

1993

Employment-at-Will—Is the Model Act the Answer?

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Recommended Citation

St. Antoine, Theodore J. "Employment-at-Will—Is the Model Act the Answer?" *Stetson L. Rev.* 23 (1993): 179-97.

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EMPLOYMENT-AT-WILL — IS THE MODEL ACT THE ANSWER?*

Theodore J. St. Antoine**

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I. INTRODUCTION

At-will employment is both emblematic of, and an anomaly in, American society. Stated most baldly, the doctrine asserts that, unless a contract of hire has a fixed term, employers “may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong.”¹ This harsh rule may square well with the

* This Article is based on an address delivered at the “Eighth Annual National Conference on Labor and Employment Law: Critical Issues for 1993” held January 22-23, 1993 in Tampa, Florida. The Stetson University College of Law Center for Dispute Resolution presented the conference.

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1. *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884). *See also* HORACE

rugged, self-centered individualism that social commentators from de Tocqueville through Robert Bellah have identified as one distinctive feature of the national psyche.² But it ill comports with other equally prominent traits among Americans, such as their open-handed generosity toward the less fortunate and their passion for fairness in the treatment of all persons.³

The United States remains the last major industrial democracy in the world that has not heeded the call of the International Labor Organization for generalized legal protections against unjust dismissal.⁴ A few legal scholars have defended at-will employment on such grounds as freedom of contract and management efficiency.⁵ The substantial majority, however, have concluded that those concerns are outweighed by the demands of simple justice and a balancing of the various interests at stake.⁶ Individual workers lack

WOOD, LAW OF MASTER AND SERVANT 272-73 (1877).

2. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 477 (J. Mayer & M. Lerner eds., 1966); ROBERT N. BELLAH ET AL., HABITS OF THE HEART 142, 144-45, 150 (1985). See also Frederick J. Turner, *The Significance of the Frontier in American History*, in THE FRONTIER IN AMERICAN HISTORY 1 (Frederick J. Turner ed., 1976); GUNNAR MYRDAL, AN AMERICAN DILEMMA 17-18 (20th ann. ed. 1962).

3. There is no need to document the readiness of the United States to respond to a natural disaster anywhere in the world. On the domestic scene, three decades of increasingly expansive civil rights legislation testify to the concern about extirpating nearly all forms of categorical or status-based discrimination from the workplace. See, e.g., the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1988); the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. III 1992); and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (Supp. III 1992).

4. *Convention No. 158 Concerning Termination of Employment at the Initiative of the Employer*, INTERNATIONAL LABOUR CONFERENCE AND RECOMMENDATIONS 68th SESS. xxxviii (1982). Some 60 nations prohibit the discharge of employees without cause, including the European Community, Sweden, Norway, Japan, Canada, and others in South America, Africa, and Asia. Committee Labor & Empl. Law, Ass'n Bar City N.Y., *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 175 (1981). At present Montana is the only state with a statute forbidding dismissal without good cause. MONT. CODE ANN. § 39-2-901 (1987).

5. E.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955, 966 (1984); Timothy J. Heinsz, *The Assault on the Employment-at-Will Doctrine: Management Considerations*, 48 MO. L. REV. 855 (1983).

6. E.g., Benjamin Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections*, in NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION 13 (Howard J. Anderson ed., 1982); Lawrence R. Blades, *Employment-at-Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); Cornelius J. Peck, *Unjust Discharges from Employ-*

equal bargaining power in dealing with their employers. The termination of any single relationship means far more to the employee than to the employer. The results can be devastating, and not just economically. Numerous surveys attest to the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, spouse and child abuse, and impaired social relations that follow the loss of a job.⁷

Most companies undoubtedly strive to treat their workers fairly. That is not only the decent thing to do; the expense of training new recruits and the value of having experienced personnel also make it a matter of good business. Nonetheless, petty antagonisms can develop and faulty judgments can occur. A careful scholar has estimated that two million of the sixty million at-will employees in the country are dismissed annually and that "[a]bout 150,000 of these workers would have been found to have been discharged without just cause"⁸ if they had the same job protections accorded civil service personnel or nearly everyone in the unionized sector. In terms of the number of people involved, the problem is an eminently practical and important one.

Employers, as well as employees, are likely to profit from improved working conditions, including enhanced job security. Several studies, both here and abroad, have shown a marked correlation between guarantees of fair procedures in the workplace and high productivity along with quality output.⁹ In light of these worldwide industrial trends, the obsession in some quarters of American management with absolute autonomy in directing the work force ought

ment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 (1979); Jack Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in PROC. 32D ANN. MEETING INDUS. REL. RES. ASS'N 155 (B. Dennis ed., 1980); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Symposium, *Employment Rights*, 67 NEB. L. REV. 1 (1988); Symposium, *Individual Rights in the Workplace: The Employment-at-Will Issue*, 16 U. MICH. J.L. REF. 199 (1983).

7. *E.g.*, BARRY BLUESTONE & BENNET HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 63-66 (1982), and authorities cited; LOUIS FERMAN & JEANNE GORDUS EDS., *MENTAL HEALTH AND THE ECONOMY* (1979).

8. Jack Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 558 (1985).

9. Fred K. Foulkes, *Large Nonunionized Employers*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 129, 134-36, 141-44, 151-56 (Jack Stieber et al. eds., 1981); RICHARD T. PASCALE & ANTHONY G. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 131-57 (1981). *Cf.* SPECIAL TASK FORCE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *WORK IN AMERICA* 93-110, 188-201 (1973).

not to prevail.

Over the last quarter century, the most significant development in the field of labor and employment law has been a nationwide movement toward a revision of the at-will employment doctrine. Courts in over forty-five jurisdictions have used one or more of three main theories to carve out exceptions to the previously all-pervasive principle.¹⁰ Unfortunately, though one can applaud the values embodied in these decisions, there are serious deficiencies in the common law modifications. The purpose of this Article is to outline those defects and to demonstrate that the interests of employees and employers alike would be better served by new remedial legislation, such as the Model Employment Termination Act.¹¹

II. DEFECTS IN COMMON LAW MODIFICATIONS

A. Tort Theories

With a doctrine as well entrenched as at-will employment, only a truly shocking case could jar the judiciary into a reexamination of the doctrine's basic premises. That case was *Petermann v. International Brotherhood of Teamsters Local 396*,¹² where an employee challenged his dismissal for refusing to commit perjury in order to shield his employer from a legislative investigating committee. A California Court of Appeal called the discharge "obnoxious" to the interests of the state and sustained a cause of action on the grounds it violated public policy.¹³ Two decades later, in *Tameny v. Atlantic Richfield Co.*,¹⁴ the California Supreme Court confirmed that such violations of public policy would support a tort action in a case where an employee was fired for declining to participate in an illegal price-fixing scheme. The practical importance of denominating these discharges contrary to public policy as torts was that it opened the way to punitive as well as compensatory damages.¹⁵ Subsequently, other courts extended the public policy

10. 9A Lab. Rel. Rep. (BNA) ¶ 505:51 (July 1992); CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* (2d ed. 1992); WILLIAM HOLLOWAY & MICHAEL LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* (2d ed. 1993); HENRY PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE* (3d ed. 1992).

11. See *infra* notes 43-92 and accompanying text.

12. 344 P.2d 25 (Cal. 1959).

13. *Id.* at 27.

14. 610 P.2d 1330 (Cal. 1980).

15. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (holding that

exception beyond the situation where an employee suffers retaliation for a refusal to engage in unlawful activity. Dismissals covered included those resulting from the performance of a civic duty, such as serving on a jury¹⁶ or "blowing the whistle" on company wrongdoing,¹⁷ and those resulting from the employee's exercise of a legal right or privilege, such as filing a workers' compensation claim.¹⁸

Not all courts, however, are prepared to enunciate public policy concerning workers' dismissals, especially in the more amorphous area of whistle-blowing, preferring to leave the issue for legislative resolution.¹⁹ Even the bolder innovators increasingly require that the public policy relied upon be "well accepted" and "clearly articulated,"²⁰ or that it be "evidenced by a constitutional or statutory provision."²¹ Accordingly, the public policy exception, or tort theory, is not available to most employees fired arbitrarily or without good cause; only those rare few who are the victims of the most blatantly outrageous treatment have viable claims. After all, most employers know that one does not discharge an employee for declining to commit perjury or join an antitrust conspiracy.

B. Contract Theories

In *Toussaint v. Blue Cross & Blue Shield of Michigan*²² and

where an employer has a policy for or states that it will dismiss an employee only for cause and refrain from arbitrary dismissal, the employer must abide by its policy or statement).

16. *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (holding employers not liable for punitive damages after dismissing employee for attending jury duty because they did not know their conduct was improper).

17. See *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980), and *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981), for cases holding that dismissal of an employer for whistle-blowing gives rise to a cause of action in tort.

18. See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978), and *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983), for cases holding that allegations of wrongful discharge for filing a workers compensation claim state a cause of action. *Contra* *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. 3d DCA 1978).

19. See, e.g., *Murphy v. American Home Prod. Corp.*, 448 N.E.2d 86 (N.Y. 1983); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974).

20. See *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1034 (Ariz. 1985); see also *Clifford v. Cactus Drilling Corp.*, 353 N.W.2d 469, 474 (Mich. 1984) (Williams, C.J., dissenting).

21. See *Adler v. American Standard Corp.*, 432 A.2d 464 (Md. 1981); *Brockmeyer v. Dunn & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983).

22. 292 N.W.2d 880 (Mich. 1980).

Weiner v. McGraw-Hill, Inc.,²³ decided in the early 1980s, the highest courts of Michigan and New York joined the California courts in modifying employment-at-will, this time on a contract theory.²⁴ If an employer orally assures an employee of continuing job security at the time of hiring, or declares in a personnel manual that the company's policy is not to discharge except for "just cause," that statement may constitute an express or implied contract, which will be legally enforceable.²⁵ With *Toussaint*, *Weiner*, and the California decisions in the vanguard, the vast majority of American jurisdictions followed suit during the ensuing decade in modifying at-will employment, usually on both contract and public policy grounds.²⁶

Despite the broader applicability of contract theory as contrasted with tort theory, an employer obviously may still refrain from any commitment concerning continuing employment. Unequivocal language in a job application that any resulting employment will be only at-will,²⁷ or a clear and prominent disclaimer in an employee handbook asserting that any policy statements are not legally binding,²⁸ will ordinarily foreclose employee claims. Furthermore, even if an employer has established a policy of just cause protections, most courts permit a unilateral revocation as long as the affected workers receive adequate notice in advance.²⁹

Therefore, even the most widely available exception to at-will employment, the contract action, is something of a will-o'-the-wisp; it is available only as long as an employer allows it. At least one early proponent, Michigan, has also cut back on the contract theory through restrictive qualifications.³⁰ An oral assurance, for exam-

23. 443 N.E.2d 441 (N.Y. 1982).

24. California adopted a contract theory in *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (1981).

25. See *supra* note 15 for a California case outlining this theory.

26. See *supra* note 10.

27. See *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *French v. Dillard Dept Stores, Inc.*, 686 S.W.2d 435 (Ark. 1985).

28. See *Woolley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257, 1260, *modified on other grounds*, 499 A.2d 515 (N.J. 1985); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984).

29. See *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 443 N.W.2d 112 (Mich. 1989). Cf. *Enis v. Continental Ill. Nat'l Bank & Trust Co.*, 795 F.2d 39, 41 (7th Cir. 1986).

30. *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 275 (Mich. 1991) (holding in a 4-2 decision that the statement "as long as they generated sales . . . they had a job" not sufficient to rebut at-will employment).

ple, must generally be the product of actual bargaining to be legally effective.³¹ Finally, as a practical matter, only the more enlightened business firms are likely to adopt a just cause discharge policy, and only professional or higher ranking managerial personnel are likely to receive individualized guarantees. The rank and file worker in the marginal plant or shop, who probably most needs protection, is the least likely to acquire contract rights.

C. Good Faith and Fair Dealing

Potentially the most expansive common law safeguard for employees is the covenant of good faith and fair dealing. But only about a dozen states have recognized this doctrine.³² One of the most important of these, California, sharply limited the impact of the covenant by reclassifying an action based on it as contractual rather than tortious, thereby blocking access to punitive damages.³³ On the merits, the decision of the New York Court of Appeals in *Murphy v. American Home Products Corporation*³⁴ seems correct in insisting that extension of the covenant to wrongful discharge would not be merely an exception to at-will employment but rather a rejection of the whole doctrine.³⁵ Historically, the covenant has not served as a universal protection against every kind of arbitrary behavior in a contractual relationship, such as unjust dismissal, but instead as a specific assurance that neither party to the contract will interfere with the other party's performance or its enjoyment of the fruits of the agreement.³⁶ Most courts will probably emulate New York and refrain from so daring a step as an outright repeal of employment-at-will under the aegis of the covenant of good faith and fair dealing.

31. *Id.*

32. 9A Lab. Rel. Rep. (BNA) ¶ 505:51 (July 1992). *E.g.*, *Buysse v. Paine, Webber, Jackson & Curtis, Inc.*, 623 F.2d 1244 (8th Cir. 1980) (applying Minnesota law); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487 (Mont. 1984).

33. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (asserting that only three courts outside California have granted tort damages for breach of the covenant of good faith and fair dealing).

34. 448 N.E.2d 86 (N.Y. 1983).

35. *Id.* at 91 (holding no implied obligation of good faith regarding termination exists in at-will employment contracts).

36. See 3 ARTHUR CORBIN, CONTRACTS §§ 570-71 (1960); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

D. Summing Up the Common Law Modifications

The recent common law modifications of at-will employment will not meet the needs of most employees. The public policy tort exception reaches only a few extreme cases and the good faith covenant applies in only a handful of states. Contract theories are subject to employer disavowals. In all instances, the successful plaintiff will usually be a professional or upper-level managerial type. Ordinarily, rank and file workers who lose their jobs will not have a sufficient dollar claim to attract the attention of a lawyer looking for a sizable contingent fee.

At the same time, financial devastation can befall the hapless employer that does get ensnared in a common law wrongful discharge suit. Several studies of California cases found that a plaintiff who reached a jury won almost seventy-five percent of the time, with the average verdict around \$450,000.³⁷ Jury generosity is not confined to California. Across the country, plaintiffs have received awards of compensatory and punitive damages in such amounts as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million.³⁸ Company attorneys in Chicago, Cleveland, and Detroit have stated that even the successful defense of a discharge case before a jury can cost between \$100,000 and \$150,000, while their counterparts on the coasts said that figure can reach \$200,000.³⁹ In addition, a recent RAND⁴⁰ study indicates that the hidden costs incurred by American businesses in trying to avoid this onerous litigation, including the creation of elaborate personnel procedures and the retention of undesirable employees, may add up to one hundred times more than the adverse judgments and other legal expenses.⁴¹

37. JAMES N. DERTOUZOS, ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 34-26, 33-37 (1988); Cliff Palefsky, *Wrongful Termination Litigation: Dagwood and Goliath*, 62 MICH. B.J. 776 (1983); *Discharge Verdicts Average \$424,527 in California*, 1 *Indiv. Empl. Rts.* (BNA) No. 14, at 3 (Mar. 3, 1987).

38. Kenneth Lopatka & Julia Martin, *Developments in the Law of Wrongful Discharge*, in ABA NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS vii, 13-18 (1986).

39. Conversations between author and management lawyers at 1992 midwinter meeting of the ABA Labor Law Section Committee on Individual Rights and Responsibilities in the Workplace on April 8-9, 1992, at Silverado, California.

40. RAND is a private, non-profit institution which seeks to improve public policy through research and analysis. RAND stands for Research and Development.

41. JAMES N. DERTOUZOS & LYNN A. KAROLY, *LABOR MARKET RESPONSES TO EM-*

To summarize, in the existing common law system employees' substantive rights are too limited and unpredictable, the remedies against employers are too haphazard and often excessive, and for everyone the procedure in the civil courts is too slow, costly, and cumbersome.

III. THE MODEL EMPLOYMENT TERMINATION ACT

A. Overview and Prospects

The National Conference of Commissioners on Uniform State Laws approved the Model Employment Termination Act (META)⁴² at its annual meeting in August 1991 and recommended enactment of the proposed Act by all fifty states.⁴³ The final vote of the Uniform Law Commissioners (ULC) on any measure up for adoption is by state delegations. There were thirty-nine jurisdictions in favor of META and only eleven opposed.⁴⁴ These numbers alone testify to the Act's merits and its increasing appeal to a group of intelligent evaluators who are prepared to spend the time becoming educated about all its features.

The ULC are a national cross-section of influential members of the legal profession, mostly lawyers and judges, with a sprinkling of law professors and state legislators. Each state delegation averages about six persons. They tend to represent mainstream attitudes, not extremist views. Bills are prepared by committees that meet two or three times a year for intensive two-and-a-half day drafting sessions. The ULC do not adopt bills unless they have been read line by line at least twice at different annual conferences. More controversial proposals, like META, may take three or more readings. Significantly, before its very first reading was completed, META had to survive an almost unprecedented motion to discharge its drafting committee on the grounds the whole enterprise was a futility and a waste of the Commissioners' time. META's subsequent overwhelming approval speaks volumes about the reaction a fuller acquaintance with it generated in an initially skeptical but open-minded and perceptive audience.

The META drafting committee consisted of eleven members,

PLOYER LIABILITY xiii, 36-40 (1992).

42. 9A Lab. Rel. Rep. (BNA) ¶ 540:21 (Dec. 1991).

43. *Id.*

44. *Id.*

with the author as "reporter," or principal draftsman. Drafting committees are traditionally composed of generalists, with no axes to grind. Specialized expertise is supplied by the reporters and by outside advisors. The META drafting committee received extremely valuable input from representatives of the American Bar Association's Labor and Employment Law Section and its Tort and Insurance Practice Section, the AFL-CIO, the United States Chamber of Commerce, the National Employment Lawyers Association, the American Civil Liberties Union, the American Trial Lawyers Association, the American Arbitration Association, the National Academy of Arbitrators, and various other groups and individuals. META was ultimately designated as a model act rather than a uniform act. That means that the ULC considered uniformity a "desirable" but not a "principal" objective, with the Act's purposes being achievable without its adoption "in its entirety by every state" and "without the same emphasis on adhering to the verbatim text."⁴⁵

The essence of the Model Act is compromise, not as a matter of political expediency but as a practical, balanced accommodation of the competing worthy interests of employers and employees. Workers are entitled to be free from arbitrary treatment; business is entitled to be free from unnecessary costs. META promotes both objectives. The proposed Act guarantees the vast majority of employees certain irreducible minimum rights against wrongful discharge but substantially reduces the potential liability of employers.⁴⁶ META substitutes the use of professional arbitrators in place of long, expensive court proceedings as the preferred method of enforcement.⁴⁷ That substitution also eliminates wayward verdicts by emotional juries.

To date, META, or bills drawing upon it have been introduced in approximately ten state legislatures.⁴⁸ It would be folly to think that passage will be quick or easy anywhere. By definition, the

45. *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts* §§ 4(6)(b), 7 (Aug. 2, 1988), in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1991-1992 REFERENCE BOOK, 111-12, 113 (1991).

46. See *infra* notes 51-57 and accompanying text.

47. See *infra* notes 80-85 and accompanying text.

48. *E.g.*, Delaware, Hawaii, Iowa, Maine, Massachusetts, Nevada, New Hampshire, and Oklahoma, and to a lesser extent, New York and Pennsylvania. This information was provided by the ULC headquarters in Chicago and by Professor Stuart Henry of Eastern Michigan University, Ypsilanti, Michigan.

constituency most keenly affected consists of unorganized workers. The AFL-CIO's Executive Council has officially endorsed the principle of a statutory prohibition of discharges without cause,⁴⁹ but it has not embraced META as the solution. Although some legal counsel for management privately applaud the proposal as a fair compromise, one cannot expect widespread support from the business community. Many employers remain confident that the lightning of costly lawsuits will strike someone else, and that such precautions as the purging of "just cause" policy statements from personnel manuals will ward off most heavy blows. Plaintiffs' lawyers, ironically, are among the strongest opponents of META. Some undoubtedly are influenced by what they sincerely believe are disadvantages for workers, such as the loss of punitive and general compensatory damages.⁵⁰ Some are probably influenced by fears of losing the large contingent fees they now derive from a few successful upper-middle-class claimants. If opposing political pressures are not simply too great, the legislatures should eventually be moved by the same informed sense of justice that led the Uniform Law Commissioners over the course of three years to see the rightness in the balance struck by META.

B. The Standard of Good Cause

META prohibits the termination of covered employees except for "good cause."⁵¹ Good cause could consist of either misconduct or poor performance by an individual worker, or the economic needs and goals of the enterprise as determined by management in the good faith exercise of business judgment.⁵² The drafters chose the term "good cause," rather than the more common "just cause" appearing in collective bargaining agreements, to emphasize the economic flexibility afforded the employer. No difference in meaning was intended. The official comments direct interpreters of the statute to heed the arbitral precedent developed over the past half century, so the cryptic language has already been defined and fleshed out in thousands of published decisions.⁵³

49. 1 *Indiv. Empl. Rts.* (BNA) No. 14, at 1 (Mar. 3, 1987).

50. Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 *LAB. L.J.* 500 (Aug. 1992).

51. *Model Employment Termination Act* [hereinafter META] §§ 1(4), 3(a) (1991).

52. *Id.* § 1(4).

53. META § 1(4) cmt.

Some of the listed examples of good cause for a termination in an individual case are theft, fighting on the job, destruction of property, drug or alcohol use at work, insubordination, excessive absenteeism, and inadequate performance.⁵⁴ Off-duty conduct is included if it is relevant to the employee's job performance or the employer's business reputation.⁵⁵ An objective standard applies, with the arbitrator or other factfinder making the ultimate determination. Distinguished management counsel among the drafting committee's advisors favored the "good cause" criterion over a subjective standard like "good faith and reasonable belief," primarily on the grounds that the more objective term ensured greater predictability because of its long arbitral history.

Unlike decisions concerning the dismissal of a particular individual, economic decisions leading to layoffs or other terminations are largely subjective. Good faith is the only limitation on an employer's business judgment. Management is entirely free to determine the scope of the enterprise, the size of the work force, the location of plants, and all other similar questions. Of course an employer could not concoct a sham layoff to rid itself of an employee when good cause for a termination was lacking, because that would violate the requirement of a good faith business judgment.

Employers may also set the standards of performance for given positions in their establishments at the highest levels they desire.⁵⁶ The only restriction is that particular individuals may not be prejudiced by a deliberate skewing of standards.⁵⁷ In intensely competitive occupations, like professional sports, law practice, or the entertainment industry, a performance standard could call for the most proficient performer available for a specific post.

C. Coverage

META covers most full-time employees (those working 20 or more hours a week) after one year of service with an employer.⁵⁸ Small employers (those with less than five employees) are excepted.⁵⁹ These small employers may well be responsible for some

54. *Id.*

55. *Id.*

56. META § 1(4) and cmt.

57. META § 1(4) cmt.

58. *Id.* §§ 1(1), 3(b).

59. *Id.* § 1(2).

of the most arbitrary treatment found in the workplace. Nonetheless, the drafters considered intervention in situations where there are extremely intimate and potentially hostile personal relationships to be imprudent and a misallocation of resources. Initially, this author proposed excluding high-ranking policymaking executives, because he felt that at some level policy judgments and standards of good cause became too interwoven for an outsider to sort out, and that in any event the Lee Iacoccas of the world could fend for themselves. Management advisors objected. A trade-off for protection under META resulted in the elimination of common law tort and implied contract actions based on prohibited terminations. Naturally, well paid corporate officials are most likely to have the biggest claims. Thus, the Act in its final form protects even corporation presidents, but denies them tort and implied contract suits.

Workers subject to union contracts are covered by META to the extent permitted by federal preemption law.⁶⁰ In light of the United States Supreme Court's deference to state law dealing with employment discrimination, "minimum labor standards," and worker welfare generally,⁶¹ preemption of good cause protections would appear unlikely merely because employees were unionized. For employees actually covered by collective bargaining agreements, however, the Court's current fixation on the need for interpreting the labor contract as the touchstone of preemption under the Labor Management Relations (Taft-Hartley) Act⁶² could raise problems about their resort to state law protections.⁶³ It seems anomalous that a union member could lose a state "good cause" claim merely because a court might have to look to the collective agreement to rule on an employer's argument that the union had waived the employee's right to sue by substituting a right to arbitrate.⁶⁴ Logically, one would believe the contrary to be true, namely, that seri-

60. META §§ 2(d) and (e) cmt.

61. *E.g.*, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963). *But cf.* *Barnes v. Stone Container Corp.*, 942 F.2d 689 (9th Cir. 1991).

62. 29 U.S.C. § 185 (1988).

63. *See, e.g.*, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

64. *See generally* Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck*, 66 CHI-KENT L. REV. 685, 706-13 (1990); Thomas Bean, Note, *NLRA Preemption of State Law Actions for Wrongful Discharge in Violation of Public Policy*, 19 U. MICH. J.L. REF. 441 (1986).

ous constitutional questions would arise if states *deprived* employees of certain minimum labor guarantees because they had organized and engaged in collective bargaining. The inclusion of public employees under META is left to state option.⁶⁵

D. Preemption of Common Law

A major trade-off in META, as indicated earlier, is the preemption or extinguishment of most common law actions based on terminations prohibited by the Act.⁶⁶ Those actions include implied contract claims and all tort claims, such as defamation and intentional infliction of emotional distress.⁶⁷ There is no displacement of rights or claims under express contracts (*e.g.*, fixed-term agreements and “golden parachutes”⁶⁸) or under statutes or administrative regulations, like those dealing with job discrimination, “whistle-blowing,” and occupational health and safety concerns.⁶⁹

Suits may still be brought for independent torts such as assault, malicious prosecution, and false imprisonment, if there are facts separate and apart from the termination itself to ground such causes of action.⁷⁰ The key to the abolition of a tort claim is not the nature of the tort, but whether its basis is the termination itself or acts taken or statements made that are reasonably necessary to initiate or effect the termination. The converse of this is that workers who are not entitled to the good cause protections of the statute retain the whole body of their common law rights and remedies.⁷¹

The Act does not affect an employer’s report of a termination or its grounds to another prospective employer.⁷² Such a communication continues to be governed by the existing tort law of the state, including presumably the generally applicable doctrine of qualified privilege. Finally, the preemption provision applies only to employee suits against an employer or its representatives and does not touch employer suits against an employee, such as suits for disloy-

65. META § 1(2) and cmt.

66. *See supra* notes 12-36 and accompanying text.

67. META § 2(c) & (e).

68. *Id.* § 2(e) and cmt.

69. *Id.* § 2(d) & (e) cmt.

70. *Id.* § 2(c) and cmt.

71. *Id.* § 2(d).

72. META § 2(c) cmt.

alty, breach of a covenant not to compete, and theft or destruction of property.⁷³

E. Remedies

Remedies under META are limited to those provided by the federal Civil Rights Act of 1964⁷⁴ as originally adopted, namely, reinstatement with or without back pay and attorneys' fees for a prevailing party.⁷⁵ Severance pay is allowable when reinstatement is impracticable, up to a maximum of thirty-six months' pay in the most egregious cases.⁷⁶ Compensatory and punitive damages are expressly excluded.⁷⁷

Employees' representatives complain that META's remedies are inadequate, and employers' representatives complain that they are excessive. This mutual dissatisfaction suggests that the remedies probably are just about right. The primary objective should be to return wrongfully discharged employees to their old jobs if feasible. Large monetary awards may punish the employer, without benefiting the employee as much over time as would a productive use of acquired skills in a familiar setting. Of course, when the intensity of personal feelings or other factors rule out reinstatement, the arbitrator should have sufficient discretion to fashion a suitable severance payment. META seeks to apply a principle of "proportionality" to the remedial process. The maximum three years' severance pay would not automatically be granted even if it were foreseeable that a fired worker would be unemployed for three years or longer. Instead, the circumstances of hiring, the length and quality of service, and the gravity of the wrong perpetrated in the dismissal, as well as the employee's probable loss, would be taken into account.⁷⁸

Attorneys' fees are awarded to a prevailing party in accordance with federal civil rights law standards.⁷⁹ This seems essential if employees are to obtain adequate legal representation in pursuing

73. *Id.*

74. 78 Stat. 253 (1964).

75. META § 7(b).

76. *Id.* § 7(b)(3).

77. *Id.* § 7(d).

78. *Id.* § 7(b)(3) cmt.

79. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) for examples of awards of attorneys' fees in civil rights cases.

their claims. For impoverished rank and file workers, the amount of any likely recovery will seldom, if ever, be enough to attract capable counsel who must rely on a contingent fee.

F. Enforcement Procedures

META offers three options for its enforcement. The preferred method is the use of professional arbitrators appointed by an appropriate state agency.⁸⁰ Arbitrators have the skill, understanding, and experience to appreciate the special problems of the workplace. Thus, they should be more acceptable to employers and employees alike. Their efficiency in resolving industrial disputes should also reduce the time and expense of proceedings. Another advantage of ad hoc arbitrators would be the avoidance of a new permanent staff of civil servants.

One departure from arbitral practice in the unionized sector is that the burden of proof under META rests on a complainant employee.⁸¹ The drafters here accepted the usual rule of the civil courts. But, because the drafters recognized that the employer knows best the exact reasons for the termination, the employer must ordinarily proceed first to present its case. Apropos of this, many arbitrators will vigorously maintain that the burden of proof means little or nothing in arbitral decisionmaking. Although possibly overstated, this author agrees that the importance of proof burdens in labor arbitrations can easily be exaggerated.

META limits judicial review of arbitral awards to such grounds as fraud and corruption, an abuse of authority by the arbitrator, or a prejudicial error of law.⁸² Even so, that is a broader scope of review than governs arbitrations under collective bargaining agreements.⁸³ The latter instances do not cover error of law. The Supreme Court's limit on judicial review of contractual arbitrations is based on the notion that unions and employers have agreed to treat

80. META § 6.

81. *Id.* § 6(e).

82. *Id.* § 8(c).

83. See *Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960), where the Supreme Court discusses an arbitrator's fraud, dishonesty, or infidelity to the commission to draw the "essence" of the award from the collective bargaining agreement as grounds for setting aside the award. Awards are not to be reversed simply because of "factual or legal error." *Paperworkers*, 484 U.S. at 38. Of course an illegal contract or illegal award will not be enforced.

arbitral awards as “final and binding,” and that the parties’ own contract is applied by the arbitrator.⁸⁴ When individual statutory rights are at stake, the Court has declined to give the same weight even to the awards of arbitrators operating under union-management agreements.⁸⁵ In META, individual statutory rights are the issue, and arbitration as the enforcement mechanism has been imposed upon the parties, not agreed to by them. For these reasons, an arbitrator’s “prejudicial error of law” is added as a ground for judicial review. Unless a legal error adversely affects the rights of a party, however, a court should not vacate an award.

Instead of using arbitrators on an ad hoc basis, some states may believe that it would be less expensive to employ full-time civil service or other government personnel as hearing officers. An alternate provision in META authorizes such staffing.⁸⁶ A third option would place enforcement in the hands of the civil courts.⁸⁷ That would almost surely be the most costly, complex, and time consuming procedure. Nonetheless, a few states may believe that their constitutional guarantees of right to jury trial, access to the courts for the redress of wrongs, and other procedures preclude the substitution of other forums. This author believes that only one or two states might be so inhibited.

G. Costs

As a matter of principle, the proposed new right to be free from unjust dismissal, like any other right of the citizenry, should be enforced by a publicly funded tribunal. Most states are currently in dire financial straits, however, and the prospect of an additional fiscal burden of uncertain dimensions could be fatal for a measure that is going to spark heated controversy. The META drafters accordingly suggest, as an alternative to the normal nominal filing fee, that the states consider imposing a substantial part of the cost on the parties themselves.⁸⁸ A local arbitrator’s fee and expenses should be in the range of \$1200-\$1800.⁸⁹ If other administrative

84. *Id.*

85. *See, e.g.,* *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

86. META Appendix, Alternative A.

87. *Id.*, Alternative B.

88. META § 5(e) and cmt.

89. A common per diem fee for arbitrators today is \$600. Hearings in discharge

costs are included and the total shared equally, each party would have to pay about \$700-\$1100. Perhaps it would be equitable to cap the employee's portion in the amount of one or two weeks' pre-termination pay. Another possibility would be for a state to impose a special "employment termination tax" on businesses covered by the Act, using an experience rating similar to that applicable to unemployment insurance.

H. Waivers

The spirit of compromise and the seductive appeal of "freedom of contract" combined to produce some of the most debatable provisions in META. Under certain conditions, employers and employees may waive or "opt out" of the prescribed statutory rights and procedures. By express written agreement, for instance, the parties may dispense with the good cause protections and substitute a mandatory severance payment of at least one month's pay for each year of employment up to thirty months' pay.⁹⁰ Similarly, the parties may agree on a private arbitration procedure to resolve their dispute.⁹¹

Freedom of contract is a prized element of Anglo-American law. The waiver of statutory rights in the employment context, however, has long been eyed suspiciously by labor theorists. Most workers applying for a job have so little bargaining power that they will sign any form an employer puts in front of them. Fortunately, well recognized theories, such as economic duress and contracts of adhesion, may enable the courts to curb the grosser forms of overreaching. Furthermore, the rather generous severance pay schedule and other technical features of that provision will tend to confine its use to higher-ranking managerial personnel. Thus, the definition of a "termination" under the Act includes a layoff of more than two months.⁹² Severance payments under a valid "buyout" agreement must be granted if there is a termination for any reason (including what would otherwise be good cause) except an employee's willful misconduct. Therefore, an employer would be taking the risk that

cases usually run 1 to 1 1/2 days, and the writing of the award takes another 1/2 to 2 days.

90. META § 4(c).

91. *Id.* § 4(i).

92. *Id.* § 1(8)(ii). A layoff resulting from economic conditions would be for good cause, and consequently, an employee not covered by a buyout agreement would have no basis for a claim.

any employee subject to periodic layoffs who was out of work for over two months could elect to treat the layoff as a termination and secure the severance entitlement. In assessing any private arbitration system, the courts should also insist on strict adherence to due process requirements before allowing the statutory procedures to be displaced.

IV. CONCLUSION

META has its rough edges, as would any product emerging from the clash of strongly contending forces. Its ultimate shape was fashioned, however, not by partisans, but by persons whose highest allegiance was to the ideal of a fair balance between the interests of employers, employees, and the public. The Act's central tenet, that a worker of demonstrated capacity should not be fired without good cause, is a matter of elementary justice. The rest of the statute is a sophisticated scheme to effectuate this right in a manner that will be reasonably swift, sure, and simple. Every other major democracy in the industrial world has already written the underlying concept into law. In the long run, a country as dedicated as is the United States to the principle of justice for all can do no less.