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# Employment at Will: The French Experience as a Basis for Reform

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# COMMENT

# EMPLOYMENT-AT-WILL: THE FRENCH EXPERIENCE AS A BASIS FOR REFORM

Roughly one-quarter of the workers in the United States are represented by unions, leaving three-quarters subject to the vicissitudes of the employment-at-will doctrine.[1] At-will employees, as a general matter, lack protection against dismissal without cause.[2] That is, an employer may dismiss an "at will" employee without notice, "for good reason, bad reason or no reason at all," so long as the proffered reasons for dismissal do not violate random whistle-blowing provisions or federal and state anti-discrimination statutes.[3] The mirror image of the employer's right to dismiss at will is the right of an employee who was hired to perform work for an indefinite period of time to terminate the employment relationship for any reason at any time.[4]

By contrast, union employees enjoy the benefit of the collective bargaining agreement which, in a written contract between the employer

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1. For a survey of statistics on the status of employees at will and the number of employees annually terminated under the employment-at-will doctrine see Rodgers & Stieber, *Employee Discharge in the 20th Century: A Review of the Literature*, 108 MONTHLY LAB. REV. 35 (1985); Stieber, *Most U.S. Workers Still May Be Fired Under the Employment-At-Will Doctrine*, 107 MONTHLY LAB. REV. 34 (1984); Stieber, *Termination of Employment in the United States*, 5 COMP. LAB. L. 327 (1982); Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING 155, 160-61 (B. Dennis ed. 1980); Estreicher & Wolff, *At-Will Employment and the Problem of Unjust Dismissal* in CURRENT TRENDS AND DEVELOPMENTS IN LABOR AND EMPLOYEE RELATIONS LAW 195, 199 Practicing Law Institute (J. Waks ed. 1982) [hereinafter CURRENT TRENDS]; Keyes, *Emerging Rights of Unrepresented Employees and Protections from Arbitrary Discharge, supra* in CURRENT TRENDS at 143, 148.

2. Common exceptions to the employment-at-will rule found throughout the United States include civil servants, university and college professors. Interview with Janice Bellace, Associate Professor of Legal Studies and Management, The Wharton School, University of Pennsylvania, in Philadelphia (Mar. 23, 1987).

3. *Id.* *See* Keyes, *supra* note 1, at 146-147 (survey of federal anti-discrimination legislation).

4. For a statement of the rule see Keyes, *supra* note 1, at 143. *See* Adair v. United States, 208 U.S. 161 (1908); *see also* California Labor Code § 2(d) 922; Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (held no right of action for wrongful discharge where complaint discloses legitimate reason for termination); Ford v. Blue Cross & Blue Shield of Michigan, 389 N.W.2d 114 (Mich. Ct. App.1986) ("exit interview" after employee dismissed did not create implied contract employee would be dismissed for just cause).

and the union, expressly creates mutual rights and obligations.[5] The collective agreement lays down nearly all of the terms and conditions of employment of the employees in the bargaining unit.[6] One of the terms present in nearly all collective agreements is a term limiting the employer's power of discharge to cases in which just cause exists.[7] Non-unionized employees, however, remain subject to the traditional doctrine of at-will employment.[8]

State courts have recognized some exceptions to this doctrine in the past two decades.[9] For the most part, however, these are narrow exceptions, based on public policy concerns.[10] Some observers have argued that the continuing judicial erosion of the employment-at-will doctrine will move closer the date of true statutory reform of dismissal law.[11] The purpose of this Comment is to explore the feasibility of modeling either a federal or a uniform state statute governing dismissal law after statutes that now exist in a few states.[12] A look at other countries' statutory

5. Summers, *The Rights of Individual Workers, The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment At Will*, 52 FORDHAM L. REV. 1082, 1085 (1984).

6. *Id.* at 1088.

7. *Id.*

8. *Id.*

9. *See e.g.* Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980) (personnel manual which contained a "just cause" standard, gave rise to enforceable contract rights); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (alleged discharge for refusal to socialize with foreman; held, that an employer may not discharge if motivated by bad faith, malice or retaliation).

10. *See e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharge for performing the public obligation of jury duty); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (supplying information about fellow employee to police in criminal investigation).

11. *See generally* Estreicher, *Emerging Rights of Unrepresented Employees and Protections from Arbitrary Discharges* in CURRENT TRENDS AND DEVELOPMENTS IN LABOR AND EMPLOYEE RELATIONS LAW 155, Practicing Law Institute (J. Waks ed. 1982); Keyes, *supra* note 1, at 146-153; Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983); Decker *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. L. REV. 351 (1984); Hill, *Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal*, N. ILL. U.L. REV. 111 (1982); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466 (1983); Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983); Peck, *Employment Problems of the Handicapped: Would Title VII Remedies be Appropriate and Effective?*, 16 U. MICH. J.L. REF. 343 (1983); St. Antoine, *You're Fired*, 10 HUMAN RIGHTS 32 (1982); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 431 [hereinafter Summers, *Individual Protection*]; Summers, *The Rights of Individual Workers, supra* note 5; Note, *Employment at Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787 (1983); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 389 (1983); Note, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. (1984); Note, *The Employment-At-Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. MICH. J.L. REF. 435 (1983); Note, *Three New Exceptions to the Employment At Will Doctrine—Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 685 P.2d 1081 (1984), 60 WASH. L. REV. 209 (1984).

12. Recent state legislatures have considered but not passed bills in this area. In California, the Assembly considered Assembly Bill 1165 in 1983, which was introduced by Member McAlister and provided for relief if termination was found to be in breach of an implied contract and not based

development may also be instructive.[13] France provides one such model.

Part One of this Comment focuses on the French approach to the dismissal law. Part Two of the Comment examines France's restrictions on the employer's right to dismiss through the development of the judicial doctrine of *abus de droit*.[14] Part Two also analyzes the underlying purposes of the early dismissal legislation in France and explores the mechanics and judicial application of the French dismissal statute. Part Three examines the historical development of the employment-at-will doctrine in the United States and its judicial and legislative erosion. Part Four suggests a way to incorporate both the French model and the existing International Labor Organization unfair dismissal standards into our state statutory systems. The Comment concludes that adoption of unfair dismissal legislation on a state-by-state basis in the United States is not only timely and feasible but also desirable.

## *I. France*

The French Revolution shaped the master-servant system of employment relations.[15] The drafters of the Napoleonic Civil Code[16] were influenced by the principle of individual liberty.[17] As a result, the Civil Code established and respected the preeminence of the will of individual parties to enter freely into contracts for the "hiring of service."[18] Since

upon fair and honest cause or reason. It also considered Assembly Bill 3017 in 1974, also introduced by Member McAlister, which provided for mediation and arbitration procedures for wrongful discharge claims. The California Senate considered two bills: Senate Bill 2317 in 1983, which was introduced by Senator Royce and provided relief if termination was found to be in breach of an implied contract and not based upon fair and honest cause yet was not applicable to executives and Senate Bill 1348 in 1985, which was introduced by Senator Greene and was endorsed by the California Federation of Labor. In Michigan, the House considered House Resolution 5155 in 1983, which prohibited unfair discharge and provided for mediation and final and binding arbitration. The New York State Senate considered Senate Bill 8969 in 1984, which was introduced by Senator Pisani and protected employees from unjust dismissal. Lastly, the Pennsylvania House considered House Bill 2105 in 1984, which protected employees from unjust dismissal and provided for mediation and arbitration proceedings as well as legal remedies.

13. For an insightful discussion of the uses and misuses of comparative labor law see Whelan, *Labor Law Reform and Comparative Law*, 65 TEX. L. REV. 1425 (1985).

14. For an explanation of the concept of *abus de droit*, see *infra* note 50, and accompanying text.

15. For a general historical background on the development of workers' rights in France, see G. CAMERLYNCK & G. LYON-CAEN, PRÉCIS DE DROIT DU TRAVAIL, 6-25 (1973) [hereinafter DROIT DU TRAVAIL]; Camerlynck, *Contrat de Travail*, in *Dalloz Encyclopédie Juridique Répertoire de Droit du Travail* 1 (1976) [hereinafter *Contrat de Travail*]; F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY 44-72 (1964).

16. CODE CIVIL [C. CIV.] art. 1134 (codifies the principle that "contracts legally entered into have the authority of law with respect to the contracting parties").

17. DROIT DU TRAVAIL, *supra* note 15, at 150-51; *Contrat de Travail, supra* note 15, § 1.

18. The Civil Code treated all contracts with equal respect. Two specific kinds of contracts were addressed by the Civil Code: the contract for purchase and sale of merchandise and the contract for hiring of labor. In both instances, the principle of individual liberty and freedom of contract applied. *See* G. LYON-CAEN, CODE CIVIL (1928) (specific language of Code reproduced with annotation); *see* DROIT DU TRAVAIL, *supra* note 15, at 6-7; MEYERS, *supra* note 15, at 44-45.

the government would not interfere with the relationships created between employer and employee via the contract for labor, employment relationships were largely unregulated.[19]

The French National Assembly enacted a series of statutes which acted to condemn guilds and medieval corporations as against public interest. The National Assembly viewed guilds and corporations as unduly restrictive of commerce and as vehicles for the reintroduction of involuntary servitude as the length of apprenticeship could be for many years or even for life.[20] In 1791, French workers were given the right to "exercise any profession, craft or trade which they please[d]."[21] As a result of the decree, workers could now sell their labor to any employer under any terms to which they could agree, with one exception.[22] Article 1780[23] of the Civil Code limited the right of a worker to contract out his labor to a specified employer for a specified amount of time.[24] The underlying purpose of this provision was to prevent the resurgence of associations counter to the new liberal system by allowing individuals the freedom to strike any bargain, on whatever terms they desired.[25]

To the extent that the Napoleonic Code did regulate the formation of employment contracts, it favored the employer.[26] Article 1781,[27] which was repealed in 1868, provided that in disputes involving wages, paid or due, the affirmation of the master alone automatically created an irrebuttable presumption that wages were in fact paid.[28] Nevertheless,

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19. *See supra* note 18.

20. Lorwin, *France*, in COMPARATIVE LABOR MOVEMENTS 313-409 (W. Galenson ed. 1952) (discussion focuses on the history and role of trade unions in France, not specifically the development of rights of individual workers).

21. C. CIV. art. 1791, *quoted in* DROIT DU TRAVAIL, *supra* note 15, at 6.

22. *See Contrat de Travail, supra* note 15, § 2; *see also* MEYERS, *supra* note 15, at 45-46.

23. C. CIV. art. 1780 *revised in* C. TRAV. art. L.122-1. All provisions of the Labor Code cited in this Comment are printed numerically in Petits Codes Dalloz (41e ed. 1982) [hereinafter P.C.D.], *reprinted in* INTERNATIONAL LABOUR OFFICE, FRENCH LABOUR CODE (1982) (English translation of the French Labor Code).

24. *Contrat de Travail, supra* note 15, at 1; *Contrat de Travail, supra* note 15, at 7; MEYERS, *supra* note 15, at 44. Similar to Article 1780 was Article 1142 which provided that only damages were available as a remedy for failure to act or refrain from acting; *see e.g.* Mouricault, *Rapport du Citoyen Mouricault* in VII RECEUIL DES LOIS COMPOSANT LE CODE CIVIL 197 (1804), *quoted in* MEYERS *supra* note 15, at 44. (Mouricault consecrates the principle of individual liberty.) The result of this legislation was that employers were not required to continue an employment contract they had breached because specific performance of a contract for service was prohibited by Article 1142. Employers could unilaterally terminate an employment contract, even a contract for a specified time, and remedy the employee's loss through money payments. *See* RECUEIL DALLOZ-SIREY, 286 (B. de Segogne ed. 1916).

25. *See* MEYERS, *supra* note 15, at 44.

26. Although the purpose of the legislation seems to have been to abolish slavery and peonage by preventing the formation of guilds and combinations characteristic of the medieval system of labor, the result of Article 1781 for employees was second-class status vis-a-vis the employer. *See* MEYERS, *supra* note 15, at 44.

27. C. CIV. art. 1781 *repealed by* L. August 2, 1868.

28. *Contrat de Travail, supra* note 1, ch. 1, § 1.

parties to an employment contract were generally considered to be on equal footing and at arm's length distance with respect to one another.[29] *Egalité civile*[30] aside, the master enjoyed not only a skewed allocation of the burden of proof, but also because the servant could not rebut the master's assertions by the production of witnesses, the master enjoyed absolute credibility on the matter of proper wages.[31]

Shortly thereafter, the Law of 22 "*germinal an*" XI created the "*livret ouvrier*."[32] The *livret ouvrier* was a booklet that could be retained by the employer for the term of employment as a guaranty against advanced wages and returned to the employee at its expiration as proof that the employee was free from any other work engagement.[33] While the *livret* system was justified as a police measure against vagabondage, in practice, the *livret* itself "could become an instrument of servitude."[34] Possession of the *livret* gave the unscrupulous employer an opportunity to prevent a dissatisfied employee from attempting to work elsewhere.[35]

At the end of the eighteenth century and the beginning of the Industrial Revolution, the master-servant relationship broke down.[36] During this time, freedom to contract philosophy prevailed, with its application continuing to favor the interests of the employer over the employees as many workers, especially women and children, had little or no bargaining power.[37] For the most part, employees continued to lack statutory protection against employer abuses.[38] Article 1134 recognized only the written terms of the agreement as representing the will of the parties.[39] Employers would often bind employees to accept adhesion contracts, imposing unfavorable working conditions and inadequate wages.[40] Children and women were, as a common practice, hired for work of a nature determined unilaterally by the employer.[41] While the courts read a requirement of notice and indemnity into the contract for termination, except when the employee was dismissed for serious misconduct,[42] the

29. DROIT DU TRAVAIL, *supra* note 15, at 7.
30. *See* MEYERS, *supra* note 15, at 44.
31. DROIT DU TRAVAIL, *supra* note 15, at 7.
32. *See* MEYERS, *supra* note 15, at 46.
33. *Id.*; *see also* Lorwin, *France*, *supra* note 20, at 314; DROIT DU TRAVAIL, *supra* note 15, at 7.
34. Lorwin, *supra* note 20, at 314; DROIT DU TRAVAIL, *supra* note 15, at 7.
35. *See* MEYERS, *supra* note 15, at 46; Lorwin gives an additional reason for the livret law: "[it] was justified as guaranteeing workshops against desertion, and contracts against violation." Lorwin, *supra* note 20, at 314.
36. *See* MEYERS, *supra* note 15, at 46.
37. The Industrial Revolution in France began in the 1840's. For a historical discussion of the labor movement in France see, DROIT DU TRAVAIL, *supra* note 15, at 7-9.
38. *Id.* at 7-8.
39. *Id.* at 6-7.
40. *See Contrat de Travail*, *supra* note 1, at § 2.
41. *See* DROIT DU TRAVAIL, *supra* note 15, at 6.
42. *See* DROIT DU TRAVAIL, *supra* note 15, at 7-9.

remedy for dismissal without notice was limited to money damages.[43] This indemnity remedy was not viewed as a penalty to employers, but rather as a means of providing for an employee's severance pay or expenses while the employee searched for another job.[44]

In 1926, the *Cour de Cassation*, the Supreme Court of France, recognized a cause of action for holding an employer liable for abusive discharge when such termination was based on a malicious intent: *légèreté coupable* or *blâmable* which is comparable to culpable negligence or capriciousness.[45] Each case would be decided on a case-by-case basis to determine whether or not the discharge was capricious or malicious.[46] Where the discharge followed employee illness or absence and the employer did not produce any other justification for the discharge, courts would occasionally award damages limited to the amount of pay for the period of notice.[47] Where the facts contained clear evidence of abuses, the courts would readily find the employer liable.[48] For example, a discharge motivated purely by personal reasons, such as the dismissal of an employee who refused to testify at his employer's divorce proceedings, was and still is the kind of abusive discharge suit that would succeed.[49] This principle of *abus de droit* or the employer's abuse of its right to discharge was finally adopted by statute in 1928.[50]

## *II. Abus de Droit*

### A. Legislative Intervention

The Law of 1928 codified the principle of *abus de droit* as it applied to individual employment relationships.[51] The three major developments in French labor law subsequent to the enactment of the Law of 1928 were: (1) the elaboration of special rules surrounding dismissal and reversal of the traditional burden of proof for a few specific categories of employees; (2) the evolution of a more liberal burden of proof requirement, which favored the employee; and (3) the enactment of a new law in 1958 providing for longer minimum periods of notice.[52] Judicial development of the doctrine of abuse of right, over time, carved out exceptions

43. *See, e.g.*, 1 RECEUIL DALLOZ SIREY I 57 (1859). (Provides doctrine, legislation with commentaries, selected jurisdictions reported).

44. *See* MEYERS, *supra* note 15, at 48.

45. *Id.*

46. *See* 2 RECEUIL DALLOZ-SIREY 40 (B. de Segogne ed. 1904).

47. *See* MEYERS, *supra* note 1, at 55.

48. *E.g.*, 1 RECEUIL DALLOZ 35 (1922); 1 RECEUIL DALLOZ 503 (1906); 1 RECEUIL DALLOZ 155 (1902); 2 RECEUIL DALLOZ 441 (1897).

49. 1 RECEUIL DALLOZ 94 (1920).

50. *Id.*

51. The Law of July 19, 1928 is codified and is available in D.H. 1928.

52. *See* MEYERS, *supra* note 15, at 58-59.

to the rule of employment-at-will so that pregnancy, illness, engaging in a lawful strike, mere participation in employee representation organizations (for example, as a shop steward or in the works council), political beliefs, personal pique or dislike, and the exercise of citizenship rights no longer formed the basis for a lawful dismissal.[53]

The scope of protection accorded individual workers under the French doctrine of abuse of right does not extend as far as the protection accorded workers in U.S. arbitration proceedings. In U.S. arbitration proceedings, the burden of showing "good cause" is placed on the employer.[54] By contrast, the French doctrine places the burden of proof on the dismissed employee, requiring the employer to show that the employer abused its right of dismissal.[55]

Nevertheless, the French courts appear more willing than American courts to find that a dismissal was arbitrary or capricious.[56] For example, employers are required to give the French court a reason for the dismissal; courts have often found the employer's reason to be mere pretext for unfair dismissal.[57] Furthermore, the French courts have extended the doctrine of abuse of right to situations in which the employer failed to follow customary or collectively bargained procedures and rules.[58] Reinstatement, however, is never a remedy for an abusive discharge; only damages may be obtained.[59]

## B. The ILO Recommendation

The member states of the International Labor Organization (ILO) adopted Recommendation No. 119 on the Termination of Employment at the 1963 International Labor Conference.[60] The purpose of the Recommendation was to provide workers with some kind of safeguard against the termination of employment at the initiative of the employer.[61]

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53. *Id.*

54. *See* Summers, *Individual Protection, supra* note 11, at 481.

55. *Id.* at 510.

56. *See* C. TRAV. art. L. 122-14-3. *See, e.g.*, Judgment of June 25, 1975, Cass. civ. soc., 4 Bull. Civ. VI 306 (*de facto* serious cause for dismissal because the employee did not address the issue of employer's alleged serious cause for dismissal); *See generally* 4 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS § 222 (R. Blanpain ed. 1977) [hereinafter INTERNATIONAL ENCYCLOPAEDIA] (Blanpain surveys all of the major provisions of the French dismissal statute and analyzes how each of the provisions operates and interacts with the entirety of the French Labor Code.)

57. *See* MEYERS, *supra* note 15, at 62.

58. *See* 2 LA SEMAINE JURIDIQUE (JURIS CLASSEUR PERIODIQUE) 11052 (R. Dorat des Monts, J. Hugot, & H. Thuillier eds. 1959) (a general source, providing practice guides, theory and doctrine; selected jurisdictions reported).

59. *See* MEYERS, *supra* note 15, at 63.

60. *See* Summers, *Individual Protection, supra* note 11, at 510.

61. Approximately twenty years after the Recommendation was issued by the ILO, the item of employment termination at the initiative of the employer was reexamined. At the 1982 ILO Conference, ILO Convention No. 158 was ratified. Member states voluntarily become signatories to a

The Recommendation extended to "all branches of economic activity and all categories of workers" but excluded workers engaged for a specified period, temporary workers, probationary workers, and civil servants.[62]

The Recommendation set forth guidelines requiring that employers advance a valid reason for termination. Under these guidelines, the employer may not base a dismissal on an employee's union membership or representation on race, color, sex, marital status, religion, political opinion, national or social origin.[63] In addition, the Recommendation required the employer to give the employee notice or compensation in lieu of notice, as well as time off from work during the notice period to seek other employment.[64] Finally, the employer must provide the employee with severance pay and a certificate of dismissal.[65]

If, however, the termination is for serious misconduct, the employee will be deemed to have waived her right to notice or compensation.[66] But before the termination for serious misconduct becomes final, the employee must have an opportunity, within a reasonable amount of time, to go before a neutral tribunal to state his or her case.[67] The decision of this body can, in turn, be appealed.[68] On the other hand, if the employer does not dismiss the employee for serious misconduct within a reasonable amount of time after becoming aware of such conduct, the employer waives the right to dismiss the employee for that particular instance of misconduct.[69] If the court or arbitration tribunal find the evidence of serious misconduct to be insufficient or that the employer did not act in good faith, the employee is entitled to damages.[70]

1. The Report from France on ILO Recommendation No. 119

Prior to adopting the Recommendation, France sought to limit the

specific Convention with the obligation to implement it in their state. As a forerunner to the Convention, the Recommendation, not binding on member states, provides much more detailed language and guidelines on the topic. Much of the language of Convention No. 158 is drawn from Recommendation No. 119. *Compare* INTERNATIONAL LABOUR CONFERENCE, 68TH SESSION, 1982: REPORT VIII(2)—CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER [EIGHTH ITEM ON THE AGENDA] 85-129 (1981) [hereinafter REPORT], *with* INTERNATIONAL LABOR CONFERENCE, RECORD OF 67TH SESSION, 1982: REPORT VIII(1)—TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER [EIGHTH ITEM ON THE AGENDA] 102-105 (1980) (reprint of the text of the 1963 Recommendation).

62. *See* Bellace, *supra* note 11, at 211.
63. Recommendation, *supra* note 61, Part IV § 18.
64. *Id.*, at pt. II § 3(d).
65. *Id.* at pt. II § 8(1).
66. *Id.* at pt. II § 9.
67. *Id.* at pt. II § 11(1).
68. *Id.* at pt. II § 11(5).
69. *Id.* at pt. II § 11(3).
70. *Id.* at pt. II § 11(2).

discretionary power of the employer to terminate through a judicial notion of abuse of right.[71] Once France became a signatory to the Recommendation, however, it undertook the task of applying the Recommendation to all French laws and regulations.[72] It deserves mention that while the French government, in its report, adopted all substantive provisions of the Recommendation, it omitted marital status and political opinion as unlawful reasons for termination.[73] Writing the report to the ILO spurred compliance with the Recommendation so that shortly after the French government sent its report to the ILO, it amended its Labor Code with respect to termination of an indefinite employment contract.[74]

Pressure from the unions, an increase in sensitivity to the persisting problems of job security and official impetus from the adoption of ILO Recommendation No. 119 led the French government to amend its dismissal statute for the first time.[75] Codified as Title II of the Labor Code, the Law of 1973 requires the utilization of procedural safeguards and provides for judicial review of the employer's decision to terminate an employee.[76] An important goal of the statute was to provide protection against arbitrary dismissal.[77] The Law of 1973, however, was incomplete in its scope as it did not address the problem posed by economically motivated dismissals.[78] To remedy this defect, the legislature passed the Law of 1975, in order to complete the scheme of protection by providing for protection for employees dismissed for economic reasons.[79]

Neither statute, however, addressed the concerns of those employees whose status is governed by contracts of employment for a specified amount of time. The scope of the Act of 1973 extends only to the contract of employment for an indefinite duration.[80] This defect was reme-

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71. *See supra* notes 46-50, and accompanying text.

72. France reported in 1974 that the whole of the Recommendation applied to French laws and regulations: "the whole of the Recommendation is applied, by virtue of laws or regulations, custom, collective agreements or decision by the courts." INTERNATIONAL LABOUR CONFERENCE (59TH SESSION), TERMINATION OF EMPLOYMENT (1974) (summary of reports on Recommendation no. 119 (article 19 of the constitution) [hereinafter Summary]).

73. *See id.*

74. *See* C. CIV. art. 73-680.

75. *See id.*

76. C. CIV. art. 73-680 amending the Labor Code with respect to termination of an indefinite employment contract was adopted within months of the drafting of the Report to be sent to the ILO. The ILO Summary of Reports covers reports received by that office up to November 1, 1973. *See* Summary, *supra* note 72, Introduction.

77. DROIT DU TRAVAIL, *supra* note 15, at 151; *Contrat de Travail, supra* note 15, at ¶ 9.

78. DROIT DU TRAVAIL, *supra* note 15, at 151.

79. *See generally* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 56, at § 203. Blanpain briefly discusses the historical context in which the Law of 1975 was passed. The focus of this Comment, however, is on dismissal for reasons personal to the worker, such as misconduct, and not for economic reasons. Therefore, this Comment will not address the Law of 1975 in a detailed fashion.

80. *See id.*

died by the Act of 1979, which regulates contracts of employment of definite duration.[81] In practice, the 1979 statute has proven to offer employees the same level of protection for the specified term of the contract provided for in the earlier legislation.[82]

Despite the liberal intent underlying each of the dismissal statutes, many commentators have criticized the French labor law in this area for both its complexity and its failure to implement real safeguards.[83]

## C. Mechanics Of The Law Of Dismissal Of 1973

The laws of dismissal incorporated into Title II of the Labor Code provide two kinds of permissible dismissals: dismissal motivated by a genuine and serious cause (*cause réelle et sérieuse*) and dismissal motivated by economic factors.[84]

### 1. The Law of 1973.

The Act of 1973 preserves the right of the employer to dismiss.[85] Nevertheless, an employee can challenge a dismissal as a wrongful discharge by bringing suit in a labor court, the *Conseil des Prud'hommes*, composed of lay persons elected to serve as judges of labor disputes by employers and employees.[86] All of the provisions of the Act of 1973 apply to all workers covered by an individual employment contract in France and all workers covered by an individual employment contract with a French company but providing their labor for a foreign subsidiary.[87] If an employee in the latter case is dismissed by the subsidiary, the parent (French) company must provide the employee with the same pro-

81. *See* Camerlynck, *supra* note 15, § 2 (outlines the authority and scope of the Law of 1973).

82. *See* Corrighan-Carsin, *Contrat de Travail*, in DALLOZ ENCYCLOPÉDIE JURIDIQUE, RÉPERTOIRE DE DROIT DU TRAVAIL §§ 41-297 (1976) (chapter, Contrat de Travail à Durée Determineé, outlines the authority and scope of the Law of 1975). For a thorough comparison of the implications of the contract of employment for a determined duration and the contract of employment for an undetermined duration before the enactment of the Law of 1973 and the Law of 1975 see G. POULAIN, LA DISTINCTION DES CONTRATS DE TRAVAIL À DURÉE DETERMINÉE ET INDÉTERMINEE (1971).

83. *See* Rojot, *Protection Against Unfair Dismissal in France*, in PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 147 (J. Stieber & J. Blackburn eds. 1983) (Rojot briefly outlines the mechanics of the French Labor Code).

84. Rojot sharply criticizes the French Act of 1973 as raising "more legal problems than it has solved." Rojot, *supra* note 83, at 50. But Rojot concludes: "the Act [of 1973] serves as a useful reminder to all parts of management that terminating a worker is an important decision which should be taken seriously after due consideration and due process." *Id.* at 53. He goes on to add: "Whatever its [Act of 1973] faults, it has improved the job security of individual employees without too many undue constraints on the employer's freedom to manage." *Id.*

85. *See* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 56, at 92.

86. *Id.* at 204. For a discussion of the *Conseils des Prud'hommes* system, see Rojot, *France* in 9 COMP. LAB. L.J. 70, 70-77 (1987) (special issue on role of neutrals in the resolution of shop floor disputes).

87. For a full discussion of the structure and mechanics of the French labor courts see W. MCPHERSON & F. MEYERS, THE FRENCH LABOR COURTS: JUDGMENT BY PEERS (1966).

cedures for dismissal guaranteed to all other French workers discussed below.[88] However, notice rules, penalties for non-compliance with procedure and for dismissal without a genuine and serious cause provided by the Act of 1973 do not apply to collective layoffs for economic reasons, dismissals in enterprises with fewer than eleven employees, or instances where the worker has less than one credited year of seniority. Workers with less than one year tenure are not entitled to either a hearing prior to dismissal or a letter from the employer stating the grounds for dismissal.[89]

2. The Contract of an Indeterminate Duration

The procedures for dismissal in a contract of indeterminate duration are set forth in Section L. 122-14 and Section R. 122-2 of the Labor Code.[90] The procedural framework consists primarily of three stages or phases.[91]

a. Preliminary Phase. Before the case is heard, the employer must initiate a conciliatory session with the *prud'hommes* of the labor court acting as mediators.[92] The purpose of the mandatory conciliation session, as articulated by the reporter of the legislation at the National Assembly, was that "a true dialogue could take place and would lead eventually to a solution of the problem without the inevitability of dismissal."[93] The employer must send a letter to the employee announcing the time, place and purpose of the meeting.[94] Both parties must appear in person at the session.[95] Technical assistance is available to the employee in preparation for the informal session.[96] The employee's assistant, who must be a coworker, will not have his or her salary reduced by any time spent assisting the dismissed employee.[97]

b. Notice of Dismissal. If the employer wishes to dismiss the employee instead of applying the lesser penalty recommended by the conciliatory commission, the employer must notify the employee of the

88. *See* INTERNATIONAL ENCYCLOPEDIA, *supra* note 56, at 92.

89. *Id.* For example, the employee must be provided with the same protective procedural rules of Section L. 122-14-3, notice or compensation in lieu of notice. (codified in CODE DU TRAVAIL *supra* note 23, at L. 122-14-3).

90. *See* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 56, at § 205.

91. C. TRAV. D.P.C. (1979); INTERNATIONAL LABOUR OFFICE, FRENCH LABOR CODE (1982).

92. In his note to *Contrat de Travail à Durée Indéterminée*, Camerlynck arranges the mechanics of the Law of 1973 in stages or procedural phases. See Camerlynck, *supra* note 15, at ¶¶ 69-106, *see also* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 56, at 201-244 (INTERNATIONAL ENCYCLOPAEDIA arranges the analysis of the Law of 1973 by the nature of the dismissal, for example justified dismissal, unlawful dismissal).

93. *See* Camerlynck, *Contrat due Travail, supra* note 15, at § 69.

94. Journal Official Deb. Ass. Nat., May 23, 1973 *quoted in* Camerlynck, *supra* note 15, at § 70.

95. *See* Camerlynck, *Contrat de Travail, supra* note 15, at ¶ 72.

96. *Id.* at ¶ 73.

97. *Id.* at ¶ 86.

dismissal by letter but may remain silent as to the reason for the dismissal.[98] Unless the employee committed a major offense, the employer must honor a pre-determined grace period of time between the notice of dismissal and the actual termination of the employment agreement.[99] While this period of time is fixed by law, it can be improved upon (i.e. lengthened) by custom and agreement.[100] During this time, the employee has the right to take off two hours of work a day to seek alternative employment.[101]

c. Declaration of genuine and serious cause (*cause réelle et sérieuse*). Upon the demand by an employee, the employer must send a letter to the employee providing specific reasons for the dismissal.[102] The employee's demand must be made within ten days of the date of termination.[103] The date the employer mails the registered letter announcing its intent to dismiss the employee initiates the notice period.[104] The employer's letter must include a description of the genuine and serious cause justifying the dismissal.[105] The letter, in turn, must be sent to the employee within ten days of the date of receipt of request from the employee.[106] The purpose of allowing this delay in the employer's response is to permit the employer a short cooling-off period to ensure that the dismissal notice was not the result of a hot-headed decision.[107]

d. Evidence of Genuine and Serious Cause. In practice, but not by law, the employer must carry the burden of persuading the judge that the cause of the dismissal was serious.[108] The employee is no longer required to prove the absence of genuine or serious cause but benefits by producing evidence that the reason for dismissal asserted by the employer is pretextual.[109]

3. The Contract of a Determined Duration

The contract of determined duration, by definition, has its duration fixed by the occurrence of a certain future event. Its expiration does not depend entirely on the will of the parties.[110] Such contract, is in this

98. *Id.* at ¶ 77.
99. *Id.* at ¶ 88.
100. *Id.* at ¶ 94.
101. *See* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 57, at ¶ 94.
102. *Id.* at ¶ 95.
103. *See* Camerlynck, *Contrat de Travail, supra* note 15, at ¶ 88.
104. *Id.* at ¶ 88.
105. *Id.* at ¶ 103.
106. *Id.*
107. INTERNATIONAL ENCYCLOPAEDIA, note 56, at ¶ 95.
108. *See* Camerlynck, *Contrat de Travail, supra* note 15, at ¶¶ 226-228, *see also* INTERNATIONAL ENCYCLOPAEDIA, *supra* note 56, at § 215.
109. *See* Camerlynck, *Contrat de Travail, supra* note 15, at ¶¶ 222-228.
110. Corrighan-Carsitn *supra* note 82, at ¶ 107.

regard, distinguishable from the contract for an undetermined duration.[111] Employees, under contract law, indirectly enjoy some of the benefits provided to the employees with indeterminate contracts covered by the Act of 1979.[112] For example, a contract for a determined duration may be "suspended" because of the employee's absence from work due to illness, injury or pregnancy.[113] But the suspension period ends and the contract becomes effective again as soon as the employee returns to work.[114]

Neither the employer nor the employee may unilaterally terminate a contract for a determined duration.[115] Dismissal, under this kind of contract, is treated as nonperformance of the employer's obligation.[116] An employer may seek to dismiss an employee judicially.[117] That is, an employer must provide evidence to a court that the employee has committed serious misconduct and has therefore failed to perform under the contract.[118] If the employer fails to produce sufficient evidence of serious misconduct, but nevertheless dismisses the employee, the court will often set damages at the amount of pay the employee would have received as wages had the contract run its specified duration.[119]

### D. Judicial Applications Of The Concept Of Genuine And Serious Cause (Cause Réelle et Sérieuse)

An employee who chooses to sue the employer for wrongful dismissal generally takes the claim to a labor court.[120] The labor courts are organized by sections corresponding to different categories of occupations.[121] The judges, comprised of an equal number of the elected representatives of employers and employees, are elected from the occupations controlled by each court's jurisdiction.[122] This arrangement ensures that the judges are familiar with the custom and practice of the industry involved in the dispute.[123] One commentator has noted that the work of scholars, "consists of elucidating, organizing and systematizing [the La-

111. *Id.*
112. Corrighan-Carsin, *supra* note 82, at ¶ 203.
113. *Id.* at ¶ 221.
114. *Id.* at ¶¶ 203, 222.
115. *Id.* at ¶¶ 198, 203.
116. *Id.* at ¶ 203.
117. *See generally id.* at ¶¶ 51-140, 207 (The application of the Law of 1979 results in much of the same protection the Law of 1973 offers.)
118. Rojot, *supra* note 83, at 149.
119. *Id.* at 148.
120. *Id.*
121. *Id.* (If a contract for a determined duration is continually renewed, that is, more than once, it will be treated by the courts as in fact being of undetermined duration.)
122. *See* Summers, *Individual Protection, supra* note 11, at 510.
123. *See*, W. MCPHERSON & F. MEYERS, *supra* note 87.

bor Code]."[124] Furthermore, French judges have the task of adapting traditional jurisprudence to the concept of social right while taking into account the needs and characteristics of employment relations.[125] Remarking on the treatment of the statute by the courts, Ewald, a noted commentator, stated:

> The right to work in France is much more than the filling up of lacunae of statutory or civil law on the matter of labor; instead, it represents a judicial invention, itself linked to the transformation of political rationality which governs us all. The right to work presents another type of right and another way of decision-making. The right to work in France is the increasing accumulation of legalities and rules ever more precise, complex and detailed. These legalities embody the positive rights of workers. These rights do not announce a great deal of principles; but rather they announce a fountain of fussy prescriptions destined to circumscribe in the most precise and fastidious manner the ways in which workers may and may not exercise their rights.[126]

A few examples of this *ad hoc*, yet most detailed, approach of French labor courts and tribunals to the application of the dismissal statutes will be illustrative.

Recently, the French Supreme Court held that a supermarket employee who stole a pair of shoelaces after his workshift from his employer's store could be dismissed for serious misconduct even though the employee was no longer under the employer's authority.[127] This case provoked a great deal of criticism because the finding of dismissal for real and serious cause deprives the employee of notice or compensation in lieu of notice.[128]

In *Tscheiller v. Office d'Hygiène Sociale de Meurthe-et-Moselle*,[129] the employer stated he dismissed the employee because the employee spoke out against the employer at work regarding the employer's choice as to location of the worksite. The employer argued that the dismissal

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124. Ewald, *Le Droit du Travail: Une Légalité Sans Droit*, [1985] DROIT SOCIAL, 723, 727 [hereinafter DR. SOC.].

125. *Id.*

126. *See* Ewald, *supra* note 124, at 727.

127. Judgment of February 20, 1986, CASS. CIV. SOC., [1986] DR. SOC. 239.

128. Laroque, *Réflexions sur la Jurisprudence de la Chambre Sociale de la Cour de Cassation*, in ETUDES CAMERLYNCK 28 (1978) *quoted in* Ewald, *supra* note 124, at 728. *See* Pelissier, *Ambiguités et Logique du Contrôle de la Cour de Cassation*, [1986] DR. SOC. 179. (Pelissier states: ". . .the Supreme Court controls the interpretation and application of the legal rule.") *Cf.* Dupeyroux, *Deux Observations Préliminaires*, [1986] DR. SOC. 176. (The author argues that Judgment of February 20, 1986, CASS. CIV. SOC., [1986] DR. SOC. 179 represents a great departure from the provisions of the Labor Code.) *See also* Savatier, *La Paire de Lacets ou Les Limites de la Faute Grave*, [1986] DR. SOC. 236, 236 ("La solution a choqué notre sentiment de la justice." *Trans*: "The resolution shocks our concept of justice.") (The author criticizes the penalty for petit larceny imposed upon the employee, that is dismissal without notice or grounds for damages, as disproportionate to the crime committed.).

129. Judgment of December 10, 1985, CASS. CIV. SOC., [1986] DR. SOC. 209.

was justified as a dismissal for a real and serious cause.[130] The employee claimed the true reason for the dismissal was his participation in worker representative elections.[131] The Court, in reviewing the record of the facts as determined by the court below, found that in fact the employee had committed a series of acts which were injurious to the functioning of the office and held that this was sufficient to establish serious misconduct for lawful dismissal.[132]

In *Ste. d'Exploitation des Ets. Erba. v. Arsac*,[133] the employee, a ship-painter, refused to perform temporary work in an outside shipyard. The Court, taking into account the lower court's findings regarding the customs and practices of the shipbuilding industry, held that the flexibility and mobility required by the industry justified the employee's dismissal for serious misconduct.[134]

In *Blaze v. SARL O'Connor*,[135] the employer dismissed the employee for serious misconduct because the employee, Mrs. Blaze a salesperson and a coworker and the wife of the office supervisor, created tension at work. The Court held that the supervisor had sufficient cause, in assuring the normal functioning of the enterprise, to dismiss Mrs. Blaze and deny her claim for damages.[136]

As the above cases illustrate, the judicial trend in France seems to favor a restricted application of the concept of unjust cause. The result is a standard from which the employer benefits. Yet, the standard in France is more generous to the employee than the judicial standards used by U.S. courts in unlawful dismissal cases.[137]

### *III. United States*

The employment-at-will doctrine in the United States has dubious origins.[138] A noted commentator, H. G. Wood, confidently announced

130. *Id.*
131. *Id.*
132. *Id.*
133. Judgment of December 11, 1985, CASS. CIV. SOC., *Id.* at 210.
134. *Id.* (The Court held that a dismissal for serious cause does not bar an employee's right to compensation).
135. Judgment of December 10, 1985, CASS. CIV. SOC., *Id.*
136. *Cf.* Judgment of December 11, 1985, CASS. CIV. SOC., [1986] DR. SOC. 211, (the employee was dismissed for excessive absences which were said to disrupt the general operation of the enterprise, but the Court held that although adequate grounds for serious misconduct were found, the absences were not sufficiently serious to justify dismissal without compensation).
137. For the most recent legislative and judicial developments to date in French law in the area of dismissal see Ray, *Le Nouveau Droit du Licenciement*, [1987] DR. SOC. 664; Chelle et Prétot, *Le Champ d'Application de l'Autorisation Administrative de Licenciement des Salariés Protégés*, [1987] DR. SOC. 686; Belier, *Le Contrat de Travail à Durée Indéterminée Intermittent*, [1987] DR. SOC. 696.
138. St. Antoine, *The Twilight of Employment at Will? An Update*, in NEW DIMENSIONS IN LABOR AND EMPLOYMENT RELATIONS, LABOR AND EMPLOYMENT LAW INSTITUTE 2 (W. Dolson ed. 1985); Summers, *Individual Protection, supra* note 11, at 485.

the rule in 1877:

> [W]ith 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.[139]

By the end of the nineteenth century, courts often quoted the rule: "all [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[140] A constitutional basis for this "at-will" doctrine was articulated by the United States Supreme Court in *Adair v. United States*.[141]

## A. Judicial Erosion Of The Employment-At-Will Doctrine

Three theories have been used by courts to attack the employment-at-will doctrine: a tort theory, a contract theory and a public policy theory.[142] The finding of "abusive" discharge is based on a theory most similar to the French theory of *abus de droit*.[143]

### 1. Tort Theory

In *Monge v. Beebe Rubber Co.*,[144] the New Hampshire Supreme Court held that a dismissal motivated by bad faith or malice or based on retaliation, constituted a breach of the employment contract, which the court reasoned was contrary to the best interest of the economic system. The court emphasized the particularly arbitrary and capricious nature of the dismissal: "the foreman's overtures (to the female employee) and the capricious firing at 2:00 a.m., the seeming manipulation of job assignments, and the apparent connivance of the personnel manager in this course of events all support the jury's conclusion that the dismissal was maliciously motivated."[145]

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139. *See* H. WOOD, MASTER AND SERVANT, 272 (1877); *see also* Hathaway v. Bennett, 10 N.Y. 108 (1854) and Perry v. Wheeler, 75 Ky. (12 Bush) 541 (1877).

140. Payne v. Western & A.R.R., 81 Tenn. 507, 519-520 (1884); *see also* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

141. 208 U.S. 161 (1908).

142. *See* St. Antoine, *supra* note 138, at 5-13; *see also* Keyes, *supra* note 15, at 149-153. (Both authors describe the current theories courts have been using to base decisions that go against the employment-at-will rule.).

143. *See* note 45 and accompanying text.

144. 114 N.H. 130, 316 A.2d 549 (1974).

145. *Id.* at 134, 316 A.2d at 552.

In *Novosel v. Nationwide Ins. Co.*,[146] the Third Circuit Court of Appeals held that the discharge of an employee because of the employee's political views and his refusal to lobby the state legislature on the employer's behalf implicated a public policy under Pennsylvania law and therefore constituted a wrongful discharge.[147] This case is significant because the court explicitly recognized that a new standard had developed.

> [T]he inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases on this point, we believe that the clear direction of the opinions promulgated by the state's courts suggests that this question be answered in the affirmative.[148]

In *Smith v. Atlas Off-Shore Boat Service, Inc.*,[149] the Fifth Circuit Court of Appeals held that an employer's dismissal in retaliation for a seaman's exercise of his legal right to file a personal injury action against his employer constituted abusive firing.[150] These decisions show a willingness by some courts to see in the employment relationship an obligation by the reasonable employer not to discharge employees in bad faith.

2. Contract Theory

In *Toussaint v. Blue Cross & Blue Shield of Michigan*,[151] the Michigan Supreme Court held that procedures published in a company's personnel policy handbook established a basis for protection against unjust discharge. The court further extended procedural protection to employees who relied on oral statements made by the employer regarding just cause for dismissal. Thus, the Michigan court observed:

> [W]hen a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause). . . . The result is that the employee, if discharged without good or just cause, may maintain an action for wrongful discharge.[152]

This sort of case is a corollary to those cases arguing under a contract

146. 721 F.2d 894 (3d Cir. 1983), 114 L.R.R.M. (BNA) 3105 (no. 83-5101, Slip Op. 3d Cir. October 26, 1986) (per curiam).

147. *Id.*

148. *Novosel*, 721 F.2d at 901.

149. 653 F.2d 1057 (5th Cir. 1981).

150. *Id.* at 1063. *But cf.* Howard v. Dorr Woolen Company, 414 A.2d 1273 (N.H. 1980) (dismissal due to age or sickness does not fall into the *Monge* category "where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn").

151. 408 Mich. 579, 292 N.W.2d 880 (1980).

152. *Id.* at 581, 292 N.W.2d 881.

theory that express or implied promises of just cause may be enforced.[153]

3. Public Policy Theory

Another theory adopted by courts is based on public policy concerns. This theory incorporates features of both the tort and contract theories. For example, in *Cloutier v. Great Atlantic & Pacific Tea Company, Inc.*,[154] the New Hampshire Supreme Court held that a store manager met a two part test in showing that the employer was motivated by bad faith, malice, or retaliation and that the employer violated a public policy giving rise to a wrongful discharge cause of action.[155] These judicially recognized theories of tort, contract and public policy exceptions to the employment-at-will doctrine are important as they can provide the impetus for other courts to rule similarly and further erode the employment-at-will doctrine.

B. Legislative Intervention In The United States

*State Law.* To date, no state except Montana has enacted legislation protecting all employees from unjust discharge.[156] A number of states have, however, enacted statutes providing some protection to employees terminated for certain reasons.[157] Moreover, legislation intended to narrow the scope of the employment-at-will doctrine has been proposed in several states.[158] At least one state has modeled its statutes after arbitra-

153. *See* Rasch v. City of East Jordan, 141 Mich. App. 336, 367 N.W.2d 856 (Mich. App. 1985) (employee's knowledge of just cause termination policy sufficient to establish cause of action for wrongful discharge); Hrab v. Hayes-Albion Corporation, 103 Mich. App. 90, 302 N.W.2d 606 (Mich. Ct. App. 1981) (oral representation to employee by employer that he would be discharged only for good cause could be enforced as an implied contract). *But see* Ford v. Blue Cross & Blue Shield of Michigan, 389 N.W.2d 116, 150 Mich. Ct. App. 522 (1986) (employer practice stated in policy handbook of offering dismissed employee opportunity to be heard in "exit interview" was not sufficient to create an implied contract for just cause dismissal).

154. 121 N.H. 915, 436 A.2d 1140 (1981).

155. *But see* Percival v. General Motors Corporation, 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (public policy exception not extended to recognize claim for wrongful discharge for trying to correct misleading information); *see also* Geary v. United States Steel Corporation, 456 Pa. 171, 319 A.2d 174 (1974) (employee alleged that he was dismissed for expressing reservations to his employer regarding the safety of its products; Pennsylvania high court refused to apply the public policy exception but indicated it would under the proper circumstances.).

156. *See generally*, REPORT ON EMPLOYMENT AT WILL (BNA) (1984); Stieber, *Termination of Employment in the United States*, 5 COMP. LAB. L. 327, 334-335 (1982); Summers, *Individual Protection, supra* note 11, at 481; Wald & Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB. LAW. 533 (1985). Montana has recently passed a wrongful discharge statute. *See* 39-2 MONT. CODE ANN. tit. 39-2, §§ 901-905, 911-914 (1987).

157. *E.g.*, jury duty, testifying in criminal trials, doing military or reserve duty, obtaining mental health treatment, or filing worker's compensation claims. DeGiuseppe, *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 20-21. Because these statutes do not relate to the more common dismissal scenario, they will not be addressed in this Comment.

158. Two examples of these state statutes are Assembly Bill 1165 which was considered by the California Assembly in 1983 which provided for relief if termination was found to be in breach of an

tion procedures commonly provided for in collective bargaining agreements.[159] These procedures would permit an employee to appeal a discharge to an arbitration panel.[160] The purpose of these legislative proposals is to allow individual employees the recourse to an impartial panel for relief currently available only to unionized employees under collective bargaining agreements.[161]

*Federal Law.* A noted scholar in this area has argued that dismissal legislation more appropriately should be enacted at the state level rather than the federal level.[162] Scholars have urged the enactment of a federal statute protecting at-will or non-unionized employees as the preferable vehicle for reform.[163]

State legislation may appear more desirable because it permits greater experimentation and variety before comprehensive federal legislation is enacted.[164] Also, state legislation presents a more practical forum for test legislation, such as dismissal statutes, because headway may be more easily made through progressive state legislatures than through the more cumbersome process of enacting federal legislation.[165] Federal legislation, on the other hand, has its unique advantages.[166] No single state may want to suffer the consequences of making itself less attractive to commercial and industrial investors and employers by imposing a more restrictive discharge rule on its citizens than exists in other states.[167] The scope of any such federal statute should be limited to discharge actions. The statute could then be amended or modified in order to incorporate additional coverage against all unjust discipline in the future.[168] The federal statute should not define "just cause" but should rather leave the term open to an application of the industrial common law definition of just cause.[169]

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implied contract and not based upon fair and honest cause or reason; and Senate Bill 2317 considered by the California Senate also in 1983, which had the same provisions.

159. *See* Summers, *Individual Protection, supra* note 11, at 501. (Professor Clyde Summers remarks on the principles underlying discipline and discharge cases followed by arbitrators.).

160. *See generally,* Summers, *Individual Protection, supra* note 11, at 481-503; 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) 51:1 (1979) (survey of voluntary grievance procedures).

161. *See supra* note 160.

162. *See, e.g.,* Summers, *Individual Protection, supra* note 11, at 481-533.

163. Stieber & Murray, *supra* note 11, at 337.

164. *Id.*, at 336.

165. *Id.* at 336.

166. *Id.*

167. *Id.* at 338.

168. *Id.* at 336.

169. *Id.* at 337.

### C. The Need For Reform: Inadequacy of Federal Anti-discrimination Legislation as Judged by International Standards

Domestic legal scholars have supported the erosion of the employment-at-will doctrine.[170] On the other hand, some scholars have argued against its demise claiming that most employers do not unfairly dismiss workers.[171] These scholars argue that statutes already in existence such as Title VII, the Fair Labor Standards Act, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act and other statutes that protect against dismissal for discriminatory reasons provide adequate protection in the most egregious cases of abusive discharge.[172] Yet, the ILO Recommendation No. 119 and the subsequent Convention No. 158 on the same topic provide more protection than that currently afforded U.S. workers under the various federal statutes mentioned. For example, Title VII extends protection to U.S. employees discharged on the basis of race, color, sex, pregnancy, religion, or national extraction.[173] Title VII, in contrast to the ILO Recommendation and Convention, does not extend to discharges based on social origin, political opinion, or marital status.[174]

In the area of discharge for temporary absence from work, non-unionized employees are subject to the unilateral determination of the employer.[175] That is, there are no clear guidelines for an employer to follow in the United States regarding what constitutes a temporary absence from work not justifying dismissal.[176] In fact, the at-will doctrine makes such guidelines irrelevant. Therefore, employees are left with no guarantee that an employer will not set unreasonable or arbitrary boundaries on the length of an employee's leave of absence.[177] By contrast, the ILO Convention, in Article 6, declares that temporary absence from work does not constitute a valid reason for discharge.[178] The Convention does not, however, state a guideline as to what amount of time would consti-

170. *See supra* note 11. (Proposed legislation, articles and notes arguing for reform in this area are cited). Many of the proposals set forth in this section are generally derived from St. Antoine's work previously *cited in infra* note 138 and Bellace *supra* note 11.

171. *See, e.g.*, Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REV. 249 (1983); Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Note, *Challenging the Employment-At-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J.L. REF. 449 (1983); Rosen, *Commentary: In Defense of the Contract at Will*, 51 U. CHI. L. REV. (1984).

172. *Id.*

173. *See* 42 U.S.C. § 2000E-2 (1982). *See, e.g.*, Yuhas v. Libby-Owens-Ford Co.,, 562 F.2d 496 (7th Cir. 1977) (court held company policy of prohibiting employment of married couple valid provided company gave couple choice as to which person should resign).

174. Bellace, *supra* note 11, at 214.

175. *Id.*

176. *Id.*

177. Convention, *supra* note 61, art. 6(1).

178. *Id.*

tute a reasonable temporary absence.[179] Article 6 delegates to each signatory nation the task of outlining the specifics of what constitutes a temporary absence in accordance with the practices and customs of its domestic law.[180] Nevertheless, this provision guarantees the employee some modicum of reasonableness in discharge determinations, as opposed to the United States approach favoring the unilateral prerogative of the employer.

Under ILO Convention No. 158, the employee is also entitled to an opportunity to defend against punishment in the form of dismissal before the dismissal is a *fait accompli*. At a hearing before an impartial body, the employee is given the opportunity to defend against the employer's allegations of poor performance or misconduct.[181] The United States does not offer any parallel opportunity to non-unionized workers; it has relegated disciplinary discharges to the absolute discretion of the employer.[182] In addition, the ILO guidelines place the burden of proof on the employer to show the discharge was based on a valid reason; or in the alternative they require that the arbitration committee determine the reason based on the facts.[183] Given the loss dismissal constitutes for employees, employers should have a valid reason to dismiss. To impose this obligation on an employer is not unreasonable.

### D. Implementing Statutory Protection

Implementation of a statutory guarantee against unjust dismissal in the United States could be achieved through a uniform state statute. Every state could adopt a statute that provides that "every employee has the right to be dismissed only after a fair procedure and for just cause."[184]

The clarity and straightforwardness of this statutory formula would benefit all. Employers would be able to gauge when they have exceeded the bounds of the rights to discharge for just cause by referring to the practice of the industry as developed in this area in collective bargaining agreements.[185] Similarly, employees might be able to better assess whether or not they have a meritorious unjust discharge claim.

Employees who realize they do not have a substantial claim would not process the grievance, thereby reducing the caseload of arbitrators and reducing the burden and cost on the grievance system in general.

179. *Id.* at art. 6(2).
180. Convention, *supra* note 61, at art. 7.
181. Bellace, *supra* note 11, at 215.
182. Convention, *supra* note 61, at art. 8(1).
183. Bellace, *supra* note 11, at 238.
184. *See* Summers, *supra* note 160.
185. *Id.*

State legislative drafters should, therefore, keep the language of the statutory guarantee as simple and comprehensible as possible.

Another advantage of this approach is that it is congruent with the standard already firmly established through collective bargaining in the unionized sector of an employer's right to discharge "for just cause." In applying the "just cause" standard, courts and arbitrators will be able to refer to a body of law already developed by arbitrators on the meaning of just cause.[186]

A third advantage to this form of statutory guarantee is that it could be favorable to unions.[187] Unions could champion the statute and thus use advocacy of it as an organizing tool and political symbol.[188] Moreover, such a statute would also shift the burden of proof onto the employer to show just cause in cases involving dismissal of a union sympathizer.[189]

The fact that only one-fourth of American workers are protected against unjust dismissal through collective bargaining agreements means that the traditional bargaining processes have not produced protection for the majority of workers.[190] Whatever the theoretical risks to the traditional bargaining processes that may result from such a statute, they do not outweigh the devastating costs to the approximately 100,000 workers a year who are fired without just cause.[191]

## *IV. The French Model*

As mentioned earlier, the French, as signatory to ILO Recommendation No. 119, adopted the ILO standards relating to unjust cause.[192] Since the implementation of the ILO Recommendation in France, the highest court of France, the *Cour de Cassation*, has undertaken the task of shaping the contours of what is meant by "genuine and serious cause." Often, this has resulted in a very restricted application of the unjust cause standard.[193] That is, employers in France currently enjoy a judicial trend favoring a narrow application of the concept of unjust cause.[194] In practice, an employer can still terminate an employee without a genuine and serious cause for dismissal upon payment of damages. French critic Rojot explains:

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186. *See* St. Antoine, *supra* note 138, at 15.
187. *Id.*
188. *Id.*
189. Added to balance.
190. See Keyes, *supra* note 11, at 146 for an overview of federal law relating to termination of employees for discriminatory motives.
191. St. Antoine, *supra* note 138, at 14.
192. *See, supra* note 74 (with the exception).
193. *See, e.g., supra* note 136.
194. *Id.*

> The principle remains that in France an individual contract of employment of indeterminate duration is terminable at will by the employer, as well as by the employee, at any time, provided that the employer pays severance pay and gives the customary notice or makes payments in lieu thereof. . . . This in practice means that an employer willing to pay the price (severance pay, pay in lieu of notice, damages) is always able to finally dismiss an employee if he wishes to do so.[195]

Notwithstanding the practical problems that the French model has developed, it does provide the United States with an initial point of departure. Much of the structure of the French model could be readily transplanted to the United States.[196]

## A. International Implications

International commentators have seen a general trend in the development of unjust dismissal statutes. It has been observed that throughout the industrial world, "[o]n balance. . .the equities [now] tilt toward the individual employee."[197] Unfortunately, this description overlooks the United States. All other major industrialized democracies in the world have provided protection for their workers through unjust dismissal legislation.[198]

The United States is the only industrialized nation in the world to persist in the practice of permitting employers to dismiss employees wrongfully.[199] The United States stands alone in its position of so vigorously opposing and rejecting the Recommendation No. 119 and the subsequent Convention No. 158 unfair dismissal standards.[200] ILO standards, as set forth in ILO recommendations and conventions, announce not the ideal or standard for best practice in a given area, but rather set out the standard of minimally acceptable behavior. Hence, the

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195. Rojot, *supra* note 83, at 50.

196. *See* Bellace, *supra* note 11, at 207. (Author explains how British law on unfair dismissal is instructive to the U.S. and outlines how the U.S. could inexpensively implement the ILO standards, using a model building on the current Pennsylvania unemployment claims system.)

197. St. Antoine, *supra* note 138, at 14.

198. *Id.*, and accompanying text.

199. Of the member states voting at the June 1982 ILO Conference on the proposed Convention, "Termination of Employment At The Initiative of the Employer", *supra* note 61, only seven countries had representatives who voted against adoption of the Convention. In six of the seven, only the employers' representatives voted against the Convention. The United States was the only country whose government representative voted against the Convention. (The United States employers' representative also voted against the Convention). For the official record of the 1982 Convention, see ILO, INTERNATIONAL LABOUR CONFERENCE CONVENTION CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER, 68th Sess. ILO Convention, No. 158 (1982). The ILO annually holds an International Labour Conference for the purpose of voting on conventions, recommendations or resolutions. Conventions are ratified by a two-thirds vote. INTERNATIONAL LABOUR ORGANISATION CONST. art. 19(2). Each member state sends four voting delegates: two representing the government, and one each representing employers and workers. *Id.*, art. 3, ¶ 1.

200. *See supra* note 61.

United States' failure to adopt ILO standards sets the United States as falling below the ILO's minimum standards.

Adoption of the ILO standards would directly undermine employment-at-will in the United States. In fact, this reason is exactly why the United States' government and representatives opposed the 1982 Convention on Termination of Employment at the Initiative of the Employer.[201] In order to address their concerns, it is important to understand the reasons put forward by the United States' government and employers' representatives for so vigorously opposing the Convention. First, as previously mentioned, the U.S. employers' representative at the 1982 Conference opposed the ILO standards because of the limitation on the employer's private initiative to dismiss workers for economic or structural reasons.[202] The United States' government representative specifically opposed the requirement of a just cause for termination and post-dismissal appeal to an impartial arbitration committee where the employer would be required to put forth a valid reason for the termination.[203]

Although the ILO does not have a mechanism by which it can enforce its standards, the American government and industry opposition to Convention No. 158 can be understood when it is noted that signatory members seriously undertake the application of ILO standards to their national systems.[204] In anticipation of this result, the United States sought to contain, if not roll back, the impact which the approval of Convention No. 158 would have on the standards for dismissal on American subsidiaries abroad.[205] For example, prior to the 1982 Conference, the Council for International Business responded to the proposed Convention by mounting a national lobbying effort against the ratification of the Convention by informing its member companies with foreign subsidi-

201. Members are expected to implement through the appropriate national authority or instrument the standards adopted at the convention within one year of the date of the convention's ratification. Members assume an obligation to implement the convention's provisions by signing the ratified convention and communicating such action to the Director-General of the ILO. Signatory members periodically report to the International Labour Office as to actions taken through the national legislature or other body to comply with the convention. But no enforcement mechanism exists to compel signatory nations to comply. *See* INTERNATIONAL LABOUR ORGANISATION CONST. art. 19(5).

202. The United States' representatives proposed in 1982 that the clause of the Convention requiring the employer to state a valid reason for termination be removed from the Recommendation. *See* Report, *supra* note 61. Spokesman for the United States, Paul Weinberg of American Express, stated in the proceedings just before the vote that the United States opposed the Convention "basically because its very concept . . . erodes the principle of termination at will." *Id.* no. 35 (Twenty-Ninth Sitting), at 4 (June 22, 1982) *quoted in* Bellace, *supra* note 11, at 212-213 n.27.

203. *See* REPORT, *supra* note 61 (questionnaire to member countries relating to proposed Convention).

204. *See id.*, No. 356, at 4-5.

205. France's report outlining its compliance with the Recommendation was sent to the International Labor Office just before the enactment of the Law of 1973. On the other hand, the United States has ratified only seven ILO conventions. Bellace, *supra* note 11, at 217 n.53.

aries of the contents of the Convention.[206] These United States' employers did not want to have to meet an unjust dismissal standard in business operated overseas or domestically.[207] Nonetheless, compliance with the ILO standard has not discouraged foreign investment in those countries that have ratified the Convention. For instance, the United States continues to operate subsidiaries in France despite the fact that those plants are subject to the French dismissal laws; and U.S. businesses have more subsidiaries located in Great Britain than any other country notwithstanding the fact that British law has adopted the whole of the ILO standards.[208]

Extending a minimum amount of protection against arbitrary and capricious discharge to the vast majority of U.S. workers[209] will not disadvantage U.S. employers in the international market because the United States would be joining the vast majority of industrialized nations that already have incorporated ILO unjust dismissal standards into their national legislation. Moreover, if the United States intends to remain competitive in the international market, France, and other nations teach the lesson that there may be a significant correlation between the security of a nation's workforce and the high productivity and quality of that nation's output.[210]

*Conclusion*

The United States is headed for a state-by-state legislative development of an unjust dismissal statute that will look something like the French statute in terms of its underlying purpose. These statutes will give individual workers the right not to be terminated without some of

206. U.S. Council, *Termination of Employment*, INT'L LAB. AFF. REP., No. 3, at 5, 1982; *see The Employment-At-Will Issue*, 111 LAB. REL. REP. (BNA) No. 23, at 9-12 (Nov. 22, 1982) (letter from spokesman for United States at Convention Paul Weinberg of American Express to Chairman of Council for International Business, urges coalition of efforts in order to block ratification of the Convention because of the impact it would have on foreign subsidiaries). *Quoted in* Bellace, *supra* note 11, at 217 n.54.

207. *See supra* note 202.

208. *See* Bellace, *supra* note 11, at 217.

209. THE EMPLOYMENT-AT-WILL ISSUE—A BNA SPECIAL REPORT 24 Nov. 22, 1982 (providing useful statistics on the number of employees terminated annually under the employment-at-will rule).

210. Approximately sixty countries in the world provide statutory protection against unjust discharge. *See* Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 175 (1981) (providing statistics on the status of dismissal legislation throughout the world) *quoted in* St. Antoine *supra* note 138 at 3. For a comprehensive review of dismissal legislation in Europe, see COMMUNAUTE EUROPEENNÉ DU CHARBON ET DE L'ACIER HAUTE AUTORITÉ, LA STABILITÉ DE L'EMPLOI DANS LE DROIT DES PAYS MEMBRES DE LA C.E.C.A. (1958). *See* St. Antoine, *supra* note 138 at 18 comparing U.S. and Japan on same point; *see also* SPECIAL TASK FORCE, DEP'T OF HEALTH, EDUCATION & WELFARE, WORK IN AMERICA 93-110, 188-201 (1972) (providing statistics on productivity in U.S.).

the procedural requirements (hearing, notice, and statement of motive for termination) that the French statute currently requires. The state courts will fill the gaps with respect to what is just cause in a fashion similar to the work done by the *Cour de Cassation* in France. This development is desirable because current federal legislation does not adequately protect employees against an employer's arbitrary and capricious dismissal. Dismissal legislation similar to that enacted in France is workable in the United States and would bring the United States into the community of industrialized nations of the world that already extend such protection to their employees.

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