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Kurt H. Decker

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I. Introduction

At-will employment allows termination of employment by either an employee or employer for no cause at all.[1] Recently, courts and legislatures in jurisdictions outside Pennsylvania have created certain exceptions to the at-will employment relationship.[2] Despite widespread criticism,[3] however, courts in Pennsylvania[4] have seemingly remained faithful to the doctrine.

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* B.A., Thiel College; M.P.A., The Pennsylvania State University; J.D., Vanderbilt University; L.L.M. (Labor), Temple University; Stevens & Lee, Reading, Pennsylvania; Member Pennsylvania Bar.

1. THE RESTATEMENT (SECOND) OF AGENCY § 442 (1958) refers to at-will employment as follows:

> Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

Id.

2. *See infra* notes 41-69 and accompanying text.

3. Recent commentators consider at-will employment the labor relations topic for the 1980s. *See, e.g.,* C. BAKALY, JR. & J. FEERICK, DEVELOPING RIGHTS OF EMPLOYEES IN THE WORKPLACE (1981) [hereinafter cited as BAKALY, JR. & FEERICK]; C. BAKALY, JR. & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH (1983); J. BARBASH, J. FEERICK & J. KAUFF, UNJUST DISMISSAL AND AT WILL EMPLOYMENT (1982) [hereinafter cited as BARBASH, FEERICK & KAUFF]; R. BERENBEIM, NONUNION COMPLAINT SYSTEMS (1980); R. COULSON, THE TERMINATION HANDBOOK (1981); THE EMPLOYMENT-AT-WILL ISSUE (M. DICHTER & A. GROSS eds. 1982); F. FOULKES, PERSONNEL POLICIES IN LARGE NON-UNION COMPANIES (1980); A. WESTIN, WHISTLEBLOWING, LOYALTY, AND DISSENT (1980); Abramson & Selvestri, *Recognition of a Cause of Action for Abusive Discharge in Maryland,* 10 BALT. L. REV. 257 (1981); Baxter, Jr. & Farrell, *Constructive Discharge — When Quitting Means Getting Fired,* 7 EMPLOYEE REL. L.J. 346 (1981); Berger, *Defining Public Policy Torts in At-Will Dismissals,* 34 STAN. L. REV. 153 (1981); Blades, *Employment At-Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967); Bowers & Clarke, *Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason,'* 10 INDUS. L.J. 34 (1981); Dedon, *McKinney v. National Dairy Council: The Employee At Will Relationship in Massachusetts,* 16 NEW ENG. L. REV. 285 (1980); DeGiuseppe, Jr., *Effect of the Employment At-Will Rule on Employee Rights to Job Security and Fringe Benefits,* 10 FORDHAM URB. L.J. 1 (1981); Enright, *The Motivation Requirement in Single Employee Discharge Cases,* 11 LOY. U. CHI. L.J. 501 (1980); Harrison, *Wrongful Discharge: Toward a More Efficient Remedy,*

In the 1960s, vast changes were instituted at the federal[5] and state[6] levels to eliminate employment discrimination based on race, sex, religion, national origin, age, and handicap. Today a corollary interest exists in broadening protections for employee job interests.

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56 INDIANA L.J. 207 (1981); Hochman, *Determining a Standard of Causation for Discriminatory Discharges Under Section 8(a)(3) of the National Labor Relations Act,* 59 WASH. U. L.Q. 913 (1981); Isaacson, *The Worker's Re-emergence as an Individual,* 7 EMPLOYEE REL. L.J. 189 (1981); Lewis, *Employment Protection: A Preliminary Assessment of the Law of Unfair Dismissal,* 12 INDUS. REL. L.J. 19 (1981); Madison, *The Employee's Emerging Right to Sue for Arbitrary or Unfair Discharge,* 6 EMPLOYEE REL. L.J. 422 (1980); Mennemier, *Protection from Unjust Discharges: An Arbitration Scheme,* 19 HARV. J. ON LEGIS. 49 (1982) [hereinafter cited as Mennemier]; Murg & Sharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?,* 23 B.C. L. REV. 329 (1982); Olsen, *Wrongful Discharge Claims by At Will Employees: A New Legal Concern for Employers,* 32 LAB. L.J. 265 (1981); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1 (1979) [hereinafter cited as Peck]; St. Antoine, *The Right Not to be Fired Unjustly,* 10 HUMAN RIGHTS 32 (1982) [hereinafter cited as St. Antoine]; Summers, *Protecting All Employees Against Unjust Dismissal,* 58 HARV. BUS. REV. 132 (1980); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976) [hereinafter cited as Summers, *Individual Protection*]; Tanis, *Contract Law: Tort Law as a Basis for Wrongful Discharge Actions in Illinois,* 12 LOY. U. CHI. L.J. 861 (1981); Van Nopper, III, *Workers' Compensation — Retaliatory Discharge — The Legislative Response to Dockery v. Lampart Table Company,* 58 N.C.L. REV. 629 (1980); Vernon & Gray, *Termination At Will — The Employer's Right to Fire,* 6 EMPLOYEE REL. L.J. 25 (1980); Weisburst, *Guidelines for a Public Policy Exception to the Employment At Will Rule: The Wrongful Discharge Tort,* 13 CONN. L. REV. 617 (1981); Comment, *Wrongful Discharge of Employees Terminable At Will — A New Theory of Liability in Arkansas,* 34 ARK. L. REV. 724 (1981); Comment, *The Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 DUQ. L.R. 477 (1983) [hereinafter cited as Comment, *The Employment-at-Will Rule*]; Comment, *Kelsay v. Motorola, Inc.: Tort Action for Retaliatory Discharge Upon Filing of Workmen's Compensation Claims,* 12 J. MAR. J. 659 (1979); Comment, *Pierce v. Ortho Pharmaceutical Corporation: Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?,* 33 RUTGERS L. REV. 1187 (1981); Comment, *Kelsay v. Motorola, Inc.: A Remedy for the Abusively Discharged At Will Employee,* 1979 S. ILL. UNIV. L.J. 563 (1979); Comment, *Tameny v. Atlantic Richfield Co.: Wrongful Discharge, A New Tort to Protect At Will Employees,* 8 WASH. ST. UNIV. L. REV. 91 (1980); Note, *Job Security for the At Will Employee: Contractual Right of Discharge for Cause,* 57 CHI. KENT L. REV. 697 (1981) [hereinafter cited as Note, *Job Security*]; Note, *Limiting the Employer's Absolute Right of Discharge: Can Kansas Courts Meet the Challenge?,* 29 KAN. L. REV. 267 (1981); Note, *Non-Statutory Causes of Action for an Employer's Termination of an 'At Will' Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship,* 24 N.Y.L. SCH. L. REV. 743 (1979); Note, *Recognizing the Employee's Interests in Continued Employment — The California Cause of Action for Unjust Dismissal,* 12 PAC. L.J. 69 (1980); Note, *Judicial Limitation of the Employment-At-Will Doctrine,* 54 ST. JOHN'S L. REV. 552 (1980); Note, *Employer and Employee: Employee At Will — Discharge of Employee At Will Actionable Under Public Policy Exception,* 11 SETON HALL L. REV. 557 (1981); Note, *A Personal Damage Remedy for the Employee At Will: A Reappraisal of a Recent Proposal,* 22 S.D.L. REV. 431 (1977); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335 (1974) [hereinafter cited as Note, *Implied Contract*]; Note, *Limiting the Right to Terminate At Will — Have the Courts Forgotten the Employer?,* 35 VAND. L. REV. 201 (1982) [hereinafter cited as Note, *Limiting the Right to Terminate*]. In Pennsylvania, the at-will employment issue has also been recently reviewed. *See, e.g.,* Weiner, *At Will Employees Prevail in Pennsylvania*, 6 PA. L.J. 1 (February 14, 1983) [hereinafter citd as Weiner]; Halbert, *Pittsburgh's Employment Law Firm: Gallo & Weiner*, 6 Pa. L.J. 11 (February 7, 1983) [hereinafter cited as Halbert]; Lore, *Employment At Will: A View from the Other Side,* W. PA. L.J. 6 (January 24, 1982) [hereinafter cited as Lore]; Bosch, *You're Fired! Limitations on a Pa. Employer's Right to Terminate,* U. PA. L.J. 14 (January 11, 1982) [hereinafter cited as Bosch]; Bannon, *A Tort of Wrongful Discharge?, Geary v. U.S. Steel Revisited,* III PA. L.J. 1 (November 10, 1980) [hereinafter cited as Bannon].

4. *See infra* note 73.
5. *See infra* notes 23-33.
6. *See infra* note 34.

This interest is in part attributable to a slowing economy,[7] high interest rates,[8] and excessive unemployment.[9] The need to protect at-will employees who do not possess the bargaining power equal to that of an employer has arrived.[10] These employees are limited in their right to seek legal redress for their wrongful terminations.

Pennsylvania courts, however, should at this time avoid further modification of the at-will employment relationship.[11] Restraint should be observed to minimize the adverse effects that any complete abrogation might have on employment, productive efficiency, and overburdening of the judicial process with additional cases. Time and thought should be given *now* to whether abrogation of the doctrine should occur through "judicial erosion" or "legislative mandate."

This article examines the extent to which the legislature, rather than the courts, should abrogate the at-will employment relationship within Pennsylvania. Some limits must be placed upon employers to protect employees who lack adequate bargaining power. To accomplish this task, the following will be reviewed: (1) historical perspective of at-will employment; (2) erosion of at-will employment within the United States; (3) status of at-will employment in Pennsylvania; and (4) abolishing at-will employment in Pennsylvania through a statutory proposal.

II. Historical Development of At-Will Employment within the United States

A. Traditional View of At-Will Employment

Employee and employer rights within the United States trace their beginnings to England's Statute of Labourers.[12] This statute provided that a general hiring of labor for an unfixed term was presumed to be for a year and a "master" could not "put away his servant" except for "reasonable cause."[13] After its repeal, English courts continued to apply the statute's spirit by presuming that a "general hiring" was intended to serve as an employment contract

7. *News and Background Information,* 112 LAB. REL. REP. (BNA) 14 (Jan. 3, 1983).
8. *News and Background Information,* 111 LAB. REL. REP. (BNA) 127 (Oct. 18, 1982).
9. *News and Background Information,* 111 LAB. REL. REP. (BNA) 201 (Nov. 15, 1982).
10. Approximately 60% to 65% of all American employees are hired on an at-will basis. Another 22% are unionized and about 15% are federal or state employees. *See* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 427 (table 704) (union membership); *id.* at 392 (table 644) (total labor force); *id.* at 313 (table 509) (government employees); *see generally* Peck, *supra* note 3, at 8-10; St. Antoine, *supra* note 3, at 34.
11. *See infra* note 73.
12. 1 W. BLACKSTONE, COMMENTARIES 425 (1969). The Statute of Labourers was enacted in response to the extreme labor shortage that resulted from the Black Death in the mid-fourteenth century.
13. *Id.* at 425-26.

for one year.[14] If the employment continued for longer than one year, it could be terminated only at the end of an additional year.[15]

The American at-will employment approach has been viewed both as a departure from, and as a part of, this English heritage. Early American courts adopted the English approach.[16] In the 1880s, however, American law departed from this by developing its own version of at-will employment.

In 1877, H. G. Wood's treatise on master-servant relationships articulated what seemingly became at-will employment in America.[17] Although "Wood's Rule" has been persuasively challenged,[18] it has become the primary basis for at-will employment in this country.[19] American courts probably adopted "Wood's Rule" to facilitate development during the industrial revolution by promoting the prevalent economic idealogy of laissez-faire and freedom of contract.[20] Within this framework "Wood's Rule" seemed equitable. It provided the employer the flexibility to control the workplace through the unchallengeable power to terminate at will. In turn, the employee retained the freedom to resign if more favorable employment presented itself or if working conditions became intolerable. The at-will employment relationship has been codified in several jurisdictions[21] and referred to by the United States Supreme Court.[22]

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14. The English term "general hiring" is equivalent to the American term "indefinite hiring" — an employment relationship with no specific duration. Annot., *Duration of Contract of Hiring which Specified No Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year,* 11 A.L.R. 469 (1921).

15. Beeston v. Collyer, 130 Eng. Rep. 786 (C.P. 1827).

16. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE, 133 (1969). *See, e.g.,* Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891); Davis v. Gorton, 16 N.Y. 255 (1857); Bascom v. Shillito, 37 Ohio St. 431 (1881).

17. Wood wrote that:

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

WOOD, MASTER AND SERVANT § 134 (3d 3d. 1886) [hereinafter cited as H. WOOD].

18. The notion that at-will employment arrangements of indefinite duration are terminable by either party at any time is not one that has its roots deep in the English common law. *See supra* notes 12-16 and accompanying text. It apparently sprang from an American treatise writer. *See* H. WOOD, *supra* note 17; *see also* Note, *Limiting the Right to Terminate, supra* note 3, at 205-06 nn.22-30 and accompanying text. The treatise cited three cases that supposedly supported this view: Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd on other grounds,* 80 U.S. 254 (13 Wall.) (1871); DeBriar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870) (cited in H. WOOD, *supra* note 17, § 136, at 283 n.5). Commentators, however, have severely questioned the soundness of this support. *See, e.g.,* St. Antoine, *supra* note 3, at 33-34; Summers, *Individual Protection, supra* note 3, at 485; Note, *Job Security, supra* note 3, at 699-700; Note, *Implied Contract, supra* note 3, at 341 nn.53 & 54.

19. Annot., *supra* note 14, at 470; Annot., *Employee's Arbitrary Dismissal as Breach of Employment Contract Terminable At Will,* 62 A.L.R.3d 271 (1975). *See also* Note, *Limiting the Right to Terminate, supra* note 3, at 206 n.30.

20. *See, e.g.,* Summers, *Individual Protection, supra*, note 3, at 484-86; Comment, *Protecting At Will Employees, supra* note 3, at 1824-36; Note, *Job Security, supra* note 3, at 700; Note, *Implied Contract, supra* note 3, at 342-43, 346-47.

21. *See, e.g.,* CAL. LAB. CODE § 2922 (West 1978); GA. CODE ANN. §§ 66-101 (1979).

B. *Statutory Restrictions on the Right to Terminate At-Will*

Congress and various state legislatures have prohibited, in certain instances, the summary termination of an at-will employee.[23] The primary federal statutory schemes that limit an employer's right to terminate an at-will employee are the Labor Management Relations Act (LMRA)[24] and Title VII of the Civil Rights Act of 1964.[25] The LMRA prohibits termination for exercising the right to organize and select an employee representative.[26] Title VII prohibits any termination based upon discrimination involving race, color, religion, sex, or national origin.[27] In enforcing these statutes, courts have maintained that an employer is free to terminate an employee for any reason except one specifically prohibited by these statutes.[28] Other legislation restricting the right to terminate includes: (1) the Age Discrimination in Employment Act of 1967;[29] (2) the Occupational Safety and Health Act of 1970;[30] (3) the Vietnam Era Veterans Readjustment Assistance Act;[31] (4) the Fair Labor Standards Act;[32] and (5) the Rehabilitation Act of 1973.[33] State statutes contain similar limitations.[34]

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22. *See* Adair v. United States, 208 U.S. 161, 172-76 (1908).

23. Generally speaking, United States government employees, as well as various state and municipal employees, may not be terminated without a hearing and, in some instances, government employees cannot be fired except upon a showing of cause. *See, e.g.,* 5 U.S.C. § 7513 (Supp. IV 1980) (Civil Service Reform Act of 1978). For example, the Civil Service Reform Act of 1978 provides that a government agency may remove or otherwise discipline a covered employee only for such cause as will promote the efficiency of the Civil Service. The statute also provides a notice period prior to adverse action and affords the employee the right to be represented by an attorney and the right to a written decision enumerating the reasons for the action taken. *Id.*

24. 29 U.S.C. §§ 141-157 (1976 & Supp. III 1979).

25. 42 U.S.C. §§ 2000e-1-20002-17 (1976 & Supp. III 1979).

26. *See* 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1976).

27. *See* 42 U.S.C. § 2000e-2(a) (1976).

28. *See, e.g.,* NLRB v. Condenser Corp. of America, 128 F.2d 67, 77 (3d Cir. 1942).

29. 29 U.S.C. § 621 (1976) (prohibiting discrimination based on age).

30. 29 U.S.C. § 660(c)(1) (1976) (prohibiting discrimination against an employee for assertion of rights guaranteed under the Occupational Safety and Health Act).

31. 38 U.S.C. §§ 2021(a)(A)(i), 2021(a)(B), 2021(b)(1) (1976) (guaranteeing the right to re-employment upon satisfactory completion of military service and prohibiting discharge "without cause" within one year after re-employment).

32. 29 U.S.C. § 215(a)(3) (1976) (prohibiting discharge of an employee for filing any complaint or instituting any proceeding under the Fair Labor Standards Act).

33. 29 U.S.C. § 794 (Supp. IV 1980) (requiring affirmative action to advance the employment of handicapped individuals by government contractors or subcontractors).

34. *See* Note, *Limiting the Right to Terminate, supra* note 3, at 203 n.10. For example, state legislatures have also provided some protection for at-will employees. Several states have statutes prohibiting discharges based upon political activity. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 56, § 33 (West 1975). For a collection of state laws regarding firing for political activity, *see* [1982] LAB. L. REP. (CCH) (State Laws) ¶ 43,045. Some states prohibit discharges because of physical handicaps. *See, e.g.,* CAL. LAB. CODE § 1420(a) (West Supp. 1981); MASS. ANN. LAWS ch. 149, § 24K (Michie Law. Co-op. 1976); MINN. STAT. ANN. § 363.03, Subd. 1(2) (West Supp. 1981). A few states do not permit employers to take action against employees for serving as jurors or for indicating their availability as jurors, for example, Idaho, Massachusetts, Michigan, North Dakota, and Vermont. For a collection of state laws regarding termination for serving on a jury, see [1982] LAB. L. REP. (CCH) (State Laws) ¶¶ 43,035, 54,055. Other

The principal goals of this federal and state legislation have been to: (1) promote unionization as a countervailing force against employer power and control;[35] (2) establish a minimum level of economic entitlement for employees;[36] (3) combat discrimination against specific groups in hiring and dismissals;[37] (4) protect employee health and safety;[38] and (5) guarantee a minimum level of security for retirement and for the survivors of wage earners.[39] In addition, the "assumption of risk doctrine" as it applied to employment has been effectively repealed by workers' compensation laws.[40]

III. Erosion of At-Will Employment

Perhaps the most significant recent legal development affecting employment relations has been the modification of at-will employment in a number of jurisdictions.[41] In the past twelve years, critics

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states prohibit termination for refusing to take a lie detector test, for example, Connecticut, Hawaii, Idaho, Maryland, Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, and Washington. For a collection of relevant state laws, see [1982] LAB. L. REP. (CCH) (State Laws) ¶ 43,055. Another common provision in state laws is a prohibition against retaliatory termination for filing a workers' compensation claim. *See, e.g.,* TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980). *See also* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT ch. 3 (1966); Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers,* 61 NW. U. L. REV. 907 (1967).

35. *See supra* notes 24 and 26.

36. 26 U.S.C. §§ 3301-3311 (1976) (Federal Unemployment Tax Act); 29 U.S.C. §§ 201-219 (1976) (Fair Labor Standards Act of 1938) (minimum wage and hours); *see* U.S. DEPT. OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS (1972) (federal-state unemployment insurance system). *See generally* W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 545-639 (1974).

37. *See supra* notes 25, 29-31, 33.

38. *See supra* note 30.

39. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C., Social Security Act, Pub. L. No. 271, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C.).

40. *See* I. A. LARSON, WORKMEN'S COMPENSATION §§ 5.00-.20, at 33-39 (1978).

41. *See* Comment, *The Unemployment-at-Will Rule, supra* note 3; Note, *Limiting the Right to Terminate, supra* note 3, at 203-04 n.11. For example, courts in at least 18 states have adopted a public policy exception to at-will employment. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Jackson v. Minidoka Irrigation, 98 Idaho 330, 563 P.2d 54 (1977); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas. Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Murphy v. City of Topeka-Shawnee County Dept. of Lab. Serv., 6 Kan. App. 2d 488, 630 P.2d 186 (1981); Firestone Textile Co. v. Meadows, No. 81-CA-2460-MR (Ky. Ct. App. Nov. 12, 1982); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Henderson v. St. Louis Housing Auth., 605 S.W.2d 800 (Mo. 1979); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Lally v. Copygraphics, 85 N.J. 668, 428 A.2d 1317 (1981); McCullough v. Certain Teed Products Corp., 70 App. Div. 2d 771, 417 N.Y.S.2d 353 (1979); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Krystad v. Lau, 65 Wash.2d 817, 400 P.2d 72 (1965); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

Courts in at least nine states, including the District of Columbia, have indicated that they might adopt a public policy exception to at-will employment given the appropriate factual setting. Larson v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978); Ivy v. Army Times Pub. Co., 428 A.2d 831 (D.C. App.

have increasingly sought to abrogate this relationship. Courts and some state legislatures have responded to this criticism by developing viable exemptions to at-will employment.

A. Court Action

1. Tort or "Abuse" Theories.—The circumstances in which an employer's right to terminate have been judicially curtailed under a tort or "abuse" theory divide into three categories. First, courts have been willing to permit an exception when the termination violates established public policy, especially a "clear," statutorily declared policy. Second, an exception has been applied when employees have been involved in "whistle blowing"; *i.e.,* the reporting by an employee of unlawful or improper conduct. Finally, courts have found an exception for "abusive" or "retaliatory" terminations; *i.e.,* when an employee refuses to accede to improper requests or demands.

(a) "Public Policy" exception.—One of the most important limitations that some courts have placed upon the termination of at-will employees is the public policy exception. This is usually applied when employees were terminated for: (1) refusing to violate a criminal statute; (2) exercising a statutory right; (3) complying with a statutory duty; or (4) observing the general public policy of the state. Specific examples of employee terminations violating some form of recognized public policy include: (1) declining to commit perjury at the employer's behest;[42] (2) refusing to participate in an illegal price-fixing scheme;[43] (3) serving on a jury;[44] (4) filing workers' compensation claims;[45] (5) refusing to take a lie detector test in a state prohib-

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1981); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); K.W.S. Mfg. v. McMahon, 565 S.W.2d 368 (Tex. Civ. App. 1978); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (Ct. App. 1980).

Courts in only six states have specifically rejected a public policy exception to at-will employment. Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980); Catania v. Eastern Airlines, Inc., 381 So. 2d 265 (Fla. Dist. Ct. App. 1980); Goodroe v. Georgia Power Co., 148 Ga. App. 193, 251 S.W.2d 51 (1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); Whitaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. 1981).

42. Ivy v. Army Times Pub. Co., 428 A.2d 831 (D.C. App. 1981); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

43. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *see also* Adler v. American Standard Corp., 432 A.2d 464 (Md. App. 1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). Some federal courts recently have permitted employees fired for refusing to participate in illegal price-fixing schemes to maintain a private cause of action under the federal antitrust laws. *See* Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982); Shaw v. Russell Trucking Line, 542 F.Supp. 776 (W.D. Pa. 1982); *but see In re* Industrial Gas Antitrust Litigation, 681 F.2d 514 (7th Cir. 1982).

44. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

45. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Lally v. Copygraphics, 85 N.J. 668, 428

iting its forcible administration;[46] (6) performing unauthorized catheterizations;[47] (7) mislabeling packaged goods;[48] (8) avoiding payment of commissions;[49] and (9) avoiding payment of a pension.[50]

Although the public policy exception has expanded the circumstances in which an employee may sue an employer, it is not without limits. Generally, the employee initially must demonstrate that the termination concerns a matter of public policy. When only private interests are involved, courts hesitate to allow recovery. For example, employees have had their claims denied when terminated for: (1) questioning an employer's internal management system;[51] (2) questioning an employer's integrity;[52] (3) threatening to sue an employer for an injury unrelated to employment;[53] (4) taking too much sick leave;[54] (5) misusing the employer's Christmas funds;[55] (6) seeking to examine an employer's books in the employee's status as a shareholder;[56] (7) attending night school;[57] and (8) cohabitating with one employee while having an affair with a married co-employee.[58]

(b) "Whistleblowing".—Terminations involving reporting to the employer or to government authorities the employer's or an employee's allegedly unlawful or improper conduct relate to the public policy exception. These situations essentially involve instances of either: (1) protective whistleblowing; or (2) active whistleblowing. "Protective whistleblowing" occurs when the employee is asked to commit a crime.[59] "Active whistleblowing" involves the employee seizing the initiative and disclosing his/her suspicions, which may or may not be well-founded. Cases have recognized this exception for reporting, to either government or employer authorities, conduct that may violate law when no statute requires an employee to report.[60]

A.2d 1317 (1981); *contra* Martin v. Tapley, 360 So. 2d 708 (Ala. 1978); Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. App. 1978).

46. Perks v. Firestone Tire & Rubber Co., 611 F.2d 1353 (3d Cir. 1979).
47. O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978).
48. Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980).
49. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).
50. Savodnik v. Korvettes, Inc., 489 F. Supp. 1010 (E.D.N.Y. 1980).
51. Keneally v. Orgain, 606 P.2d 127 (Mont. 1980).
52. Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978).
53. Daniel v. Magma Copper Co., 127 Ariz. App. 320, 620 P.2d 699 (1980).
54. Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979).
55. Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977).
56. Campbell v. Ford Indus. Inc., 274 Or. 243, 546 P.2d 141 (1976).
57. Scrogham v. Kraftco Corp., 551 S.W.2d 811 (Ky. App. 1977).
58. Ward v. Frito-Lay, Inc., 290 N.W.2d 536 (Wis. App. 1980).
59. *See* Tomery v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
60. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978).

(c) "Abusive" or "Retaliatory" termination.—In cases of abusive or retaliatory termination, the employer tries to exploit a position of power in the employment relationship. The employer then retaliates against the employee for refusing to accede to its demands.[61]

2. Contract Theories

(a) Express or implied guarantees.—This exception concerns situations in which employees have been told upon hiring that they would be employed so long as they "did the job."[62] Statements of this nature may create indefinite term contracts. These situations may occur through express agreement, oral or written, especially when an employer's personnel manual provides a policy for release of employees "for just cause only."[63] Personnel manuals potentially may have a much broader application. Employers can probably minimize liability, however, if they refrain from giving assurances or promises, oral or written, at any time.[64]

(b) Good faith and fair dealing.—Some courts have indicated that an implied-in-law covenant of good faith and fair dealing exists in all contracts, including employment contracts.[65] This covenant results when the totality of the relationship firmly establishes the indicia of an implied agreement that gives rise to the requirement of good faith and fair dealing. Among the factors indicative of this covenant are: (1) extraordinary length of service; (2) good employee performance demonstrated by routine receipt of raises, bonuses, and promotions; (3) employer assurances that employment would continue; (4) employer practice of not terminating except for cause whether based on an oral or written policy; and (5) no prior warning that the employee's position was in jeopardy.[66]

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61. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

62. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Magnan v. Anaconda Indus., Inc., 37 Conn. 38, 429 A.2d 492 (1980); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

63. *Id.*

64. *See* Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980). Personnel manuals and employee handbooks have been rejected as the basis for legally binding modifications of at-will employment in Illinois, Indiana, Kansas, Nebraska, and New York. *See* Sargent v. Illinois Inst. of Technology, 397 N.E.2d 443 (Ill. App. 1979); Shaw v. S.S. Kresge Co., 328 N.E.2d 775 (Ind. App. 1975); Johnson v. National Beef Packing Co., 551 P.2d 779 (Kan. 1976); Mau v. Omaha Nat'l Bank, 299 N.W.2d 147 (Neb. 1980); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Co. 1978), *aff'd,* 70 A.D.2d 791, 416 N.Y.S.2d 160, *aff'd,* 48 N.Y.2d 603, 396 N.E.2d 207 (1979); Edwards v. Citibank, N.A., 100 Misc. 2d 59, 418 N.Y.S.2d 269 (N.Y. Co. 1979), *aff'd,* 74 A.D.2d 553, 425 N.Y.S.2d 327, *appeal dismissed,* 51 N.Y.2d 875, 414 N.E.2d 400 (1980).

65. Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

66. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

B. Legislative Action

Despite the seemingly abundant legislation at the federal and state levels limiting the right to terminate at-will employees,[67] an outright alteration or abolition of at-will employment still remains to be achieved. Regretfully, the existing piecemeal restrictions may evidence a continued legislative acknowledgement that some vitality remains in the at-will employment relationship.

This piecemeal approach, however, does not indicate complete legislative failure to consider statutory regulation of at-will employment. Legislatures in Connecticut, Michigan, New Jersey, New York, Pennsylvania, Puerto Rico, South Dakota and Wisconsin have reviewed this.[68] Since 1980, Michigan, Puerto Rico and Wisconsin have enacted limited statutory protection.[69] This provision of only limited protection indicates a beginning of serious legislative action to firmly follow the path of many state judiciaries in modifying or abolishing at-will employment. As more courts make in-roads into this area, legislatures will experience increased pressure to create statutory solutions that specifically define employee and employer rights, instead of allowing fluctuating case law interpretations to supply definitions. The next ten years will witness continued debate on this issue as inflation, unemployment, and employee desires for increased job security remain of widespread concern.

IV. At-Will Employment in Pennsylvania

In a 1974 decision, the Supreme Court of Pennsylvania refused to create an outright nonstatutory cause of action for unjust or wrongful terminations.[70] The court did, however, acknowledge a limited public policy exception to at-will employment by indicating that "a discharge might plausibly give rise to a cause of action where a clear mandate of public policy is violated."[71] In 1981, the Pennsylvania House of Representatives, Committee on Labor Relations, began considering House Bill No. 1742. This bill would establish a statutory cause of action for unjust terminations.[72]

A. Court Action

Notwithstanding a possible restrictive public policy exception,

67. *See supra* notes 23-39.

68. *See* BARBASH, FEERICK & KAUFF, *supra* note 3, at 23, 65-79; BAKALY, JR. & FEERICK, *supra* note 3, at 42. *See also* Comment, *The Employment-at-Will Rule*, *supra* note 3.

69. BARBASH, FEERICK & KAUFF, *supra* note 3, at 23, 65-79; MICH. COMP. LAWS § 15.362 (1982); P.R. LAWS. ANN. tit. 29, §§ 185a, 185b (1982); S.D. CODIFIED LAWS ANN. §§ 60-1 to 60-4 (1982).

70. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

71. *Id.* at 185, 319 A.2d at 180.

72. Pennsylvania House of Representatives, H.B. No. 1742 (July 1, 1981).

Pennsylvania courts have followed the traditional view that either party may terminate an at-will employment relationship for any reason.[73] The Pennsylvania Supreme Court reexamined this view in *Geary v. United States Steel Corp.*[74] In *Geary,* an at-will employee was terminated for notifying the employer of serious defects in several products marketed by the employer.[75]

In affirming the case's dismissal, the court determined that the employee bypassed the employer's chain of command and created a nuisance. The court, however, indicated that in some circumstances an employee could have a cause of action for wrongful termination.[76] While cognizant of radical changes in the economic environment and employment relationships since the 1891 Pennsylvania decision[77] initially acknowledging the at-will employment relationship, the court declined to create an overall nonstatutory cause of action.[78] Consequently, *Geary* has not precluded all wrongful termi-

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73. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); Henry v. Pittsburgh & Lake Erie R.R. Co., 139 Pa. 289, 21 A. 157 (1891); Appeal of Colban, 58 Pa. Commw. 104, 427 A.2d 313 (1981); Yaindl v. Ingersoll-Rand Co. Standard Pump - Aldrich Div., 281 Pa. Super. 560, 422 A.2d 611 (1980); Reuter v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1353 (3d Cir. 1979); Callahan v. Scott Paper Co., 541 F. Supp. 550 (E.D. Pa. 1982); Wood v. Burlington Indus., Inc., 536 F. Supp. 56 (E.D. Pa. 1981); Boresen v. Rohm and Haas, Inc., 526 F. Supp. 1280 (E.D. Pa. 1981); Rogers v. International Bus. Mach. Corp., 500 F. Supp. 867 (W.D. Pa. 1980); Lekish v. International Bus. Mach. Corp., 469 F. Supp. 486 (E.D. Pa. 1979); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979); Arnold v. Great Atl. & Pac. Tea Co., Inc., 461 F. Supp. 425 (E.D. Pa. 1978); O'Neill v. A.R.A. Services, Inc., 457 F. Supp. 182 (E.D. Pa. 1978); Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. Pa. 1977); McGinley v. Burroughs Corp., 407 F.. Supp. 903 (E.D. Pa. 1975); *but see* Trainer v. Trainer Spinning Co., 224 Pa. 45, 73 A. 8 (1909).

74. 456 Pa. 171, 319 A.2d 174 (1974); *see also* BANNON, *supra* note 3, at 1.

75. George G. Geary's duties involved the sale of tubular products to the oil and gas industry. His employment was at-will. He claimed that his termination stemmed from a disagreement concerning one of the company's new products, a tubular casing designed for use under high pressure. Geary alleged that he believed the product had not been adequately tested and constituted a serious danger to anyone who used it. He voiced misgivings to his superiors and was ordered to "follow directions," which he agreed to do. Nevertheless, he continued to express reservations and took his case to a vice-president in charge of the product's sale. As a result of his efforts, the product was re-evaluated and withdrawn from the market. Despite these actions, which were in the best interest of the public and the company, he was summarily terminated. 456 Pa. at 171, 319 A.2d at 174.

76. The court stated:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of the areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. . . . We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at-will employment relationship and no clear mandate of public policy is violated thereby, an employee at-will has no right of action against his employer for wrongful discharge.

Id. at 184-85, 319 A.2d at 180.

77. *See supra* note 73.

78. The Court indicated that:

1. Suits of this nature could impact on the legitimate interests of employers in hiring and retaining the best personnel available and inhibit the critical judgments by employers concerning employee qualifications.
2. Suits of this nature could impose a heavy burden upon the judicial system in terms of an increased case load and thorny problems of proof.

456 Pa. at 181, 319 A.2d at 179.

nation actions. Several claims have been filed in state and federal courts within Pennsylvania; these have attempted to fall within *Geary's* apparent restrictive public policy exception.[79] Aside from cases grounded in traditional tort theory, an analysis reveals that the public policy exception in Pennsylvania applies only when a *clear* constitutional or statutory mandate exists.[80]

Any discussion of this area within Pennsylvania should not omit *Trainer v. Trainer Spinning Co.*[81] Pennsylvania courts and commentators who have reviewed at-will employment have repeatedly overlooked this decision.[82] *Trainer* indicates that the Pennsylvania Supreme Court, as early as 1909, permitted recovery for a wrongful termination based on a contractual theory.[83] *Trainer* involved the termination of an employee who had been hired to manage a spinning company.[84] The facts made no reference to any written employment agreement. Only corporate minutes and resolutions referred to the employment. Termination occurred after differences arose between the employee and some members of the corporation's board of directors. The employee sued to recover the balance of the salary allegedly due for the remaining period of time that the employee was not permitted to continue as a manager. A jury trial resulted in a verdict that allowed the recovery. The Pennsylvania

79. *See supra* note 73.

80. Subsequent Pennsylvania decisions have recognized causes of action for wrongful termination where employees have alleged retaliations for exercise of their statutory rights or duties. For example, termination of an employee for serving on jury duty, refusing to submit to a polygraph examination, or to participate in an allegedly illegal price-fixing scheme, violates a clear mandate of public policy. Reuter v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979). In fact, within Pennsylvania there is already evidence that jury verdicts favoring employees are occurring in unreported cases. *See* Weiner, *supra* note 3; Halbert, *supra* note 3.

Other cases, however, have rejected wrongful termination claims where the public policy allegedly violated has not been defined by the legislature. For example, reporting that company money was used to finance loan-shark operations and to bribe officials. *See* O'Neill v. ARA Services, Inc., 457 F. Supp. 182 (E.D. Pa. 1978).

In several cases, plaintiffs have attempted to transform allegations of age, sex, race, or handicap discrimination into wrongful termination claims. These plaintiffs have maintained that the public policy against discrimination is statutorily defined and that violations of this policy should be actionable under the recognized exception to employment at-will. Federal courts interpreting Pennsylvania law, however, have rejected these contentions, holding that the exclusive remedy for allegations of age, race, sex, or handicap discrimination is provided by the Pennsylvania Human Relations Act. PA. STAT. ANN. tit. 43, §§ 951 *et seq.* (Purdons 1964, Supp. 1982-83); Wolk v. Saks Fifth Avenue, Inc., 31 Fair Empl. Prac. Cas. (BNA) 858 (1983); Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978); Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. 1977); Bruffett v. Warner Communications, Inc., 534 F. Supp. 375 (E.D. Pa. 1982); *but see* McGinley v. Burroughs Corp., 407 F. Supp. 903 (E.D. Pa. 1975); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

81. 224 Pa. 45, 73 A. 8 (1909).

82. A review of Shepards Citations indicates that this case has never been overruled or cited by any court. Its only reported recognition outside of its original publication appears in the Annotated Law Reports. *See* Annot., *Vacation Pay Rights of Employee Not Hired Under Collective Labor Agreement,* 91 A.L.R.2d 1079 n.4 (1963).

83. 224 Pa. 45, 48, 73 A. 8, 10 (1909).

84. *Id.*

Supreme Court upheld the jury's verdict and indicated that "the jury could very properly . . . determine whether there was 'just cause' for the discharge."[85]

This case is significant. It supports an additional exception to at-will employment other than a public policy exception based on an express or implied contract.[86] A "just cause" requirement may also be a prerequisite to termination.[87] *Trainer* analogizes to cases in other jurisdictions that allow recovery for a wrongful termination and that involve express or implied contracts founded on policy books, handbooks, personnel manuals, promissory estoppel, reliance and change of position by the parties, oral promises, corporate minutes, etc.[88] In fact, Pennsylvania courts have already recognized that, for "public employees," a handbook may create an employment property right that requires a hearing prior to termination.[89]

Using *Trainer* as a basis, an employee should prevail in Pennsylvania if he/she can establish either all or a combination of any of the following: (1) that the termination without "just cause"[90] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts, especially where there has been a substantial length of service; raises, bonuses, and promotions were routinely received; prior assurances were given that employment would continue if a "good job" was performed; the employer acknowledged a practice of not terminating personnel except for cause; or no formal criticism or warning was received that employment was in jeopardy; and (2) the employer breached its policies mandating a responsibility to engage in good faith or fair dealing rather than in arbitrary, capricious, or discriminatory conduct with respect to employees.[91] Therefore, in Pennsylvania, judicial exceptions to at-will employment should be recognized if founded on a violation of public policy, or an express or implied contract.

B. Legislative Action — Pennsylvania House Bill 1742

Recently, within the Pennsylvania Legislature, House Bill No. 1742 was presented for consideration.[92] House Bill No. 1742 pur-

85. *Id.* at 51, 73 A. at 10.
86. *See supra* notes 62-66.
87. Trainer v. Trainer Spinning Co., 224 Pa. 45, 51, 73 A. 8, 10 (1909).
88. *See supra* notes 62-66.
89. *See* Appeal of Colban, 58 Pa. Commw. 104, 427 A.2d 313 (1981).
90. Trainer v. Trainer Spinning Co., 224 Pa. 45, 51, 73 A. 8, 10 (1909).
91. *See supra* notes 62-66.
92. Pennsylvania House of Representatives, H.B. No. 1742 (July 1, 1981). This proposed legislation reads as follows:

PENNSYLVANIA HOUSE BILL NO. 1742
INTRODUCED JULY 1, 1981
REFERRED TO THE COMMITTEE ON LABOR RELATIONS
AN ACT

ports to create a general statutory scheme to protect Pennsylvania's

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Protecting employees from unjust dismissal, providing for mediation and arbitration proceedings and providing legal remedies.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.

This act shall be known and may be cited as the "Unjust Dismissal Act."

Section 2. Definitions.

The following words and phrases when used in this act shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Bureau." The Bureau of Mediation of the Department of Labor and Industry.

"Dismissal." An involuntary discharge from employment, including a resignation or voluntary quit resulting from an improper or unreasonable action or inaction of the employer.

"Employee." A person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied. Employee does not include those protected by a collective bargaining agreement or those protected by civil service or tenure against unjust discharge, or a person who has a written employment contract of not less than two years and whose contract requires not less than six months' notice of termination.

"Employer." A person who has one or more employees, including an agent of an employer.

"Registered mail." Includes certified mail.

Section 3. Dismissal of employees.

(a) Grounds. — An employer may not discharge an employee except for just cause.

(b) Notice. — An employer who discharges an employee shall notify the employee orally at the time of discharge and in writing by registered mail within 15 calendar days after the discharge, of all reasons for the discharge.

Section 4. Complaints of unjust dismissal.

(a) Time for filing. — An employee who believes that he or she has been discharged in violation of section 3(a) may file by registered mail a written complaint with the Bureau of Mediation, not later than 30 days after receipt of the employer's written notification of discharge as provided in section 3(b).

(b) Time when notice requirement not met. — If an employer fails to provide the discharged employee with written notification of his or her discharge and the reason for same, the discharged employee may file by registered mail a written complaint, as described above, with the Bureau not later than 45 calendar days after the discharge.

Section 5. Mediation.

(a) Appointment of mediator. — Upon receipt of a complaint from a discharged employee, the Bureau shall appoint a mediator to assist the employer and the discharged employee in attempting to resolve the dispute.

(b) Explanation of arbitration option. — If the dispute is not resolved within 30 calendar days after the commencement of mediation, the mediator shall explain to the employer and employee, the process and purpose of final and binding arbitration.

Section 6. Arbitration proceedings.

(a) Request for arbitration. — After the option of arbitration is made available to the discharged employee, the employee may request a continuance of mediation if he or she believes that a mutual resolution of the dispute is possible. If a mutual resolution is not likely, the discharged employee may file by registered mail a written request with the Bureau for arbitration of the dispute.

(b) Hearing. — Within 60 calendar days after his or her appointment, or within further additional periods to which the parties may agree, the arbitrator shall call a final hearing and shall give reasonable notice of the time and place of the hearing to the employer and the employee.

Section 7. Decision of arbitrator.

(a) Time of decision. — Within 30 calendar days after the close of the hearing, or within further additional periods to which the parties may agree, the arbitrator based upon the issues presented to him or her, shall render a signed opinion and award. The arbitrator shall deliver by registered mail a copy of the opinion and award to the employer, the employee and the Bureau.

(b) Remedies. — The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the discharge.

(2) Reinstating the employee with no, partial or full back pay.

(3) A severance payment.

employees from wrongful terminations.[93] Excluded from coverage are any employees protected by a collective bargaining agreement, those protected by civil service, tenured employees, or persons who have a written employment contract of not less than two years and whose contracts require not less than six months notice of termination.[94]

The bill would require employers to terminate employees only for "just cause."[95] If terminated, the employee must receive oral notification at the time of termination, and written notification by registered mail within fifteen calendar days of the termination, of all reasons for the action.

House Bill No. 1742 permits employees to file complaints concerning their terminations.[96] Written complaints must be filed with the Pennsylvania Bureau of Mediation within thirty days of the termination. Once the complaint is received, the Bureau must appoint a mediator to assist the employer and the terminated employee in resolving the dispute. If, within thirty calendar days after commencement of mediation, no mutually satisfactory resolution has occurred, the employee has the option of invoking arbitration proceedings.

After a hearing, the arbitrator may select remedies that include: (1) sustaining the termination; (2) reinstating the employee with no,

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(c) Settlement. — If the employer and the employee settle their dispute during the course of the arbitration proceeding, the arbitrator, upon their request, may set forth the terms of the settlement in the award.

Section 8. Effect of award.

An award of the arbitrator shall be final and binding upon the employer and the employee and may be enforced, at the instance of either the employer or the employee, in the court of common pleas for the county in which the dispute arose or in which the employee resides.

Section 9. Judicial review.

The court of common pleas for the county in which the dispute arose or in which the employee resides may review an award of the arbitrator, but only for the reason that the arbitrator was without or exceeded his jurisdiction, or the award was procured by fraud, collusion or other similar and unlawful means. The pendency of a proceeding for review shall not stay automatically the award of the arbitrator.

Section 10. Contempt

Any employer or employee willfully disobeying a lawful order of enforcement issued by the court, may be held in contempt. The punishment for each day that said contempt shall be a fine not to exceed $250 per day.

Section 11. Construction of act.

This act shall not supersede an employer's grievance procedure that provides for impartial and final and binding arbitration of discharge-related grievances. Upon the request of an employer or employee, the Bureau shall determine whether or not an employer's grievance procedure meets this standard.

Section 12. Posting copy of act.

An employer shall post a copy of this act in a prominent place in the work area.

Section 13. Effective date.

This act shall take effect immediately.

93. For a discussion of this bill *see* BOSCH, *supra* note 3, at 14.

94. Pennsylvania House of Representatives, H.B. 1742 (July 1, 1981).

95. *Id.*

96. *Id.*

partial, or full backpay; or (3) ordering a severance payment.[97] The arbitrator's decision is appealable to the court of common pleas for the county where the dispute arose or where the employee resides. Judicial review of the award would be limited. The award could be set aside only if the arbitrator exceeded his/her jurisdiction, or if the decision was procured by fraud, collusion, or other similar and unlawful means.[98]

It is likely that House Bill No. 1742 will not be enacted as originally proprosed, if at all; however, the bill provides an excellent reference point for all interested parties to begin the debate on abrogating at-will employment through legislative action. As employees become increasingly concerned over the importance and security of their jobs, they will in greater numbers demand that some form of legislative action be taken to preserve their jobs, especially in times of inflation and high unemployment.

V. Abolishing At-Will Employment Through Legislation

An employer enjoys formidable power over its employees, and when that employer is a large corporation the power has virtually no limit. "Take-it-or-leave-it" is the name of the game.[99] Recruiters, to attract the most qualified employees, commonly state that the employee will enjoy life-long employment if he/she performs well. Similarly, a conscientious employer attempting to further positive employee relations may include in an employee handbook a grievance procedure or a statement that termination will be for only "just cause." Likewise, a personnel manager, in making an employment offer, may quote a salary on a per annum basis. These typical employer actions have for years constituted the norm. It was rarely considered that such commonplace statements, representations, and policy enunciations might form the basis for employer liability.

Today, there is a growing recognition that the at-will employee should receive protection similar to most public employees and union-organized employees in the private and public sectors. The dissent by Justice Roberts in *Geary v. United States Steel Corp.* takes on special significance as a definitive statement of these employees' rights.[100] Justice Roberts called upon the Pennsylvania Supreme Court to take the first step and protect at-will employees from arbitrary and retaliatory terminations.[101] Undeniably, this right goes back to the medieval Statute of Labourers that imparted a "just

97. *Id.*
98. *Id.*
99. *See* LORE, *supra* note 3, at 6.
100. 456 Pa. 171, 194, 319 A.2d 174, 185 (1974) (Roberts, J., dissenting).
101. *Id.*

cause" requirement in employee terminations.[102]

Job terminations are treated quite differently in other areas of the industrial world. The International Labor Organization (ILO) recommended in 1963 that there should be a "valid reason for such termination connected with the capacity or conduct of the worker based on the operational requirements [of the employer]."[103] This recommendation was considered again at the ILO International Labor Conference in the summer of 1982.[104] The convention called for better protection for at-will employees. Regretfully, the American government and its business delegates adhered to their traditional "tunnel vision" approach on this question and voted against the proposal.[105] Significantly, all the Common Market countries, Sweden, Norway, Japan, and Canada, afford statutory protection against wrongful employment terminations.[106]

The practice in Western Europe is to hear wrongful termination claims before specialized labor courts or industrial tribunals. Typically these are tripartite. These panels normally consist of a professional judge, or legally trained individual, serving as chairman along with laypersons.[107]

That all employees are entitled to protection against wrongful terminations should be taken as a given.[108] The question involves whether the courts or the legislatures should be the primary movers in abrogating at-will employment. Through the courts a body of common law would result. Statutory solutions would involve selection of tribunals and procedures. Both would be confronted with the problem of selecting remedies. While courts may be unwilling "to break through their self-created crust of legal doctrine,"[109] legislation is often the product of organized interest groups.[110]

Recent judicial decisions limiting at-will employment make it possible to foresee what the judiciary will impose.[111] Courts are likely to be long on generalization and short on detail when the situ-

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102. *See supra* notes 12-18 and accompanying text.

103. Employer Discipline: I.L.O. Report, 18 RUTGERS L. REV. 446, 449 (1964).

104. *News and Background Information,* 110 LAB. REL. REP. (BNA) 179 (July 5, 1982).

105. *Id.* The vote was 356 in favor, 9 against, and 54 abstentions. The three United States delegates were joined in voting against the proposal by delegates from Iraq, Saudi Arabia, Lebanon, Brazil, and Chile. It is interesting to note that the Canadian government, employer, and labor representatives all voted for the proposal. *Id.*

106. Association of the Bar of the City of New York Committee Report of the Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal,* 36 RECORD ASS'N OF THE BAR OF THE CITY OF NEW YORK No. 4, § IIIC (April, 1981).

107. ST. ANTOINE, *supra* note 3, at 35.

108. This view has most recently been prominently advanced by the distinguished professor from the University of Michigan, Theodore J. St. Antoine. *See* ST. ANTOINE, *supra* note 3, at 35; *News and Background Information,* 107 LAB. REL. REP. (BNA) 911 (June 1, 1981).

109. SUMMERS, *Individual Protection, supra* note 3, at 521.

110. PECK, *supra* note 3.

111. *See supra* notes 41-66, 70-71, 73-91, 100-101.

ation requires outlining procedures and remedies.[112] Even though legislatures may not wish to take the initiative for understandable political reasons, they may be compelled to take action by the boldness of some courts.[113] At some point, employers may support legislation in the belief that the compromises and greater exactness of a statutory solution are preferable to the broad strokes and blurred outlines often produced by an uninnovative judiciary.[114] Even more important, nonunionized employers may perceive legislation as the most important deterrent to unionization of their plants because the union's argument of increased job protection from wrongful termination is minimized.[115]

The result may be that in a number of states the process of abrogating at-will employment will require two stages. The courts may take the first step, which may be considered as tentative. After this, the legislatures may find themselves compelled to provide a more definitive, logical, and orderly framework for resolution of these disputes.[116]

Pennsylvania should not follow this two-stage process. Courts are neither equipped to handle the additional caseload nor sufficiently experienced in the area of employee terminations. The long and procedurally cumbersome judicial process cannot provide adequate or swift remedies to the parties involved.[117] Adequate consideration of employers' and employees' interests in at-will employment relationships demands new, specialized legislation. The judiciary may appropriately respond to the extreme case or to the atypical situation; however, courts have no capacity to construct an administrative mechanism for daily enforcement and the average person has no ready access to their more formalized processes.

Any statute should take the initial handling of these matters out of the court's jurisdiction. Instead, arbitrators should handle all employee termination disputes. These arbitrators should receive the same court deference as arbitrators in other labor matters receive.[118]

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112. ST. ANTOINE, *supra* note 3, at 35.

113. *Id.*

114. This promise of a union bargaining greater job security cannot be underestimated. It is one of the most important reasons why employees seek to organize. On the other hand, organizational labor may be a critical factor in securing legislative relief. It is the only interest group that might be willing to take the lead in promoting such a cause. A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will undercut one of the unions' prime selling points. This possibility cannot be denied. Organized labor, however, could profit considerably from refurbishing its image as the champion of the disadvantaged. More practically, a universal rule against termination without cause could actually prove beneficial to unions in their organizing drives by protecting union sympathizers. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United

Arbitration would provide a proven, quick, inexpensive, and final resolution without overburdening the courts.[119]

The statute should articulate a standard for lawful termination or discipline in terms similar to "just cause."[120] Certain employees

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Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). The grievance arbitration process has been described as being:

> at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of the disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

119. *See* MENNEMEIER, *supra* note 3.

120. Most collective bargaining agreements in the private and public sectors do, in fact, require "cause" or "just cause" for termination or other discipline. Where this is not contained in a collective bargaining agreement many arbitrators imply a "just cause" limitation. For instance, Arbitrator Walter E. Boles held that "a just cause" basis for consideration of disciplinary action is, absent or clear proviso to the contrary, implied in a modern collective bargaining agreement. *See* Cameron Iron Works, Inc., 25 Lab. Arb. (BNA) 295, 301 (1955). The reason is:

> If the Company can discharge without cause, it can lay off without cause. It can recall, transfer, or promote in violation of the seniority provisions simply in invoking its claimed right to discharge. Thus, to interpret the Agreement in accord with the claim of the Company would reduce to a nullity the fundamental provision of a labor-management agreement — the security of a worker in his job.

See Atwater Mfg. Co., 13 Lab. Arb. (BNA) 747, 749 (1949).

The general significance of the terms "cause" or "just cause" were discussed by Arbitrator Joseph D. McGoldrick as follows:

> . . . "[I]t is common to include the right to suspend and discharge for "just cause," "justifiable cause," "proper cause," "obvious cause," or quite commonly simply for "cause." There is no significant difference between these various phrases. These exclude discharge for things for which employees have traditionally been fired. They include the traditional causes of dischaige in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of "common law" that may be regarded either as the latest development of the law of "master and servant" or, perhaps, more properly as part of a new body of common law of "Management and labor under collective bargaining agreements." They constitute the duties owed by employees to management and, in their correlative aspect, are part of the rights of management. They include such duties as honesty, punctuality, sobriety, or, conversely, the right to dischage for theft, repeated absence or lateness, destruction of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.

Worthington Corp., 24 Lab. Arb. (BNA) 1, 6-7 (1955).

Absent precise definitions, "cause" or "just cause" may be considered any combination of the following factors:

(a) The "law of the shop" as to the particular offense; *i.e.,* the response to that offense developed over a period of years. Showing a consistent pattern of viewing that offense in a certain manner, as requiring severe or less than severe discipline;

(b) A consistent pattern of enforcement of rules and regulations and of making known the rules to all employees;

(c) Case histories of other incidents of enforcement;

(d) Known practices of severe discipline for certain offenses because of the product manufactured or safety consideration;

(e) Offenses calling for immediate suspension and those not requiring removal;

(f) On-premises and off-premises offenses, and the differences in their treatment;

(g) General "arbitral authority," derived from publication of awards, articles, etc.;

(h) The arbitrator's own sense of equity and his/her subjective judgment as to the signifi-

should be excluded from the statute. Among those appropriately excluded are probationary employees and employees covered by a contract or collective bargaining agreement providing for binding arbitration in the event of a termination.

Instead of opposing legislation, the prudent employer should welcome a statutory scheme as providing an orderly legal remedy outside the courtroom. The alternative involves the prospect of increased and costly litigation. Terminated employees can be expected to litigate new fact situations concerning an employer's obligation to deal with employees fairly and in good faith.

Preventive employer planning can be important. More responsible employee hiring, training, and termination procedures should be developed. In essence, abrogation of at-will employment may cause employers to make better employment decisions that may eventually effect improved personnel policies. These policies should result in more efficient use of personnel, if the employer conscientiously develops these areas.

At the same time, any legislation should create responsibilities for both employees and employers in terminations. Employers should be afforded protection for improper employee resignations that include usurping corporate opportunities to work for a competitor or to compete against the employer.[121] These general guidelines provide the framework for legislation that will not undermine the employment relationship. The legislation sets forth a speedy, just, inexpensive, and conclusive means for resolving one of the most important disputes between employee and employer.

VI. Statutory Proposal for Regulating At-Will Employment in Pennsylvania

A. Statutory Proposal

Outlined below is a statutory proposal for regulating at-will employment terminations within Pennsylvania:

EMPLOYEE/EMPLOYER PROCEDURES FOR EFFECTING TERMINATION OF THE

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cance, seriousness and weight to be given the incident involved, the record of the employee, or the circumstances causing the termination;

(i) The severity of the case's facts;

(j) Attempts made to rehabilitate the employee by the employer;

(k) Progressive discipline steps that may or may not have been taken;

(l) The discipline penalty imposed as it relates to the case's facts;

(m) Whether a "second chance" is warranted from the employee's prior record; or

(n) Whether the employee is unreclaimable as indicated by his/her prior record, facts of the case; etc.

For a general discussion of "cause" and "just cause" *see* F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 611-13 (3d ed. 1976).

121. *See* Annot., *Liability for Inducing Employee Not Engaged for Definite Term to Move to Competitor,* 24 A.L.R.3d 821 (1969).

Section 1. Short Title.

This act shall be known and may be cited as the "Act Regulating Employment Terminations."

Section 2. Definitions.

The following words and phrases when used in this act shall have, unless clearly indicated otherwise, the meanings given to them in this section:

"Appointing Authority." Either the Pennsylvania Bureau of Mediation or the Court of Common Pleas, whichever is designated the responsibility through the filing of a complaint for appointing an arbitrator to hear an employment termination.

"Bureau." The Bureau of Mediation of the Department of Labor and Industry.

"Court of Common Pleas." The Court of Common Pleas for the county where the termination of employment occurred.

"Employee." Any person who performs a service for wages or other remuneration under a contract of hire that is written, oral, express, or implied. Employee includes any person employed by an individual, person, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions or any agency, authority, board, or commission created by them. Employee does not include those: (a) covered by a collective bargaining agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; (b) protected by a statutory civil service or tenure procedure; (c) who has a written employment agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; or (d) that is in a probationary status.

"Employer." Any individual, person, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions or any agency, authority, board, or commission created by them.

"Person." Any individual, sole proprietorship, partnership, association, corporation, and the Commonwealth of Pennsylvania, including any of its political subdivisions or any agency, authority, board, or commission created by them.

"Probationary Status." A six month period of time that occurs immediately after an employee is hired by an employer. It shall not include the situation in which an already employed employee is given a new employment position, advancement, or promotion by his/her employer.

"Termination of Employment." Any involuntary or voluntary discontinuation of the employment relationship by an employee or employer including but not limited to: terminations, discharges, resignations, firings, layoffs that result from an improper action or inaction of an employee or employer, etc.

Section 3. Termination of Employment.

Termination of the employment relationship by an employee or employer shall not occur unless there is a valid reason for the termination that is not arbitrary, capricious, or discriminatory and relates to: (a) the ability or conduct of the employee; (b) the operational requirements of the employer; or (c) an employee's desire to seek other employment or discontinue current employment.

Section 4. Termination of Employment — Notice

(a) *Employee Initiated Terminations.* An employee who terminates the employment relationship on his/her own initiative shall notify the employer orally of the intended termination at least fifteen (15) calendar days prior to the effective date of termination and shall before the date of termination provide the employer in writing with the reasons for the discharge either through delivery in person or by certified mail return receipt requested.

(b) *Employer Initiated Terminations.* An employer who terminates the employment relationship shall notify the employee orally at the time of the employment termination of the reasons therefore and thereafter in writing by delivery in person or by certified mail return receipt requested within ten (10) calendar days after the employment termination of all the reasons therefor.

Section 5. Termination of Employment — Complaints.

An employee or employer who believes that a termination of employment has occurred in violation of section 3 may file by certified mail return receipt requested a written request for arbitration of the dispute with either, but not both, the: (a) Bureau of Mediation; or (b) the Court of Common Pleas for the county where the termination of employment occurred at the county's Prothonotary's office. This written request must be mailed by certified mail return receipt requested not later than thirty (30) days after receipt of the employee's or the employer's written notification as is provided for in Section 4. Where no written notification or an untimely written notification is provided in accordance with Section 4, the employee or employer must file this written request by certified mail return receipt requested not later than ninety (90) days after the employee's last date of employment.

Section 6. Arbitration.

(a) *Appointment.* Where a written request for arbitration has been filed with the Bureau of Mediation, the Bureau shall appoint an arbitrator within forty-five (45) days after the request is received from the panel of arbitrators maintained by the Bureau and shall within this time period notify the employee and employer of the appointment. In the event a written request for arbitration is filed with the Court of Common Pleas for the county where the termination of employment occurred, the Court on its own motion shall appoint an arbitrator within forty-five (45) days after the request is received by the county's Prothonotary's Office from a list of attorneys it shall maintain who it deems by experience, knowledge, and familiarity of employment relations are qualified to hear these disputes on an alternating basis.

(b) *Hearing.* Within thirty (30) calendar days after his/her appointment, or within further additional periods of time as the employee and employer may in writing agree, the arbitrator shall schedule a hearing.

(c) *Conduct of Hearing.* The hearing shall be conducted in the following manner:

(1) *Fixing of Locale* — The parties may mutually agree upon the locale where the arbitration is to be held. If there is a dispute as to the appropriate locale, the arbitrator shall have the power to determine the locale and his/her decision shall be binding. At least ten (10) days prior to the hearing, the arbitrator shall mail notice of the time and place of the hearing, unless the parties otherwise agree.

(2) *Vacancies* — If any arbitrator should resign, die, withdraw, refuse, or be unable or disqualified to perform the duties of his/her office, the Bureau or the Court of Common Pleas, whichever was the original appointing authority, shall, on proof satisfactory to it, declare a vacancy. Vacancies shall be filled in the same manner as the making of the original appointment, and the matter shall be reheard by the new arbitrator.

(3) *Representation of a Party* — Any party may be represented at the hearing by an attorney or by another representative of their choosing.

(4) *Stenographic Record* — Any party may request a stenographic record by making their own arrangements. If a transcript is agreed by the parties to be the official record of the proceeding, it must be made available to the arbitrator. The cost of a record shall be paid by those parties requesting one in such proportion as they may agree.

(5) *Attendance at Hearing* — Persons having a direct interest in the arbitration are entitled to attend hearings. The arbitrator shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other persons.

(6) *Adjournments* — The arbitrator for good cause shown may adjourn the hearing upon the request of a party or upon his/her own initiative, and shall adjourn when all the parties agree thereto.

(7) *Oaths* — Before proceeding with the testimony, the arbitrator may, in his/her discretion, require witnesses to testify under oath administered by him/her or if requested by either party.

(8) *Arbitration in the Absence of a Party* — The arbitration may proceed in the absence of any party, who, after due notice acceptable to the arbitrator, fails to be present or fails to obtain an adjournment.

(9) *Evidence* — The parties may offer evidence as they desire and shall produce additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrator may subpoena witnesses and documents upon his/her own initiative or upon the request of any party. The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the arbitrator and all of the

parties, except where any of the parties is absent, in default, or has waived his/her right to be present.

(10) *Evidence by Affidavit and Filing of Documents* — The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he/she deems proper after consideration of any objections made to its admission.

(11) *Inspection* — Whenever the arbitrator deems it necessary, he/she may make an inspection in connection with the subject matter of the dispute.

(12) *Closing of Hearings* — The arbitrator shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for filing of these briefs. The time limit within which the arbitrator is required to make his/her decision shall commence to run, in the absence of other agreement by the parties, upon the closing of hearings.

(13) *Reopening of Hearings* — The hearings may be reopened by the arbitrator on his/her own motion, or on the motion of either party, for good cause shown, at any time before the decision is made.

(14) *Time of Decision* — The decision shall be rendered promptly by the arbitrator and, unless otherwise agreed by the parties, not later than thirty (30) days from the date of closing the hearings.

(15) *Release of Documents for Judicial Proceedings* — The arbitrator shall, upon the written request of a party, furnish to the party at its expense certified facsimilies of any exhibits in the arbitrator's possession that may be required in judicial proceedings relating to the arbitration. Personal notes and working papers of the arbitrator are exempt from disclosure.

(16) *Judicial Proceedings* — The arbitrator is not a necessary party in any subsequent judicial proceedings relating to the arbitration unless a court so requires.

(d) Decision. After the close of the hearing, the arbitrator, based upon the issues presented, shall render a written opinion outlining the reasons for the decision. The arbitrator shall sign and date the decision. A copy of the decision shall be mailed to the employee, employer, and the appointing authority by certified mail return receipt requested. Parties shall accept as legal delivery the date the decision is received in the mail via certified mail return receipt requested from the arbitrator, addressed to such party at its last known address or to its attorney, or other representative appearing at the hearing.

(e) *Remedies.* The remedies from which the arbitrator may select include, but are not limited to, the following:

(1) Sustaining the termination of employment against the employee or employer with or without a monetary award.

(2) Reinstating the employee with no partial, or full back pay.

(3) A severance payment.

(4) Adding a reasonable rate of interest to any monetary award.

(5) Requiring restitution for any employee or employer property.

(6) Attorney's fees or other fees for a party's representative.

(7) Any other remedy permitted under the law.

(f) *Settlement.* At any time after the appointment of the arbitrator, the employee and employer may settle their dispute and the terms of the settlement shall be set forth in an arbitrator's decision.

(g) *Costs of Arbitration.* The employee and employer shall share equally the costs of the arbitration, but shall bear their own costs for witnesses and the presenting of their respective position unless otherwise decided by the arbitrator. The arbitrator shall set his/her own fee for the hearing of the dispute.

Section 7. Effect of the Arbitrator's Decision.

An arbitrator's decision shall be final and binding upon the employee and employer and may be enforced in the Court of Common Pleas for the county in which the dispute arose.

Section 8. Judicial Review.

The Court of Common Pleas for the county in which the dispute arose shall review the arbitrator's decision, upon petition by either an employee or employer filed within thirty (30) days after receipt of the arbitrator's decision. This review shall be only for the reasons that:

(a) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct of the arbitrator prejudicing the rights of any party;

(b) the arbitrator exceeded his/her powers; or

(c) the arbitrator refused to postpone the hearing upon good cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing so as to prejudice substantially the rights of a party.

The pendency of a proceeding for review by the Court of Common Pleas or any further appeal to either the Superior Court in appeals involving private sector employees or the Commonwealth Court in appeals involving public sector employees, or in subsequent appeals to the Supreme Court of Pennsylvania shall not automatically stay enforcement of the arbitrator's decision.

Section 9. Contempt.

An employee or employer who disobeys a lawful order for enforcement of an arbitrator's award issued by any court of this Commonwealth, may be held in contempt. The punishment for each day that the contempt occurs shall be a fine as set by the court, imprisonment, or any other enforcement measure deemed appropriate.

Section 10. Conflict With Other Acts.

Initiation of procedures pursuant to this act, shall preclude an employee or employer from instituting similar proceedings under any other act. The remedies and procedures of this act shall be

exclusive and shall not be construed to duplicate any other act or be in addition thereto.

Section 11. Notice of this Act.

(a) *Posting of Act.* An employer shall post a copy of this act in a prominent place of the work area.

(b) *Copy of Act to Employee.* Where the employer terminates the employment relationship, a copy of this act shall be provided along with the written notification provided for in section 4(b).

Section 12: Effective Date.

This act shall take effect 90 days after enactment and shall cover any termination of employment that occurs on or after the effective date of this act. This act shall not be retroactive.

B. Analysis of Statutory Proposal

In comparison to statutory schemes for the regulation of at-will employment that have been suggested within Pennsylvania[122] and other jurisdictions,[123] this proposal is unique. Its scope is much broader than a mere attempt to abrogate at-will employment. The proposal offers an all-encompassing attempt to set forth procedures for terminating the employment relationship by both employees and employers. Efforts to regulate this area must consider and balance both employee and employer rights. Employees must be protected from improper employment terminations initiated by employers and employers should be accorded equal recourse against improper employment terminations.

The proposal is intended to cover all employees and employers in the public and private sectors. Only limited exclusions are provided for: (1) employees covered by a collective bargaining agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; (2) employees protected by a statutory civil service or tenure procedure; (3) employees employed pursuant to a written employment agreement that contains a final and binding grievance arbitration procedure for the review of employment terminations; or (4) employees classified in a probationary status.

The standard to evaluate an improper termination by either an employee or employer is simple. The issue is whether a valid reason exists for the termination, which reason is not arbitrary, capricious, or discriminatory. This standard is broad yet specific in that a "valid reason" for the termination must exist.

Notice of an employment termination is required of both employees and employers. This notice must be given both orally and in writing. A cause of action for an improper termination occurs from

122. *See supra* notes 92-98 and accompanying text.
123. *See supra* notes 68-69 and accompanying text.

the date the written notice is received by certified mail return receipt requested. When no notice is given or timely received, the period for filing a complaint is increased. This extension is provided to encourage the giving of written notice; otherwise, potential backpay liability is extended.

The initiation of the complaint simply requires the filing of a request for arbitration. The complainant may select one of two choices. The initiation may occur through the services of the Bureau of Mediation of the Department of Labor and Industry or through the local Court of Common Pleas for the county in which the improper employment termination occurred.

The proposal places no additional burden on the Bureau of Mediation to administer this act. The Bureau already has available lists of arbitrators that it considers competent to handle these disputes. The only duty of the Bureau is to appoint an arbitrator. An employee and employer are given no discretion in the selection of the arbitrator. The selection is solely the responsibility of the Bureau of Mediation.

The act places an additional, yet not overburdensome, requirement on the Court of Common Pleas. The court must develop a list of attorneys that it feels can serve competently as arbitrators.[124] These individuals should have the experience, knowledge, and familiarity necessary to deal with employment relations.[125] This requirement is an effort to develop a pool of individuals who may be called upon later to serve as labor arbitrators for other disputes.

The at-will arbitration is conducted like any other labor arbitration. An arbitrator's award is final and binding on the parties, and can only be set aside through the same standards that apply to the review of any arbitration award. Failure to conform to an arbitration award carries a severe contempt penalty.

To discourage appeals of other than the most legitimate cases, no automatic stay of enforcement is provided. This lends further to

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124. Within Pennsylvania, court appointed arbitrators are already used to hear and decide civil cases. PA. CONS. STAT. ANN. tit. 42, § 7361 (Purdon's 1982). A similar pool of arbitrators may provide the training ground for what could eventually become a labor court. *See infra* note 125.

125. An even bolder approach would be to establish a separate system of labor courts within Pennsylvania to deal with any labor-related problem. This suggestion has been previously advanced by other commentators for use within the United States. *See* Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments,* 62 MICH. L. REV. 1115, 1122 and n.11 (1964). A system of specialized labor courts has been successful in Denmark, Germany, and Sweden. These courts could be operated with a simplified procedure like that used in small claims courts. In this way, cases could be readily presented by personnel managers, union representatives, or other laypersons without the necessity of being represented by attorneys. In simple cases, the use of attorneys may only obfuscate and complicate what is readily apparent. These courts would also be equipped to hear complex cases to give full scope to representation by legal counsel. *See* P. HAYES, LABOR ARBITRATION — A DISSENTING VIEW 116-18 (1966).

the finality and binding quality of any arbitrator's decision. To receive the benefit of a stay, a party must demonstrate some likelihood of success on appeal or extreme prejudice.

This procedure is not intended to duplicate any other remedies available for improper employment terminations. All employees must receive notice of the act. Finally, the effective date of the act is postponed for ninety days to allow employees and employers to prepare for the act's implementation.

This proposal is an effort to provide a quick, efficient, and economical means for resolving employment termination disputes between employees and employers without unduly placing an extra strain on the courts of this Commonwealth. Undeniably, as this area of the law continues to develop during the next ten years, legislatures will be increasingly called upon to regulate this area by both employees and employers. The proposal is intended as a beginning point for immediately addressing the needs of both employees and employers in the termination of any employment relationship.

VII. Personnel Policies to Avoid At-Will Employment Litigation

No employer desires engaging in litigation if it can be avoided. This is particularly true of suits brought by former employees charging wrongful termination. Even when an employer prevails, it may suffer damage from poor publicity. Because courts and legislatures are altering at-will employment, many employers may be left unprepared. Termination practices once acceptable may suddenly become inadequate.

Lawsuits, whether justified or not, generate poor public relations for employers. Consequently, many employers settle out of court to avoid negative publicity. Realizing this, more and more attorneys are ready to pursue at-will employment cases on a contingency basis because the likelihood of monetary settlement has increased.

It is only human nature for an employee to classify a termination as unjust. Whether the terminations are just or unjust, however, they often cause deep-seated emotional problems. Thus, the desire to sue for damages is not surprising. In view of the growing evidence of judicial and legislative sympathy for terminated employees, litigation will surely increase during the 1980s.

Despite this, employers can lessen their exposure to involvement in these cases. The following suggestions may aid in minimizing any employer liability:

1. Put the grounds for termination in writing and distribute this information to all employees. This may protect against charges of termination without proper warning.

2. Document every termination action. Keep precise records of conferences, warnings, probationary notices, remedial efforts, and other steps that precede termination.

3. Refine performance evaluations to give honest appraisals of each employee's weak and strong points. The courts are particularly sympathetic to documented evidence that a terminated employee had previously received favorable annual assessments.

4. Provide advance warning that an employee has taken a course possibly leading to termination unless changes occur in his/her performance. Put these notices in writing or have witnesses present at oral admonitions.

5. Watch for signs of an employee's work problems. Job-related stress or discontent over working conditions may turn a once satisfactory performer into a termination possibility. Signs include a drop in productivity, a tendency to slow down on the job, and an increase in the number of complaints. Try to reclaim such an employee before termination becomes necessary.

6. Involve two or more persons in the termination process. This practice can minimize suits that allege malice or personality conflicts between a terminated employee and a supervisor.

7. Review severance pay policies. If a terminated employee considers a severance payment fair, he/she may be less likely to initiate litigation. Any extra money expended usually amounts to only a fraction of what a court might award.

8. Develop a severance package that includes continuance, for a limited time, of health and life insurance benefits. Such courtesies may preclude any charges of vindictiveness and may help to mollify any injured feelings.

9. Terminate only when you must, and terminate only with care and compassion. In general, an exit interview should be conducted away from other employees to avoid embarrassment. The reason(s) for termination should be explained clearly and the nature of any reference to be given should be described.

10. Consider buying "defense and judgment" insurance. This relatively new form of coverage protects employers against lawsuits arising from cases other than personal-injury or property-damage suits covered under conventional insurance policies.

An employer should be able to document that a termination was for "cause" to prevent lawsuits, contest unemployment compensation claims, defend union challenges, or successfully litigate discrimination charges. In addition to keeping written records, an employer should follow clear-cut, well-publicized procedures for all disciplinary actions.

Proper attention to an employee's problem or the employer's

problems with him/her may save the employee's position and save the employer future trouble and expense. If the cause of an employee's problem is personal, counseling may provide the answer; if the problem is vocational, either transfer or retraining may help. It pays to postpone a termination until all other possibilities have been examined. If termination is unavoidable, however, the employer should proceed slowly and carefully; everyone will benefit in the end.

VIII. Conclusion

The foregoing examination of the at-will employment doctrine and its abrogation through legislative means has not purported to offer the only, or necessarily the preferable, method of dealing with this increasingly important question. However, it is believed that statutory regulation realistically offers the most concrete manner in which to confront this problem. The need for immediate and thoughtful study in this area is clear. Until the impact or viability of regulating employment terminations through statute is assessed, courts will continue to develop a common law that encourages overburdening the judicial system by failing to set forth specific guidelines. This will be costly for employees, employers, and an already overtaxed judicial system.

The time is *now* for all interested parties to begin a thoughtful and realistic examination of this developing area. No longer can employers ignore the impact of these disputes. Courts of this and other jurisdictions have already set forth sufficient warning signals for the initiation of legislative action.