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Panel Discussion: Second Annual Corporate Symposium

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PANEL DISCUSSION

This Panel Discussion took place as a part of the Second Annual Corporate Symposium, Beyond Collective Bargaining and Employment at Will: Discharging Employees in the 1990s, at the University of Cincinnati College of Law, Cincinnati, Ohio, on March 9, 1989.

PANEL MEMBERS:

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Dayton, Ohio

DISCUSSION

PROF. MURPHY: I am John Murphy, Professor of Law at the University of Cincinnati College of Law. This is the concluding session of the program, the Panel Discussion, and the purpose is to solicit questions and comments.

We have a large team on this panel; Bill Gould, Hank Perritt, Dan Kosanovich, Tom Manley. I am going to add Dennis Henry, who spoke this morning on the Dayton Power & Light [DP & L] experience. Since we have already heard from them, I am going to pro-

pose that we ask for comments by the members of this panel whom we haven't heard from before. That is Marc Krass from Procter & Gamble, Paul Tobias, a local attorney with a national reputation in employee rights, and Ken Dau-Schmidt, a colleague of mine.

We will turn now to our first commentator, Marc Krass from Procter & Gamble. He is an employment lawyer with Procter & Gamble and manages labor relations throughout North America and Canada. This includes operations with independent unions, affiliated unions, and operations without a union at all. Marc Krass.

MR. KRASS: It seems pretty clear, listening to all the presentations we have had so far, that there have been a lot of changes in how, in the United States, employees are employed. It seems equally clear that the law will have to catch up with these changes. All of us, whether we are practicing or whether we are studying law, are trying to predict where the law will be in two years, since the actions we take today will be measured by that law and it will be much different. Hence, it makes no sense for your client to proceed without obtaining your perspective as to the direction of the law at that point. This is a very difficult challenge, I think, for all of us.

The question that Professor Gould raised when talking about the Supreme Court's *Yeshiva*¹ case, is whether, in advanced work systems with a high degree of worker participation in determining the direction of the enterprise, an employee is acting in a managerial capacity. If the employer is acting as a manager, collective bargaining is inappropriate for that organization.

Many employers are moving toward systems where their non-managers are effectively managing the daily business of the operation, whether in blue-collar situations such as manufacturing, or in more white-collar situations like the university in *Yeshiva*.² Where there is such an alignment of economic interest between management and labor, the law questions whether the distinctions between the two entities are so blurred that there really may be no sense in having collective bargaining.

I just want to question whether perhaps there still are roles for unions and collective bargaining, even in those advanced work systems. One key role, a traditional role for the unions, is that of the advocate, dealing with questions of discharge, discipline, unfairness by senior management and failures of the system. Defining that advanced work system in the workplace is another traditional role the union could still perform in these settings.

1. NLRB v. *Yeshiva Univ.*, 444 U.S. 672 (1980).

2. *Id.*

There is also an opportunity for unions to exercise their leadership and training. The unions, using their position and centralized resources, could exert a great deal of influence as the work system changes. They could serve as a guardian of the non-manager interests. While this could occur without the formal institution of a union, they are ideally positioned to participate.

Dan Kosanovich raised an interesting point about how grievances and disputes can be resolved more effectively. One of the problems I frequently find in a grievance situation is that the parties immediately start posturing for the ultimate legal battle in arbitration, rather than use the grievance procedure as an effective problem-solving opportunity. They immediately start posturing, are very careful about their choice of words, and as Dan pointed out, they often ignore or don't even try to find out what the real issue is.

I think it is important for lawyers to urge clients to use the grievance procedure for problem-solving. That is difficult if you have a traditional contract with a traditional grievance procedure and know you may well end up in a battle before an arbitrator anyway. To resolve that problem you must meet the letter of the procedure laid out in the contract, but also go beyond the contract and see what else you can do to try to find out what is the issue, what is motivating the parties to go forward, what will solve the real problem, not just what will adjust the legal issue. All too often the parties come before an arbitrator, one party wins and the other party loses, and the problem is still there when the arbitration is over. Therefore, it is important to continue the discussions, whether in a formal grievance meeting or in the hallway afterwards, until the real issue is discovered.

Some employers have extended the last stage in the contractual grievance procedure prior to arbitration. For example, the third step, where the plant manager and the union president or business agent are meeting to have the last go-around on the grievance, the plant manager says, "I am denying the grievance for this reason." As the lawyer, I am not going to assume the next step is arbitration, even though that is the next step according to the terms of the contract. I have seen a "third-and-a-half-step meeting"—I have had one client go to "three and three-quarters"—just in terms of continuing the dialogue, probing back to find out what is the real issue, making sure each side is hearing one another and trying to get the ultimate problem resolved.

I also endorse the DP & L theory that the grievant, the party affected, remain in the process all the way through. This is critical, not only so the grievant can meet with all parties at all stages in the

procedure and participate in the process, but also so the people who make the ultimate decision can hear the person who is most affected all the way through as well. This mutual communication is very important.

Tom Manley discussed greater employee involvement in the workplace. The model changes away from Dan Kosanovich's old model where the employees were the doers who operated from the neck down and management were the thinkers who operated from the neck up. As management realizes that employees have great value from the neck up as well as from the neck down, it will put an entire resource to work to move the business forward. This realization has already started.

Although the employee role is being redefined, so that employees have more information and more opportunities to decide how the work should be done, what standards must be met, how to reduce costs in scrap and waste, and so forth, the new role for management is still uncertain. Employees are doing more and more of what first-level and sometimes second-level managers traditionally used to do with a resulting elimination of many of those managers. A self-managing workforce does not need a large group of managers. Some managers will be retained, but their roles will be different. They will coach, guide and serve as resources for the teams of employees working on the problems and managing the business daily.

It can cause a great deal of stress in those managers who are told by their top management, "Move this work system in the new direction. Give the employees more power, encourage them, train them to run the business daily," but at the same time are not told what their new role and responsibilities will be. These managers may begin to question their validity in the system of tomorrow. As a result they may resist the changes that top management and employees want to see. This may ultimately result in litigation for wrongful discharge, which you all will have to deal with later.

Finally, in response to Professor Perritt and his suggestions about wrongful-dismissal legislation, I think that there is some experience with legislation of this type in Canada, particularly the western provinces, which have had wrongful discharge statutes for some time. Those statutes generally provide for damages where wrongful discharge is proved, but not reinstatement. That system wouldn't necessarily work in the United States, but there is a bank of data in Canada that we can investigate if the United States considers moving in this direction.

One thing that is apparent, though, for any employer, whether operating in one jurisdiction or across the country is that the law of

wrongful discharge is constantly changing. Consequently, as I said in the beginning, there is difficulty trying to predict the standards that will be used to judge your client's behavior one or two or five years hence when that case finally gets to court.

Nobody knows what the Montana Supreme Court is going to do with the current case,³ nor does anybody know what the Ohio Supreme Court is going to do in cases that it has. That is true, of course, for the federal judiciary as well, which I think ultimately will resolve these issues.

From the employer's perspective, I would acknowledge that there is always a line over which the employer cannot cross when dealing with its employees. The only question is, "Where is that line going to be drawn?" From an employer's standpoint, operating within the constantly evolving court-made and legislative-made legal base, it is really up to the employer always to be fair, to obtain all the information needed to make an objective decision and to be even-handed in all decisions. If the employer does that, it is going to be able to meet the standards of any court-made doctrine or any state legislative doctrine in the employment law area. That would be my best guidance to employers, given the constantly changing state of the law.

PROF. MURPHY: Thank you, Marc. He mentioned the fact that the parties, in their process of traditionally resolving problems or the prospect of arbitration keep one eye on the possibility of a fair-representation case. Our next commentator is probably one familiar with the law in that area. Paul Tobias is a local attorney with a national reputation, an author of several recently published volumes on the subject of employment at will and collective bargaining. He is also Chairman of the Plaintiffs Employment Lawyers group. Paul Tobias.

MR. TOBIAS: Thank you. It is great to be back at the University of Cincinnati Law School.

I was in Florida yesterday for a meeting of the Executive Board of Plaintiffs Employment Lawyers Association. They took a resounding "no" vote with respect to all this take-a-way legislation being proposed. That's the view of the plaintiffs' bar. The law of employee rights throughout the country is now catching up to where it should be. As a result, employers are trying to persuade legislators

3. On June 29, 1989, the Montana Supreme Court upheld the constitutionality of the Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to 914 (1987). *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 1989 Mont. Lexis 162 (1989).

to take away rights and give nothing in exchange. The plaintiffs' bar, is against it, except in Georgia, New York State and a few other states.

I am not going to talk about the topic: "What is Good for Employers." I think who ever wrote this brochure made a spelling error. The topic should be: Where does the employees' self-interest lie? We should also be questioning: Where does the public interest lie? Those are the issues we want to talk about: what is good for America and what is good for employees?

A friend of mine is the president of a great corporation in this country. He told me, "If I treat my employees fairly, the stock of my company goes up." I asked, "What happens to your profits if you have to keep inefficient employees?" He answered, "No problem, it is good for business to be fair, to have a happy work force and to have good morale." It is good for America to help dismissed employees. There are several million broken spirits who have been fired by employers. They are without income and without the resilience to get back on their feet. They need programs and the income necessary for rehabilitation.

It is also good for America and good for employers to remedy and stop outrageous conduct in the workplace. Believe me, my office is like the emergency ward at General Hospital. Day after day I see horrible cases of cruel treatment. I would hate to work in any of America's working establishments if it is like what I hear in my office. Fortunately, it's only one percent of the work force that is mistreated. But that is still a lot of injustice.

Now what about the 1990s? What lies ahead of us? In my opinion the current trend of erosion of the employment-at-will doctrine will continue. There is more media coverage and public awareness of the rights of non-union employees. The telephones are ringing in the offices of employment law specialists because people that get fired are told by their friends and family to see a lawyer. The trend is sensitivity to injustice in the workplace and the increased use of lawyers. In the 1990s lawyers will be still raising hell with the employers who treat workers badly. Regardless of what the law is, lawyers will be busy helping dismissed employees and litigating employee rights issues.

"Jury" is a "four-letter word" for employers. Juries frequently issue large punitive damages awards. That is why employers want legislation to take dismissal cases away from the jury.

Why are large punitive damages awards important? If the media reports that some employee in Oshkosh got \$10 million dollars,

boy, that sounds awful. Some may say, "Gee, why should that plaintiff get so much money? Why should his lawyer get a third of it as a fee?" Employers say, "We ought to pass a law to prevent such windfalls."

Ladies and gentlemen, fear of punitive damages is what makes large companies obey the law. The large corporations are frightened of punitive damages and this fear acts as a deterrent to wrongful discharge. Large employers are telling their staffs, "Be nice. Be good. Be fair. Use progressive discipline. Don't fire people without just cause. Firing is the last resort." I have been at scores of seminars throughout the country in the last five years. Distinguished speakers and professors are telling house counsel and personnel directors, "Be fair to employees. Avoid arbitrary and unjust terminations."

Why are they telling these people in these seminars to do the right thing? Is it because of ethical or religious considerations? Possibly. But they are also telling them because they are scared to death of juries and punitive damages. Please remember that if new statutes take away punitive damages, employers will feel free, once more, to fire "at will."

What is the position of the plaintiffs' bar? We are constructive. I personally believe in a small-claims court concept. We should have optional small-claims type tribunals for employees who want a speedy, cheap, informal hearing by an arbitrator. This should include the possibility of reinstatement, modest damages, and some attorney fees. However, if the employee elected to go to arbitration he would risk *res judicata* consequences. If the arbitrator held the employee was treated fairly, and there was just cause for dismissal, then in any other future proceedings, either before EEOC, federal or state court, the adverse finding possibly could be held against him. The employee takes some risk in going to arbitration. However, an employee should not be required to give up his common law claims. The remedy of arbitration should be optional, not mandatory. But I venture that millions of Americans would choose an optional non-preempting remedy, a small-claims type cheap, speedy arbitration tribunal. That's what we in the plaintiffs' bar suggest. Other solutions would be additional restraints and limitations on employees. Thank you.

PROF. MURPHY: Thank you, Paul. Ken Dau-Schmidt, our next commentator, is my colleague. He has a Ph.D. in economics, and has practiced in labor relations. It is a pleasure to introduce him.

PROF. DAU-SCHMIDT: Mr. Tobias is a tough act to follow. I am sure people have comments and questions, so I will try not to delay for too long your entry into this debate.

Professor Murphy asked me to try to draw together the various presentations we've enjoyed today. At first this may appear a Herculean task. There is a real dichotomy between our first topic of cooperative labor relations and our second topic of wrongful dismissal statutes. But it is not just by chance that these two topics were chosen for this symposium. I believe that these topics, and the dichotomy between them, accurately reflect the current state of American labor and employment law.

The impetus behind our labor and employment laws is the failure of individual bargaining to meet the desires and needs of employees. Individual bargaining fails to meet these needs and desires for a variety of reasons.

One reason is that individual employees can't efficiently bargain for public goods that they consume in the workplace. Such goods include health and safety measures, medical insurance, and other common working conditions. These goods are shared or jointly consumed and workers who value them highly cannot exclude the consumption of these goods by other workers who "freeride" and don't negotiate for these goods. Thus, individual bargaining results in an inefficiently low amount of such goods in the workplace.

Another reason is that individuals cannot always adequately evaluate the terms they should seek in bargaining. Individuals don't have the information they need for bargaining and cannot accurately evaluate risks, such as the risk of being injured or the risk of being discharged without cause, that must be evaluated for intelligent bargaining. As a result, there are serious impediments to individual bargaining over sophisticated contract terms, especially those involving risk.

And, finally, individuals can't get the contract terms they want from employers because, individually, they don't have sufficient bargaining power. As a result, they look elsewhere for redress with their employers.

Now, traditionally there have been two ways to remedy the failures of individual bargaining. One is collective bargaining; the other one is legislation, the two topics we discuss today. For a time, from the 1930s to the early 1960s, collective bargaining was the predominant means this country used to redress the failures of individual bargaining and resolve disputes in employee-employer relations. However, since that time, unions have suffered a precipitous decline

in the private sector in this country. I believe that this decline has largely been due to employer recalcitrance and failure of the laws to adequately punish such recalcitrance. Whatever the reason, this decline in union power has decreased the importance of collective bargaining in solving the problems of individual employees. With this decline in unions and collective bargaining, the country has moved more and more towards uniform legislation to solve the problems of employees. We see this in the new plant closing legislation, the proposals on childcare and health care legislation, and the proposals for wrongful dismissal statutes.

As a result, in the 1980s we have a residual core of employees and employers who have collective bargaining relationships, some mature enough to realize the benefits of cooperation and power sharing, and we have the remainder of employees who must rely on legislation to solve their problems in the labor market. As a result, it is not surprising that both cooperative collective bargaining and wrongful dismissal statutes are important issues in American labor and employment law in the late 1980s.

Now, for particular comments on the presentations. With respect to Professor Gould and cooperative labor relations, I think Professor Gould has quite accurately described the problem. Parties, such as Dayton Power and Light and Local 175, who engage in cooperative bargaining and power sharing, have developed a relationship that was not envisioned in our labor laws. As Professor Gould points out, Section 8(a)(2), Section 8(a)(5) and the definition of employees in the National Labor Relations Act⁴ do not envision this new kind of relationship and stand as potential impediments to its development.

I believe that, as long as the union's independent status is not undermined, cooperative bargaining and power sharing is a good thing. Indeed, it is the best of all collective bargaining relationships. As we heard today from Dayton Power and Light and Local 175, cooperative bargaining consists of employees and employers sitting down, communicating their differences, exchanging information and trying to resolve their problems together. That is the best of collective bargaining. Thus, I think that such relationships should be encouraged and fostered in the law, and as Professor Gould argues, we should try to either interpret or amend the law so it does not inhibit this kind of activity.

I worry, though, about the chasm between those employees and employers who have such mature collective bargaining relationships

4. 29 U.S.C. § 158 (1982).

and the rest of the employees out there who either are not represented by an independent union or perhaps have a recalcitrant employer. For most employees, there is no way that cooperative collective bargaining can address their problems in the workplace. I worry about the practical limitation of increasing cooperation. I believe it should be encouraged, but I worry that it's not going to reach the vast majority of employees.

With respect to Professor Perritt and wrongful discharge legislation, I agree with him that we should enact legislation limiting the employment-at-will doctrine, although I have somewhat different reasons.

As I understand his presentation—and his article is quite clear, it is not hard to understand, it is a very good presentation—he makes no normative prescription as to whether the demise of the employment-at-will doctrine is good or bad. He argues instead that this demise is inevitable and that it's in employers' best interest to get involved in drafting and enacting wrongful dismissal statutes to ensure that their concerns are addressed and to promote integration of any such a solution into the overall legal structure. He wants to prevent adding yet another layer of claims and another forum to the legal doctrine.

I would make a positive statement that I applaud the demise of the employment-at-will doctrine. And, I agree with Professor Perritt that legislation is the best means to accomplish this change in our employment law. Given the demise of collective bargaining in this country, legislation is probably the most efficient means of dealing with employees' rights in discharge. I would add that I think it's appropriate, under our constitutional system, for our elected legislature to make such a decision which fundamentally changes our public policy and employment laws.

My support of wrongful dismissal legislation might surprise some people because I have an economics background. Traditionally economists resist mandatory contract terms and a wrongful dismissal statute imposes such a mandatory contract term. A wrongful dismissal statute would prohibit employment-at-will relationships and impose on every employment agreement some minimum level of job security for employees.

Traditionally, economists say that imposing mandatory contract terms is inefficient in that the benefits of the term must not outweigh its costs. The argument is that if the benefits of the term outweighed its costs, the parties would voluntarily adopt the term in their agreement. If the government must impose a contract term, the benefits must not exceed its costs and the term is inefficient.

In response to this argument, I think there are some valid arguments that, in fact, just cause or some level of employment security in excess of employment-at-will is efficient for most employees. First, you can go back to the argument I previously raised that individuals can't adequately evaluate their risk of being discharged, and thus don't bargain for employment security in individual bargaining even though it is efficient. Second, there is the empirical evidence that employment security and just cause protection is negotiated into most collective bargaining agreements. Evidently the employees and employers who enter into these collective agreements believe that the benefits of employment security outweigh its costs and thus is efficient.

However, putting efficiency aside, I think the real driving force behind wrongful dismissal legislation is the values of the American people. The law is not just about economic efficiency. It's an ordering of the conflicting desires of people. I think that most Americans, myself included, do not value an employer's desire to arbitrarily or perhaps maliciously discharge employees. As a result, we don't want to give merit to that desire in our law and will provide employees with some protection against arbitrary or malicious discharge.

Moreover, to the extent that wrongful dismissal legislation injects inefficiency into the economy, that inefficiency will be disproportionately borne by employers who are irresponsible in their dealings with employees and discharge employees without cause. This added burden will tend to drive these irresponsible employers out of the economy. I say good riddance to them. I hope they are replaced by better employers. I think they will be.

Finally, if I could return to my initial point about the trade-off between collective bargaining and legislation in remedying employees' problems in the workplace. One reason why I favor legislation limiting the employment-at-will doctrine is the decline of collective bargaining in this country. The benefits of just-cause protection under collective bargaining agreements are limited to relatively few employees. Realistically, the only way the majority of employees are going to gain the benefit of any form of job security is through uniform legislation.

But I see such legislation as an inferior solution to collective bargaining in this case, and I regret having to take it. Collective bargaining is often a better solution to employee's problems than uniform legislation, and the case of employee job security is a prime example.

As Professor Perritt points out in his article, collective bargaining with a just cause clause and mutual resolution of grievances by the parties is a superior solution to uniform legislation in addressing discharge grievances, because the parties can reach an individual solution that fits their needs that can never be achieved through a uniform statute. The parties are the ones that have to live with their agreement, they are the ones that know what is best for them, and they should be the ones to decide how discharge grievances are resolved.

Also, the resolution of discharge grievances under collective bargaining, using arbitration, is a much more efficient method of dealing with these problems than under a wrongful dismissal statute using litigation. Professor Perritt advocates incorporating arbitration procedures into wrongful dismissal statutes, and I agree with him on this point. But, there are possible constitutional problems with this solution. It is not clear that the government can compel the use of such procedures without violating the Seventh Amendment.⁵ So, on the one hand, we have collective bargaining, with the more efficient system of grievance arbitration, and on the other, if we use legislation and the constitutional questions are resolved the wrong way, we may end up with a very burdensome system of litigating discharge grievances.

Finally, as Professor Perritt has pointed out, with legislation we often simply add another layer of legal doctrine and another forum on top of existing remedies. Although Professor Perritt would like to avoid this problem with wrongful dismissal legislation by integrating it into existing remedies, I worry that the legislatures will take the politically expedient route and merely add another solution without integration. Professor Perritt has already addressed the problems such layering of doctrine and forums can cause.

In conclusion, while I applaud the recent efforts at cooperative labor relations, I bemoan the recent decline of collective bargaining in our country. A decline which I believe has resulted due to our failure to properly encourage and foster collective bargaining. In response to this decline I believe there is a need for more protective legislation including wrongful dismissal legislation. Thank you.

PROF. MURPHY: Thank you, Ken.

We have the Tobias proposal of a small-claims court on disciplinary discharge, optional but precluding employees from other forms that they choose to employ.

5. U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . .").

We have the Perritt proposal of a disciplinary dismissal statute, and we have the question implied by the Gould presentation and by the Kosanovich and Manley presentation, that is: How are disciplinary dismissal and other forms of discipline going to be handled in the experiments where employee groups and management share power? These presentations set the context for that question, although it wasn't directly raised.

So now is the time for you to make comments or raise questions. You can direct them to anyone who made a presentation at an earlier part of the program. Does anybody have any question or comments? Yes, sir, could you please give us your name?

MR. HOGAN: My name is Charles Hogan. I was associated with an employer for many years. The question is for Mr. Tobias. Is it still the case law in Ohio that malicious discharge of an employee is not actionable?

MR. TOBIAS: I would never concede that generality, because there are certain torts that still exist and are being used creatively by the plaintiffs' bar, such as defamation, the intentional infliction of emotional distress, fraud, false imprisonment, interference with contractual relationships and the right to privacy. So if you can find the right tort to apply to the particular discharge situation, you can get relief for "malicious" activity on the part of the employer. However, if you are merely pleading, "He fired me maliciously, please give me damages," you would probably get tossed out of court, because at the moment there is no such cause of action for bad faith malicious discharge in Ohio.

There is still a question about the tort of discharge in violation of public policy. The Supreme Court of Ohio in the *Phung*⁶ case has said there may be no cause of action for a dismissal in violation of public policy. Ohio is one of the few backward states in that area of law. However, recently the Supreme Court has agreed to reconsider the issue and hopefully *Phung* will be modified.⁷

MR. LANDEN: My name is Everett Landen. I just want to ask Professor Gould about the action of the California Supreme Court in the *Foley*⁸ decision of December 29th. The ABA columns said it was a great reversal. I read the case with some interest and saw it backing away from a full intentional tort claim for the breach of the duty of fair dealing, but saw them sort of saying that they retained the con-

6. *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

7. *Greely v. Miami Valley Maintenance Contractors, Inc.*, 40 Ohio St. 3d 706, 534 N.E.2d 847 (1988).

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

tract right for breach of the fair dealing. I wonder if that's the way you read it and understood it or what comments you have on it.

PROF. GOULD: No. Let me say that, of course, *Foley* did, in contrast to the holdings of a number of the intermediate courts in California and of the United States Court of Appeals, back away from the idea of punitive damages and tort damages for the violation of covenants of good faith and the fair dealing obligation.

There are three principal areas that *Foley* confronts. One is that it holds for the first time that the implied contract is a theory which will be recognized in California. That is to say, that you can form a contractual relationship even where there is not something explicit or fancy like the contracts of Reggie Jackson or Dan Rather. I think that is a very significant aspect of *Foley*, because in a fairly abbreviated period of time, on the basis of the way in which the employer and employee deal with one another, this kind of obligation may arise. As Professor Perritt says, we don't have any knowledge of what the remedy is going to be in California. It could be a very expensive remedy, and it could cover a very large number of years.

Secondly, the court continued to adhere to its 1980 ruling in the *Tameny*⁹ case. California recognizes, as many other jurisdictions do, that the public policy exception to the principle that the contract of employment is terminable at will is going along very well. However, the court defined it fairly narrowly in this particular case. Only Justice Mosk disagreed with the majority of the court in its conclusion that, while it is against public policy for the employer to retaliate against the employee when it goes to the public authorities to whistle-blow, it is not against public policy to dismiss a worker when he or she complains to his own employer about wrongdoing that he observes. This is an anomaly, that as a matter of policy someone can go outside but not inside.

Lastly, the Court does not address the host of independent tort causes of action referred to by Paul Tobias. What impact the Court's holding has on these tort causes of action is difficult to say.

Could I just say a word about what I would like to see?

PROF. MURPHY: Go right ahead, Professor Gould.

PROF. GOULD: I think that the *Foley*¹⁰ opinion's holding on contracts really comports with the employment relationship as it is. That is to say, most employees in the employment relationship have the expectation that they will be treated fairly, that they will not be dis-

9. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980).

10. 47 Cal. 3d 654, 765 P.2d 373 (1988).

missed without cause. That's very important. It will be the starting point for consideration of all policy. The seeds for this policy are in the anti-discrimination laws. The modern manifestation of that is the reverse discrimination cases, which, as pernicious as those cases have been for our societal fabric, have really manifested the desire by employees, all employees, to be treated fairly. The employees have said, "Hey, look, standards of fairness have been created in other areas of arbitrary conduct. Other people have been protected, why can't I be protected also?" That is very important.

Minority employees and female employees often have focused upon elements of fairness when they can't show racial or sexual discrimination as employers have modified personnel practices in response to such changes. It's an important, good change for us, triggered by the civil rights revolution.

The second point I'd like to make is that virtually no employers voluntarily adopt the mechanisms for dismissals that we see in the organized sector of the economy. You would think, if the market was operating, that some employers would say, "Well, we may have to pay my workers a little bit less if I would give them something more of that which is valuable: job security in exchange for pay raises." Maybe that other guy wants to pay big wages but doesn't want to provide any kind of security. Although, out of the threat of wrongful discharge actions, employers have moved to accept ad hoc arbitration where they control and pay for it, they will not accept in the main arbitration for nonunion employees which resembles anything like what we have now in collective agreements.

I advocate, in the California State Committee report, referred to earlier, basically three things. One is a just-cause system. It seems to me that that is what the courts are accepting in many jurisdictions through implied contracts, and whatever the courts do, that is what juries are accepting, regardless of the legal instructions that are given them.

Secondly, we are simply in a situation where the average employee is screened out of the existing system because many of these theories are not particularly relevant to the average employee.

Thirdly, the report supports limited traditional labor law remedies; back pay with interest, attorney's fees, cost for the prevailing employee, reinstatement where appropriate, or where not appropriate lost wages for up to two years' subsequent to the time of reinstatement if it would have been reinstated. In the case of employees who are particularly vulnerable and unlikely to obtain alternate employment, more may be available.

Where this proposal, which was put forward five years ago, differs from the existing system, is that it is designed, even though it limits the remedies, to benefit the average employee, the mass of employees, and not the relatively privileged few who are able to work their way through the existing system and retain excellent counsel like Paul Tobias.

PROF. MURPHY: Sir, would you state your name into the record?

MR. O'CONNOR: My name is John O'Connor. I am a student here at the University of Cincinnati. I have a question for Professor Gould.

During your presentation you mentioned a specific provision in the Worker Adjustment and Retraining Notification Act¹¹ which, I believe, defines an employee of a company that is furnished by another company as the employee of the purchasing company for the purpose of identification in the Act. You found that to be an important provision. I would like you to expand on that more specifically. Do you see that as an important provision of the statute for the area of purchase/acquisitions now, or is it something you see expanding on employee rights in other areas of labor law?

PROF. GOULD: Well, on the latter point, one question which Congress did not focus upon explicitly at any point during the 1988 debate on the plant closing legislation, ironically, given the awareness of the National Labor Relations Act, was the question of to what extent the Board, in formulating its own views of what constitutes an unfair labor practice violation, must take into account the 1988 law.

This question has already arisen in many different forms under the National Labor Relations Act in connection with other statutes that have previously been enacted by Congress, such as, Title VII of the Civil Rights Act of 1964 and the Landrum-Griffin Act of 1959. We have a variety of answers, depending upon the form in which the question arises.

So question number one is, is the Board agreeing to impose obligations upon a successor employer where the employer did not give notice and did not give the kind of alternate opportunities that an employer must provide or offer in order to escape imposition of employee status upon the successor?

I have long thought that—again, this goes to the question of uniform law—that the Board ought to take into account the will of Congress where explicitly provided for in different statutes and in the 1988 statute, where it interprets the 1935 statute.

11. 29 U.S.C. §§ 2101-2109 (1988).

Now, in regard to your first question on mergers, I don't have the statute in front of me, but my recollection is that the statute speaks of purchases and sales explicitly, and I think that each business rearrangement would have to be examined to see whether or not it could fit within that ruling.

PROF. MURPHY: Sir?

MR. MORLEY: My name is Michael Morley. I am a student here. I would like to direct a question at Mr. Henry. I remember seeing a couple of weeks ago something on dissident union members who oppose cooperative employee/management relations in the auto industry. There was the perception that the union was selling out to management, and I was wondering how much of that did you encounter in the creation of the labor compact at DP & L?

MR. HENRY: When you deal with a group as big as 1800 people, you will always have different opinions. We communicated what we were attempting to do throughout the negotiation process. This communication had a great deal to do with the ratification of the 3-to-1 vote in favor of that type of compact. You always will have people who have different opinions and some may be accused of being "in bed" with the company, so to speak. But when you get right down to the bottom line, if the company doesn't exist, we don't exist on a local-type level.

So what you have to do is work real hard to make sure that the people who have concerns have them addressed. In our case we did it through the creation of a resolution process so that the people who have those concerns have their say and we have the ability to do the problem solving. Even though some people may accuse you of selling out to the company, you can really see where the differences are resolved.

That is how we dealt with the problem. It is not a big problem, and, again, these things are new to employees and employers. It is breaking a 40-year tradition, so to speak, and it takes a lot of work to make it work.

Interestingly enough, the group really bought into it at first. They did have the concept that, "This is the way we can fix all our problems and this is something new, and we are all going to jump on the band wagon and go with it." Then as you go along, something happens and then they start to revert. That is the tough part, keeping them from going back to the adversarial position. But those are the things that we have to work at.

PROF. MURPHY: Are there any other questions or comments? I think Professor Perritt wanted to make a comment. Professor Perritt?

PROF. PERRITT: I really enjoyed the first two presentations this morning, but I had an observation that I wanted to make about the two of them. It grows out of a report that I did for the United States Department of Labor on the effect of the Railway Labor Act on labor/management cooperation in the railroad and airline industries. My conclusion in the report is the same one that I would offer more generally to the National Labor Relations Act.

I am skeptical whether it makes any difference what the law is. I think that what determines if you are going to have a labor/management cooperative effort like the one described to you by Mr. Henry, Mr. Manley and Mr. Kosanovich is whether the attitude is there on the part of the management and on the part of the union. It would be a mistake to think about the issue from the wrong way, and suppose that you can't have labor/management cooperation unless you change the law. I am very skeptical about that.

To take some of the points that Professor Gould raised—and it's not that I disagree with what I think was a very good and clear presentation on his part about some of the difficult legal areas—what I quarrel with is whether they really inhibit labor/management cooperation.

Take, for example, mandatory subjects for bargaining. That doesn't inhibit labor/management cooperation, because if the employer wants to bargain, even though over a non-mandatory subject, it is free to do so. Calls for information won't inhibit labor/management cooperation. If the employer wants to give the information, it is perfectly free to do that under existing law.

Likewise, with respect to the "employee" definition, at least in part, if the employees, or those not statutory employees, want to play a particular role in a cooperative arrangement, that can be done.

Now, I will say that actions in violation of 8(a)(2)¹², which forbids dominating and assisting a labor organization, obviously can inhibit a cooperative effort. But I would be interested to know how many charges have been filed and how many complaints have issued and what the remedies have been for 8(a)(2) violations in connection with bona fide labor/management cooperative arrangements. Our conclusion with respect to the Railway Labor Act, which has a similar kind of company/union provision, is that it really probably didn't

12. 29 U.S.C. § 158 (1982).

matter. People could go ahead and take the risk. In the end, if it was a bona fide arrangement, the likelihood of any kind of remedy that would trouble anybody very much was pretty small.

So, if the will is there on both sides and if the creativity is there, it doesn't much matter what the legal environment is. And I would certainly welcome your reactions to that.

PROF. GOULD: I suppose that my view is that the law has an impact in two different respects. Of course there would be an 8(a)(2) area where you could actually say it is a deterrent. I don't know, but there actually have been a number of articles written about the frequency of 8(a)(2) litigation and the kinds of arrangements that have been viewed as unlawful in the statute. As to whether those relationships were arms-length, genuine relationships or not, I don't know and I don't suppose that anybody knows. On a broader basis, my point is that if everybody had good relationships, we wouldn't need the law at all. Maybe that is the ideal, a situation where we don't need the law at all.

There are certain characteristics of a relationship which tend to produce a more genuine, wide open, honest and thus ultimately cooperative relationship which the law can foster. They can be fostered in that kind of relationship by obliging the parties to disclose and to bargain. The assumption behind the law is that if you can produce bargaining in particular areas, you may be able to produce better understanding.

Now, of course, that does not always prove to be the case. In Europe, where periodic disclosure is required, periodic information-sharing occurs without any kind of request for information in a bargaining context. It might be said that European unions and employers who are members of OECD, or members of the European Economic Community, would have behaved that way anyway. I tend to think not, though. There are some who will be pushed and shoved along.

PROF. MURPHY: I think we have to come to a close, but one of our commentators has asked for 30 seconds. This is Paul Tobias.

MR. TOBIAS: We are in the midst of a law revolution. The decade of 1980 to 1990 was the beginning. We are now seeing a period of reaction and slowing down of the erosion of the at-will doctrine. The next ten years will make a difference. I urge the law students and academics to help us come up with some solutions to the problems. Down the road ten years, twenty years I predict that the answer is not going to be state by state legislation, but rather a federal solution in the form of a national law. The professors started it

all by important law review articles. Maybe academia can bail us out of the current state of confusion.