*.¹⁶⁵ Because of evidence of collusion between the railroad and the union, the Supreme Court concluded that use of the bargained-for grievance procedures would be "wholly futile" and would not be required before suit could be brought by the employee.¹⁶⁶ Another exception has been extended to trustees of multiemployer trust funds where the collective bargaining agreement evinces no intent by the parties to bind the trustees to the grievance procedure.¹⁶⁷ Similarly, retirees have been found not bound to grievance procedures in section 301 actions to enforce contract provisions concerning pensions.¹⁶⁸

Most important for the purposes of this Comment, however, is the emerging "public policy exception" to *Maddox* exclusivity. In certain highly spe-

159. *Id.* at 183-84; *Clayton v. UAW*, 451 U.S. 679, 693 n.23, 695 (1981). Problems of proof are substantial in allegations of breach of the duty of fair representation. Before 1977, for example, the UAW had admitted breach of its duty only once in 20 years. See *Graf v. Elgin, J. & E. Ry.*, 697 F.2d 771 (7th Cir. 1983) (showing of mere negligence insufficient to make out a cause of action for breach of union's duty of fair representation). In *Graf*, a union official placed an employee's grievance in his jacket pocket and forgot about it until after the time for its filing had lapsed. *Id.* at 774.

160. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 566 (1976).

161. See *id.* at 566; see also *id.* at 569-70.

162. Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. I 1983)).

163. 393 U.S. 324 (1969).

164. *Id.* at 325-26.

165. *Id.* at 329.

166. *Id.* at 330-31. See *supra* note 7 and accompanying text. See also *Schultz v. Owens-Illinois*, 696 F.2d 505 (7th Cir. 1982) (use of grievance procedure excused as futile where union had already agreed to employer's rejection of a similar grievance with another employee); *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612 (9th Cir. 1981) (use of grievance procedure excused where union's lack of support made employees fearful of retaliatory discharge for the filing of a grievance).

167. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984).

168. *Anderson v. Alpha Portland Indus.*, 752 F.2d 1293 (8th Cir. 1985).

cialized circumstances, an arbitration decision¹⁶⁹ will not be enforced because that decision is contrary to public policy.¹⁷⁰ This Comment contends that these public policy exceptions are developing on a parallel track to public policy exceptions to the employment at-will doctrine. The Comment will develop a model applying these employment at-will exceptions to the unionized context despite the myriad preemption problems presented by the federal labor law scheme.¹⁷¹ In order to appreciate fully the tremendous difficulties presented to the unionized employee wishing to use employment at-will doctrine in state court actions, the structure of deferral to the usual dispute resolution mechanism of collective bargaining must be examined.

B. The Steelworkers Trilogy: Preference and Deference Become Absolute

The preference for contractual grievance-arbitration procedures as a means of dispute resolution is established by the Taft-Hartley Act.¹⁷² Grievance procedures ending in arbitration are almost invariably found in collective bargaining agreements.¹⁷³ The grievance procedure provides two essential services to federal labor law. First, as the Supreme Court has noted, "the agreement to arbitrate grievance disputes is the *quid pro quo* for

169. The "arbitration decision" need not be the decision of an arbitrator at the last step of a grievance procedure. A good faith decision by a union not to proceed to the last step will satisfy the exhaustion requirement. *See Vaca*, 386 U.S. at 188-95 (discussing whether refusing to process a grievance to the last step of the procedure constitutes a breach of the union's duty of fair representation).

170. *See, e.g.,* Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 264 (5th Cir.), *cert. denied*, 105 S. Ct. 124 (1984) (arbitration decision constituting an unfair labor practice unenforceable); *United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) (court refuses to enforce arbitration award reinstating postal employee convicted of embezzling postal money orders); *Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983) (court refuses to enforce reinstatement award of discharged truck driver who admittedly drank on duty as contrary to public policy of preventing drinking and driving); *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280 (9th Cir.), *cert. denied*, 459 U.S. 1200 (1982) (arbitration award reinstating postal worker who had participated in strike vacated because of statute prohibiting employment of persons who had participated in a strike); *Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982) (vacating arbitration decision upholding work rule prohibiting direct contact between packing house employees and federal meat inspectors). The *Jones Dairy* court specifically noted that "we are aware that when a court bars enforcement of an arbitration award on the basis of public policy, that public policy must be clearly defined." 680 F.2d at 1145. *Cf. Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963) (arbitration award ordering reinstatement of employee who gambled on company premises upheld because public policy against gambling insufficient to overturn award).

171. *See infra* notes 289-328 and accompanying text.

172. 29 U.S.C. § 173(d) (1982 & Supp. I 1983); *see supra* note 6.

173. *See supra* note 4.

an agreement not to strike."¹⁷⁴ Second, contractual arbitration provides effective resolution of disputes over the interpretation and application of a contract at the level those disputes are understood best—the plant.¹⁷⁵

Judicial sanction of arbitration as a dispute resolution mechanism was most clearly enunciated in the *Steelworkers Trilogy*.¹⁷⁶ The *Trilogy* involved suits for breach of collective bargaining agreements under section 301 of the Taft-Hartley Act.¹⁷⁷ The first, *United Steelworkers v. American Manufacturing Co.*,¹⁷⁸ examined judicial intervention before a dispute was submitted to arbitration.¹⁷⁹ There, an injured worker who had received compensation was estopped in the district court from compelling the arbitration called for in his collective bargaining agreement.¹⁸⁰ The United States Court of Appeals for the Sixth Circuit affirmed on the grounds that the grievance was baseless and frivolous.¹⁸¹ The Supreme Court reversed, reasoning that the courts are in no position to adjudge the merits of the alleged contract violation.¹⁸² The Court viewed the controversy as a simple breach of contract question.¹⁸³ The union alleged breach of contract for the company's refusal to arbitrate and the company defended by stating that it was not obligated to arbitrate meritless grievances. The Court, however, considered this dispute to be clearly arbitrable.¹⁸⁴

The determination of whether any contract dispute is arbitrable was addressed in the second case of the *Steelworkers Trilogy*, *United Steelworkers v. Warrior and Gulf Navigation Co.*,¹⁸⁵ in which the Supreme Court proclaimed a presumption of arbitrability.¹⁸⁶ The Court concluded that unless the arbitration clause was not susceptible to an interpretation that covers the

174. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

175. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595-96 (1960).

176. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The decisions were all announced the same day and have come to be known, then, as the *Steelworkers Trilogy*. Justice Douglas was the author of all three majority opinions in the *Steelworkers Trilogy*.

177. 29 U.S.C. § 185(a) (1982 & Supp. I 1983); see *supra* note 5.

178. 363 U.S. 564 (1960).

179. *Id.*

180. 363 U.S. at 566.

181. *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 628 (6th Cir. 1959), *rev'd*, 363 U.S. 564 (1960).

182. *American Mfg.*, 363 U.S. at 568.

183. *Id.* at 569.

184. *Id.*

185. 363 U.S. 574 (1960).

186. The majority stated: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83 (footnote omitted).

asserted grievance, the courts should determine that the dispute is arbitrable.¹⁸⁷

In *United Steelworkers v. Enterprise Wheel & Car Corp.*,¹⁸⁸ the third case of the *Steelworkers Trilogy*, the Court declined to review the merits of previously arbitrated grievances. The majority reasoned that the parties had bargained for the arbitrator's judgment, not the Court's.¹⁸⁹ The Court noted, however, that the arbitrator's award can be upheld only to the extent that it "draws its essence from the collective bargaining agreement."¹⁹⁰

Suits brought to enforce or overturn an arbitrator's award are brought under section 301.¹⁹¹ Under a *Steelworker's Trilogy* analysis, the award will be enforced except in some narrow circumstances,¹⁹² such as when the union has breached its duty of fair representation.¹⁹³ Courts reviewing arbitration awards under the *Enterprise Wheel & Car* "essence" standard acknowledge that the arbitrator has wide discretion to interpret the contract and existing law to solve the contractual dispute at hand and require only that the arbitrator's award be a rational interpretation of the agreement.¹⁹⁴

The arbitrator, however, may not order an award that would constitute an unfair labor practice.¹⁹⁵ Such an award would be "repugnant" to the Taft-Hartley Act.¹⁹⁶ More broadly, arbitration awards that violate other specific statutory prohibitions are contrary to public policy and therefore cannot be enforced.¹⁹⁷ This narrow public policy exception is the door through which exceptions to the employment at-will doctrine enter the unionized setting.

187. *Id.*

188. 363 U.S. 593 (1960).

189. 363 U.S. at 598-99.

190. *Id.* at 597.

191. *See, e.g., Lincoln Mills*, 353 U.S. at 449-56 (asserting broad scope of § 301 jurisdiction during discussion of legislative rejection of common law rule that executory agreements to arbitrate are unenforceable).

192. *See supra* note 8; *see also supra* notes 153-61 and accompanying text.

193. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *supra* notes 155-60 and accompanying text.

194. *See, e.g., Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp.*, 725 F.2d 264, 268 (5th Cir.), *cert. denied*, 105 S. Ct. 124 (1984); *Brotherhood of R.R. Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1132-33 (3d Cir. 1969).

195. *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1291 (5th Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979); *Sperry Systems Management Division v. NLRB*, 492 F.2d 63 (2d Cir. 1974), *cert. denied*, 419 U.S. 831 (1976); *Local 7-210, Oil, Chemical & Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194 (7th Cir.), *cert. denied*, 414 U.S. 875 (1973); *Glendale Mfg. Co. v. Local No. 520, ILGWU*, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961); *accord Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp.*, 725 F.2d 264 (5th Cir.), *cert. denied*, 105 S. Ct. 124 (1984).

196. *General Warehousemen & Helpers*, 579 F.2d at 1293.

197. Even before the *Steelworkers Trilogy*, the Supreme Court had noted in dicta that an

Thus, the development of public policy exceptions to the employment at-will doctrine¹⁹⁸ may provide the vehicle by which unionized workers may circumvent their grievance procedure and bring suit in state court for wrongful discharge.

Nevertheless, the practical effect of this *Maddox-Steelworkers* axis is that a union member wishing to sue for breach of his collective bargaining agreement must exhaust the agreement's arbitration procedure. Once the arbitration procedure has run its course, absent one of the narrow exceptions outlined above,¹⁹⁹ the courts will defer to that arbitration decision²⁰⁰ and will not allow suit to proceed under the *Steelworkers Trilogy* rationale.²⁰¹ After exhaustion of such grievance procedure, a subsequent section 301 suit will be dismissed because of *Maddox* exclusivity principles.²⁰²

arbitration award should be vacated if the award were in "manifest disregard" of the law. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

In *American Postal Workers v. United States Postal Serv.*, 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983), an arbitration award reinstating a postal worker who had participated in a strike was vacated as illegal and, therefore, against public policy. Under 5 U.S.C. § 7311 (1982 & Supp. I 1983), persons who participate in a strike against the United States government are prohibited from federal government employment. In *General Teamsters Local Union 249 v. Consolidated Freightways*, 464 F. Supp. 346 (W.D. Pa. 1979), Teamsters were discharged for refusing to drive their trucks without mud flaps, as required by Pennsylvania law. An arbitration award upholding the discharges was vacated because the practical effect of the award was to require the Teamsters to violate state law. *Id.* at 349.

Arbitration awards need not directly violate a specific statute in order to be overturned as against public policy. *See United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984). In this *Postal Workers* case, the United States Court of Appeals for the First Circuit refused to enforce a reinstatement order for a postal service employee who had been convicted of and subsequently discharged for embezzling postal money orders. *See also Amalgamated Meat Cutters Local 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). In *Local 540* a driver was discharged for wrecking a company tractor trailer and subsequently receiving a citation for drinking while driving. Federal Motor Carrier Safety Regulation, 49 C.F.R. § 392.5 (1984), prohibits motor carrier drivers from consuming intoxicating liquor within four hours before operating a motor carrier. These regulations were found to constitute sufficient public policy to deny enforcement of an arbitration award of reinstatement. *Local 540*, 712 F.2d at 125. *Cf. supra* notes 37-47 and accompanying text (public policy exceptions to the employment at-will doctrine). *But cf. Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963) (arbitration award ordering reinstatement of an employee who gambled on company premises upheld because public policy against gambling sufficiently protected by criminal sanctions, and employee's discharge was too severe a penalty under the circumstances).

198. *See supra* notes 37-47 and accompanying text.

199. *See supra* notes 191-98 and accompanying text.

200. *See supra* notes 172-90 and accompanying text.

201. *See supra* note 8.

202. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (arbitration decision is the exclusive remedy absent breach of the duty of fair representation).

IV. EXHAUSTION, DEFERRAL, AND PREEMPTION

One type of interplay between deferral to arbitration in the courts and federal preemption of state law through *Garmon*, *Machinists*, or section 301 preemption is illustrated by the recent decision of the United States Court of Appeals for the Ninth Circuit in *Buscemi v. McDonnell Douglas Corp.*²⁰³ Buscemi, a member of the International Association of Machinists, was covered by the union's collective bargaining agreement with McDonnell Douglas. He was discharged and pursued the grievance procedure provided by the union. The union, however, refused to go to arbitration on his behalf.²⁰⁴ Buscemi subsequently filed suit in the Superior Court of California against McDonnell Douglas for retaliatory discharge, wrongful termination, and intentional infliction of emotional distress—all recognized causes of action under the California employment at-will doctrine.²⁰⁵ He alleged that he had been fired for circulating petitions among his fellow employees in which he had voiced complaints regarding certain employer practices.²⁰⁶ After McDonnell Douglas removed the case to federal district court, Buscemi added the union as a defendant, alleging breach of the duty of fair representation.²⁰⁷ The district court granted the defendants' motion to dismiss.²⁰⁸ Affirming the district court, the Ninth Circuit held that Buscemi's allegation that his discharge was retaliatory was preempted by *Garmon* because his conduct was arguably protected by section 7 of the Taft-Hartley Act.²⁰⁹

Buscemi based his claim of wrongful termination on California law, which allows recovery in tort when a discharge violates public policy or a statute, or when it breaches an implied contract of employment.²¹⁰ The court observed in dicta that, as a union member working under a collective bargaining agreement, Buscemi could not claim breach of an implied contract.²¹¹ The Ninth Circuit therefore also affirmed the district court's characterization of the complaint as a breach of contract action arising under section 301

203. 736 F.2d 1348 (9th Cir. 1984).

204. *Id.* at 1349.

205. *See supra* notes 36-42 and accompanying text.

206. *Buscemi*, 736 F.2d at 1350.

207. *Id.* at 1349.

208. *Id.* The district court dismissed Buscemi's complaint on the grounds that (1) his discharge was allegedly for § 7-protected activity and therefore preempted under the *Garmon* primary jurisdiction rationale; (2) the use of a California at-will tort claim was properly cognizable as a § 301 action for breach of Buscemi's collective bargaining agreement; and (3) Buscemi's complaint was time barred under the six-month statute of limitations defined in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983). *Buscemi*, 736 F.2d at 1349-50.

209. *Id.*

210. *See supra* notes 36-42 and accompanying text.

211. *Buscemi*, 736 F.2d at 1350.

of the Taft-Hartley Act.²¹²

Interestingly, Buscemi added his union as a defendant only *after* the case was removed to federal district court. At that time, the employer had raised as a defense its contention that the suit should properly be characterized as one arising under section 301.²¹³ Were the suit so characterized, the employer would be able to defend on the ground that Buscemi had not exhausted his contractual remedies under the *Maddox* rule.²¹⁴ Additionally, to prevail in a section 301 suit, Buscemi would have to prove not only breach of contract by the employer but also the union's breach of its duty of fair representation.²¹⁵ Apparently, by adding the union as a defendant, Buscemi was attempting to preserve at least a section 301 action against his employer. The allegation of breach of the union's duty of fair representation, however, belied Buscemi's claim that his cause of action arose under California, and not federal, law. The case was found to be subject to the grievance procedure of Buscemi's collective bargaining agreement, preempted by section 301, and thus dismissed.²¹⁶

In contrast, a Teamster in California was able to maintain an action under California at-will doctrine in spite of the unionized setting in *Garibaldi v. Lucky Food Stores*.²¹⁷ Garibaldi was employed by Lucky Food Stores under a collective bargaining agreement providing for arbitration of otherwise unresolved grievances.²¹⁸ In March 1979, Garibaldi noticed that a load of milk he was to deliver was spoiled and reported this to his employer, who ordered him to proceed with the delivery.²¹⁹ Garibaldi did not deliver the milk but rather reported it to the local health department, which condemned the

212. *Id.* at 1350-51. *Cf.* *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980). In *Fristoe*, a unionized employee stylized his complaint for wrongful discharge in common law terms. The court held that the action was preempted. "The court's recharacterization of Fristoe's complaint as one arising under § 301 is required by federal preemption doctrines." 615 F.2d at 1212.

213. *See supra* notes 5, 130-36, and accompanying text.

214. *See supra* notes 137-68 and accompanying text.

215. *See supra* notes 148-61 and accompanying text; *see also* *Graf v. Elgin, J. & E. Ry. Co.*, 697 F.2d 771 (7th Cir. 1983) (application of union's breach of duty of fair representation under Railway Labor Act). Employees are not required to exhaust the bargained-for grievance procedure when that procedure is futile. *See supra* notes 162-68 and accompanying text. Retirees are not required to exhaust grievance procedures. *See* *Anderson v. Alpha Portland Indus.*, 752 F.2d 1293 (8th Cir. 1985). Of course, the grievance procedure must be intended to be exclusive. *Maddox*, 379 U.S. at 657-58. *See also* *Vaca*, 368 U.S. at 177-78; *supra* note 8.

216. *Buscemi*, 736 F.2d at 1352.

217. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

218. *Id.* at 1368.

219. *Id.*

milk.²²⁰ Garibaldi was discharged in October 1980 and subsequently grieved his discharge.²²¹ An arbitrator found that Garibaldi had been discharged for cause.²²² Garibaldi then filed a complaint in California Superior Court, claiming "damages for bad faith, wrongful termination and intentional infliction of emotional distress," alleging he had been discharged because of his report to the health department.²²³ The employer removed the case to federal court.²²⁴ The district court ruled that Garibaldi's cause of action for wrongful termination was actually a breach of contract action arising under section 301.²²⁵ Unlike Buscemi, Garibaldi never claimed that his discharge was even arguably an unfair labor practice. *Garmon* preemption thus was not implicated.

Before the Ninth Circuit, the employer argued that Garibaldi's termination claim was preempted by the operation of both the collective bargaining agreement's grievance procedure and section 301 of the Taft-Hartley Act.²²⁶ The court admitted that the question of whether a claim for wrongful discharge is preempted solely by a union contract, when the claim is based on a violation of state public policy, was one of first impression.²²⁷

220. *Id.* See CAL. AGRIC. CODE § 32,906 (West 1968) (making it unlawful "to sell . . . or deliver . . . any impure, polluted, tainted, unclean, unwholesome, stale or adulterated milk").

221. *Garibaldi*, 726 F.2d at 1368.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 1368-69. The district court based this finding on principles outlined in *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980). *Id.* at 1369. "Mere omission of reference to LMRA [the Labor Management Relations (Taft-Hartley) Act] § 301 in the complaint does not preclude federal subject matter jurisdiction." 615 F.2d at 1212. See *supra* note 213.

226. *Garibaldi*, 726 F.2d at 1369.

227. *Id.* at 1371. The court's characterization of the case as one of first impression is interesting. The United States Court of Appeals for the Tenth Circuit had found previously that an Oklahoma retaliatory discharge statute was not preempted. *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981). The Oklahoma statute forbids discharge in retaliation for filing a workmen's compensation claim. The *Peabody* panel found it "inconceivable that there would be state court interference with federal labor policy in connection with the present type of statute." 666 F.2d at 1316. Thus, there was no *Machinists* preemption, nor was *Garmon* preemption indicated on the facts.

The Tenth Circuit's reasoning in *Peabody* centered on an analogy to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), holding that rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982 & Supp. I 1983), supplemented rights contained in collective bargaining agreements. *Peabody*, 666 F.2d at 1320-21. See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1982) (supplemental statutory rights found in the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-218 (1982 & Supp. I 1983)).

The Oregon Supreme Court had reached the same result on a similar workmen's compensation statute in *Vaughn v. Pacific Northwest Bell Tele. Co.*, 289 Or. 73, 611 P.2d 281 (1980). In addition to following a *Gardner-Denver* supplemental statutory rights analysis, the court also pronounced that Oregon had a substantial interest in the integrity of its workmen's compensation system. 289 Or. at 88-89, 611 P.2d at 287. The Oregon high court further held that

The *Garibaldi* court relied on the plurality opinion in *New York Telephone Co. v. New York State Department of Labor*,²²⁸ in which the Supreme Court ruled, *inter alia*, that a state law will not be preempted by federal labor law when: (1) it serves a state purpose other than regulation of the bargaining relationship; and (2) it does not frustrate the implementation of federal labor laws.²²⁹ The court reasoned that California's interest in ensuring that only wholesome milk is distributed within the state was wholly unrelated to regulation of the bargaining relationship.²³⁰ The court further held that California had a legitimate interest in ensuring that employment cannot be conditioned upon required participation in unlawful conduct by an employee.²³¹ In addition, the Ninth Circuit asserted that reporting to the local health department was precisely the type of conduct California sought to protect in the state's exceptions to the employment at-will doctrine.²³²

The court flatly stated that a tort claim for wrongful discharge based upon a state's public policy would not significantly interfere with the collective bargaining process because of the difference between contractual remedies and remedies available in tort.²³³ The court buried its analysis, however, in a footnote.²³⁴ That analysis centered on the proposition that state statutory rights operate independently of rights arising from the collective bargaining agreement.²³⁵

because the workmen's compensation laws afforded supplemental or alternative remedies to those contained in the collective bargaining agreement, exhaustion was not required of the aggrieved employee. 289 Or. at 89-90, 611 P.2d at 289. Using an analysis derived from the *Steelworkers Trilogy*, the court reasoned that because the rights Vaughn was trying to enforce were beyond the power of the arbitrator to address, exhaustion was superfluous. 289 Or. at 90, 611 P.2d at 291.

228. 440 U.S. 519 (1979). See *supra* notes 114-15, 123-24, and accompanying text.

229. *Garibaldi*, 726 F.2d at 1372 (citing *New York Tele.*, 440 U.S. at 519).

230. *Id.* at 1374.

231. *Id.* (citing *Tameny*, 27 Cal. 3d at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845). See *supra* note 41 and accompanying text. Although the *Garibaldi* court states that the public policy exception for wrongful discharge cases was established in *Tameny*, the first California case was 21 years before that. *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). See *supra* notes 36-42, 44, and accompanying text.

232. *Garibaldi*, 726 F.2d at 1374.

233. *Id.* at 1375.

234. See *id.* at 1375 n.12.

235. *Id.* See *supra* note 227 and accompanying text. In support of its result in *Garibaldi*, the Ninth Circuit cited *Machinists Automotive Trades Dist. Lodge No. 190 v. Utility Trailer Sales Co.*, 141 Cal. App. 3d 80, 190 Cal. Rptr. 98 (1st Dist.), *appeal dismissed*, 464 U.S. 1005 (1983), which was rather backhanded support for its analysis. In *Utility Trailer Sales*, the worker's state statutory right to indemnity was not preempted by federal labor law, *id.*, and, in fact, the Supreme Court dismissed the case for want of a substantial federal question. 464 U.S. 1005 (1983). The Ninth Circuit interpreted the Supreme Court's dismissal to be a decision on the merits of the case.

Finally, the court examined the effect of the adverse arbitration decision Garibaldi received in regard to his right to bring subsequent court action. The court posited that independent statutory rights exist outside of the collective bargaining process.²³⁶ According to the Ninth Circuit, the distinction between these contractual and statutory rights was not obliterated merely because both were violated as a result of the same occurrence.²³⁷

The court's preemption analysis clearly showed that Garibaldi's action had a separate, identified basis outside the collective bargaining agreement.²³⁸ To the *Garibaldi* court, that the state statutory basis had survived *Garmon* preemption lent support to the court's conclusion that the arbitration decision adjudicated only those contractual rights and did not affect the state statutory claim.²³⁹ The arbitration decision, therefore, did not preempt California's tort remedy for Garibaldi.²⁴⁰

Garibaldi was distinguished by the Ninth Circuit in *Olguin v. Inspiration Consolidated Copper Co.*²⁴¹ The applicable collective bargaining agreement provided that employees could be fired only "for just cause"²⁴² and further provided a grievance procedure culminating in binding arbitration.²⁴³ Olguin filed a complaint with the Federal Mine Safety and Health Administration (MSHA), alleging that his discharge had been in retaliation for complaints that he had filed previously with the MSHA.²⁴⁴ Olguin also filed an unfair labor practice charge with the NLRB based upon his discharge.²⁴⁵ The NLRB regional director declined to issue a complaint against the company,²⁴⁶ citing insufficient evidence and the NLRB practice of deferral to

236. *Garibaldi*, 726 F.2d at 1375.

237. *Garibaldi*, 726 F.2d at 1375 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. at 53). In *Alexander v. Gardner-Denver*, there likewise had been an adverse arbitral decision. See also *Garibaldi*, 726 F.2d at 1375-76 and n.13.

238. See *supra* note 219 and accompanying text.

239. *Garibaldi*, 726 F.2d at 1376.

240. See *supra* notes 191-98 and accompanying text.

241. 740 F.2d 1468 (9th Cir. 1984).

242. See *supra* note 3 and accompanying text.

243. See *supra* note 4 and accompanying text.

244. 740 F.2d at 1471. Olguin filed his complaint pursuant to the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977).

245. *Olguin*, 740 F.2d at 1471. By reporting hazardous working conditions that might affect both himself and his fellow workers, Olguin was arguably engaging in concerted activity for "mutual aid or protection" within the meaning of § 7 of the Taft-Hartley Act, 29 U.S.C. § 157 (1982 & Supp. I 1983). Cf. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (remanding to the NLRB for reexamination of whether the conduct of a single worker in relation to safety at the workplace constitutes protected concerted activity within the meaning of § 7 of the Taft-Hartley Act), *cert. denied*, 54 U.S.L.W. 3309 (U.S. Nov. 5, 1985) (No. 85-464), and *cert. denied*, 54 U.S.L.W. 3310 (U.S. Nov. 5, 1985) (No. 85-463).

246. *Olguin*, 740 F.2d at 1471.

MSHA on retaliatory discharge claims.²⁴⁷ The mine safety agency found Olguin had not been discriminatorily discharged.²⁴⁸ After unsuccessful administrative appeals to both the NLRB and MSHA, Olguin filed suit in Arizona Superior Court.²⁴⁹ Olguin's complaint, like Garibaldi's, alleged wrongful discharge in violation of public policy and intentional infliction of emotional distress.²⁵⁰ Olguin also alleged wrongful discharge in violation of an unidentified employment agreement and breach of an implied contract arising from a personnel policy manual.²⁵¹

Because of these allegations, Olguin's complaint was faulty in several respects. The collective bargaining agreement under which Olguin was covered contained a clause stating that the contract and addenda referenced in the contract were the sole agreement between the union, its covered employee, and the employer.²⁵² Olguin's suit was, necessarily, one to enforce the collective bargaining agreement, despite the omission of any reference to the agreement in his complaint. The grievance procedure was Olguin's exclusive remedy and section 301 thus preempted the count of the complaint that alleged his discharge was in violation of an implied contract.²⁵³ Olguin's cause of action for wrongful discharge was based on a common law right to be discharged only for cause.²⁵⁴ That right, however, was seen by the court as "essentially equivalent" to the just-cause dismissal clause in Olguin's collective bargaining agreement.²⁵⁵ The court therefore read that count of the complaint as one for breach of contract²⁵⁶ and found it similarly preempted.²⁵⁷

The complaint of wrongful discharge in violation of public policy involved federal mine safety law. Unlike Garibaldi, Olguin could not point to a *state* statute pursuant to which he had acted; instead he cited only general state "public policy." Olguin alleged that he was discriminatorily discharged for whistleblowing on violations of *federal* mine safety statutes. The Ninth Circuit noted that Arizona's interest in enforcing federal mine safety law was minimal. It therefore determined that this count of the complaint similarly

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1475.

251. *Id.*

252. *Id.* at 1474.

253. *Id.* at 1475-76. See Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975).

254. *Olguin*, 740 F.2d at 1474.

255. *Id.* at 1474.

256. *Id.*

257. *Id.* at 1474-75.

was preempted by federal law.²⁵⁸ Finally, the court viewed Olguin's complaint of intentional infliction of emotional distress as arising out of the mere fact of his discharge and not the manner in which he was discharged.²⁵⁹ The fact of Olguin's discharge was already shown to be covered by the collective bargaining agreement and, therefore, by section 301 of the Taft-Hartley Act.²⁶⁰ Consequently, Olguin's remedy lay in the exclusive grievance procedures provided in his contract.²⁶¹ The court concluded that because Olguin had not used the grievance procedure, his section 301 suit was not viable.²⁶²

The *Olguin* court distinguished *Garibaldi* in two ways. First, if a claim of discharge in violation of public policy is to escape preemption, that claim must be based solely on state law.²⁶³ Second, the alleged tort of infliction of emotional distress must arise out of conduct not subject to federal regulation.²⁶⁴ The emotional distress itself must be inflicted not from the fact of discharge but from some other set of circumstances, such as the egregious manner in which the distress was inflicted, that may or may not be factually linked to the collective bargaining agreement.²⁶⁵

The nexus of rights embodied in a collective bargaining agreement and violation of rights outside of that agreement, but nevertheless factually linked to it, present close questions in preemption analysis. Last Term, the Supreme Court examined the confluence of state-established rights and collective bargaining agreements in *Allis-Chalmers Corp. v. Lueck*.²⁶⁶ In *Lueck*, a unionized employee brought an action for bad faith in the handling of an insurance claim against his employer and the administrator of the employer's self-insured disability plan. Lueck alleged that the defendants "intentionally, contemptuously, and repeatedly failed" to pay disability benefits to which he was entitled under the terms of the disability plan established by his union's collective bargaining agreement with Allis-Chalmers.²⁶⁷ Lueck did not attempt to invoke the contract's grievance procedure but instead brought his suit in Milwaukee County Circuit Court.²⁶⁸

258. *Id.* at 1475.

259. *Id.* at 1476; *see also* *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977).

260. *See supra* notes 191-98 and accompanying text.

261. *Olguin*, 740 F.2d at 1476.

262. *Id.*

263. *Id.* at 1475.

264. *Id.* at 1476.

265. *Cf. Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) (tort arising not from discharge under collective bargaining agreements, but from malicious handling of discharge).

266. 105 S. Ct. 1904 (1985).

267. *Lueck*, 105 S. Ct. at 1908.

268. *Id.*

If Lueck's bad faith claim were properly characterized as breach of contract, then section 301 would govern. In that case, Lueck's contractual remedies—the grievance procedure—would have to be exhausted before suit could be maintained.²⁶⁹ If his claim were properly characterized as exclusively a tort claim arising only out of breach of statutory duties by the insurance carrier and administrator, the grievance procedure would be unable to remedy the wrong, section 301 would not apply, and the state court action could proceed. Upon appeal, the Wisconsin Supreme Court concluded that in an insurance context, the tort of bad faith did not necessarily entail a breach of contract.²⁷⁰ That court characterized Lueck's tort claim as one "separate and independent" from a claim for breach of the collective bargaining agreement.²⁷¹ The tort did not arise out of a breach of the insurance contract but rather out of the manner in which Lueck's disability claim was handled.²⁷² Consequently, Lueck was not required to exhaust his grievance procedure.

The United States Supreme Court reversed.²⁷³ In a unanimous decision,²⁷⁴ the Court held that resolution of the state law claim was dependent upon interpretation of the collective bargaining agreement.²⁷⁵ The basis of the Wisconsin court's decision, that state law and not the labor contract created implied provisions of good faith, was an assumption that state law could not make.²⁷⁶ According to the Court, the breadth of the grievance clause at issue²⁷⁷ "hardly suggest[ed]" that only the right to receive benefits, and not the manner in which they were received, was covered by the grievance procedure.²⁷⁸

The Court noted that the collective bargaining agreement did indeed posit two separate duties, the implied duty to act in good faith and the explicit

269. See *supra* note 8.

270. *Lueck v. Aetna Life Ins. Co.*, 116 Wis. 2d 559, 565, 342 N.W.2d 699, 702 (1984), *rev'd*, *Allis-Chalmers v. Lueck*, 105 S. Ct. 1904 (1985).

271. *Id.* at 565, 342 N.W.2d at 702. See *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977); *cf. Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984) (examples of preemption where tort arises out of breach of contract itself); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980).

272. See *supra* notes 58-93, 115-29, and accompanying text.

273. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985).

274. Justice Blackmun delivered the opinion of the Court. Justice Powell took no part in the consideration or decision of the case.

275. *Lueck*, 105 S. Ct. at 1914-15.

276. *Id.* at 1913.

277. With reference to the disability plan, a Joint Plant Insurance Committee was empowered to resolve disputes involving "any insurance-related issues that may arise." *Lueck*, 105 S. Ct. at 1913 (emphasis added by the *Lueck* Court).

278. *Id.*

contractual duty to pay.²⁷⁹ The extent and interpretation of those duties, however, were plainly questions preempted by section 301.²⁸⁰

The Supreme Court reasoned further that Lueck's failure to exhaust his contractual grievance should have led to dismissal of the state claim under a *Lucas Flour* analysis.²⁸¹ While the State of Wisconsin may have wished to characterize the actions involved in *Lueck* as tort, the federal common law of section 301 required that the bargained-for arbitration provide the decision in this case.²⁸²

According to the *Lueck* Court, the need for both an effective arbitration system and avoidance of conflicting state interpretations of contract terms plainly preempted Lueck's tort claim. *Lueck* fell under the alternative dismissals of preemption by section 301 or failure to exhaust grievance procedures under *Maddox*.²⁸³

Notably, the *Lueck* Court asserted that this decision did not mean that all state rights which may relate to provisions of a collective bargaining agreement would automatically be preempted in a manner similar to Lueck's.²⁸⁴ Preemption of state claims by federal labor law "remains to be fleshed out on a case-by-case basis."²⁸⁵ Certain state tort claims, based on employment at-will principles, may still survive preemption even after *Lueck*.

The Court was careful to point out the distinction between state law rights and obligations that exist independently of private agreements and those which may be waived or altered by agreement of contracting parties.²⁸⁶ These independent state law rights were termed "non-negotiable" by the *Lueck* Court.²⁸⁷ It would seem that at least some of the public policy exceptions to the employment at-will doctrine implicate such nonnegotiable rights.²⁸⁸

279. *Id.* at 1913-14.

280. *Id.* at 1914-15.

281. *Id.* at 1915; see *supra* notes 133-36 and accompanying text (discussing *Lucas Flour* as heralding development of substantive federal labor law under § 301); see also *supra* notes 137-71 (discussing concomitant *Maddox* exhaustion prerequisites).

282. *Lueck*, 105 S. Ct. at 1915-16.

283. *Id.* at 1916.

284. *Id.*

285. *Id.*

286. *Id.* at 1912. The Court relied upon a comparison to *Malone v. White Motor Corp.*, 435 U.S. 497 (1978). In *Malone*, the Court found that the federally ordained state regulation of pension funds was not preempted by a collective bargaining agreement negotiated under the Taft-Hartley Act. *Id.* at 504-05. The *Malone* Court found congressional intent clearly indicated that regulation of certain pension funds was to be left to the states. *Id.* at 505. Collective bargaining agreements, even though negotiated under federal auspices, could not preempt these nonnegotiable state prerogatives.

287. *Lueck*, 105 S. Ct. at 1912.

288. See *supra* note 40.

B. Expansion of Workers' Remedies

From *Lueck*, *Buscemi*, *Garibaldi*, and *Olguin*, a model for preemption of state tort claims for wrongful discharge may be developed. Under the following scenario, a unionized worker can escape preemption and bring a state tort claim for wrongful discharge. As is the usual case, the scenario deals with a unionized worker whose collective bargaining agreement contains both a "just cause" dismissal clause and a grievance procedure that not only culminates in binding arbitration but also purports to be exclusive as to all grievances arising in the employment relationship.²⁸⁹ The union member must engage in some conduct furthering a public policy of the worker's state.²⁹⁰ For the purposes of this model, it is preferable that the policy be embodied in a state statute.²⁹¹ After engaging in conduct that furthers public policy, the union member is discharged for his action. The worker now may or may not file a grievance based upon the discharge.²⁹² If the worker does file a grievance, the union may or may not process the grievance to arbitration.²⁹³ The union member need not request that the union fully process the grievance.²⁹⁴

At this point, the union member must bring a state claim against the employer for wrongful discharge, assuming that the state provides for such an action.²⁹⁵ The defendant employer should attempt to remove the action to federal court under section 301 of the Taft-Hartley Act.²⁹⁶ Although the removal requires the recharacterization of the action as one arising under

289. See *supra* notes 3, 4.

290. See *supra* notes 217-40 and accompanying text; see also *supra* notes 37-47 and accompanying text. What precisely is the public policy of the state and how the worker's action furthers that policy are determinations for the trial court.

291. See *supra* notes 41, 43-47, and accompanying text. The balancing of federal and local interests inherent in these preemption analyses is accomplished more easily if the state's interest is codified.

292. Compare *Garibaldi*, 726 F.2d 1367, discussed *supra* at notes 216-37 and accompanying text (grievance filed and arbitration decision rendered but state court action not preempted), with *Buscemi*, 736 F.2d 1348, discussed *supra* notes 203-16 and accompanying text (grievance filed and no arbitration decision rendered but nonetheless preempted) and *Vaughn v. Pacific Northwest Bell Tele. Co.*, 289 Or. 73, 611 P.2d 281, discussed *supra* at note 227 (status of grievance irrelevant to preemption of workmen's compensation statute).

293. See *supra* note 169.

294. See *Vaca*, 386 U.S. at 188-95.

295. See *supra* notes 37-47 and accompanying text.

296. Removal jurisdiction derives from § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1982 & Supp. I 1983), granting original jurisdiction to the federal district courts for suits for breach of a collective bargaining agreement, and 28 U.S.C. § 1441(b) (1982 & Supp. I 1983), allowing removal of actions over which the federal courts have original jurisdiction. Cf. *Garibaldi*, 726 F.2d at 1370 (discussing removal of state claims alleged to be disguised federal claims).

section 301, courts have not been reluctant to recharacterize state suits.²⁹⁷ If the suit is so recharacterized, the defendant employer may invoke one of three strains of preemption analysis to have the suit dismissed from state court as preempted. First, if the state, in examining the worker's claim, would have to examine that aspect of the worker's conduct that the NLRB would examine in deciding whether the discharge was arguably protected or prohibited by section 7 or 8 of the Taft-Hartley Act, the action is within the primary jurisdiction of the NLRB and is thereby "*Garmon* preempted."²⁹⁸ Second, if state jurisdiction and regulation of the employer's or employee's conduct concerning the discharge would upset the balance of economic power by depriving the employer or employee of a weapon in the economic war recognized by Congress, the action is "*Machinists* preempted."²⁹⁹ Both *Garmon* and *Machinists* preemptions, however, contain certain traditional "local interest exceptions" that may impinge upon these determinations. Third, if the employee did not attempt to use the grievance procedure of the collective bargaining agreement, a subsequent section 301 suit is precluded by the *Maddox* exclusivity rule.³⁰⁰ If the employee used the grievance procedure and received a final decision, either an arbitration decision or a decision by the union not to proceed to arbitration, a section 301 suit is precluded by the *Steelworkers Trilogy* preference for arbitration.³⁰¹ Finally, if the worker attempts to bring suit against the employer and does not allege breach of the union's duty of fair representation, the union member is hurled back into the *Maddox* arbitration exclusivity requirement by *Vaca*.³⁰²

Avoidance of these preemption pitfalls is, ultimately, policy bound. Arbitration awards which are contrary to public policy may keep jurisdiction within the state courts. To avoid *Garmon* preemption, the worker's action must be for the benefit of the state and its citizenry³⁰³ and cannot be for the "mutual aid or protection"³⁰⁴ of fellow workers alone.³⁰⁵ To circumvent

297. See, e.g., *Olguin*, 740 F.2d 1468, discussed *supra* at notes 241-62 and accompanying text; *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (1980) ("Mere omission of reference to LMRA [Labor Management Relations (Taft-Hartley) Act] § 301 in the complaint does not preclude federal subject matter jurisdiction. The court's recharacterization of *Fristoe's* complaint as one arising under § 301 is required by federal preemption doctrines.").

298. See *supra* notes 58-93 and accompanying text.

299. See *supra* notes 94-114 and accompanying text.

300. See *supra* notes 137-47 and accompanying text.

301. See *supra* notes 172-201 and accompanying text.

302. See *supra* notes 148-61 and accompanying text.

303. See *supra* notes 217-20 and accompanying text; see also *supra* notes 37-47 and accompanying text.

304. Section 7 of the Taft-Hartley Act reads, in part, "Employees shall have the right . . . to engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157 (1982 & Supp. I 1983).

Machinists preemption, the state claim must be immune from an interpretation that state law is attempting to regulate part of the collective bargaining process or relationship that Congress meant to remain unregulated.³⁰⁶ Both *Garmon* and *Machinists* preemption analyses have been applied in cases revealing a "local interest exception."³⁰⁷ While the local interest exception may be useful in avoiding preemption, those interests similarly are bound by policy.³⁰⁸

Avoidance of *Maddox*, *Vaca*, or the *Steelworkers Trilogy* "preemption"³⁰⁹ depends upon whether plaintiff can prevent the suit from being characterized as a breach of contract action.³¹⁰ Given the posited just-cause dismissal clause and the scope of the grievance procedure in the collective bargaining agreement, dismissal would seem to be an arbitrable matter and the action would be preempted, therefore, by the *Maddox-Steelworkers* axis.³¹¹ The arbitral decision, however, is only legitimate insofar as it "draws its essence from the collective bargaining agreement."³¹² Even after *Lueck*, a state claim adjudicating rights existing independently of the collective bargaining agreement should not necessarily be preempted.³¹³

For a unionized worker to thread her way through the above model, the state's interest in the discharge must be found to override the federal labor scheme at every step. In *Lueck*, the state's contractual duty of good faith was too closely allied with the clearly arbitral interpretation of the explicit

305. Cf. *supra* notes 197-98 and accompanying text (discussing how public policy considerations affect arbitration awards).

306. See *supra* notes 94-114 and accompanying text.

307. See *supra* notes 115-29 and accompanying text.

308. Compare *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) (claim for intentional infliction of emotional distress allowed because distress resulted from the manner of union's treatment of plaintiff), with *Olguin*, 740 F.2d 1468, discussed *supra* at notes 241-62 and accompanying text (claim for intentional infliction of emotional distress not allowed because distress resulted from fact of plaintiff's discharge).

309. The *Maddox-Steelworkers* axis does not supplant a body of state law with federal law but rather requires deferral to a collective bargaining agreement. See *supra* notes 8, 191-98, and accompanying text.

310. Cf. *Olguin*, 740 F.2d 1468; *Buscemi*, 736 F.2d 1348; *Fristoe*, 615 F.2d 1209 (all recharacterizing state court actions as claims cognizable under § 301).

311. See, e.g., *Lueck*, 105 S. Ct. 1904 (state tort claim for bad faith handling of insurance claim under disability plan contained in collective bargaining agreement so entwined with substantive terms of agreement as to require recharacterization of state suit as § 301 action); see also *supra* notes 297, 310, and accompanying text.

312. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Arbitration awards will be denied enforcement if the arbitrator acts outside of the authority granted by the collective bargaining agreement. *Id.* See *supra* notes 188-99 and accompanying text.

313. See, e.g., *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981) (Oklahoma statute forbidding retaliatory discharge for the filing of a workmen's compensation claim not preempted for unionized workers); see also *supra* notes 170, 197.

substantive terms of the collective bargaining agreement.³¹⁴ Uniformity of federal labor law necessitated subjugation of Wisconsin's theories of contract and insurance laws.³¹⁵ State interests could not override the federal labor scheme in *Buscemi* because that employee in fact was asserting rights existing under the federal labor scheme, especially those preempted under a *Garmon* analysis.³¹⁶ In *Olguin*, state concerns could not override the federal scheme because *Olguin* had not asserted any state interest.³¹⁷ In *Garibaldi*, however, the asserted state interest was found sufficient to override even the adverse arbitration decision.³¹⁸

If the balancing of state and federal interests is the main concern of all forms of preemption analysis,³¹⁹ it seems that in allowing unionized workers to bring state tort claims for wrongful discharge, the courts might not give due regard to the federal interest in the primacy of arbitration as a dispute resolution mechanism. While *Lueck* certainly provided a stirring reaffirmation of the primacy of arbitration, the Court left open the possibility that workers may vindicate their rights without the help of the union. Ultimately, this possibility may detract from the union's position as exclusive bargaining agent.³²⁰ When courts permit unionized workers to circumvent their grievance procedures, employers, who had bargained to limit the workers' remedies against them³²¹ are open to a new range of actions. While arbitrators' remedies are confined usually to back pay and reinstatement for discharged workers,³²² state tort claims may produce not only compensatory damages but punitive damages as well.³²³ As the grievance procedure becomes nonexclusive in the settlement of contractual disputes,³²⁴ the procedure's attractiveness as a means of dispute resolution wanes.³²⁵

As a result of the development of state tort actions that survive preemption, the union member is no longer wholly dependent on the union for pro-

314. *Lueck*, 105 S. Ct. at 1914-15.

315. *Id.* at 1916.

316. *See supra* notes 206-09 and accompanying text.

317. *See supra* note 258 and accompanying text.

318. *See supra* notes 217-40 and accompanying text.

319. *See generally* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

320. The Supreme Court also has noted on several occasions that the inclusion of a grievance procedure in a collective bargaining agreement is "the *quid pro quo* for an agreement not to strike." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *see United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

321. *See supra* note 142 and accompanying text.

322. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 648 (3d ed. 1973).

323. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

324. *See, e.g.*, *Garibaldi*, 726 F.2d 1367, discussed *supra* notes 217-40 (discharged employee allowed to sue for monetary damages despite adverse arbitral decision).

325. *See supra* note 143 and accompanying text.

tection against discharge for improper cause; the union member may seek redress in the state courts. Such redress is sought, although the limitations of this avenue are *highly* restrictive, because the arbitration process does not always yield satisfactory results³²⁶ and because, in cases like *Garibaldi*, the at-will action is available even to a unionized worker who has availed himself of the bargained-for arbitration procedure.³²⁷

The use of exceptions to the at-will doctrine in a unionized context adversely affects trade unionism by making the bargained-for grievance procedures, the union's primary means of enforcing workers' rights, only one of the remedies available to a discharged worker. From the viewpoint of the employee, the employer, and the union, application of at-will doctrine in the unionized setting directly affects the collective bargaining process.³²⁸

V. CONCLUSION

Despite the apparent effect of a unionized application of exceptions to the employment at-will doctrine on the collective bargaining process, the application may not be as onerous as it appears. Arbitration does not necessarily provide justice to the discharged employee; however, adjudication in state courts of wrongful discharge claims may.³²⁹ Moreover, the applications of this doctrine in the unionized setting are very narrow. Provision of just-cause dismissal and arbitration clauses usually ensure protection against discharge for unionized workers for myriad reasons. Exceptions to the at-will doctrine ensure against only *improper* discharge. In the unionized setting, exceptions to the employment at-will doctrine may ensure against "improper" arbitration decisions.

Nevertheless, it is at least ironic that the American employment at-will doctrine, a rule that gave impetus to the trade union movement, has returned to that movement as an opportunity for workers to protect themselves further against discharge for exercising important state-protected

326. See, e.g., *Garibaldi*, 726 F.2d at 1367. Although the record is unclear, there is no suggestion that *Garibaldi* was discharged for any reason other than his refusal to deliver the milk. The Ninth Circuit's opinion does not address whether *Garibaldi*'s discharge was in retaliation for his report to the health department.

327. See *Garibaldi*, 726 F.2d at 1368.

328. The establishment of a just-cause dismissal standard for all workers has been suggested by some commentators. This proposal would require the establishment of a nationwide arbitration system to rule on dismissals. See generally Catler, *The Case Against Proposals to Eliminate the Employment At Will Rule*, 5 INDUS. REL. L.J. 471 (1983). Such a national system would render union grievance procedures obsolete by redundancy. To the extent that exceptions to the employment at-will rule begin to equalize the position of unionized and nonunionized workers, unions themselves become redundant.

329. Cf. *Garibaldi*, 726 F.2d 1367 (arbitration decision held that milk truck driver was dismissed "for cause" for reporting spoiled milk to state health board).

rights. It is an interesting turn of events that in this peculiar application of the employment at-will doctrine, the pendulum has swung from an era when the employer reigned supreme, through a time when the strength of collective worker action might offset employer power, to the present moment, in which the individual worker can challenge the dispute resolution structure that both company and union have built for themselves.

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