

# THE PITFALLS OF AT-WILL AND JUST CAUSE EMPLOYMENT: A COMPARATIVE ANALYSIS OF EMPLOYMENT LAW IN THE UNITED STATES AND COLOMBIA

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## I. INTRODUCTION

In March 2012, fourteen employees from a South Florida law firm were fired for simply wearing orange-colored shirts to work.<sup>1</sup> Some employees were allegedly wearing orange to protest new work rules while

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1. See Doreen Hemlock, *6 of 14 Employees Fired Wearing Orange Shirts Hire Lawyer*, SUNSENTINEL.COM (March 27, 2012), [http://articles.sun-sentinel.com/2012-03-27/business/fl-orange-shirts-elizabeth-wellborn-fired-lawyer-20120327\\_1\\_happy-hour-employees-shirts](http://articles.sun-sentinel.com/2012-03-27/business/fl-orange-shirts-elizabeth-wellborn-fired-lawyer-20120327_1_happy-hour-employees-shirts) (last visited Aug. 25, 2013).

others, according to their statements, were wearing orange because they were going to happy hour later that day.<sup>2</sup> Regardless of the employer's motivation, they were legally permitted to dismiss these employees, even if the reason was as frivolous as disliking the color of their shirt, the way they wore their hair, or something equally irrelevant and unrelated to their employment. In the majority of the United States, this action by an employer is lawful.<sup>3</sup> This illustration serves to show the attitude of the United States towards employment law—the employer has great discretion to dismiss his employees for almost any reason.

In April 2003, Miguel Fernando Restrepo Tobón was fired from his job at the Institute of Social Security in Colombia, a position that he had occupied since 1999.<sup>4</sup> He brought suit against his former employer alleging that he was dismissed without just cause and entitled to reinstatement.<sup>5</sup> The Institute of Social Security alleged that its actions were pursuant to established law, and further, that the claimant had been reassigned to a different governmental agency, and as such, not entitled to the relief requested.<sup>6</sup> The Colombian Supreme Court agreed with the claimant.<sup>7</sup> The Court ordered reinstatement and the payment of wages and benefits from the date his contract was terminated.<sup>8</sup> This case might appear extreme, especially from an American perspective, but it highlights the greater emphasis that Colombia put on job stability, and it demonstrates how Colombia removes a lot of employer discretion for dismissing employees.

In most cases, an employee is considered an “at-will-employee” if the relationship can be terminated by either party at any time for any reason.

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2. *See id.* Employees that were wearing orange to protest work conditions might be protected, but if the employees claimed that wearing orange was not part of a protest of working conditions, said employees would have no protection.

3. *See* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 65, 67 (2008). The exception would be Montana, which is the only state that does not follow the employment at-will doctrine. *See id.* at 69–70.

4. *See* Corte Suprema de Justicia [C.S.J.] [*Supreme Court*], Sala Lab. agosto 31, M.P.: C. Tarquino Gallego, Sentencia [A.S.] 37373 (Colom.). The Instituto de Seguro Social (Institute of Social Security) was a State sponsored provider of health services linked to the Ministry of Health and Social Protection. However, despite this case concerning what could be seen from the American perspective as a State employee, this case was ruled under the principles of a contract for an undefined term under the Colombian Labor Code. *See* below for further explanation of this principle.

5. *See id.* Although the reinstatement was due to a clause in a collective bargaining agreement (CBA), employees that have been in their positions for more than ten (10) years can be reinstated by a court if it deems they were not dismissed due to just cause; thus, this case can be seen as illustrative of what may happen even where no CBA is present.

6. *Id.*

7. *See id.*

8. *See id.*

Employment law is an important are when doing business internationally. Across the globe, the treatment of employees varies immensely. Many countries differ on whether an employee has legal standing to dispute things such as termination or entitlement to benefits when duration of their employment contract is undefined. In the United States for example, standing is not implied in this situation, however, in Colombia, it is.<sup>9</sup>

A comparison of employment law between the United States and Colombia is important because of the Free Trade Agreement (FTA), that was signed by both countries and went into effect on May 15, 2012.<sup>10</sup> Although the FTA does not mandate substantive changes in the employment law of either country, it does mandate that each country apply their respective laws.<sup>11</sup> For the United States to sign the FTA, it required Colombia to present a plan ensuring that conditions for workers in Colombia would improve.<sup>12</sup> The FTA's main changes in the law were procedural and institutional. It created procedures for labor and employment grievances and for the proper enforcement of the existing laws.<sup>13</sup> Nonetheless, because of the increased trade between the United States and Colombia, it is important to make a comparative analysis between both countries.

This article will discuss employment law in both the United States and Colombia, the doctrine of employment at-will and the just cause system, and the protections granted to workers against dismissal. It will then explore the motivation for the framework of each country's employment laws and the failures of both the American at-will doctrine and the Colombian system of just cause. Finally, it will provide recommendations for both systems that would respect the rights and values that each society considers important.

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9. See generally CÓDIGO SUSTANTIVO DEL TRABAJO [C.S.T.] [*Labor Code*] art. 62; see *infra* Appendix.

10. See M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL34470, THE U.S.—COLOMBIA FREE TRADE AGREEMENT: BACKGROUND AND ISSUES 1 (2012).

11. See Katerine Bermúdez A., *TLC Estados Unidos: Que Implica en lo Laboral* [*TLC United States: What Implications in Labor*], 169 REVISTA ACTUALIDAD LABORAL 145 (Jan.–Feb. 2010).

12. See *id.* at 149.

13. See *id.*

## II. UNITED STATES EMPLOYMENT LAW

A. *At-Will Employment*

In most of the United States, there is a presumption that employment is at-will when there is no employment contract.<sup>14</sup> The at-will employment doctrine allows an employer to dismiss employees “for good cause, for no cause, or for a cause that some might view as morally indefensible.”<sup>15</sup> At-will employment stems from the American belief that free markets should control employment standards without government intervention.<sup>16</sup> Any government involvement in the authority of employers is eyed with suspicion.<sup>17</sup> Employment law in the United States does not, through either federal statute or federal common law, prohibit “unfair dismissal or discharge without cause, nor even any period of notice.”<sup>18</sup> Furthermore, in the United States, the plaintiff has the burden of proving any wrongful termination under any applicable statute or doctrine.<sup>19</sup>

The employment at-will doctrine evolved from the English common law dealing with employment relations.<sup>20</sup> As stated by Blackstone, “when there was no time specified for the employment relationship, said relationship would last for a year.”<sup>21</sup> As employment law evolved, this presumption changed.<sup>22</sup> By the late 1800s, with the States disagreeing on how to approach employment law, the at-will rule was first expressed by Albany lawyer and treatise writer, Horace Gray Wood.<sup>23</sup> Wood asserted that the rule for when there was no contract for a defined period of time was “that a general or indefinite hiring is prima facie a hiring at will, and if the

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14. See Porter, *supra* note 3, at 63. Montana repealed the employment-at-will doctrine in 1987 with the passage of the “Wrongful Discharge from Employment Act.” Puerto Rico and the Virgin Islands do not use employment-at-will either. See *id.* at 69–70.

15. See *McCown v. Gray Kentucky Television, Inc.*, 295 S.W.3d 116, 118 (Ky. Ct. App. 2008).

16. See David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH L. REV. 523, 523 (2009).

17. See *id.*

18. See Clyde W. Summers, *Employment-At-Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000).

19. See Kim Sheehan, *Has Employment-At-Will Outlived Its Usefulness? A Comparison of U.S. and New Zealand Employment Law*, 28 CAL. W. INT’L L. J. 323, 336 (1997).

20. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT LAW* 40 (Thomson/West, 3d ed. 2004) [hereinafter ESTREICHER: EMPLOYMENT LAW].

21. See *id.*

22. See *id.*

23. See *id.* at 41.

servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.”<sup>24</sup> Wood’s rule spread across the nation and was widely adopted.<sup>25</sup> For example, the New York Court of Appeals adopted it in *Martin v. New York Life Insurance Co.* in 1895.<sup>26</sup>

Employment at-will evolved in the United States as a byproduct of a capitalistic system, empowering the employers and limiting the rights of the employees to claim a voice in the determination of the conditions they worked in.<sup>27</sup> Due to this origin, at-will employment has been thoroughly criticized. One criticism is that at-will employment leaves employees with no protection against arbitrary action by the employers “regardless of prior years of service, any firm-specific human capital investments, the absence of alternative employment opportunities, or the insubstantiality of the grounds for termination.”<sup>28</sup>

There is a discussion amongst scholars in the United States regarding the status of the employment at-will doctrine. Several are of the opinion that employment at-will contracts have weakened over the past few years and are on the decline.<sup>29</sup> Courts throughout the United States are inconsistent in their application of the at-will doctrine by carving out certain exceptions that are recognized by some States and not by others.<sup>30</sup> Even the rationales for some of these limitations are conflicting.<sup>31</sup> However, “employment at will, ‘while it has eroded over the years, still remains firmly anchored in the common law.’”<sup>32</sup>

An employment agreement in the United States need not be in writing; a contract can be oral or implied from the conduct of the parties.<sup>33</sup> Americans view the individual freedom of contract as the preferred model

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24. *See id.*

25. *See id.* at 42.

26. *See Martin v. New York Life Insurance Co.*, 148 N.Y. 117, 120 (N.Y. 1895); *see* ESTREICHER: EMPLOYMENT LAW, *supra* note 20, at 42.

27. *See* ESTREICHER: EMPLOYMENT LAW, *supra* note 20, at 43.

28. *See id.* at 39.

29. *See* Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187, 204 (1990); *see* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L. J. 653, 682 (2000).

30. *See* Scott A. Moss, *Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment-At-Will*, 67 U. PITT. L. REV. 295, 298 (2005).

31. *See id.* at 301.

32. *Id.*

33. *See* 27 AM. JUR. 2D *Employment Relationship* § 11 (2013).

for an efficient and productive labor market.<sup>34</sup> When no express employment contract exists, a court may determine that an implied contract was formed nonetheless.<sup>35</sup> An implied contract may arise between an employer and employee based on their understanding and intent. The intent of the parties is determined from factors such as “written or oral negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, [and] the nature of the employment.”<sup>36</sup> Additional factors include: “longevity of service; oral and written assurances of stable and continuous employment, including commendations and promotions; and the employer's personnel practices and policies.”<sup>37</sup>

Courts have recognized some exceptions to the employment-at-will doctrine. There are four main rationales that American courts have used against employment at-will:

- 1) Public policy;
- 2) Implied-in-fact contracts;
- 3) Implied covenant of good faith and fair dealing; and
- 4) Wrongful discharge under tort law.<sup>38</sup>

Employees are protected under public policy when it is deemed that a policy supported by some statutory or constitutional provision would be violated by the dismissal of the employee.<sup>39</sup> However, public policy is very narrowly defined. In some cases, states do not apply the public policy exception when it is based on federal law rather than state law.<sup>40</sup>

The second exception to employment at-will is implied-in-fact contracts. These contracts exist when there is a representation by the employer of continuing employment either in the form of an oral promise, a handbook, or a policy implying that dismissal will only occur for just cause.<sup>41</sup> Instances of these cases have declined as employers have modified

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34. See Tim Louris, *The “Necessary and Desirable Counterpart:” Implementing a Holmesian Perspective of Labor Rights as Human Rights*, 28 *LAW & INEQ.* 191, 199 (2010).

35. See 27 *AM. JUR. 2D Employment Relationship* § 12 (2013).

36. *Id.*

37. *Id.*

38. See Porter, *supra* note 3, at 67; see Massingale, *supra* note 29, at 191.

39. See Summers, *supra* note 18, at 73.

40. See *id.* at 73–4.

41. See Porter, *supra* note 3, at 67.

their handbooks and become more cautious to avoid liability under an implied-in-fact contract.<sup>42</sup>

The third exception is the implied covenant of good faith and fair dealing, which is rooted in contract principles and the expectations of the parties who enter into an agreement.<sup>43</sup> The implied covenant of good faith and fair dealing prevents a party in a contract from taking benefits from the other party after an agreement is reached.<sup>44</sup> Because a covenant of good faith and fair dealing requires a contract, this doctrine's application is very limited in the context of employment at-will.<sup>45</sup>

The fourth exception to the employment at-will doctrine used by American courts is wrongful discharge under tort law. The wrongful discharge exception has generally been used to deal with cases where the employee's dismissal violates public policy.<sup>46</sup> Three main categories of actions fall under the umbrella of public policy:

- 1) An employee's refusal to break the law;
- 2) An employee's performance of a public obligation; and
- 3) An employee's exercise of a legal right.<sup>47</sup>

These limitations to the at-will doctrine only have a minimal effect on the discretion of employers to dismiss employees, and the subservience of employees to employers maintains its strength in American law.<sup>48</sup> Additionally, because these doctrines are created primarily at the state level, application at the federal level is inconsistent, which leads to confusion.<sup>49</sup>

### B. *Protections to Employees in the United States*

Title VII of the Civil Rights Act of 1964, proscribes employer discrimination practices in hiring, firing, and throughout the course of

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42. *See id.*

43. *See* ESTREICHER: EMPLOYMENT LAW, *supra* note 20, at 88.

44. *See* Porter, *supra* note 3, at 67.

45. *See id.*

46. *See id.*

47. *See id.*, Some examples of public obligations are: jury duty, attending depositions, and honoring subpoenas. An exercise of a legal right are things such as: filing worker's compensation claims, suing employers, engaging in union or political activities, protesting unsafe conditions, and refusing to take a polygraph test.

48. *See* Summers, *supra* note 18, at 84.

49. *See* Porter, *supra* note 3, at 71.

employment.<sup>50</sup> Nonetheless, the prohibition against discrimination is only limited to five classes: race, color, religion, sex, and national origin.<sup>51</sup> The primary impetus for the statute was the movement for racial equality that followed World War II and continued into the 1960s.<sup>52</sup> Congress was concerned with the status of African Americans in the labor market and their inability to equally compete for positions and wages.<sup>53</sup> Title VII was also passed to assist African Americans in becoming a more productive part of the labor force.<sup>54</sup> However, “these laws limit employer prerogatives only to the extent of requiring that all employees be treated equally.”<sup>55</sup>

There are two main ways to prove discrimination for one of the protected classes covered by Title VII: disparate treatment and disparate impact. In order to prove disparate treatment, an employee must show:

- 1) That he belongs to a protected class;
- 2) That he applied and was qualified for a job for which the employer was seeking applicants;
- 3) That, despite his qualifications, he was rejected; and
- 4) That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.<sup>56</sup>

To prove disparate impact an employee must prove that:

- 1) There was a specific policy/practice that is facially neutral but has a disparate impact in application;
- 2) The employer can then offer as a defense that the policy/practice is job related and a business necessity; and
- 3) The employee can then show that there is a nondiscriminatory alternative policy/practice that may be used.<sup>57</sup>

Under the category of discrimination on the basis of sex, Title VII grants women protections from discrimination due to pregnancy and sexual

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50. See SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW* 8 (Thomson/West, 3d ed. 2008) [hereinafter ESTREICHER: EMPLOYMENT DISCRIMINATION].

51. *Id.* at 8.

52. *Id.*

53. *Id.*

54. *Id.* at 18.

55. Summers, *supra* note 18, at 85.

56. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792–93 (1973).

57. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).



harassment. In 1978, Congress amended Title VII by passing the Pregnancy Discrimination Act (PDA) to include pregnancy, childbirth, or related medical decisions.<sup>58</sup> Nevertheless, the PDA does not require employers to offer benefits to women that are not offered to other employees; it merely ensures that women are treated equally.<sup>59</sup> Discrimination based on sex has also been used to prohibit sexual harassment. In this context, the U.S. Supreme Court stated that when the workplace is riddled with “discriminatory intimidation, ridicule, and insults are sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” it will be considered a violation of Title VII.<sup>60</sup>

Religious discrimination is likewise a protected category under Title VII. American tradition recognizes the importance of the freedom to practice any religion.<sup>61</sup> The protection of freedom of religion granted by Title VII in the employment setting is a reflection of how American society views the practice of one’s religion as a critical part of human dignity and freedom.<sup>62</sup> Without these safeguards, individuals from religious groups might find it difficult to gain employment. That places these individuals in a situation where they either have to change their beliefs, or they have to form isolated communities to their own detriment and to society at large.<sup>63</sup>

Religion is different from the other protected classes in Title VII because an employer must provide “reasonable accommodation” for the employee’s religious beliefs.<sup>64</sup> These accommodations include, for example, days off for religious observances, even if they are unpaid.<sup>65</sup> Employers can offer as a defense that the requested accommodations could not be granted without undue hardship for the employer.<sup>66</sup>

The Age Discrimination in Employment Act of 1967 (ADEA), prohibits discrimination in employment due to age.<sup>67</sup> A possible justification for the ADEA is that employers might dismiss older employees in order to replace them with younger employees who might be more

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58. ESTREICHER: EMPLOYMENT DISCRIMINATION, *supra* note 50, at 282.

59. *Id.* at 284.

60. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

61. *See* U.S. CONST. amend. I.

62. ESTREICHER: EMPLOYMENT DISCRIMINATION, *supra* note 50, at 551.

63. *Id.*

64. *See Trans World Airlines, Inc. v. Hardison*, 431 U.S. 63, 74 (1977).

65. *See e.g. id.* at 84–85.

66. *See id.* at 85–86.

67. *See* The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 29 U.S.C. §621 (2012).

productive at a lower wage.<sup>68</sup> The ADEA protects all employees over the age of forty.<sup>69</sup> In passing the ADEA, Congress borrowed the statutory framework of Title VII.<sup>70</sup> Therefore, ADEA jurisprudence has followed a similar development to that of Title VII; this includes the use of the elements of disparate treatment and disparate impact by the courts.<sup>71</sup>

The Americans with Disability Act of 1990 (ADA), makes it unlawful “to discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.”<sup>72</sup> Congress passed the statute because disabled Americans have historically been at an economic disadvantage.<sup>73</sup> Before the ADA was passed, two-thirds of disabled Americans were unemployed, and those that were working earned thirty-six percent less than non-disabled workers.<sup>74</sup> To help people with disabilities into the labor market, the ADA mandates employers provide “reasonable accommodation” if it would enable a qualified individual with a disability to do the job.<sup>75</sup> As with religion under Title VII, employers can use the same undue hardship defense.<sup>76</sup>

The federal government and many of the States have passed anti-retaliation and whistleblower legislation to protect employees.<sup>77</sup> Anti-retaliation laws ensure that employees are able to enforce their rights without being dismissed for doing so.<sup>78</sup> In addition to these laws, anti-retaliation provisions are included in Title VII and the ADA.<sup>79</sup>

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68. ESTREICHER: EMPLOYMENT DISCRIMINATION, *supra* note 50, at 392.

69. *Id.* at 393.

70. *Id.*

71. *Id.*

72. SAMUEL ESTREICHER & MICHAEL C. HARPER, STATUTORY SUPPLEMENT TO CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 126 (Thomson/West, 3d ed. 2008).

73. ESTREICHER: EMPLOYMENT DISCRIMINATION, *supra* note 50, at 457.

74. *Id.*

75. *See generally id.* at 459–00.

76. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 42 U.S.C. 2000e, (j) (2012).

77. *See* Americans with Disabilities Act of 1990, Pub. L. No. 110-325, 42 U.S.C. §12003 (2012).

78. *See id.*

79. *See id.*

Whistleblower statutes are designed to protect employees from being penalized when they expose violations of the law by their employers.<sup>80</sup>

Aside from the protections stated above and some other limited instances, the employment at-will doctrine is alive and well in the United States.<sup>81</sup> This leaves American employees as “some of the most vulnerable to arbitrary discharge in the Western World.”<sup>82</sup>

### III. COLOMBIAN EMPLOYMENT LAW

In Colombia, employment law is addressed in the Constitution of 1991. It is mentioned in the Preamble as one of the aims of government; it is also mentioned in Article 1.<sup>83</sup> Likewise, Articles 53 through 58 of the Constitution address several facets of employment law including a mandate to create a labor code.<sup>84</sup> Article 53 mandates that Congress create a labor code and instructs on the minimum protections that this code must provide employees.<sup>85</sup> Protections under Article 53 include the rights to equal opportunity of employment, equality for women, minimum wage, employment stability, timely pay, and protections for minors.<sup>86</sup> Article 53 also establishes a presumption in favor of the employees whenever there is ambiguity in the interpretation or application of a law.<sup>87</sup> Similarly, it incorporates any international convention that is properly ratified into the domestic legislation.<sup>88</sup> Article 54 gives employees the right to training by

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80. Porter, *supra* note 3, at 69.

81. There are five other federal statutes that limit the discretion of an employer to fire an employee. The National Labor Relations Act (NLRA) also known as the Wagner Act allows workers to organize in order to reach agreements with employers as to their work conditions; the Fair Labor Standards Act (FLSA) fixed minimum wages, hours, and compensation for overtime; the Occupational Safety and Health Act (OSHA) prohibits retaliation against employees who seek to enforce safety and health standards; the Employee Retirement Income and Security Act (ERISA) which prohibits employers from dismissing employees whose retirement plan benefits might soon vest; and the Family and Medical Leave Act which prohibits employers from dismissing employees who take the leave the benefits the act entitles them to. See Donald C. Carroll, *At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection*, 46 U.S.F. L. REV. 655, 667 (2012); see also, Porter, *supra* note 3, at 70.

82. James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. Pa. Lab & Emp. L. 235, 249 (2007).

83. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [*Constitution of Colombia*] Preámbulo, art. 1.

84. See *id.* art. 53, 58; see *infra* Appendix at II A.

85. See *id.* art. 42.

86. See *id.* art. 53; see *infra* Appendix at II A.

87. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 53; see *infra* Appendix at II A.

88. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 53; see *infra* Appendix at II A.

either the State or the employer.<sup>89</sup> The Constitution also mandates the State to promote employment. Finally, Article 54 guarantees the right for people with disabilities to be employed.<sup>90</sup>

#### *A. Contract of Undefined Term*

The Colombian Labor Code specifies the types of employment contracts recognized by law.<sup>91</sup> This discussion focuses on the contract for an undefined time as it seems to be the equivalent, although it may appear ideologically opposite, to the American employment at-will doctrine. Under Article 47 of the Labor Code, an agreement is a contract of undefined term when an employer and an employee enter into an agreement for services without a specified amount of time.<sup>92</sup> A contract of undefined term is valid as long as the facts giving rise to the contract exist.<sup>93</sup> Article 47 provides one way of terminating the contract for an undefined term: it allows the employee to terminate the contract by providing notice at least thirty days in advance to the employer.<sup>94</sup>

Article 47 was the product of a long battle between unions and workers to obtain greater stability at work, which resulted in Congress passing Article 5 of Decree 2351 in 1965.<sup>95</sup> These protections eventually became Articles 47, 48, and 49 of the Colombian Labor Code.<sup>96</sup> With the history behind the passage of these articles in mind, it is clear that the legislative intent was to provide employees with more stability and security.<sup>97</sup> Nevertheless, aside from the provision for thirty days notice, Article 47 does not give guidance on how the employment contract may be terminated.

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89. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 54; see Appendix at II A.

90. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 54; see *infra* Appendix at II B.

91. Article 45 of Labor Code recognizes four types of contracts:

- i) To execute an occasional, transitory, or accidental work;
- ii) For the time it takes to complete a certain job or labor
- iii) For an undefined period; or
- iv) For a determined period.

See Código Sustantivo del Trabajo [C.S.T.] [*Colombia Labor Code*] art. 45.

92. See *id.* art. 47.

93. See *id.*; see *infra* Appendix at I B.

94. See *id.*; see *infra* Appendix at I B.

95. See Decreto 2351 de 1965 [*Decree 2351 of 1965*] art. 5 [Colom.]; see Código Sustantivo del Trabajo [C.S.T.] [*Colombia Labor Code*] art. 47.

96. See Código Sustantivo del Trabajo [C.S.T.] [*Colombia Labor Code*] art. 48–49.

97. See *id.* art. 47.

*B. Just Cause for Terminating the Employment Contract*

Article 61 of the Labor Code specifies the general instances in which contracts terminate. Situations that terminate the contract include: the death of the worker; mutual consent; the permanent liquidation or closure of the factory/establishment; the suspension of the employer's activities during longer than one hundred and twenty days; a rendered judgment; and the failure of the employee to return to his position once the situation giving rise to the suspension of the contract ceases to exist.<sup>98</sup> Furthermore, in some of these situations the employer must obtain the permission of the Ministry of Work and Social Security before dismissing the employee and terminating the employment contract.<sup>99</sup>

There are a number of situations in which the employer or the employee can unilaterally terminate an employment contract of undefined term. Article 62 of the Labor Code lists the just causes to end the employment contract of undefined term this way (with the exception of the thirty day notice by the employee stated in the Constitution).<sup>100</sup> The employer cannot unilaterally dismiss the employee except for a limited list of circumstances which include:

[B]eing deceived by the employee to obtain the job or an unfair advantage, the employee committing an act of violence, injury or ill-treatment against the employer, his family, partners, managers, watchmen, or guards in the course of his employment, the employee committing a serious act of violence against any of the above mentioned outside of the course of his employment, intentional material damage to any material, building, raw material, etc.<sup>101</sup>

The reasons allowing termination of the contract for just cause are mostly comprised of situations that would gravely jeopardize the employer, the employer's family, associates, business, or any other extreme situations. Additionally, Article 62 limits the ability of the employers to dismiss employees for economic reasons.<sup>102</sup>

On the other hand, the employee is limited in his ability to end the employment contract of undefined term by giving thirty days advance notice as stated in Article 47 of the Labor Code, or by giving notice within

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98. See *id.* art 61.

99. See *id.*

100. See Código Sustantivo del Trabajo [C.S.T.] [*Colombia Labor Code*] art. 62.

101. C.S.T. art. 62; see *infra* Appendix, at i-iii.

102. See C.S.T. art. 62 (a).

fifteen days of when the employee has been deceived as to: the working conditions; the employer commits any act of violence, mistreatment or serious threats against the employee or the employee's family, or committed by the employer's relatives, or representatives while in service of the employer and with his consent or tolerance; any act of the employer that incites the employee to commit a crime or commit an act that is contrary to the employees political or religious convictions; or the requirement of the employer, without valid reasons, to do a different job, or in a different place that was agreed under the contract.<sup>103</sup>

The Colombian Supreme Court has decided that when there is just cause for terminating the contract, the principles of good faith still apply.<sup>104</sup> Not only must the employer notify the individual of the causes for dismissal, but also such causes must be so clear that the employee can choose to either raise a defense or dispute the decision.<sup>105</sup> For the sake of stability in the employment, the power to dismiss was removed from the will of the employer; they cannot terminate the contract by making the reasons for entering into the contract disappear.<sup>106</sup> If one party has influenced the circumstances that ended the contract, that party is considered culpable and will carry whatever legal ramifications the termination of the contract carries.<sup>107</sup>

#### IV. HUMAN DIGNITY VERSUS INDIVIDUAL LIBERTY IN EMPLOYMENT LAW

American employment law embraces the idea of unrestricted free markets and views limitations of management authority with deep suspicion.<sup>108</sup> The founding principles of the United States are more closely related with the classical liberal state and its distrust of government.<sup>109</sup> Over the last few decades, the United States has followed the principle that employment markets are the essence of human liberty and the route that must be followed for society to progress.<sup>110</sup> The United States is one of the

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103. *Id.* art. 47, 62; *see infra* Appendix, at iii.

104. Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], Sala Lab. 17 de noviembre de 1997, M.P. Dr. Alejandro Martínez Caballero, Expediente D-1676, (Colom.).

105. *Id.*

106. *See id.*

107. *See id.*

108. Yamada, *supra* note 16, at 523.

109. See John C. Goodman, What is Classical Liberalism?, National Center for Policy Analysis, <http://www.ncpa.org/pdfs/whatisclassicalliberalism.pdf> (The classical liberal state is one characterized by the belief in liberty. This philosophy is based upon the belief that people have natural rights apart from the government and the purpose of the government is to protect such rights.)

110. *Id.* at 526.

few countries, industrialized or developing that has no general protections against unfair dismissal or even a minimum period of notice.<sup>111</sup>

Cultural perceptions and public opinion in the United States heavily favor employers at the detriment of employees. American culture has given fame and prestige to employers and managers who use intimidation as a leadership tool.<sup>112</sup> For example, “Neutron” Jack Welch was celebrated for saving General Electric by cutting approximately 130,000 jobs “with a management style that was described as criticizing, demeaning, ridiculing, and humiliating to his employees.”<sup>113</sup>

Despite the principle of individual freedom underlying employment law, most Americans work for someone else to earn a living, accept the employer’s right to command their behavior in intimate detail, and give up some of their individual liberties.<sup>114</sup> Given the power disparity between employers and employees, most employees have little to no voice about the products they create or how the rewards of the enterprise are distributed.<sup>115</sup> “The typical at-will employee has, at best, the ability to make requests or submit non-binding suggestions to an employer.”<sup>116</sup> Additionally, the vulnerability of employees is present all over American society and touches every income level.<sup>117</sup>

On the other hand, Colombian employment law stems from its Constitution. Article 53 of the Constitution states that “no covenant, agreement or employment contract may infringe on the human dignity.”<sup>118</sup> Before the new draft in 1991, the ideological orientation of the Colombian Constitution followed the classical liberal state.<sup>119</sup> The classical liberal state ideology was based on the defense of individual freedom, and the principle such freedom was achieved by the non-intervention of the State in certain spaces.<sup>120</sup> Europeans followed this constitutional framework throughout the eighteenth century and into the beginning of the

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111. *Id.* at 532.

112. *Id.* at 529.

113. *Id.* Jack Welch served as the Chief Executive Officer of General Electric from 1981 to 2001.

114. Yamada, *supra* note 16, at 527.

115. *Id.*

116. *Id.* at 534.

117. *Id.* at 531.

118. C.P. art. 53.

119. Luis Eduardo Fajardo & Juan Carlos Guataqui, *La Corte Constitucional y la Flexibilidad del Mercado Laboral*, REVISTA DE ECONOMÍA INSTITUCIONAL, SEGUNDO SEMESTRE, AÑO/VOL. 2, NUMERO 003, UNIVERSIDAD EXTERNADO DE COLOMBIA, 80–81.

120. *Id.* at 81.

nineteenth.<sup>121</sup> Nonetheless, during the latter part of the nineteenth and beginning of the twentieth centuries, many started to doubt the classical liberal state's ability "to guarantee real justice beyond the formal freedoms."<sup>122</sup> Therefore, a shift in thought occurred and state intervention was considered a vehicle for guaranteeing economic equality in society—an idea of real equality rather than apparent equality of rights.<sup>123</sup> Through the Social Welfare State, the government acquires an active character to shield its population from some economic risks.<sup>124</sup> Also under this model, the state maintains "a minimum standard of wages, nutrition, health, housing, and education."<sup>125</sup>

The Colombian Constitution of 1991 explicitly dictates that the Colombian Republic is modeled as a Social Welfare State.<sup>126</sup> Thus, the Constitution mandates the State to take action to grant and protect certain rights to its citizens. In the labor field, the protection of these rights is achieved by several employment benefits stated in the Constitution that: defends the human dignity by guaranteeing a minimum standard of living.<sup>127</sup> With the establishment of the Social Welfare State, employment in Colombia became "[a] principle, [a] duty, and [a] right."<sup>128</sup> The Magistrate Alejandro Martínez described the change between the Classical Liberal State and the Social Welfare State introduced with the 1991 Constitution in the following way: "[t]he values of the Constitution are not being negated, instead they are being made more effective, giving them a base and a material content."<sup>129</sup> There is a contradiction in this doctrine with respect to employment laws; the benefits given to the employee signify a protectionist and interventionist attitude of the State that seems to oppose the constitutional concept of legal equality.<sup>130</sup> The employer's freedom to make decisions regarding dismissal of employees is traded for the employee's stability in the employment.

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121. *Id.*

122. *Id.*

123. Fajardo, *supra* note 119, at 81.

124. *Id.*

125. *Id.*

126. C.P. pmbi.

127. Fajardo, *supra* note 119, at 81.

128. SERGIO RAÚL CHAPARRO HERNÁNDEZ ET AL., *TRABAJO DIGNO Y DECENTE EN COLOMBIA*, 33 (Procuraduría General de la Nación 2011).

129. Fajardo, *supra* note 119, at 82 ("The values [embodied] in the constitution are not negated rather [the adoption of the Welfare State in Colombia] seeks to make them more effective, giving them a base and material content.").

130. *Id.*



Colombian courts have participated in the discussion of what path the Constitution has laid out with respect to employment law and what model the branches of the Colombian government must follow to respect the Constitution.<sup>131</sup> The Constitutional Court stated that the Constitution was not neutral in the economic model it dictated because the policy it contained adopted a Social Welfare State and restricted the policies that can be implemented; furthermore, the government must respect those limits, honor the constitutional values, and respect the fundamental values established therein.<sup>132</sup> Magistrate Jorge Ignacio Pretelt Chaljub stated:

[t]he text of the preamble and article 1 [of the Colombian Constitution] demonstrates that work is a founding principle of the Social Welfare State, because it is conceived as a mandate that should guide the public policies of full employment as well as the legislative measures to propel decent and just conditions in the performance of the employment or profession.<sup>133</sup>

Thus, the Colombian Constitution considers having a job and stability in employment as a fundamental right. Also, the working conditions must respect the dignity of the employee.

## V. PROBLEM WITH THE AMERICAN AND COLOMBIAN EMPLOYMENT LAW

### A. *Drawbacks of American Employment Law*

Employment law in the United States, as mentioned above, stems from distrust in the government and a belief that individuals should have as much freedom as possible in making contractual decisions. This has resulted in a system where the employer has a great amount of discretion when deciding to dismiss an employee. The employment at-will doctrine has been criticized for leaving employees at the whim and mercy of the employers because there is certain arbitrariness in the at-will concept.<sup>134</sup> “The employer has generally been able to pick and choose not only who will be hired, but also virtually all of the terms of employment as well.”<sup>135</sup>

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131. *Id.* at 80 (Colombia has two courts that can make ultimate decisions regarding employment cases; the Supreme Court of Justice has general appellate jurisdiction and the Constitutional Court can review cases that arise through the constitutional protection known as “tutela.”).

132. *Id.* at 81.

133. Chaparro, *supra* note 128, at 79.

134. See Carroll, *supra* note 81, at 658.

135. Massingale, *supra* note 29, at 200.

Scholars who support change in American employment law point to the inequity of bargaining power favoring the employer over the employee as a reason to change the law.<sup>136</sup> “Modern employment litigation [in the United States] all too often encompasses the David versus Goliath scenario of an aggrieved worker and a small plaintiffs’ law firm vying against a large company armed with an overstaffed team of attorneys.”<sup>137</sup>

The American perspective of employment law is viewed through an economic lens that “ultimately affords capitals’ interests a higher value than worker’s rights.”<sup>138</sup> Employers, as owners of the business, are often seen as having the property right to control the job and which employee fills the position.<sup>139</sup> This perspective grants an advantage to employers with their superior bargaining power and “undermine[s] those judicial decisions and legislative provisions designed to recognize employees’ rights in their jobs and their voice in the workplace.”<sup>140</sup> This view is not only completely different from the Colombian perspective, but from the larger outlook of how employees and labor are seen at the international level. This international viewpoint may be inferred from the Universal Declaration of Human Rights (the “Declaration”), which reads in part:

[e]veryone . . . has the right to social security[,] . . . the right to work[,] . . . the right to equal pay for equal work[,] . . . the right to just and favorable remuneration[,] . . . the right[,] . . . to join trade unions[,] . . . the right to rest and leisure[,] . . . and the right to a standard of living adequate for the health and well-being of himself and his family . . . .<sup>141</sup>

The Declaration also states, “[a]ll human beings are born free and equal in dignity and rights.”<sup>142</sup> However, under employment-at-will “the worker’s sense of dignity is at the mercy of the employer, and workers as a group are denied meaningful opportunities to participate in their own livelihoods.”<sup>143</sup> Furthermore, terminations of employees, when perceived to be unfair by the employees who remain, can lead to “negative effects on

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136. Sheehan, *supra* note 19, at 324.

137. Yamada, *supra* note 16, at 535.

138. Louris, *supra* note 34, at 192.

139. *See* Summers, *supra* note 18, at 78.

140. Summers, *supra* note 18, at 84.

141. Universal Declaration of Human Rights, G.A. Res. 217<sup>a</sup>, at 75–76, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

142. *Id.* at 72.

143. Louris, *supra* note 34, at 200–01.

morale, loyalty, and productivity.”<sup>144</sup> These effects are felt throughout American society; “insecurity and stress about jobs and the future cut across socioeconomic lines, reaching low-income and professional workers alike.”<sup>145</sup>

Not only does employment at-will lead to the de-humanization of the employee due to its influence of an economic basis for decisions, but it also allows for the breach of rights American society has sought to protect through the laws described above. Many dismissals of employees that a reasonable individual would deem egregious are not unlawful under any of the discussed statutes or common law doctrines.<sup>146</sup> The following three cases are examples where none of the antidiscrimination laws were applicable and yet most people would agree there should be protections for such situations.

In *Foley v. Interactive Data Corp.*, an employee sued for wrongful discharge after he reported to management that his supervisor was being investigated by the Federal Bureau of Investigation for embezzlement.<sup>147</sup> The court reasoned that this dismissal was not covered under the public policy doctrine as “the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying [public policy] is not implicated.”<sup>148</sup>

In *Bigelow v. Bullard*, an employee was dismissed when he tried to express support in favor of African Americans because he believed “his employer was fixing to physically assault the black males to get them off the property.”<sup>149</sup> The court reasoned that even if it agreed with the employee’s allegations that the employer fired him for his support of African Americans, the employer was still protected under the at-will doctrine, as the employee was not forced to discriminate; thus, his actions were not covered under the public policy exception.<sup>150</sup> Even if the employee had brought a discrimination charge under Title VII, the employee would not have likely succeeded as he was not discriminated because of his race, but rather for his support of another race.<sup>151</sup>

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144. Yamada, *supra* note 16, at 559.

145. *Id.* at 530.

146. Porter, *supra* note 3, at 71.

147. *Foley v. Interactive Date Corp.*, 765 P.2d 373, 375 (Cal. 1988).

148. *Id.* at 380.

149. *Bigelow v. Bullard*, 901 P.2d 630, 632–33 (Nev. 1995).

150. *Id.* at 633.

151. *See* Porter, *supra* note 3, at 73.

In *Green v. Bryant*, the employee was dismissed after being raped and beaten at gunpoint by her husband.<sup>152</sup> When the employee returned to work and told one of the employers what happened, the employee was dismissed; her domestic abuse was stated as the reason for the dismissal.<sup>153</sup> The court held the dismissal was legal because the employer had not breached the privacy of the employee and there was no public policy protecting domestic abuse victims from dismissal at work.<sup>154</sup>

These cases represent only a small number of examples where the employees were left with no legal remedy, while most people would agree that they should not have been dismissed. “There are unquestionably terminations that involve outrageous conduct by an employer or circumstances underlying a discharge that are so egregious that the legal system cannot and should not condone the discharge of the wronged employee.”<sup>155</sup>

Another problem caused by the employment at-will doctrine is the undermining and overuse of the anti-discrimination statutes. “Many terminated employees bring discrimination claims regardless of whether there is any indication that discrimination was the motivation behind the termination decision.”<sup>156</sup> Employees do so because they have no legal recourse for what they perceive to be an unjust dismissal aside from an anti-discrimination action.<sup>157</sup>

Employment at-will, despite its help keeping unemployment low in comparison to the just cause system in Colombia, has greatly disadvantaged lower income individuals. It was estimated that in 2006 in the United States, “as many as 75 million workers . . . are still considered to be at-will employees, subject to discharge at any time and unprotected by specific law or collective bargaining agreements.”<sup>158</sup> Income inequality has increased over the last three decades, and “the gap between the rich and poor is bigger than in any other advanced country.”<sup>159</sup> As displayed by the table below, the U.S. Bureau of Census reports the highest earners in society have

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152. Porter, *supra* note 3, at 73; see also *Green v. Bryant*, 887 F. Supp. 798, 798–03 (E.D. Pa 1995).

153. Porter, *supra* note 3, at 73.

154. *Id.* at 74.

155. Massingale, *supra* note 29, at 200.

156. Porter, *supra* note 3, at 77.

157. See *id.* at 76.

158. Sonne, *supra* note 82, at 249.

159. Yamada, *supra* note 16, at 529–30.

benefitted the most since 1979; during this same time period, the lowest earners have actually seen a decline in income growth.<sup>160</sup>

Income Growth in Families Between 1979 and 2003 <sup>161</sup>	
Top 5% (US \$170,100 and above)	+75%
Top 20%	+51%
Fourth 20%	+26%
Middle 20%	+15%
Second 20%	+8%
Bottom 20%	-2%

Finally, aside from these criticisms, the employment at-will doctrine does not follow the American vision of individual responsibility. Employment at-will “allows for an unwarranted interference by employers in their employee’s private lives.”<sup>162</sup> While the off-duty conduct of some employees may affect an employer’s business, employees’ off-duty conduct does not always have such effect.<sup>163</sup> Many such prohibitions may stem from overzealous managers whose motivations might not necessarily be business oriented.<sup>164</sup> Giving the employer such level of control over the employee’s life means that employees are surrendering their right to make many individual decisions.

#### B. Drawbacks of Colombian Employment Law

Colombian law is designed to provide employees with stability in their employment so long as they carry out their work satisfactorily.<sup>165</sup> To ensure employment stability, discretion is removed from the employer once the employee is hired. The Colombian Supreme Court described:

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160. *Id.* at 530.

161. *Id.*

162. Porter, *supra* note 3, at 92.

163. *See id.*

164. *See id.* at 93.

165. *See* Chaparro, *supra* note 128, at 39.

The principle of stability for contracts of undefined term is conceived as a limitation in the arbitrariness of the employer, for this reason it is based on the idea that there should not be other reasons in the discrepancies in activity of a company to fire an employee, aside from the willingness of a person or a group of people in particular. This way any dismissal that is not related to the need that motivated the hiring of the employee disappearing or failure of the employee to fully comply with his duties, is considered as a unilateral and arbitrary termination that warrants indemnification.<sup>166</sup>

The Court here reinstates the principles in which Colombian employment law is based, but at the same time recognizes that their interpretation leads to a limitation on the employer's discretion to make decisions. Ideally, an employee will continue to work until the purpose of the employment has been fulfilled.

The drive of the Colombian courts to create stability for employees has even touched contracts for a defined period. The Colombian Constitutional Court held that the expiring of the time in the defined contract is not enough to legitimize the decision of the employer to refuse to renew the contract.<sup>167</sup> The Court reasoned that only through this holding would the principle of stability on employment be guaranteed as laid out in Article 53 of the Constitution.<sup>168</sup> The Constitutional Court has also greatly limited the ability of employers to hire new workers through contracts for a defined period of time, as the employer might still be liable for unjust dismissal if he fails to renew the contract.<sup>169</sup> Thus, the Court has partially transformed the contract for a defined period of time to a contract for an undefined period.<sup>170</sup>

Some sectors of Colombian society have recognized that the rigidity in employment contracts has led to an inefficient labor factor. The result of this harshness is a lower equilibrium level of employment.<sup>171</sup> These sectors also recognized that there are certain costs associated in employment contracts beyond the mere cost of wages in the form of pensions, insurance,

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166. *Id.* at 89 n. 61.

167. *See* Fajardo, *supra* note 119, at 92.

168. *Id.* at 92–93.

169. *See id.* at 93.

170. *Id.* at 93.

171. *See* Chaparro, *supra* note 128, at 91 (Although speaking in 2004 prior to modification of other employment laws, the principles of the rigidity of the employment market affecting unemployment are applicable to the present Colombian labor market as well.).

and other payments the employer incurs when an employee is hired.<sup>172</sup> Furthermore, when contracts are inflexible, the work costs increase and employers prefer to replace labor for capital or decrease salaries.<sup>173</sup> Thus, as the cost of labor rises, the employer must not only use labor more efficiently for his investment, but will also be reluctant to hire new labor and instead look for other ways to augment productivity.<sup>174</sup> Consequently, the opposite might also be correct; if the contracts were more flexible, which lowers the costs an employer faces in hiring new employees, an employer would hire more workers.

Over the last decade, Colombia has been plagued by double digit unemployment numbers that refuse to decline.<sup>175</sup> Even with the Colombian gross domestic product (GDP) experiencing recent growth from 5% to 6%, employers have not substantially hired more employees.<sup>176</sup> “Colombia, even in the wonderful years from 2003 to 2007, was not able to lower its unemployment rate to single digits, which clearly tells us there are structural problems. Some problem in our regulations that prevents the unemployment rate from decreasing.”<sup>177</sup> As seen in the table below, unemployment in Colombia, although it has been slowly decreasing, has stayed above 10% over the last ten years. This occurred despite the Colombian economy growing 6.9% in 2007. Concurrently in the United States, the unemployment rate, at its highest in 2009, did not go above 10%, even with the American economy experiencing a contraction rate of 3.5% of its GDP.

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172. Fajardo, *supra* note 119, at 94.

173. *Id.* at 95.

174. *See id.* at 97.

175. *See* Javier N. Rojas, *¿Basta Legislar Para Incentivar la Generación de Empleo en Colombia? [¿Is It Enough to Legislate to Incentivate Employment Generation In Colombia?]*, REVISTA ACTUALIDAD LABORAL NO. 162, NOV.–DEC. 2010, 4–8, 122–23 [hereinafter Rojas].

176. *See id.* at 123.

177. *Id.*

Unemployment			GDP Growth <sup>178</sup>		
Date	U.S. <sup>179</sup>	Colombia <sup>180</sup>	Date	U.S.	Colombia
Mar. 2002	5.7	15.0	2002	1.8	2.5
Mar. 2003	5.9	13.0	2003	2.6	3.9
Mar. 2004	5.8	13.6	2004	3.5	5.3
Mar. 2005	5.2	12.9	2005	3.1	4.7
Mar. 2006	4.7	11.3	2006	2.7	6.7
Mar. 2007	4.4	11.2	2007	1.9	6.9
Mar. 2008	5.1	12.0	2008	-0.4	3.5
Mar. 2009	9.8	11.8	2009	-3.5	1.7
Mar. 2010	8.9	10.9	2010	3.0	4.0
Mar. 2011	8.2	10.4	2011	1.7	5.9

Another problem in the Colombian economy has been informal work. “[The] existence of informal work slows down the growth of the formal economy, as it represents disloyal competition,” since it is cheaper, costing the government and society as a whole.<sup>181</sup> Even in the period of economic boom between 2003 and 2007, the percentage of people who were part of the informal labor market did not decrease.<sup>182</sup> According to statistics from the Ministry of Social Protection, “the rate of informality in urban

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178. The World Bank, *GDP Growth (annual %)*, [WORLDBANK.ORG](http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG), 2013, available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited Mar. 10, 2013).

179. United States Department of Labor, *Bureau of Labor Statistics*, [BLS.GOV](http://data.bls.gov/timeseries/LNS14000000), Mar. 10, 2013, available at <http://data.bls.gov/timeseries/LNS14000000> (last visited Mar. 10, 2013).

180. Departamento Administrativo Nacional de Estadística (DANE) [National Administrative Department of Statistics], *Unemployment Rate*, [DANE.GOV.CO](http://www.dane.gov.co/), Mar. 8, 2013, available at <http://www.dane.gov.co/> (last visited Mar. 10, 2013).

181. Rojas, *supra* note 175, at 124.

182. *Id.* at 123.



employment, measured in thirteen cities, has varied between 55% and 60% from 2004 to 2010.<sup>183</sup>

Moreover, Colombia stands out, particularly among Latin American countries, for having a high unemployment rate as well as high informality rate.<sup>184</sup> Most countries in the region either have high informality and low unemployment or low informality and high unemployment.<sup>185</sup> The unusual state of the Colombian labor market is further proof that a structural defect exists within the Colombian system that is affecting its potential for growth.<sup>186</sup>

## VI. FINDING A BALANCE PERSPECTIVE: THE POSITIVE ROLE OF EMPLOYMENT LAW

There is an inherent complexity in comparing two different legal systems, especially when they are the product of such different traditions and societies. As expressed by Kim Sheehan: “any attempt to compare labor laws confronts the student or scholar with ‘nearly insurmountable problems because it ultimately reaches into comparison of social structures and attitudes.’”<sup>187</sup> While law in the United States generally protects employees through negative measures, i.e., stating what the employer cannot do, Colombia, on the other hand, grants the employee affirmative rights, i.e., stating what the employer must do.<sup>188</sup>

Although the United States and Colombia have very different traditions influencing their employment laws, such traditions actually compliment one another. Thus, the solution for many of the criticisms presented here lie in finding some middle ground from the extremes where the rights and values each country deems fundamental are better protected.

### A. *What can the United States Do?*

In the case of the United States, it is important to recognize the dignity of the employee and provide a greater stability for them as long as they are being productive. Although John Locke and the Founding Fathers did not mention the word “dignity” in their writings, they understood the concept that human beings as not only physical entities but emotional as well, and that large institutions can cause harmful abuses through the use of their

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183. *Id.* at 124.

184. *Id.* at 123.

185. *Id.*

186. *See* Rojas, *supra* note 175, at 185.

187. Sheehan, *supra* note 19, at 339.

188. *Id.*

power.<sup>189</sup> These large institutions that might abuse employees also include the government.<sup>190</sup> Nicole B. Porter put it well when she stated:

Just as the Supreme Court has said that the government does not belong intruding upon peoples' right to privacy in their own homes (unless their activities are criminal offenses such as drug activity or some violent crime), employers also should not be able to intrude upon their employees' right to privacy unless that behavior adversely affects the employer.<sup>191</sup>

Therefore, government can play a positive role in preventing employers from unfairly dismissing their employees, while at the same time preserving the ability of the employers to make decisions based on production and market changes, and still preserve the dignity of the employee.

Employment law must also be limited in its scope. After all, it is not meant to regulate the conduct of people in the labor market and force them to be "nice" to one another, but it should provide certain safeguards to the employee to prevent abuse, incentivize job stability, and protect the privacy and dignity of employees.<sup>192</sup> David Yamada was also correct when he stated, "the call for dignity in the workplace is not a rallying cry for state ownership, runaway taxation, or regulatory micromanagement of the workplace. Rather, it is about promoting the complementary goals of healthy, productive, and socially responsible workplaces within a mix of robust private, public and non-profit sectors."<sup>193</sup> Legislatures should support off-duty protection statutes, as it is an important social policy that does not limit employer's work-related decisions, but limits the employer's ability to only take into account an employee's conduct that affects work.<sup>194</sup>

The last reason employment law in the United States should change from the employment at-will doctrine is the public's perception of employment law. As seen by the study below, the majority of people cannot differentiate between lawful and unlawful reasons for dismissal. The following table illustrates the public perception of current employment law. This perception presents view that employment law should provide employees with more protections from the arbitrary actions of employers.

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189. Yamada, *supra* note 16, at 543.

190. *See id.*

191. Porter, *supra* note 3, at 95.

192. Yamada, *supra* note 16, at 554.

193. *Id.* at 525.

194. *See* Joseph Lipps, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L. J. 645, 673 (2011).

Percentage of Total Responses <sup>195</sup>					
Reason for discharge	Lawful	Unlawful	No response	Legal Rule in Missouri <sup>196</sup> : Discharge is	Error Rate
Employer plans to hire another person to do same job at a lower wage	17.8	82.2	0	Lawful	82.2
Unsatisfactory job performance	92.0	7.7	0.3	Lawful	7.7
Retaliation for reporting theft by another employee to supervisor	20.8	79.2	0	Lawful	79.2
Mistaken belief that employee stole money (employee can prove mistake)	10.4	87.2	2.4	Lawful	87.2
Retaliation for reporting violation of fire regulations to government agency	8.9	88.7	2.4	Unlawful	8.9
Lack of work	78.6	18.7	2.7	Lawful	18.7
Personal dislike of employee	8.0	89.0	2.4	Lawful	89.0

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195. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an at-will World*, 83 CORNELL L. REV. 105, 134 (1997).

196. Although this study concerned employees in Missouri, we can take it as a sample of the United States at-large. Furthermore, the Author mentioned a concerned that some government employees that took the study might have answered based on the Civil Service rules but the error rate tends to be so great that the trend is still very informative.

Retaliation for refusing to participate in illegal billing practice	10.4	87.2	2.4	Unlawful	10.4
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Employment law in the United States should be modified so that an employer has the ability to dismiss his employees for any economic reason deemed necessary, but the employer would be prevented from dismissing the employees because of conduct unrelated to the work that does not negatively impact the employer's business. This model would protect the employer's ability to make economic decisions without undue governmental intervention while providing government protection to the employee's privacy and dignity.

*B. What can Colombia do?*

In Colombia, job stability can still be respected while providing a greater ability for the employers to make economic decisions. While job stability is important, and employees should have the security that they will not be fired as long as they perform their work duties satisfactorily, it is also important for employers to be able to make economic decisions regarding capital as well as labor in the course of their enterprises.

Employers face several issues with providing just cause because it is very difficult to prove that the dismissal was legal, and judges and juries are more likely to be sympathetic to an employee than to an employer.<sup>197</sup> This difficulty of inadequate proof can prevent employers from hiring new employees since the risks and costs of hiring new personnel would be too high.

The requirement of just cause might also increase discrimination because the costs of firing an employee, even when the employee is unproductive, are so high that employers "are less likely to hire 'risky' employees," or even any new employees.<sup>198</sup> Since the inability to make management decisions based on the market conditions skews the relation between capital and labor, employers focus on making the most out of the capital and the labor they currently have before hiring new and expensive labor.<sup>199</sup>

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197. See Porter, *supra* note 3, at 79.

198. See *id.*

199. See Fajardo, *supra* note 119, at 94-98.

Colombia recognizes the importance of employment and how it helps raise overall morale by providing employees with a sense of self-purpose. Having a job makes it possible to achieve some level of personal fulfillment.<sup>200</sup> Furthermore, the concept of dignity in the labor market that Colombia recognizes is tied to the concept stated in the Declaration. The Declaration and the Colombia Constitution both recognize a right to employment. Ironically, due to the inflexibility of the labor market in Colombia, unemployment is higher than it should be, and thus, the right to have a job is denied to some individuals. Globalization and changes in the realm of production call for alternative forms of labor contracts through which the labor relationship will become more dynamic, the capacity of adapting the workforce to the changes in the market will improve, or work functions can be transferred to third parties to increase competitiveness.<sup>201</sup>

To lower their unemployment rate and give more people access to employment, which Colombia considers a human right, the Colombian Legislature and court system need to work together to grant employers greater ability to make decisions regarding the dismissal of their employees based on the market and productivity. This model would allow the Colombian labor market to be more flexible and lower the costs of hiring new employees. Although it could potentially lessen job stability, the amount of jobs it would create justifies this drawback, as it would serve the goal of giving more individuals a job. Allowing employers to dismiss employees when the market takes a downturn would allow them to downsize and survive during these conditions, and it would make them more willing to hire new employees when markets improve, since new labor would not be as costly and the employees can be dismissed if the market worsens again.

## VII. CONCLUSION

Although the United States and Colombia have different perspectives when it comes to creating their legal systems, particularly with respect to employment law, there is much they can learn from each other. Additionally, the concern of both governments should be the happiness of their citizens, their well being with their jobs, and their privacy and dignity. There is no one-size-fits-all solution, but the United States can learn from Colombia about the importance of dignity in the workplace and of job stability, while still maintaining a lot of flexibility by allowing employers to

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200. Carlos Eduardo Román M., *Concepciones Teóricas Sobre el Mundo del Trabajo en el Capitalismo Contemporáneo [Theoretical Conceptions about the World of Emplomeny in the Current Capitalism]*, REVISTA VIRTUAL UNIVERSIDAD CATOLICA DEL NORTE, NUM. 14, 4 (FEB.–MAY 2005).

201. Chaparro, *supra* note 128, at 77.

make decisions based on economic conditions and the employee performance. And at the same time, Colombia can learn from the United States and grant employers greater ability to make decisions regarding the dismissal of employees for the economic welfare of their businesses, which would give more Colombians employment by incentivizing hiring of new personnel.

## APPENDIX

## Article 45—Duration.

The employment contract can be done for a determinate term, for the time it takes to do a determined job or labor, for an undefined time, or to execute an occasional, accidental, or transitory job.

## Article 47.

1. The employment contract which stipulates no fixed term or whose duration is not determined by the work or the nature of the contracted work, or does not relate to a casual or temporary work, will be a contract of indefinite term.

The contract of indefinite term will be valid as long as the causes that gave rise to it exist and the subject of the work. Still, the employee may terminate it by written notice giving not less than thirty (30) days in advance to give time for the employer to replace him. In cases where notice is not timely given or of only partial compliance, the provisions of Article 8, subsection 7 will be applied, for the all the time, or the period of time not complied with.

## Article 61

1. The employment contract ends due to:
  - a. Death of the worker;
  - b. Mutual consent;
  - c. Expiration of the time agreed upon;
  - d. End of the work or hired labor;
  - e. Due to permanent liquidation or closure of the factory or establishment;
  - f. Due to suspension of the employer's activities during longer than one hundred and twenty (120) days;
  - g. By final rendered judgment;
  - h. By unilateral decision in the cases under article 7 of the legal decree 2351 of 1965 and y of that law; and
  - i. By not returning the worker to his job, once the causes of the suspension of the contract have disappeared.
2. In the cases under e) and f) in this article, the employer shall submit the corresponding permit to the Department of Job and Social Security and notify his workers in writing of this fact. The Department of Job and Social Security will process the permit within two (2) months. The unjustified non-compliance of this period will cause the official responsible for misconduct punishable under the existing disciplinary system.

## Article 62

The following are just causes to end unilaterally the employment contract:

## a) On part of the employer:

1. Having been deceived by the employee, through submitting false certificates for employment or to gain an unfair advantage.
2. Any act of violence, injury, ill-treatment, or grave lack of discipline incurred by the employee in the course of his employment against the employer, members of his family, management or his co-workers.
3. Any serious act of violence, injury or ill-treatment incurred by the employee outside the service against the employer, members of his family or his representatives and partners, foremen, watchmen, or guards.
4. All material damage intentionally caused to buildings, works, machinery, and raw materials, instruments and other objects related to the job, and all gross negligence which endangers the safety of persons or things.
5. Any act immoral or criminal act the employee committed in the shop, establishment or workplace or in the performance of their duties.
6. Any serious violation of the obligations or special prohibitions the employee must follow according to Articles 58 and 60 of the Labor Code, or any serious offense qualified as such in agreements or collective agreements, arbitration awards, individual contracts, or regulations.
7. The worker's detention for more than thirty (30) days, unless he is subsequently acquitted, or correctional detention exceeding eight (8) days, or even for a shorter time, when the cause of the penalty sufficient by itself to justify the termination of the contract.
8. When the employee reveals the technical or commercial secrets or disclosed confidential matters, to the detriment of the company.
9. Poor work performance related to the worker's ability and average performance in similar work, when not corrected within a reasonable period despite the requirement of the employer.
10. The systematic failure to comply, without good reason, by the employee, of conventional or legal obligations.



11. Any vice of the worker that disturbs the discipline of the establishment.
12. The systematic reluctance of employees to accept preventive, prophylactic, or curative measures prescribed by a physician, the employer, or the authorities to prevent illnesses or accidents.
13. The ineptitude of the employee to perform the assigned work.
14. Recognition to the employee of his retirement benefits or disability while employed by the company.
15. Contagious or chronic disease of the employee, which has no professional character, as well as any other illness or injury that incapacitates him for work, whose recovery has not been possible within one hundred and eighty (180) days. The dismissal due to this cause cannot be done until this period has ended and does not relieve the employer of the legal and conventional benefits and indemnities derived from the illness.

In the cases covered by subsection 9 through 15 of this article, to end the contract, the employer must give notice to the worker with no less than fifteen (15) in advance.

b) In part of the employee:

1. Having been deceived by the employers as to the working conditions.
2. Any act of violence, mistreatment, or serious threats inflicted by the employer against the employee or members of his family in or out of service, or inferred by relatives, representatives or dependents of the employers while in service and with the consent or tolerance of the employer.
3. Any act of the employer or his representatives to induce the employee to commit an unlawful act or contrary to the employee's political or religious beliefs.
4. All circumstances which the worker cannot foresee when entering into the contract and that endanger his safety or health, and that the employer is not willing to modify.
5. Any damage caused maliciously by the employer to the employee in the course of service
6. The systematic failure without valid reasons by the employer of his conventional or legal obligations.
7. The requirement by the employer, without valid reasons, for providing a different service, or in different places to those the employee was hired for.

8. Any serious violation of the obligations or prohibitions owed by the employer according to the articles 57 and 59 of the Labor Code, or any serious offense qualified as such in an agreement, collective bargaining agreement, arbitration awards, individual contracts, or regulations.

The party that unilaterally ends the employment contract must notify the other, when the contract is ended, the causes or reasons for this determination. Subsequently, no valid causes or reasons can be alleged.

**Article 64—Unilateral termination of the employment contract without just cause**

In every employment contract there is to be included the condition subsequent to breach of the agreement of payment of damages by the responsible party. This compensation includes loss of profit and damages.

In case of unilateral termination of the employment contract without just cause, by the employer or if he gives rise to the termination by the employee for any of the just causes provided by the law, the employer shall owe to the employee compensation as indicated below: in fixed term contract, the value of wages for the time remaining to meet the period stipulated in the contract, or the period determined by the duration of the work or the work contracted, in which case the compensation shall be no less than fifteen (15) days.

In contracts of indefinite term compensation will be paid as follows:

- a) For employees that earn a wage of less than ten (10) legal minimum wages monthly:
  1. Thirty (30) days of wages when the employee has been in service for no more than one (1) year.
  2. If the employee has more than (1) year of continuous services he will be paid twenty (20) additional days of wages over the basic thirty (30) of subsection 1, for each year of service after the first year, and proportionally for fraction.
- b) For workers that earn a wage equal or greater to ten (10) legal minimum wages monthly”
  1. Twenty (20) days of salary when the worker has been in service for no more than one (1) year.
  2. If the worker has more than (1) year of continuous service, he will be paid fifteen (15) additional days of wages over the basic twenty (20) of subsection 1 for each year of service after the first year, and proportionally for fraction.

## Colombian Constitution

## Article 53

Congress shall issue the Labor Statute. The corresponding law will have to at least take into account the following fundamental principles: equality of opportunity for the workers; minimum and mobile living wage, proportional to the amount and quality of work; employment stability; inalienability of the minimum benefits established in the labor norms; power to compromise and arbitrate regarding conflicting and debatable rights; more favorable position for the workers in case of doubt in the application and interpretation of the formal sources of law; primacy of reality over formalities established by the subjects of labor relations; guarantee to social security, preparation, training and the necessary rest; special protection for women, maternity and minor workers. The State will guarantee the right to timely pay and the periodic readjustment of the legal pensions.

International labor conventions properly ratified shall become part of the internal legislation.

The law, the contracts, work agreements and conventions cannot undermine the liberty, human dignity, or the rights of the workers.

## Article 54

It is the obligation of the State and the employers to offer professional and technical training and qualifications for those who need it. The State shall promote the employment of people of working age and guarantee disable people the right to a job commensurate with their health.