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Arbitration as a Means of Protecting Employees from Unjust Dismissal: A Statutory Proposal

By Marvin F. Hill, Jr.*

Often, when we call law "archaic," we mean that the power system of its society is morally out of tune. But change the power system, and the law too will change.¹

I. INTRODUCTION

A female accountant, employed with a midwest accounting firm for several years, is told one day by the manager that the firm has decided to terminate her employment. No explanation is given for her discharge. If she inquires as to the reason, her supervisor may legally state that management has no obligation to explain its decision to employees. If the accountant were represented by a labor organization, she would probably have access to a grievance procedure culminating in arbitration. Such a procedure would likely result in management offering some justification for her discharge. Should the reason of the discharge be union, sex, religion, color, race, national origin, or age-related, she more than likely could pursue a cause of action under current legislation prohibiting discharge for these reasons. If the discharge was effected because of a requested leave for jury duty, some jurisdictions would hold her discharge unlawful. However, if none of these situations existed, she would have no cause of action under existing law. Her employment was "at will,"² meaning that it could be terminated at

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Mr. James Grimm, while a graduate student at Northern Illinois University, was a major contributor to this article.

1. L. FREIDMAN, A HISTORY OF AMERICAN LAW 14 (1973).

2. The at-will rule first appeared in H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). This article follows the common practice of referring to Wood's doctrine as the employment at-will doctrine, the terminable at-will doctrine, and the at-will doctrine or rule. Employees subject to this

the will of either party.

This article explores the employment "at-will" doctrine. It is contended that the at-will doctrine, which at common law essentially meant that employees may be discharged for any reason at the will of their employer, has been rescinded to a great degree by statutes, collective bargaining agreements, and judicial activism. This rescission, however, has not been complete. The majority of American workers are still employed at will,³ therefore subject to discharge for good reasons, bad reasons, false reasons⁴ or, in the case of our hypothetical accountant, for no reason.

This article begins with an exploration of the development of the at-will rule in America under common law followed by limitations to the rule. It is hypothesized that the at-will rule was founded on unsupporting case law and flourished in a period of laissez-faire socio-economic thought. Statutes were later enacted limiting the absolute power of employers to discharge, most notably on the basis of race, sex, color, religion, national origin, and union activity. Collective bargaining agreements and the arbitral application of "just cause" principles for discipline have further narrowed the at-will rule. More recently, judicial interpretations of the employment contract have carved out "public policy," "whistle blowing" and "bad-faith" exceptions to the at-will doctrine. It is argued that these limitations, while helpful in protecting workers from "unjust" dismissal, are nevertheless insufficient to accord adequate job protection to employees.

Statutes protecting workers in foreign countries from "unjust" dismissal are also examined. These statutory schemes, as well as arbitral principles of "just cause" found in both American and foreign law, are incorporated in a proposed statute at the conclusion of this article.

II. DEVELOPMENT OF THE AT-WILL DOCTRINE

The rule that employment for an indefinite period is at will and may be terminated at any time "for good cause, bad cause or no cause" and "for any reason or no reason" is an American phenomena⁵ developed through the common law. Since much of Amer-

doctrine are referred to as at-will employees or employees terminable at will.

3. See *infra* note 264.

4. See *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982) discussed *infra* at note 201.

5. The phrase "good reason, bad reason, or no reason," is a modern interpre-

ican common law is grounded in English common law,⁶ it is useful to examine the development of English law pertaining to termination of the employment relationship.⁷

A. MASTER-SERVANT RELATIONSHIP

The law surrounding the employment relationship has its origin in the legal principles of master-servant relationships.⁸ The legal nature of this relationship may be traced to early Roman law where the words "master" and "servant" were taken more literally than they are now. In early Roman law the rights of the servant were not his own but were those of his "paterfamilias"⁹ (head or master of the family). In strict Roman law the paterfamilias was an absolute ruler of the household with authority over life and death.¹⁰ This ancient doctrine gradually began to fade away as the world became more civilized and, by the fourteenth century, the erosion of the "paterfamilias" doctrine was virtually complete.

Individual societal status governed the law of employment from the fourteenth to nineteenth century. The doctrine of "master" and "servant" during this period was developed through analogy to the feudal relation of lord and tenant where the rights and duties associated with the relationship were dependent upon the positions each occupied in the feudal society.¹¹ Ideas of paternalism and subordination pervaded the legal attitudes of the rela-

tation of the phrase "for good cause, for no cause, or even cause morally wrong." See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519 (1884), *overruled on other grounds*, *Hutton v. Waters*, 132 Tenn. 44, 179 S.W. 138 (1915).

6. See L. FRIEDMAN, *supra* note 1 (1973); R. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 12-13 (1974); C. GREGORY & H. KATZ, *LABOR AND THE LAW* 17 (1979); R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 137-39 (1946).

7. Perhaps the best treatment of the development of English law and the at-will doctrine is found in Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); and Blumrosen, *Employer Discipline: U.S. Report*, 18 RUTGERS L. REV. 428 (1964). This section incorporates many of the findings of these authors.

8. 1 C. LABATT, *COMMENTARIES ON THE LAW OF MASTER AND SERVANT* § 159 (2d ed. 1913); F. BATT, *THE LAW OF MASTER AND SERVANT* 27 (1967); R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 17-18 (1946).

9. See generally Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967).

10. See R. POUND, *LEGAL IMMUNITIES OF LABOR UNIONS* 17 (1957).

11. Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L. REV. 1435, 1438 (1975).

tionship during this period.¹² The legal status of the master-servant relationship was viewed as essentially a domestic relationship¹³ and, with the rise of industrialization, the status of the relationship evolved to one of "employer" and "employee."

B. ENGLISH LAW DEVELOPMENT

English law pertaining to termination in the employment relationship was founded on rules contained in early statutes. The Statute of Labourers¹⁴ (enacted in response to the labor shortage that resulted from the Black Death in the mid-fourteenth century) provided that "no master can put away his servant without a quarters warning, unless upon reasonable cause,"¹⁵ and apprentices could be discharged only "on reasonable cause."¹⁶ Another requirement in the statute was that men must accept employment.¹⁷ While this requirement lends credence to the belief that the purpose of the statute was to protect employers,¹⁸ there is some documentation that in later years the purpose was to protect the worker and curb unemployment.¹⁹ Regardless of intent, the statute was later repealed and the English common law presumption that employment was for a year prevailed.

This common law rule that a general hiring²⁰ amounted to employment for one year was best formulated and made prominent by a nineteenth-century legal writer, W. Blackstone. In his words:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natu-

12. *Id.* at 1438 (citing 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159, at 6-8 § 3 (2d ed. 1913)).

13. Comment, *supra* note 11, at 1438 (citing 1 G. TREVELYAN, HISTORY OF ENGLAND 204 (1953)).

14. Ordinance of Labourers, 23 Edw. 3, ch. 2 (1349).

15. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 413 (1765).

16. *Id.* at 414.

17. R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 3-4 (1946). Professor Morris points out that the Elizabethan statutes maintained the principle of compulsory labor for able-bodied persons falling into certain designated categories. Of special note is a 1547 act which provided for branding and a two year sentence as a "slave" for persons convicted of vagrancy. Stat. at Large (Pickering), V, 246. Morris also notes an Elizabethan act that punished "rogues, vagabonds, and sturdy beggars" who were subject to whipping and to a sentence in a house of correction for their refusal to work at the ordinary rate of wages.

18. See Feinman, *supra* note 7, at 120.

19. Comment, *supra* note 11, at 1439.

20. A general hiring is synonymous with an indefinite hiring—a hiring at will.

ral equity, that the servant shall serve and the master maintain firm, throughout all the revolution of the respective seasons, as well when there is work to be done as when there is not.²¹

As noted by one commentator, the rule was arguably sound, for injustice would result if a master could have the benefit of a servant's labor during planting and harvest seasons and thereafter effect a discharge in order to avoid supporting him during the unproductive winter.²²

The rule, despite Blackstone's concern with the "revolution of the seasons," was not restricted to agricultural and domestic workers. The presumption that a general hiring was a hiring for a year extended to all classes of servants.²³ As an increasing variety of employment situations arose,²⁴ the English courts placed less importance on the duration of the hiring and increasing importance on the notice required to terminate. What constituted reasonable notice to terminate was a question of fact to be decided in each case. Although the question of a notice period was separate in each case, the custom of the trade was of major importance.²⁵ If there were no customs in the trade, a reasonable notice was necessary unless cause existed for summary dismissal.²⁶

In summary, by the middle of the nineteenth century the courts of England adopted the rule that, absent an express contractual agreement to the contrary, either party to an employment contract could terminate that relationship after according reasonable notice to the other. What constituted reasonable notice could only be determined by reference to the facts and circumstances of each case, including, but not limited to, the customs and practice of the industry.

C. AMERICAN LAW DEVELOPMENT OF THE AT-WILL DOCTRINE

In the nineteenth century, confusion reigned in the United

21. 1 W. BLACKSTONE, *supra* note 15, at 413.

22. Feinman, *supra* note 7, at 120.

23. See, e.g., *Baxter v. Nurse*, 134 Eng. Rep. 1171 (1844); *Beeston v. Collyer*, 130 Eng. Rep. 786 (1827).

24. Feinman, *supra* note 7, at 120. Feinman notes that a new group of "middle class" employees developed—newspaper editors, commercial and business agents.

25. *Id.* at 121. Feinman reports that domestic servants and other types of employees could be given a month's notice. Three months was also a common term, although some special cases required six or even twelve months' notice.

26. *Id.*

States with respect to the law of termination at will. Illustrating this confusion regarding the American state of law were two treatises. In 1846, Tapping Reeve's domestic relations treatise stated the English presumption of yearly hiring.²⁷ In less than a decade, Charles Manly Smith's treatise on master and servant²⁸ stated a presumption that a general hiring was a yearly hiring for all servants.²⁹ The presumption was rebuttable by custom or other evidence,³⁰ and in spite of a yearly hiring, the relationship was terminable on notice where that was customary.³¹

In 1874, an "American rule" of termination was developed by James Schouler in the second edition of his treatise.³² The rule stated "the period of payment of wages raised a presumption of a hiring for that period."³³ This rule was also presented by another treatise writer, William Story, in the same year.³⁴ Story, citing English cases, stated the same rule, but noted that if there was any evidence of an intended longer hiring, the condition of wages would not control.³⁵

While there was some court acceptance of these early treatises' statement of an "American rule,"³⁶ the situation was such that the time was ripe for a resolution of the problem of termination from employment. H. G. Wood, an Albany lawyer and prolific treatise

27. T. REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, AND MASTER AND SERVANT, AND POWERS OF THE COURT OF CHANCERY* 347 (1846).

28. C. SMITH, *MASTER AND SERVANT* (1852).

29. *Id.* at 41.

30. *Id.*

31. *Id.* at 47. Contributing to this confusion concerning the duration of employment contracts was the confusion over the nature of master and servant. Master and servant was originally classed as a domestic relationship. However, as the nineteenth century progressed, the true master-servant relationship became overshadowed by the number of employees whose relationship to their employers was essentially commercial and did not fit the original pattern. The resulting tension influenced the direction of the law, with the original perception delaying accommodations to new economic and industrial conditions. *See also* Feinman, *supra* note 7, at 123.

32. J. SCHOULER, *DOMESTIC RELATIONS* (2d ed. 1874).

33. *Id.* at 607.

34. 2 W. STORY, *CONTRACTS* § 1290 (5th ed. 1874).

35. *Id.* § 1291.

36. *See, e.g.*, *Odom v. Bush*, 125 Ga. 184, 53 S.E. 1013 (1906); *Rosenberger v. Pacific Coast Ry.*, 111 Cal. 313, 43 P. 963 (1896); *Magarahan v. Wright*, 83 Ga. 773, 10 S.E. 584 (1889).

writer, in his treatise on master-servant relationships,³⁷ ended the resulting confusion and stated the employment at-will doctrine in certain terms:

In England it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring for a year With us [in America] 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. . . . [I]t is an indefinite hiring and is terminable at the will of either party, and in this respect there is no distinction between domestic and other servants.³⁸

While this rule was and continued to be generally accepted throughout the various jurisdictions,³⁹ its origins are suspect. Wood cited four American cases⁴⁰ as authority for his rule as to general hirings, none of which supported him. Besides the lack of support, Wood incorrectly stated that no American court had approved the English rule, that the employment at-will rule was inflexible, and

37. H. G. Wood, *supra* note 2.

38. *Id.* § 134 (footnote omitted).

39. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 343 (1974). See also Annot., 11 A.L.R. 469, 470-71 (1921); Annot., 62 A.L.R. 3d 271 (1975).

40. *DeBriar v. Minturn*, 1 Cal. 450 (1851), was arguably an action for lawful ejection. The issues of employment rights were secondary as the court considered the right of a discharged bartender to occupy a room in his employer's tavern after having been given proper notification to leave within a month.

A Massachusetts court in *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870), found there was no error in allowing a jury to determine the nature of an employment contract from written and oral communications, usages of trade, the situation of the parties, the type of employment, and all other facts and circumstances of the case.

The third case cited by Wood, *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871), held that a hiring for an indefinite duration of itself did not give the employer unfettered discretion to dismiss an employee. The jury, in this case, found that a hiring for a year could reasonably be inferred and allowed a mining captain four additional months' pay after being discharged at the end of eight months when he had been assured that employment would be stable.

The final case upon which Wood relied, *Wilder v. United States*, 5 Ct. Cl. 462 (1869), *rev'd on other grounds* 80 U.S. (13 Wall.) 254 (1871), involved a business contract between the Army and private entrepreneurs for the transportation of goods and, therefore, did not involve an issue of employment rights.

that the English rule was only for a yearly hiring. He made no mention of notice and offered no policy grounds for the rule.⁴¹ Notwithstanding the questionable case support and inadequacies of explanation, by the beginning of the twentieth century, Wood's rule became the primary doctrine governing employment duration.⁴²

D. EXPLANATIONS FOR THE ADOPTION OF THE RULE

The adoption of Wood's at-will rule was a notable change from earlier presumptions of long-term hiring and reasonable notice. The reasons for this change were not, for the most part, exemplified in the early court cases. A number of explanations for the doctrine's adoption have been offered by various commentators.⁴³

The most common hypothesis for the adoption of Wood's rule argues that it is an outgrowth of nineteenth century theory of contract. Toward the end of the century the idea of a general theory of contract was a dominant force in American common law.⁴⁴ Justice mandated that each individual be at liberty to make free use of his

41. H. G. Wood, *supra* note 2, at 272.

42. An analysis of early case law involving the application of Wood's rule indicates judicial acceptance of the rule with little or no independent legal analysis. As argued in *Implied Contract Rights to Job Security*, *supra* note 39, in many of the early cases various courts simply found, as a matter of fact, that there was no express agreement covering the duration of employment and, accordingly, upheld the dismissals by merely citing Wood's rule, regardless of the rule's relevancy to the facts. See *Greer v. Arlington Mills Mfg. Co.*, 43 A. 609 (Del. S. Ct. 1899); *Harrod v. Wineman*, 146 Iowa 718, 125 N.W. 812 (1910); *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895); *Summers v. Phenix Ins. Co.*, 50 Misc. 181, 98 N.Y.S. 226 (Sup. Ct. 1906); *Edwards v. Seaboard & R.R.*, 121 N.C. 490, 28 S.E. 137 (1897). Other courts mechanically applied the rule in reaching decisions adverse to the complaining employee when the same results could have been reached on the merits. See *Haney v. Caldwell*, 35 Ark. 156, 169 (1879); *Faulkner v. Des Moines Drug Co.*, 117 Iowa 120, 90 N.W. 585 (1902); *Perry v. Wheeler*, 75 Ky. 541 (1877); *Finger v. Koch & Schilling Brewing Co.*, 13 Mo. App. 310 (1883).

43. Note, *supra* note 39, at 341; Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-25 (1974); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982).

44. R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133-68 (1943); Pound, *Liberty of Contract*, 18 YALE L. REV. 454 (1909); L. FRIEDMAN, *supra* note 1, at 464-68; J. HURST, THE GROWTH OF AMERICAN LAW 12 (1950); L. FRIEDMAN, CONTRACT LAW IN AMERICA 18 (1965). For an interesting commentary of the common law of contract, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 628-32 (1956).

natural powers in bargains and exchanges and in promises.⁴⁵ Any interference with this "freedom of contract" which had evolved from the economic philosophy of the times was looked upon with suspicion except in those select cases where the bargain struck interfered with like action on the part of others or with some court-designated "natural" right.⁴⁶ Given the laissez-faire economic and legal philosophy of the nineteenth century, it is not surprising to find that somehow freedom of contract was eventually linked to the issue of duration of contract. Using this formalistic approach, an employer's absolute discretion to terminate was presumed by the courts unless some definite duration was specified in the employment contract. It is of note that had the courts relied on pure contract theory, issues of duration of employment and notice requirements would be subject to factual determination in each situation. Rarely, if ever, was this the case.

A second hypothesis for explaining the adoption of the employment at-will rule involves an analysis of the social setting of law in the United States. As noted by legal historians, the law will move with the main currents of American thought.⁴⁷ In contrast to the twentieth-century stress on security for the individual, the social emphasis of the nineteenth-century was on the self-sufficiency of the individual in securing his or her economic gains. A society which essentially believes that an individual is not helpless against impersonal social currents can be expected to sanction the notion of a "hands off" approach in contractual relationships.

It is also important to stress that the period in which the at-will rule was adopted was characterized by the development of advanced capitalism in America. At that time, the economists accepted the prevailing philosophy of the owners of enterprise: that what was good for private enterprise was good for the general welfare.⁴⁸ This philosophy, in turn, mandated that owners of the means of production should be left free to pay whatever the market would bear for wages and materials through direct dealings with the individuals concerned. These economic ideas found support in the judiciary through the common law rule that, absent an agreement to the contrary, employment was at the will of the indi-

45. See A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776); R. POUND, *supra* note 44, at 148.

46. An excellent commentary on the philosophers of natural law may be found in J. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 73-142 (1968).

47. J. HURST, *supra* note 44, at 13.

48. See C. GREGORY & H. KATZ, *supra* note 6, at 14.

vidual parties. This was the ultimate guarantor of the capitalist's authority over the worker. If employees could be dismissed at will, they could not claim a voice in the determination of the conditions of the workplace.⁴⁹

An analysis of labor conflict and of labor law may also be made in terms of the institution of property.⁵⁰ Historically, the ownership and control of property has implied economic and political power over others.⁵¹ During the development of the at-will doctrine, courts were reluctant to recognize that the institution of property could encompass intangible interests of a worker with respect to his or her job security. It has been argued that when the law says that a course of conduct is legally protected, it is putting into authoritative form the ideas that are acceptable to that society regarding the comparative value of different kinds of activity and security, advancement in personal standing, or command over material goods.⁵²

Without doubt, political, social and economic influences fostered the development of the at-will doctrine in the United States. Moreover, the approach by the courts to stay out of the employment relationship cannot be viewed as an attempt to benefit workers. Judges, for the most part, were conservative and trained in an environment that glorified the values of laissez-faire economics. It is not surprising that the judges refused to restrain employers in the operation of their businesses. Courts, cognizant of the economic and social climate, tailored the common law in line with the interests of property owners. Such a stance had little to offer non-propertied employees functioning in a "free" market.

E. ASSERTION OF THE AT-WILL RULE

As the twentieth century progressed, the at-will doctrine became the fundamental premise in deciding employment discharge cases. The courts typically relied on the principle articulated in *Payne v. Western & Atlantic Railroad*,⁵³ "that an at-will employee could be terminated 'for good cause, for no cause, or even cause

49. Feinman, *supra* note 7, at 132-33.

50. C. GREGORY & H. KATZ, *supra* note 6, at 18.

51. *Id.*

52. J. HURST, *supra* note 44, at 12.

53. 81 Tenn. 507 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915).

normally wrong, without being thereby guilty of legal wrong.' ”⁵⁴

This absolute power of employers to discharge employees at will received constitutional protection in two early twentieth century Supreme Court decisions, *Adair v. United States*⁵⁵ and *Coppage v. Kansas*.⁵⁶ In keeping with the social and economic philosophy of the period,⁵⁷ the Court interpreted the due process clauses of the fifth and fourteenth amendments⁵⁸ as being violated by any legislation which limited the employer's right to discharge, and elevated the employer's power from common law principles to a constitutionally protected right of liberty and property. In both cases, the Court invalidated the legislation which had proscribed discharges solely because of union membership.⁵⁹

54. *Payne*, 81 Tenn. at 519-20.

55. 208 U.S. 161 (1908).

56. 236 U.S. 1 (1915).

57. See *supra* notes 47-48 and accompanying text.

58. See *infra* notes 59-65 and accompanying text.

59. *Adair v. United States* involved a federal statute barring common carriers from discharging employees because of union membership. An agent of the Louisville and Nashville Railroad Company allegedly violated the federal statute by dismissing employees for their union membership. The Court struck down the statute as “an arbitrary interference with the liberty of contract which no government can legally justify in a free land.” 208 U.S. at 175. Although the Court was only characterizing the right of discharge in the constitutional sense, the intertwining of common law and constitutional rights was underscored in the Court's justification for its decision:

It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.

Id. at 173, quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 278 (1878).

A few years later, in *Coppage v. Kansas*, the Court invalidated similar state legislation under the due process clause of the fourteenth amendment. At issue was the constitutionality of a state statute outlawing “yellow dog” contracts. (A yellow dog contract is a contract in which an employee or an applicant for employment promises not to become or remain a member of any labor union.) In striking down the statute, the Court elaborated on its reasons for concluding that the employer's right to hire and fire whomever he wishes for any or no reason was a constitutionally protected right. The Court clearly expressed its firm belief in both unrestricted freedom of contract and inviolable rights of property:

As to the interest of the employed, it is said by the Kansas Supreme Court . . . to be a matter of common knowledge that “employés, as a rule, are not financially able to be as independent in making contracts

Mr. Justice Pitney, writing for the majority in *Coppage*, concluded that since the relationship between employer and employee was voluntary, the employer has the inherent right to prescribe the terms of employment in advance. Justice Day's strong dissent expressed the desirability of infusing an element of equality into the employment relationship which was characterized by great imbalance:

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee, as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee as it is to guard that of the employer.⁶⁰

The dissenting view in *Coppage* eventually became the majority view. In *NLRB v. Jones & Laughlin Steel*,⁶¹ the Supreme Court upheld a provision in the Wagner Act⁶² prohibiting the discharge of employees because of labor union membership.⁶³ While the Court expressly approved the Act's protection of the right of employees to unionize free of intimidation and coercion by employers, it noted that the Act did not interfere with the employer's right to discharge for cause.⁶⁴

for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances . . . [S]ince it is self-evident that, unless all things are held common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

236 U.S. at 17 (citations omitted).

60. 236 U.S. at 40 (Day, J., dissenting).

61. 301 U.S. 1 (1937).

62. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970), as amended (Supp. IV 1980).

63. 29 U.S.C. § 158(a)(3) (1970) (formerly § 8(3) of the Wagner Act) provides: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

64. 301 U.S. at 45-46.

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other

Although the decision in *Jones & Laughlin* and the Wagner Act helped to balance the respective bargaining powers of employers and employees,⁶⁵ and erode the employer's right to discharge for union-related activity, the common law doctrine relating to employment terminations was preserved by the Court.

III. LIMITATIONS TO THE EMPLOYMENT AT-WILL RULE

In the preceding section it was argued that the at-will rule was adopted, at times even unquestioned, uniformly throughout America. As was also noted, the National Labor Relations Act (NLRA), as amended, curtailed one aspect of employers' absolute right to discharge—discharge because of unionization. There are, however, statutes which prohibit discharge for other reasons. This section will highlight selected statutes and their impact on the at-will doctrine and will inspect the NLRA more closely.

Contractual limitations exist in addition to statutory limitations. The most visible of the limitations are generally contained in collective bargaining contracts. The vast majority, approximately 96 percent,⁶⁶ of collective bargaining contracts contain some type of a "just cause" or "for cause" provision whereby employees cannot be discharged unless just cause exists. The impact of collective bargaining agreements on the employer's absolute power of dismissal are emphasized through arbitral construction and interpretation of just cause principles.

In the following section recent judicial limitations, which arguably have been eroding the traditional at-will rule, are analyzed. Additionally, foreign countries' protections of individuals by limitations on employers' absolute power of discharge are discussed.

hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.

Id.

65. It has been argued that unionization equalizes the bargaining power of employers and employees. The Supreme Court in *Jones & Laughlin*, stated: Long ago we stated the reason for labor organizations. We said . . . that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . .

301 U.S. at 33, citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1926).

66. See BASIC PATTERNS IN UNION CONTRACTS (BNA Books, 1979).

A. STATUTORY LIMITATIONS

Employment legislation during the last fifty years has repudiated the logic of the common law rule of employment at will by a piecemeal encroachment of its application. The once inflexible logic that, because employment is at will the employer can discharge at any time, for any or no reason, is no longer controlling. Statutes now exist that limit the right of employers to freely terminate employees. Ironically, the statutes have given employers less freedom than employees to terminate employment. Unlike the employer, a disgruntled employee can terminate the employment relationship whatever the reason.

1. *National Labor Relations Act*

The major governing statute in the area of private sector labor relations is the National Labor Relations Act of 1935 (Wagner Act),⁶⁷ as amended.⁶⁸ Since its inception, that statute has had as

67. The Wagner Act had a number of precursors. The Erdman Act of 1898, 30 Stat. 424, set up procedures for the mediation and arbitration of labor disputes for employees engaged in the operation of trains in interstate commerce. Section 10 of that statute, which prohibited anti-union discrimination, was held unconstitutional by the Supreme Court in *Adair v. United States*, 208 U.S. 161 (1908). In 1918, the National War Labor Board (NWLB), consisting of a number of representatives of labor and industry with the sanction of President Wilson, issued General Order 8, which provided that "no discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or non-membership in labor organizations." 1918-1919 NATIONAL WAR LABOR BOARD REP. at 121-22. See also NATIONAL LABOR BOARD, PRINCIPLES AND RULES OF PROCEDURE 4 (1919).

In 1926 Congress passed the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976 & Supp. IV 1980), which provided, among other things, that employees were to be free to select representatives of their choosing without interference. In *Texas & New Orleans R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930), the Supreme Court, in contrast to the *Adair* decision, held that a carrier could be restrained from interfering with the organizational rights of employees. The Court declared that bargaining rights were of the "highest public interest." *Id.* at 561.

The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1964), altered the jurisdiction of the federal courts to issue an injunction in a labor dispute except under very specific conditions. The effect of Norris-LaGuardia was to further collective bargaining by removing the judiciary from interfering with organizational efforts on the part of labor unions. See generally C. GREGORY & H. KATZ, *supra* note 6, at 83-105.

The National Industrial Act of 1933, 48 Stat. 195, a product of the New Deal of President Roosevelt, required that section 7(a) be included in each "code" of fair dealing between businessmen. That section provided employees with the right

its primary concern the rights of employees.⁶⁹ Section 1 of the Act, in relevant part, provides:

to organize and bargain collectively through representatives of their own choosing. Section 7(a) also prohibited employers from conditioning employment on a promise not to join a labor organization. More important, the statute created the National Labor Board, composed of three union representatives, three industry representatives, and one impartial member. Similar to the functions of the present National Labor Relations Board, the National Labor Board conducted elections and processed complaints charging unfair employment practices by employers. On May 27, 1935, the Supreme Court, in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), struck down the Recovery Act holding that only practices directly affecting interstate commerce were subject to federal power. Section 7(a) and the corresponding National Labor Board collapsed with the decision. *See also* *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (invalidating the Railroad Retirement Act of 1935).

68. *See supra* note 62.

69. Section 2(3) of the Labor Management Relations Act of 1947 (Taft-Hartley, 61 Stat. 136, 137-38), 29 U.S.C. § 152(3) provides:

(3) The term "employee" shall include any employee, and shall not be limited to employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 2(2) of the Statute, 29 U.S.C. § 152(2), defines "employer" as follows:

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

In general, the Labor Management Relations Act affords protection to all persons except those employees who do not meet the definition of an employee in section 2(3), or alternatively, who work for an employer who is defined as a nonemployer in section 2(2). *But see* *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (lay teachers at two Catholic schools excluded from coverage); *NLRB v. Yeshiva Univ.* 442 U.S. 938 (1980) (full-time faculty at "mature" private university excluded as managerial employees).

It is declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.⁷⁰

To effectuate this policy, Congress enacted section 7, which provides that employees covered under the statute have the right to "self-organization, to form, join, or assist labor organizations" and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁷¹ Section 8 made it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of section 7 protected rights.⁷²

In 1935, Congress created an administrative agency, the National Labor Relations Board (NLRB),⁷³ to ensure that employees would, in fact, have the right to form, join, or assist labor organizations. The Board consists of five members⁷⁴ whose main function is to process representation cases⁷⁵ and unfair labor practices

70. 29 U.S.C. § 151.

71. *Id.* § 157.

72. Section 8(a)(1) of the Act, 29 U.S.C. § 158, in relevant part, provides that: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]"

Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment

73. *See* 29 U.S.C. §§ 153-156.

74. The original Wagner Act provided for only three members; the 1947 amendments of Taft-Hartley expanded the size of the Board to five members.

75. *See* 29 U.S.C. § 159. Representation cases involve the process by which employees located in an appropriate unit select a labor organization for purposes of collective bargaining. Under this Act, a petition for an election may be filed by a group of employees, a labor organization, or an employer. After a petition is filed, the Board will usually conduct an election so long as the parties have complied with the requirements of the statute and with the rules and regulations of the Board. If a labor organization receives a majority of votes from those employees electing to vote, the Board will certify the labor union as the exclusive bargaining representative for all the employees in the unit, not just those who voted

cases.⁷⁶ The Board also reviews unfair labor practice complaints after they are first heard by an administrative law judge at the regional level.⁷⁷

The significance of the Wagner Act, as amended, is that the common law at-will rule has been severely restricted as applied to employment because of union activity. Moreover, both the Board and the courts have been liberal in according conduct by individuals a "protected" status under the law.⁷⁸ Both the Board and the courts have accorded discharged employees protection under the Act in numerous fact situations including: complaining to the employer regarding breaches of the collective bargaining agreement;⁷⁹ taking steps to induce employees to join in a grievance;⁸⁰ drafting letters of complaints to a state occupational safety agency;⁸¹ lobbying legislators regarding changes in immigration laws;⁸² insisting upon union representation in an investigatory interview conducted by the employer;⁸³ refusing to cross a picket line set up by a union that does not represent the employee;⁸⁴ participating in protests over the discharge of a supervisor;⁸⁵ walking off jobsite without prior notice because of bitterly cold shop conditions;⁸⁶ and spontaneously stopping work as a manifestation of disagreement with the employer's conduct.⁸⁷

While the specific language of the Labor Management Rela-

for the union.

76. See 29 U.S.C. § 158.

77. The NLRB is organized into thirty-three regional offices. See *LABOR RELATIONS EXPEDITER*, LAB. REL. REP. 9057-70 (BNA).

78. For an excellent review of employee concerted activity under the statute, see Kehoe, *Employee Concerted Activity: A Protected Status under Section 7 of the National Labor Relations Act* (unpublished Master's Thesis, 1981).

79. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

80. *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967).

81. *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975).

82. *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976).

83. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

84. *NLRB v. Southern Greyhound Lines, Inc.*, 426 F.2d 1299 (5th Cir. 1970); *NLRB v. Difco Laboratories, Inc.*, 427 F.2d 170 (6th Cir. 1970).

85. *Puerto Rico Food Products Corp.*, 101 L.R.R.M. (BNA) 1307 (1979).

86. *NLRB v. Washington Aluminum*, 370 U.S. 2 (1962). What is particularly noteworthy about this decision is that the discharged employees did not provide prior notice to the employer that they wanted the heating problem solved before engaging in the walkout. A large oil furnace had broken down the night before the walkout!

87. *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237 (6th Cir. 1980).

tions Act excludes supervisors from protection,⁸⁸ some courts have accorded them protection under the statute if their discharge has the effect of interfering, restraining, or coercing employees in the exercise of their section 7 rights.⁸⁹ Absent the statute (and absent access to labor arbitration), most, if not all, of the above-cited situations would result in employees having no relief from termination under the common law at-will doctrine.

2. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964, as amended, explicitly prohibits discrimination in employment as to hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.⁹⁰ Since

88. Section 2(3) of the Labor Management Relations Act, 29 U.S.C. § 152(3) declares: "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor"

Section 2(11) goes on to define a supervisor: "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees . . . [if such authority] requires the use of independent judgment." 29 U.S.C. § 152(11).

Section 14(a) further excludes supervisors:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this [Act] shall be compelled to deem individuals defined as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164(a).

89. *See, e.g.,* NLRB v. Dal-Tex Optical Co., 51 L.R.R.M. (BNA) 2608 (5th Cir. 1962); NLRB v. Brookside Indus., Inc., 51 L.R.R.M. (BNA) 2148 (4th Cir. 1962); Pioneer Drilling Co. v. NLRB, 67 L.R.R.M. (BNA) 2956 (10th Cir. 1968).

See generally Truesdale, Recent Significant NLRB Decisions, Development, and Changes: Supervisors under the NLRA (May 1, 1980) (paper presented to American Bar Association Section of Labor and Employment Law, New Orleans, La.).

90. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Title VII provides in part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

1972, the Act has applied to employers engaged in an industry affecting commerce who have fifteen or more employees each working day in twenty or more calendar weeks of the current calendar year.⁹¹ It also applies to employment agencies procuring employees for such an employer⁹² and to almost all labor organizations.⁹³ The 1972 amendments also extend coverage to all state and local governments; government agencies; political subdivisions, excluding elected officials, their personal assistants, and immediate advisors; and the District of Columbia departments and agencies, except where subject by law to the federal competitive service.⁹⁴

Any person claiming to be aggrieved under the statute may file a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC is vested with the authority to investigate individual charges of discrimination, to promote voluntary compliance with the statute, and to institute civil actions against parties named in a discrimination charge.⁹⁵ The EEOC cannot adjudicate claims or impose administrative sanctions. Rather, the EEOC prosecutes violations in the federal courts, which are authorized to issue injunctive relief and to order such affirmative action as may be appropriate.⁹⁶

To effectuate the purposes and policies of the statute,⁹⁷ Congress included section 704(a)⁹⁸ which essentially prohibits employ-

42 U.S.C. § 2000e-2(a).

91. 42 U.S.C. § 2000e(b).

92. *Id.* § 2000e(b), (c).

93. *Id.* § 2000e(c), (d).

94. Equal Employment Opportunity Act of 1972, § 2 (amending 42 U.S.C. § 2000e(a)). As originally enacted in 1964, Title VII's coverage was not extended to employees of the federal government. In 1972, however, the statute was amended to include most federal employees. Equal Employment Opportunity Act of 1972, § 11, 42 U.S.C. § 2000e-16 (1976 & Supp. III 1979).

95. 42 U.S.C. § 2000e-5(b), (f)(1) (1976 & Supp. III 1979).

96. *Id.* § 2000e-5(f), (g).

97. As expressed in the EEOC Regulations and Guidelines:

Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.

29 C.F.R. § 1608.1(b) (1980).

98. Section 704(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling

ers from retaliating against employees who initiate complaints under Title VII.⁹⁹ This section has been held to afford protection even though the conditions and conduct complained of do not constitute a violation of Title VII.¹⁰⁰ Moreover, even relatives of persons who exercise rights under the statute are protected from employer retaliation.¹⁰¹

Under Title VII, discrimination based on religion, sex or national origin is regulated by a different statutory standard than that applied to race or color. Employment discrimination with respect to religion, sex or national origin is tolerated only when religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.¹⁰² Accordingly, the statute mandates a two-

apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1976). See *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969). As the *Pettway* court noted, "The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action." *Id.* at 1005. See also *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Johnson v. Lillie Rubin Affiliates, Inc.*, 5 Empl. Prac. Dec. (CCH) ¶ 8542 (M.D. Tenn. 1973).

99. "Employee" is defined by Title VII as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (1976). The statute has been held to prohibit discrimination relating to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct. See, e.g., *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) (claim allowed against former employer for discriminatorily refusing to furnish recommendation letter to plaintiff's prospective employer despite absence of employment relationship at time of refusal).

100. See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), cert. granted, 439 U.S. 1066, vacated, 442 U.S. 366 (1979).

101. E.g., *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976) (husband brought § 704(a) claim against his former employer because of his sudden dismissal during the course of his wife's Title VII suit for sex discrimination against that company).

102. Section 703(e) provides:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor

step analysis in employment discrimination cases. First, the court must find that the employer has engaged in discrimination under one of the prohibited classifications as outlined in the statute. Only after the court makes a determination that a prohibited form of discrimination has occurred will the second step be considered. Thus, if discrimination is found, the employer still has the opportunity to demonstrate that the discrimination was justified as a BFOQ.

The reach of Title VII's prohibitions against employment discrimination has been expanded by the courts to include even neutrally stated and indiscriminately administered employment practices or procedures (in the absence of demonstrable business necessity) if the practice operates to favor an identifiable group of white employees over a protected class.¹⁰³ Provision is made in the Act to preclude application of federal preemption to state or local laws assigned to proscribe employment discrimination.¹⁰⁴ Thus, if an individual initially processes an employment discrimination charge in a state or local forum and receives an adverse ruling (or fails to obtain a timely ruling), this does not bar him from subsequently bringing a Title VII action.¹⁰⁵ Similar to the National Labor Relations Act, Title VII has cut deep into the employer's right to discharge.¹⁰⁶ In fact, had the legislation been enacted sooner, many earlier cases testing the at-will rule would arguably have been decided in the employee's favor.¹⁰⁷

organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise

42 U.S.C. § 2000e-2(e) (1976).

It is noteworthy that section 703(e) does not permit a BFOQ exception with respect to "race," which, according to the legislative history of Title VII, was excluded intentionally. See UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLE VII AND TITLE XI OF THE CIVIL RIGHTS ACT OF 1964, 3183-85, 3191-92 (1968).

103. *Griggs v. Duke Power Corp.*, 401 U.S. 424 (1971).

104. 42 U.S.C. § 2000e-7.

105. See, e.g., *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972); *Voutis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971).

106. See Blumrosen, *Strangers No More: All Workers are Entitled to 'Just Cause' Protection Under Title VII*, 25 INDUS. REL. L.J. 519 (1978).

107. See *Clarke v. Atlantic Stevedoring Co.*, 163 F. 423 (E.D.N.Y. 1908) (200

One of the notable applications of this statute, besides providing protection for minorities and women, has been its use in protecting whites. In *McDonald v. Sante Fe Trail Transportation Co.*,¹⁰⁸ the Supreme Court held that the terms of Title VII are not limited to discrimination against members of any particular race. To rule otherwise would "constitute a dereliction of the Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."¹⁰⁹

This application of Title VII and its underlying color blindness has promoted two legal scholars to suggest that Title VII can be logically generalized to provide protection for all employees against unjustifiable employer discharge decisions without regard to race or sex.¹¹⁰ It is unclear whether this application has found acceptance in more than a handful of courts.

3. *Public-Sector Statutory Limitations*

The most extensive protections against a general at-will discharge are enjoyed by public-sector employees.¹¹¹ At the federal

black stevedores hired for permanent positions were discharged to make room for white stevedores).

108. 427 U.S. 273 (1976). Three employees, one black and two white, were charged with misappropriating a shipment of antifreeze that Sante Fe was carrying for one of its customers. The two white employees were discharged, but the black employee was not. The Court ruled that the discharge of the white employees constituted racial discrimination which violated the statute. *Id.* at 283.

The court also found a violation of 42 U.S.C. § 1981 which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

109. 427 U.S. at 280, citing EEOC Decision No. 74-31 (1973).

110. See Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 19-21 (1979); Blumrosen, *supra* note 106, *passim*. Peck and Blumrosen in combination assert that *McDonald-Douglas Corp. v. Green*, 411 U.S. 792 (1973), affords all employees protection by: 1) requiring the employer to articulate some legitimate, nondiscriminatory reason for discharge (*McDonald-Douglas*); and 2) the application of Title VII to white majority employees (*McDonald*).

111. See generally Lowy, *Constitutional Limitations on the Dismissal of Public Employees*, 43 BROOKLYN L. REV. 1 (1976); Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV.

level, a major statute governing labor relations is the Civil Service Reform Act of 1978.¹¹² Particularly noteworthy is a provision in the statute which provides that, pursuant to regulations prescribed by the Office of Personnel Management, an employee subject to civil service¹¹³ can be disciplined "only for such cause as will promote the efficiency of the service."¹¹⁴ The statute further provides that an employee against whom action is taken is entitled to: (1) at least 30 days' advance written notice, unless there is reason to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed; (2) reasonable time, not less than seven days, to file an answer along with any supporting affidavits; (3) representation by an attorney or other representative; and (4) a written decision and specific reasons at the earliest practicable date.¹¹⁵ Provision is also made for appeal to the Merit Systems Protection Board.¹¹⁶

Additional protection is afforded employees who make use of the statutory procedures. Section 7116(a)(4) provides that it is an unfair labor practice for an agency "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit or petition, or has given any information or testimony under this chapter."¹¹⁷

Protection afforded state employees under state law is not as complete as federal law, but nonetheless offers some protection from arbitrary dismissal.¹¹⁸ However, public employees under the merit system are not always protected from discharge. In many jurisdictions, state civil service statutes will merely outline proce-

287 (1968); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).

Civilian employment in federal, state, and local governments was estimated by the Bureau of Census to be 16,222,000 in October of 1980, a 1.6 percent increase over 1979. See GOV'T EMPL. REL. REP. (BNA) 71:2111 (1982).

112. Civil Service Reform Act, 5 U.S.C. §§ 1101-8911 (1978).

113. *Id.* § 7541.

114. *Id.* § 7543(a).

115. *Id.* § 7543(b).

116. *Id.* § 7543(d).

117. *Id.* § 7116(a)(4).

118. In most states, public employees are protected from discharge because of union organization and Title VII-type criteria. However, state civil service laws vary from state to state. For a list of state civil service laws see GOV'T EMPL. REL. REP. (BNA) 51:501 (1980).

dures for hiring, staffing and promoting, rather than provide substantive protections against arbitrary discharges.

State statutes that grant and regulate collective bargaining rights provide a major source of protection against unjust dismissals, at least with respect to organizational activity. As of January 1981, 39 states, the District of Columbia, and the Virgin Islands had statutes or executive orders providing collective bargaining rights to some or all of their employees.¹¹⁹ The importance of these statutes cannot be overlooked. Not only are state employees protected from dismissals for their union-related activity, but bargaining itself will generally result in the enactment and institution of employee grievance procedures. Other grounds for discipline and discharge will accordingly be subject to review by arbitrators or other bodies so designated in the bargaining agreement.

4. *Additional Legislation*

There are a variety of state and federal statutes which limit the freedom of employers to discharge at will. On the federal level, the following statutes are particularly of note: 1) the Consumer Credit Protection Act, prohibiting discharge because of wage garnishment for indebtedness;¹²⁰ 2) the Age Discrimination in Employment Act, which protects persons between the ages of forty and seventy against discrimination in employment;¹²¹ 3) the Fair Labor Standards Act, which prohibits a retaliatory discharge against those exercising rights under that statute;¹²² 4) the Occupational Health and Safety Act, which also prohibits the discharge of those exercising rights under the statute;¹²³ and 5) the Selective Training and Service Act of 1940, which essentially requires reinstatement of veterans to their former positions of employment after discharge from military service.¹²⁴

119. *Id.*

120. 15 U.S.C. § 16748(a) (1976).

121. 29 U.S.C. §§ 621-634 (1976).

122. *Id.* § 215(a)(3) (1976).

123. *Id.* § 66(c) (1976). Moreover, employees cannot be discharged for refusing to perform hazardous work. See *Whirlpool v. Marshall*, 455 U.S. 1 (1980).

124. 38 U.S.C. §§ 2021-2026 (1974). The predecessor of this Act was the Selective Training and Service Act of 1940. 50 U.S.C. App. §§ 301-318. The courts in enforcing this right have given content to the undefined statutory term "cause." Cause has been broadly defined by the courts to be "such cause as a fair-minded person may act upon," *Keserich v. Carnegie-Illinois Steel Corp.*, 163 F.2d 889, 890 (7th Cir. 1947) and more specifically as . . . "We think a discharge may be upheld

Individual states have passed legislation similar to the NLRA,¹²⁵ Title VII,¹²⁶ and Age Act,¹²⁷ which further limit employers' freedom to discharge. State statutes have prohibited employer discrimination because of an employee's acceptance of jury duty,¹²⁸ political activities,¹²⁹ refusal to take a lie detector test,¹³⁰ filing of a

as one for cause only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or implied, that such conduct would be grounds for discharge." *Carter v. United States*, 407 F.2d. 1238, 1244 (D.C. Cir. 1968).

125. CONN. GEN. STAT. ANN. § 31-101 (West 1980); HAWAII REV. STAT. § 590-1 (1981); KAN. STAT. ANN. § 44-801 (1964); MASS. GEN. LAWS ANN. ch. 151E § 1 (West 1981); MICH. COMP. LAWS ANN. § 423.1 (1981); MINN. STAT. ANN. § 179.01 (West 1981); N.Y. LAB. LAW § 720 (McKinney 1980); N.D. CENT. CODE § 34-12-01 (1979); OR. REV. STAT. § 661.010 (1971); PA. STAT. ANN. tit. 43, § 211 (Purdon 1968); R.I. GEN. LAWS § 28-7-1 (1979); UTAH CODE ANN. § 20-1-13 (1979); VT. STAT. ANN. tit. 21, § 19-1501 (1976); WIS. STAT. ANN. § 111.01 (West 1980).

126. ALASKA STAT. § 18.80.010 (1980); ARIZ. REV. STAT. ANN. § 41-1402 (1980); CAL. GOV'T CODE § 12900 (West 1980); COLO. REV. STAT. § 24-34-401 (1980); CONN. GEN. STAT. ANN. § 46a-51-99 (West 1980); DEL. CODE ANN. tit. 19, § 701 (1970); D.C. CODE ANN. § 6-22-2201 (1978); FLA. STAT. §§ 23.161-23.167 (Supp. 1983); GA. CODE ANN. § 1-29 (1980); HAWAII REV. STAT. § 378-1 (1981); IDAHO CODE § 67-5901 (1980); ILL. REV. STAT. ch. 68, § 1-101 (1980); IND. CODE ANN. § 22-9-1-1 (Burns 1980); IOWA CODE ANN. § 601A.6 (West 1975 & Supp. 1982-1983); KAN. STAT. ANN. § 44-1001 (1980); KY. REV. STAT. ANN. § 344.010 (Bobbs-Merrill 1980); ME. REV. STAT. ANN. tit. 26, § 591 (1980); MD. ANN. CODE art. 49B, § 1 (1980); MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 1980); MICH. COMP. LAWS ANN. § 423 (1980); MINN. STAT. ANN. § 363.01 (West 1981); MO. REV. STAT. § 296.010 (1979); MONT. CODE ANN. § 49-1-101 (1979); NEB. REV. STAT. § 48.1101 (1978); NEV. REV. STAT. § 613.310 (1981); N.H. REV. STAT. ANN. § 354A:1 (1981); N.J. REV. STAT. § 10:5-1 (1981); N.M. STAT. ANN. § 28-1-1 (1975); N.Y. LAB. LAW § 290 (McKinney 1979); N.C. GEN. STAT. § 143-416 (repealed 1975); N.D. CENT. CODE § 34-01-19 (1979); OHIO REV. CODE ANN. § 4112.01 (1981); OKLA. STAT. ANN. tit. 25, § 1101 (West 1981); OR. REV. STAT. § 659.010 (1981); 43 PA. CONS. STAT. ANN. § 211.3 (Purdon 1980); R.I. GEN. LAWS § 28-5-1 (1981); S.C. CODE ANN. § 1-13-10 (Law. Co-op. 1979); S.D. CODIFIED LAWS ANN. § 20-13-1 (1981); TENN. CODE ANN. § 4-21-101 (1981); UTAH CODE ANN. § 34-35-1 (1981); VT. STAT. ANN. tit. 21, § 6-495 (1981); WASH. REV. CODE § 49.60.010 (1981), W. VA. CODE § 5-11-1 (1981); WIS. STAT. ANN. § 111.31 (West 1979); WYO. STAT. § 13-101 (1979).

127. IDAHO CODE § 44-1601 (1980) (repealed 1982) (*see* §§ 67-5901, -5912); IND. CODE ANN. § 22-9-2-1 (Burns 1980); LA. REV. STAT. ANN. § 892-893 (West 1978); MASS. GEN. LAWS ANN. ch. 151A § 1 (West 1978); MINN. STAT. ANN. § 181.81 (West 1979); NEB. REV. STAT. § 48-1001 (1978); N.D. CENT. CODE § 34-01-17 (1979); OHIO REV. CODE ANN. § 4101.17 (Page 1979); WASH. REV. CODE § 49.44.090 (1981).

128. *See, e.g.*, CAL. LAB. CODE § 230 (West 1978).

129. *See, e.g.*, COLO. REV. STAT. § 80-11-8 (1963); NEV. REV. STAT. § 613.040

workmen's compensation claim,¹³¹ reporting a violation of state employee safety codes,¹³² and physical handicap.¹³³

Notwithstanding this kaleidoscope of legislation protecting employees from unjust dismissals, the legislative schemes cited above fail in many respects to fully protect employees. An employee who is not dismissed because of a criterion outlined in a specific statute will generally have no cause of action. The harsh result is that unless a discharge has been effected because of union-related activity, race, color, religion, sex, national origin, or age, the probability is high that Wood's "at-will" rule will control the judicial forum, at least in most jurisdictions.

B. CONSTITUTIONAL LIMITATIONS

In a line of cases dating back to 1972,¹³⁴ the Supreme Court

(1973).

130. See, e.g., ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1982) and Nebraska Licensing of Truth and Deception Examiner's Act, NEB. REV. STAT. § 81-1932 (1981).

131. See MO. REV. STAT. § 287.780 (1975).

132. See CONN. GEN. STAT. § 31-379 (1975).

133. E.g., CAL. LAB. CODE § 1420(a) (1975); ILL. REV. STAT. ch. 38, § 65-23 (1977) (repealed in 1980 and merged into ILL. REV. STAT. ch. 68, §§ 1-101 to 9-102, which prohibits various types of discrimination).

134. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court considered the allegations of a professor that the university's failure to provide any reason or hearing for his nonrenewal violated procedural due process. The court reasoned that, prior to determining what form of hearing is required under the due process clause, it must first be ascertained whether a "liberty" or a "property" interest has been denied. Although the Court recognized that the re-employment prospects of Roth were of major concern to him, the Court nevertheless held that the nonrenewal decision violated neither a liberty nor a property interest where the state did not make any charge that might seriously damage Roth's standing in the community or impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment. The Court stated that in order to have a property interest in a benefit one must have more than an abstract demand for it; a legitimate claim of entitlement is mandated. Roth's property interest in employment was created and defined in the terms of his employment and since the university made no provisions for renewal whatsoever, no procedural infirmity existed in the denial of a hearing.

Perry v. Sindermann, 408 U.S. 593 (1972), a companion case, involved another professor serving on a year-to-year basis who was not renewed and who had not been granted a hearing. In *Sindermann*, the Court held that a potential property interest in continued employment existed where the university had a *de facto* tenure system for professors after seven or more years of service. In contrast to *Roth*, the Court found that the petitioner must be accorded the opportunity to

has incorporated the fifth¹³⁵ and fourteenth¹³⁶ amendments of the Constitution as providing public employees a degree of procedural and substantive protections in the employment area. In addition, the Court has made it clear that a public employee cannot be discharged from employment merely for exercising a first amendment right.¹³⁷ Likewise, the government cannot condition a benefit upon

establish that his property interest was secured by explicit rules and explicit understandings of the institution.

Of particular note is *Arnett v. Kennedy*, 416 U.S. 134 (1974), in which the Court, with no majority opinion, held that the removal of a nonprobationary employee consistent with the procedures outlined in the civil service statute satisfied due process. The Court rejected Kennedy's argument that the discharge procedures mandated by the statute denied him procedural due process because they failed to provide a trial-type hearing before an impartial agency official prior to removal. Kennedy had accused his director of bribery and, under the statutory format, was entitled to respond and submit supporting material before the director who would eventually make the final decision regarding his termination. A plurality reasoned that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.* at 153-54.

See also *Bishop v. Wood*, 426 U.S. 341 (1976) (property right to job, triggering requirements of procedural due process, to be defined by reference to state law creating rights); *Elrod v. Burns*, 427 U.S. 347 (1976) (non-policymaking public employees cannot be dismissed from employment on the basis of mere political affiliation).

135. The fifth amendment is a limitation only upon the actions of the federal government, *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952), and in part provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Due process is that which comports with the deepest notions of what is fair and right and just. *Solesbee v. Balkcom*, 339 U.S. 9 (1950). It is now settled that due process is more than merely a procedural guarantee. "The article is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law' by its mere will." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1856).

136. The fourteenth amendment provides in part that "[no state] shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend XIV, § 1. Although not explicitly drafted in the language of the fifth amendment, it is settled that the due process clause of the fifth amendment contains an equal protection component prohibiting the United States from individually discriminating between individuals or groups. *Bolling v. Sharpe*, 34 U.S. 497 (1954).

137. *Shelton v. Tucker*, 364 U.S. 479 (1960) (Arkansas statute mandating every teacher to file annual report listing membership in and contributions to organizations overbroad in impairing freedom of association); *Keyishian v. Board*

the surrender of otherwise constitutionally protected conduct.¹³⁸ As stated by the Court in *Perry v. Sindermann*,¹³⁹ "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited Such interference with constitutional rights is impermissible."¹⁴⁰

C. CONTRACTUAL LIMITATIONS

Few employees possess the bargaining power to command a bona fide contract of employment from their employer for a specified duration with a no-discharge clause. In normal employment situations, the employer possesses the greater bargaining power and would rarely agree to such an employment contract. The contractual limitations on the at-will rule discussed here are found in collective bargaining agreements, usually negotiated by a labor organization serving as exclusive bargaining representative for a specified unit of employees. Rarely, if ever, however, can a collective bargaining agreement be considered a true contract of employment. No employee has a job by reason of it and, as pointed out by the Supreme Court, no obligation to any individual ordinarily comes into existence from it alone.¹⁴¹ The major significance of collective bargaining agreements as a limitation on the employment

of Regents, 384 U.S. 589 (1967) (New York's Feinberg Law requiring certificates from teachers asserting non-Communist affiliation unconstitutionally overbroad; mere membership without specific intent to further unlawful aims of an organization is impermissible basis for exclusion from government benefits); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) (untured teacher may be dismissed "for no reason whatever," but discharge cannot be effected for exercise of first amendment rights).

See also Van Alstyne, *The Constitutional Rights of Employees*, 16 U.C.L.A. L. REV. 751 (1969); O'Neal, *The Private Lives of Public Employees*, 51 OR. L. REV. 70 (1971); Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297 (1974).

138. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1139 (1968); O'Neil, *Unconstitutional Conditions*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1981).

139. 408 U.S. 593 (1972).

140. *Id.* at 597.

141. *J. I. Case v. National Labor Relations Bd.*, 321 U.S. 332 (1944). See generally Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

at-will rule is found in grievance and arbitration procedures that have been negotiated by the parties and included in their collective bargaining contract.

D. ARBITRAL LIMITATIONS

A major reason for the growth of unionism and collective bargaining was the employee's desire to modify and regulate the employer's power of discharge.¹⁴² A Bureau of National Affairs survey reveals that discharge and discipline provisions are found in 96 percent of union contracts.¹⁴³ These contracts limit discharge and discipline by establishing "just cause" provisions.¹⁴⁴

Despite the high frequency of arbitration cases dealing with discharge and discipline, few, if any, contracts contain a definition of "just cause." Although there is no uniform definition of what constitutes "just cause,"¹⁴⁵ a review of published arbitration

142. See Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report*, 18 RUTGERS L. REV. 428, 434 (1964).

143. See *supra* note 66.

144. A recent study of published discharge grievances compiled in the LABOR ARBITRATION REPORTS (BNA May 1971 through January 1974) reveals that management had its disciplinary action reduced or eliminated in approximately 58% (231 of 400 cases) of the awards. See Jennings & Wolters, *Discharge Cases Reconsidered*, 31 ARB. J. 164 (1976). See also Stone, *Why Arbitrators Reinstate Discharged Employees*, 92 MONTHLY LAB. REV. 49; Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 161 (Am. Arb. A. 1976); Holly, *The Arbitration of Discharge Cases: A Case Study*, in CRITICAL ISSUES IN LABOR ARBITRATION, PROCEEDINGS OF THE TENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (BNA Books 1957); Note, *Discharge in the "Law" of Arbitration*, 20 VAND. L. REV. 81 (1966).

145. A sampling of arbitral opinion indicates the following thoughts on the nature of "just cause":

Arbitrator Phillip Ross: "Although the contract is silent on criteria to be utilized in measuring the imposed discipline, just cause is not an ambiguous, amorphous concept. Tens of thousands of arbitration decisions have explicated standards by which to evaluate the degree of justifiable discipline. Under the facts of this case, the most important of these standards are those of mitigating factors that would excuse or extenuate the discipline." *Niagra Frontier Transit Sys., Inc.*, 61 Lab. Arb. 784, 791 (1973) (Ross, Arb.).

Arbitrator James McBreaty: "This question of 'just cause' is nothing more than the question of justice, placed in an industrial setting. True, it is not legal justice; it is not social justice—it is industrial justice." *Lear Siegler, Inc.*, 63 Lab. Arb. 1157, 1160 (1974) (McBreaty, Arb.).

Arbitrators Joseph D. McGoldrick and Stephen J. Sutton: "[Just cause] excludes discharge for mere whim or caprice. [It is] . . . intended to include those

awards reveals a "common law" set of guidelines which may be applied to the facts of any particular case. Perhaps the best (and the most often-quoted) statement of the criteria used in these guidelines is in the form of a series of questions provided by Arbitrator Carroll Daugherty:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?¹⁴⁶

Arbitrator Daugherty states that a "no" answer to any one or more of the above questions normally signifies that just and proper

things for which employees have traditionally been fired . . . [It] include[s] the traditional cause of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor, and most recently . . . include[s] the decisions of the courts and arbitrators" *Worthington Corp.*, 24 Lab. Arb. 1, 6-7 (1955) (McGoldrick, Sutton and Tribble, Arbs.).

Arbitrator Harry Platt: "[Just cause mandates] not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to discipline him." *Arbitral Standards in Discipline Cases*, in *THE LAW AND LABOR-MANAGEMENT RELATIONS* 223, 234 (Univ. of Mich. 1950).

See also R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 345 (1970): "If the contract does not specify what constitutes 'cause,' it is obvious that the determination of what is 'cause' must be made in light of the mores of the industrial community."

146. *Enterprise Wire Co.*, 46 Lab. Arb. 359, 363-64 (1966); *Grief Bros. Co.operative Corp.*, 42 Lab. Arb. 555, 558 (1964) (Daugherty, Arb.). See also *Sunshine Biscuits, Inc.*, 60 Lab. Arb. 197 (1973) (Roberts, Arb.); *McCall Printing Co.*, 64 Lab. Arb. 584, 588 (1975) (Lubic, Arb.).

cause for discipline did not exist.¹⁴⁷

It is especially noteworthy that even if no "just cause" provision is contained in the agreement, the better weight of arbitral authority holds that absent a clear indication to the contrary, a "just cause" standard is implied in the contract.¹⁴⁸

E. SUMMARY OF ARBITRAL LIMITATIONS

Labor organizations have greatly limited employers' discretion to impose disciplinary sanctions on the workforce. Collective bargaining agreements frequently outline standards and procedures which must be observed by an employer when discipline is assessed. More important, in addition to the explicit limitations included in the agreement, arbitrators have developed both procedural and substantive guidelines that are operative under a just cause criterion. The effect of this development is clear. Those employees who are covered by a collective bargaining agreement with final and binding arbitration are afforded protection from unjust dismissal under a standard of "just cause." Although all the nuances of just cause cannot be quantified, the principles that have been articulated by arbitrators are sufficiently clear to afford significant protection to a large portion of the labor force against unjust discharge.

F. JUDICIAL LIMITATIONS

Restrictions on an employer's right to discharge are evident when one considers the multitude of statutes limiting such action. In addition, organized employees for the most part enjoy protection from unjust dismissals, further limiting an employer's right to discharge. However, unorganized employees and employees outside the purview of statutory restraints are to some extent beginning to receive judicial protection from unjust dismissals.

Judicial limitations on the employment at-will rule may generally be categorized into three major divisions: 1) public policy,¹⁴⁹ 2)

147. *Enterprise Wire* at 361, *Grief Bros.* at 557.

148. See M. HILL, JR. & A. SINICROPI, *REMEDIES IN ARBITRATION* 41-42 (BNA Books 1981).

149. In *Petermann v. International Brotherhood of Teamsters, Local 396*, 344 P.2d 25, 27 (Cal. App. 1959), the court declared: "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." (citing *Safeway Stores v. Retail Clerks Int'l Ass'n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726).

whistle blowing, and 3) malice and bad faith. While there is admittedly overlap, it is pedagogically useful to examine the cases within these categories.

1. *Public Policy Exception*

A theory most widely adopted by courts which limits the employment at-will rule is that employers should not be permitted to discipline or discharge employees for reasons violative of an established statutorily declared policy.¹⁵⁰ A rule to the contrary would mean that public policy could easily be defeated by retaliatory conduct on the part of employers.

The public-policy exception cases to the at-will rule may be divided into three categories: a.) cases in which employees are discharged for refusing to violate a criminal statute; b.) cases in which employees are discharged for exercising a statutory right designed to protect employees within the employment relationship; and c.) cases in which employees are discharged for complying with a statutory duty.

a. Discharge for Refusal to Violate a Criminal Statute

The leading case in this category is *Petermann v. Teamsters Local 396*.¹⁵¹ In that case, a union business agent was discharged for refusing to commit perjury for his employer (a labor union). While recognizing that an employment contract without specified duration is generally terminable at the employer's will, the California Court of Appeals stated that "the right to discharge an employee under such a contract may be limited by statute . . . or by considerations of public policy."¹⁵²

The Supreme Court of Illinois recently had this to say about public policy: There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decision.

Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981) (citing *Smith v. Board of Educ.*, 405 Ill. 143, 147, 89 N.E. 893 (1950)).

150. See, e.g., *Savodnik v. Korvettes, Inc.*, 489 F. Supp. 1010 (E.D.N.Y. 1980); *Brown v. Transcom Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Texas Steel Co. v. Douglas*, 533 S.W.2d 11 (Tex. Ct. App. 1976); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54, 57 (1977).

151. 174 Cal. App. 184, 344 P.2d 25 (1959).

152. 344 P.2d at 27. In holding for the employee, the California court

Similarly, in *Tameny v. Atlantic Richfield Co.*,¹⁵³ the Supreme Court of California found a cause of action in tort for an employee who was discharged for refusing to participate in an illegal price-fixing scheme. In so holding, the court declared:

We hold that an employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer.¹⁵⁴

In the years following the *Petermann* decision, courts in a number of jurisdictions have allowed at-will employees to sue employers for wrongful discharge when fired for refusing to violate a criminal statute. Courts have allowed a cause of action in tort for wrongful discharge when an X-ray technician was discharged for refusing to perform catheterizations (New Jersey),¹⁵⁵ when an at-will railroad employee was discharged for refusing to alter state pollution control reports (Michigan),¹⁵⁶ and when a quality control inspector was discharged for informing his employer that his packaged goods were mislabeled (Connecticut).¹⁵⁷

The cases allowing claims by at-will employees for refusal to violate criminal statutes illustrate a limited application of the pub-

concluded:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Id.

153. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

154. *Id.* at 178, 610 P.2d at 1337, 164 Cal. Rptr. at 846. *Cf.* *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976).

155. *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978). The New Jersey court emphasized that the state Medical Practice Act prohibited the performance of catheterizations by persons not licensed as nurses.

156. *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385, 388 (1978) ("It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws.").

157. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 389 (1980) ("[A]n employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment.").

lic policy exception. In general, where courts have found a cause of action based on the violation of public policy, they have cited a specific policy clearly mandated or implied in a state statute.

b. Discharge for Exercising a Statutory Right

While recognizing that generally "an employee at will may be discharged without cause,"¹⁵⁸ in 1973 the Indiana Supreme Court carved out an exception to the at-will doctrine for employees discharged for exercising a statutorily conferred right to receive compensation.¹⁵⁹ This was the first case allowing tort action for a discharge in retaliation for filing a workmen's compensation claim. The Indiana court reasoned that it would be against public policy to prohibit a cause of action since the language of the Indiana compensation statute prohibited any "device" to circumvent the employer's liability. The court went on to state:

The Act creates a *duty* in the employer to compensate employees for work-related injuries (through insurance) and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal.¹⁶⁰

While some states have passed specific legislation prohibiting discharge of employees for filing workmen's compensation claims,¹⁶¹ others have not. Therefore, several courts since *Frampton* have had to address the issue.¹⁶² Generally, those courts

158. *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425, 428 (1973). See also *Campbell v. Eli Lilly Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980), *petition for transfer denied*, 421 N.E.2d 1099 (Ind. 1981).

159. *Frampton*, 260 Ind. 249, 297 N.E. 425.

160. 297 N.E.2d at 427.

161. See *supra* note 131.

162. In addition to *Frampton*, decisions that have applied the public policy exception to the at-will doctrine when an employee is discharged for filing a workman's compensation claim include: *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Lally v. Copygraphics*, 173 N.J. Super. 162, 413 A.2d 960, *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1980); *Brown v. Transcom Lines*, 284 Or. 597, 588 P.2d 1087 (1978).

Cases which have denied the public policy exception when an employee is discharged for filing a claim include: *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Dockery v. Lampert Table Co.*, 36 N.C. App. 392, 244 S.E.2d 272 (1978) (cert. denied, superseded by

recognizing a cause of action have relied on the clear mandate of the law encouraging employees who sustain on-the-job injuries to seek disability benefits.¹⁶³ Courts refusing to grant employees a cause of action under this type of claim insist that the legislature is best suited to create new causes of action. Absent express legislative intent, these courts are reluctant to imply a cause of action for a retaliatory discharge.¹⁶⁴

As was noted in the discussion of statutory limitations,¹⁶⁵ statutes designed to protect employees who seek union representation and engage in union activities have provided courts with the clear mandate of public policy to invoke exceptions in cases where employees have been fired because of their union activities. In addition, this area of the public policy exception has successfully been invoked by an employee discharged for refusing to take a polygraph test,¹⁶⁶ and in a discharge for designating an attorney as a bargaining representative.¹⁶⁷ The court-cited criteria in all of these cases has been: 1) a clear expression of public policy in a statute protecting employees within the employment relationship; and 2) protection by statute of the class within which the employee falls.

c. Discharge for Complying With a Statutory Duty

One "statutory duty" that has been the source of much litigation

statute); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956). See also *Stephens v. Justiss-Mears Oil Co.*, 300 So. 2d 510 (La. App. 1974) (dicta).

See generally Comment, *Kelsay v. Motorola, Inc.—A Remedy for the Abusively Discharged At-Will Employee*, 1979 S. ILL. U.L. REV. 563 (1979); Note, *Judicial Limitation of the Employment At-Will Doctrine*, 54 ST. JOHN'S REV. 552 (1980); Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961); Annot., 63 A.L.R.3d 979 (1975).

163. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979) (Allowing employers to intimidate employees into foregoing statutory benefits frustrates the remedial purposes of the Act.).

164. *Dockery v. Lampert Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, 275 (1978) ("[I]f the General Assembly of North Carolina had intended a cause of action be created, surely . . . it would have specifically addressed the problem."), cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978) and superseded by statute as stated in *Buie v. Daniel Int'l Corp.* 56 N.C. App. 445, 289 S.E.2d 118, petition denied, 292 S.E.2d 574 (1982).

165. See *supra* notes 67-133 and accompanying text.

166. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3rd Cir. 1979). But cf. *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977) (no cause of action for two employees who were discharged for refusal to take psychological stress evaluation tests mandated for all employees).

167. *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401, 403 (1970).

tion is jury duty.¹⁶⁸ In the lead case in this area, *Nees v. Hocks*,¹⁶⁹ the Supreme Court of Oregon held that an at-will employee may recover in tort for wrongful discharge when complying with this statutory duty,¹⁷⁰ reasoning that the legislature and the courts regard the jury system as high on the scale of American institutions and citizen obligations.¹⁷¹ It follows that if an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected.¹⁷²

2. Whistle Blower Exception

Related to the public policy exception are discharges or other retaliatory conduct triggered by an employee's reporting of allegedly unlawful conduct. In some cases the reporting may be of a supervisor's conduct to upper management; in other cases the employee may report his company's activities to governmental agencies. The fact pattern in whistle blower cases is often the same:

The employee objects to work that the employee believes is violative of state or federal law or [conduct that is] otherwise improper; . . . the employee expresses his intention not to assist the employer in the furtherance of such work and/or engages in "self-help" activity outside the work place to halt the work; and the employer [finally] discharges the employee for refusal to work or incompatibility with management [or organizational goals].¹⁷³

The courts have had little trouble in affording a cause of action in tort to an employee who is urged by his or her employer to

168. Some states have statutes protecting employees from discharge because of accepting jury duty. See, e.g., OR. REV. STAT. § 10.090 (1981); CAL. LAB. CODE § 230 (West 1978).

169. 272 Or. 210, 536 P.2d 512 (1975).

170. The discharged employee, in this case, a secretary, won a jury verdict. The jury found her discharge had been motivated solely by her having taken time off work to serve as a juror.

171. *Nees*, 536 P.2d at 516.

172. See, e.g., *Ruether v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119, 121 (1978) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice.") (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)); *People v. Vitucci*, 49 Ill. App. 2d 171, 199 N.E.2d 78 (1964) (contempt judgment against an employee reversed). But cf. *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171, 175 (1960) (protection for jurors, even if good public policy, should be given by legislature—see *supra* note 168).

173. See *Olsen, Wrongful Discharge Claims Raised by At Will Employees: A New Legal Concern for Employers*, 32 LAB. L.J. 265, 276 (1981).

violate a criminal or civil statute as part of a company pattern or practice. The more difficult situations involve those cases where an employee, on his or her own motion, reports conduct that the employee feels is illegal or, because of professional considerations, unethical.

For example, the Supreme Court of West Virginia, in *Harless v. First National Bank in Fairmont*,¹⁷⁴ considered whether an employee who was discharged in retaliation for his efforts to require his employer to comply with a state consumer credit and protection statute stated a cause of action in tort. Finding that the legislature intended to establish a clear and unequivocal public policy that consumers of credit were to be afforded protection,¹⁷⁵ the court ruled that this "policy should not be frustrated by a holding that an employee of [a lending] institution covered by the [Act], who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action."¹⁷⁶

A similar result was reached by the Illinois Supreme Court in *Palmateer v. International Harvester Co.*,¹⁷⁷ where the court, in finding a cause of action in tort for an employee who was discharged for supplying to local law enforcement agencies information indicating that a fellow employee might be violating the criminal statutes, stated:

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. "Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused."¹⁷⁸

The court also noted that once Palmateer reported the crime, he was then under a statutory duty to further assist officials when requested to do so.¹⁷⁹

In *Price v. Ortho Pharmaceutical Corp.*,¹⁸⁰ the Supreme Court

174. 246 S.E.2d 270 (W. Va. 1978).

175. *Id.* at 276.

176. *Id.*

177. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

178. *Id.* at 132, 421 N.E.2d at 880 (citation omitted).

179. *Id.*

180. 84 N.J. 58, 417 A.2d 505 (1980).

of New Jersey considered whether an at-will employee had a cause of action against her employer to recover damages for the termination of her employment following her refusal to continue a project she considered medically unethical. What is interesting in this case is the court's focus on the special considerations arising out of the right to fire an at-will employee who is a member of a recognized profession. As stated by the court:

Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers. However, an employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of the employee's profession.¹⁸¹

While the court made it clear that a cause of action would lie where the discharge is contrary to a clear mandate of public policy,¹⁸² it cautioned that not all professional codes of ethics express a clear mandate of public policy. Absent legislation, the court declared that the judiciary must define the cause of action in a case-by-case determination.¹⁸³

Similarly, in *Geary v. United States Steel Corp.*,¹⁸⁴ the Supreme Court of Pennsylvania sustained the dismissal of an employee's complaint that public policy was violated when he was dismissed from employment after expressing his opinion to management that a new product was defective and dangerous. The record indicated that Geary, believing a product to be unsafe, bypassed his immediate supervisors and successfully persuaded higher management to withdraw the product from the market. The court sustained the dismissal of the employee's complaint because it revealed only "that there was a dispute over the merits of the

181. 417 A.2d at 512.

182. *Id.*

183. *Id.* See also *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. App. 1980) (no cause of action for dismissal of at-will employee who disclosed to superiors the alleged hazardous nature of drugs where employee cites no statutory source for the duty fulfilled); Comment, *Pierce v. Ortho Pharmaceutical Corp., Is the Public Policy Exception to the At Will Doctrine a Bad Omen for the Employment Relationship?*, 33 RUTGERS L. REV. 1187 (1981).

184. 456 Pa. 171, 319 A.2d 174 (1974).

new product,"¹⁸⁵ and because there was no evidence that Geary was discharged for the specific purpose of causing him harm or for his refusal to break any law. The court found that "Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house."¹⁸⁶ In so holding, the court dismissed as "speculative" Geary's argument that the continued sale of the defective product might have entailed both criminal and civil liability.¹⁸⁷

In another case, a court denied a cause of action for wrongful discharge to a nurse who refused a management order to reduce the overtime assignments of her staff. The court rejected the employee's contention that a cause of action should be allowed since she felt that the reduction of overtime would jeopardize the health of the patients. It was also held that a statute containing general principles pertaining to the licensing of nurses did not create a cause of action.¹⁸⁸

There is evidence to suggest that, before a court will allow a cause of action for "whistle blowing," the conduct complained of must clearly be illegal. For example, in *Adler v. American Standard Corp.*,¹⁸⁹ an employee was discharged for revealing to higher management corporate conduct which, according to Adler, included payments of commercial bribes and the falsification of corporate records and financial statements.¹⁹⁰ The court found that Adler's complaint was too vague and lacking in specifics to mount a prima facie showing that the claimed conduct contravened any criminal statute.¹⁹¹ Nor did the complaint demonstrate a clear violation of public policy. In the words of the court:

We have always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally a function of the legislative branch As Mr. Justice Sutherland stated for the Supreme Court in *Patton v. United States*, 281 U.S. 276, 306, . . . (1930):

185. 319 A.2d at 178.

186. *Id.*

187. *Id.* at n.9.

188. *Lampe v. Presbyterian Medical Center*, 590 P.2d 513, 515-17 (Colo. Ct. App. 1979).

189. 432 A.2d 464 (Md. 1981).

190. *Id.* at 466.

191. *Id.* at 471.

"The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, *only with the utmost circumspection*. The public policy of one generation may not, under changed conditions, be the public policy of another."¹⁹²

While the court admitted that Maryland recognized a cause of action for an abusive discharge by an employer of an at-will employee when the motivation for the discharge is against public policy,¹⁹³ the complaint at issue fell short of providing a "sufficient factual predicate for determining whether any declared mandate of public policy was violated."¹⁹⁴

The extension of a public policy-type exception to protect a whistle blower is especially appropriate where the employee is motivated by a bona fide desire to further a clear public policy. Indeed, the exception may be a modest expansion of the rule enunciated in *Petermann* that an employee should not be confronted with the Draconian choice of selecting loss of employment or the commission of a crime. Affording a cause of action in tort would clearly serve as a deterrent to retaliatory discharges and would promote the public policy which the discharge would otherwise violate.¹⁹⁵

A review of the cases in the whistle blower area indicates that, in finding a cause of action, the courts undertake a balancing of the competing interests at issue. The employer's interest is to be

192. *Id.* at 472.

193. *Id.* at 473.

194. *Id.* at 472.

195. In *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. App. 1980), Judge Ratcliff found that extension of the public policy exception to protect a "responsible whistle-blower" is often justified.

A conscientious employee, albeit an employee at will, who, motivated by a sincere desire to further a clear and compelling public policy, either statutorily or judicially declared, calls to the attention of his employer or appropriate authorities facts revealing actual violations of such policy for the purpose of carrying out that clear public policy should not be subjected to retaliatory discharge without being provided a remedy

Giving such a right of action for damages would serve as a deterrent to retaliatory discharge and would promote the very same strong and compelling public policy which the retaliatory discharge would violate.

Id. at 1067 (Ratcliff, J., concurring in part, dissenting in part, and concurring in result).

permitted to efficiently operate a business; the employee's interest is security in earning a livelihood. At the same time, society has an interest in making sure that its civil and criminal statutes are not violated. Accordingly, where the conduct complained of by a whistle blower clearly violates a criminal or civil statute, courts, in theory, should have little trouble finding a cause of action in tort for a retaliatory discharge. These situations involve conduct that the legislature has clearly seen fit to address. To refuse a cause of action would effectively permit an employer to increase his chances of escaping liability for violating civil or criminal statutes. It is difficult to rationalize any public policy that would be served in the case where an employer is allowed to dismiss an employee for acting as a private attorney general, at least in those instances where a court determines that the employee's allegations are correct.

A more difficult problem arises in the case where an employee reasonably but incorrectly concludes that his employer's conduct is illegal. If a court concludes that the disclosure was motivated by a good faith belief that the conduct was illegal, a cause of action should be allowed. A court can easily adjust the remedy for a retaliatory discharge to reflect the fact that the employee's accusations proved incorrect. For example, such an employee could be ordered reinstated but without any backpay. There should be no difficulty in refusing a cause of action to an employee who, for vexatious reasons, falsely accuses his employer of violating statutes. No policy is served by affording protection in this case; indeed, an employer would likely have a cause of action in tort against such an employee.

3. *Malice and Bad Faith Exceptions*

The malice and bad faith exception operates in tandem with that of public policy. The predominant case in this area is *Monge v. Beebe Rubber Co.*¹⁹⁶ A married woman was discharged by her foreman because of her refusal to go out on a date with him. The New Hampshire Court held the discharge malicious and unlawful and concluded that a termination by the employer of a contract of employment which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good.¹⁹⁷ This case launched the malice and bad faith exception to the traditional at-will employee rule and has since been

196. 114 N.H. 130, 316 A.2d 549 (1974).

197. 316 A.2d at 551.

adopted by other jurisdictions.¹⁹⁸

A related principle underlying the malice and bad faith exception is an implied covenant of good faith and fair dealing which essentially holds that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the agreement.¹⁹⁹ Two decisions are of special note in this area. The first, *Fortune v. National Cash Register Co.*,²⁰⁰ involved the discharge of a salesman with twenty-five years' service under a contract that reserved to the parties the explicit power to terminate the contract without notice. The record indicated that he was discharged while on the verge of completing a transaction which would result in a large commission. The Massachusetts Supreme Court refused to rule on the general question of whether a good faith requirement is implicit in every contract for employment at will. Nevertheless, it did declare that, on the record before it, the employer acted in bad faith when it sought to deprive the employee of commissions he otherwise would have earned. The Massachusetts Supreme Court stated that this rule was necessary in order to prevent over-reaching by employers and the forfeiture by employees of benefits almost earned.²⁰¹

198. See, e.g., *Lamley v. Celebrity Homes, Inc.*, 594 P.2d 605 (Colo. Ct. App. 1979) (employee discharged before being paid profit sharing bonus); *Sinett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970) (employee entitled to one-year stock bonus when discharged one day before completion of first year of employment under agreement providing stock bonus for each year of service).

199. See *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) and discussion *infra* at notes 200-01 and accompanying text.

200. 373 Mass. 96, 364 N.E.2d 1251.

201. 364 N.E.2d at 1257. Subsequent to *Fortune*, the Supreme Court of Massachusetts decided *Gram v. Liberty Mutual Ins. Co.*, 1981 Mass. Adv. Sh. 2287, 429 N.E.2d 21 (1981), and *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982). In *Gram*, the court allowed an insurance salesman, who would have been entitled to renewal commissions if not discharged, to recover for those commissions that were based on his past service. Unlike *Fortune*, an improper motive for the discharge was not present in *Gram*. See *Cort*, 431 N.E.2d at 910. At issue in *Cort* was a dismissal on the basis of a refusal to provide the employer with certain biographical information, including data on "business experience, education, family, home ownership, physical data, activities, and [general goals] and aims." *Id.* at 913. Finding that most of the questions were relevant to the employee's job qualifications and represented no invasion of privacy protected by law, the court stated:

We decline to impose liability on an employer simply because it gave a false reason or a pretext for the discharge of an employee at will. Such an

In *Cleary v. American Airlines*,²⁰² a California appellate court held that a cause of action could be made out for a wrongful discharge when there is a breach of the implied-in-law covenant of good faith and fair dealing, even in an employment contract of an indefinite duration. The court found that two factors were of paramount importance: the longevity of the employee's service (eighteen years) and the existence of specific procedures for adjudicating employee disputes. These factors operated as a form of estoppel, precluding any discharge of such an employee without good cause.²⁰³

Fortune and *Cleary* represent the minority view. Most courts have adhered to the common law and have not adopted a general requirement of good faith and fair dealing where employment con-

employer has no duty to give any reason at the time of discharging an employee at will. Where no reason need be given, we impose no liability on an employer for concealing the real reason for an employee's discharge or for giving a reason that is factually unsupportable.

Id. at 911. The court did point out in a footnote, however, that if the employer was attempting to conceal the real reason for the discharge and the real reason was contrary to public policy, the fact that whatever reason was given to the employee was false could be relevant in establishing a cause of action. *Id.* at n.6. The Court stressed that, on the facts of this case, public policy considerations did not justify the imposition of liability on the employer merely for falsely asserting that the employees were discharged for work-related reasons. *Id.* at 914. *See also* *McKinney v. National Dairy Council*, 491 F. Supp. 1108 (D. Mass. 1980) (good faith implied in at-will employment).

202. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

203. 168 Cal. Rptr. at 729. In *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), a California appellate court, reversing a lower court's granting of a nonsuit motion to a defendant employer, found that an employee demonstrated a prima facie case of wrongful termination in violation of an implied promise by the employer that it would not act arbitrarily in dealing with the employee. The court stated that "[i]n determining whether there exists an implied-in-fact promise for some form of continued employment . . . a variety of factors in addition to the existence of independent consideration" are relevant to such a finding. These include: "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged." 171 Cal. Rptr. at 925-26. Given Mr. Pugh's duration of employment (32 years), the commendations and promotions he received, the apparent absence of any criticism of his work, the assurances he was given that "if you are loyal to [See's] and do a good job, your future is secure," and the employer's acknowledged policies that administrative personnel would not be terminated except for good cause, the court had little trouble in concluding that there were facts in evidence from which a jury could determine an implied promise of fair dealing with the employee. *Id.* at 927.

tracts are of indefinite duration.²⁰⁴

4. *Judicial Limitations: Summary*

It is clear that the common law rule that an employer has an absolute right to discharge an at-will employee is now modified by the principle that where the employer's motivation for the retaliatory action contravenes some substantial public policy principle, a cause of action will lie either in contract or in tort. The sources of public policy, as stated by one court, include legislation, administrative rules, regulations or decisions, and judicial decisions.²⁰⁵ In selected jurisdictions, those employees who are discharged in retaliation for either having exercised a statutorily conferred personal right or having fulfilled a statutorily imposed duty will have a cause of action in tort. The courts that have adopted this exception, however, have focused on a specific policy consideration rather than the general equities of the fact situation. Matters that are the subject of personal ethics which are not overlapped by legislative-type declarations have little, if any, chance of finding protection by the courts. While courts talk of the balancing of interests in arriving at a decision,²⁰⁶ unless an employee can point to a specific statutory right or duty, the balancing will inevitably result in a resolution adverse to the complainant.

Absent a cause of action in tort, an employee challenging a discharge must rely on contract theory. The principle that every contract of employment, whatever its duration, is subject to an implied covenant of good faith and fair dealing (thereby making every employment relationship subject to a *de facto* standard of "just cause") has not been adopted by the courts, and there is no reason to believe that the judiciary is leaning toward such a standard. Selected courts have enforced promises of job security in contracts of indefinite duration even where there is no indepen-

204. See, e.g., *Stevens v. G.L. Rugo & Sons*, 209 F.2d 135 (1st Cir. 1953) (vacated and new trial granted) (jury question if dismissal reasonable); *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980); *Cactus Feeders, Inc. v. Witter*, 509 S.W.2d 934 (Tex. Civ. App. 1984).

See also *Report of the Committee on Development of the Law of Individual Rights and Responsibilities in the Work Place*, 2 A.B.A. SEC. LAB. & EMPLOYMENT L. 18-19 (1982).

205. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (1980).

206. 417 A.2d at 511. See also *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

dent consideration and mutuality of obligation,²⁰⁷ but these cases appear limited to extreme cases where legitimate expectations were created by the employer that dismissal would be for just cause only. Similarly, virtually all courts have rejected employee handbooks and personnel manuals as a basis *per se* for implying a just cause standard for at-will employees.²⁰⁸

In summary, the judiciary has carved out exceptions to the employer's power to terminate employment at will,²⁰⁹ but judicial

207. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

208. See, e.g., *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 297 N.E.2d 443 (1979); *Shaw v. S. S. Kresge Co.*, 167 Ind. App. 1, 328 N.E.2d 775 (1975); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 229 N.W.2d 147 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (Sup. Ct. 1978), *aff'd mem.*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (App. Div. 1979), *appeal denied*, 48 N.Y.2d 603, 396 N.E.2d 207, 421 N.Y.S.2d 1028 (1979); *Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S.2d 269 (Sup. Ct. 1979), *aff'd mem.*, 74 A.D.2d 553, 425 N.Y.S.2d 327 (App. Div. 1980), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E.2d 400, 433 N.Y.S.2d 1020 (1980).

209. Courts in at least 12 states have adopted the public policy exception to the at-will doctrine. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Petermann v. Teamsters Local 396*, 174 Cal. App. 184, 344 P.2d 25, 28 (1959); *Pugh v. See's Candies*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917, 922-23 (1981); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385, 389 (1980); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 358 (1978); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464, 470-71 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385, 388 (1978); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (1980); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512, 515 (1975); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119, 120 (1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

Courts in at least 11 states have indicated that they might adopt the public policy exception to the at-will doctrine under appropriate facts. *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454 (Iowa 1978); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977); *Keneally v. Orgain*, 606 P.2d 127 (Mont. 1980); *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 229 N.W.2d 147, 151-52 (1980); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737, 741 (Sup. Ct. 1978); *Jones v. Keogh*, 137 Vt.

constraints lack uniformity and are not equivalent to just cause standards found in collective bargaining agreements.

G. FOREIGN LIMITATIONS

In examining alternatives to the current status of employment law in America, it is especially noteworthy that many foreign jurisdictions have rejected the at-will rule and have adopted statutes according employees protection against unjust dismissals.

1. *Great Britain*

The common law doctrine upholding the absolute right of the employer to discharge at will has now been repudiated. The Industrial Relations Act of 1971²¹⁰ provided comprehensive protection against unjust dismissal by according covered employees the "right not to be unfairly dismissed" by their employers.²¹¹ Guidance for ascertaining what constitutes an "unfair" dismissal was given by illustrating what a "fair" dismissal was. The Act required an employer to demonstrate that a dismissal was fair by showing that the reason for the dismissal was:

. . . related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or²¹²

562, 409 A.2d 581 (1979); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764, 770 (1977); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536, 538 (Ct. App. 1980); *Forrer v. Sears Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

Courts in at least nine jurisdictions have specifically rejected the public policy exception to the at-will doctrine. *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980); *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907, 909 (1977); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265, 267 (Fla. Dist. Ct. App. 1980); *Georgia Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Jackson v. East Baton Rouge Parish School Bd.*, 393 So. 2d 243, 244 (La. Ct. App. 1980); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607, 609 (1981); *Sullivan v. Heritage Found.*, 399 A.2d 856, 860 (D.C. 1979).

210. Industrial Relations Act, 1971, ch. 72, § 22-23, 41 HAL. STAT. 2062 (1971 Cont. Vol.). The statute was amended by the Trade Union and Labour Relations Act in 1974, which essentially continues the same language as the 1971 Act. Trade Union and Labour Relations Act, 1974, ch. 52 § 6, sched. I, 44 HAL. STAT. 1766, 1789 (1974 Cont. Vol.).

211. Industrial Relations Act, § 22.

212. *Id.* § 24(2)(a).

... related to the conduct of the employee, or²¹³
 ... was ... [for] some other substantial reason of a kind such as
 to justify the dismissal of an employee holding the position which
 that employee held.²¹⁴

The Act further noted that:

[T]he determination of the question whether the dismissal was
 fair or unfair, having regard to the reason shown by the employer,
 shall depend on whether in the circumstances he acted *reasonably*
or unreasonably in treating it as a sufficient reason for dis-
 missing the employee; and that question shall be determined in
 accordance with equity and the substantial merits of the case.²¹⁵

These statutory provisions were to be interpreted by the Industrial
 Tribunals and the National Industrial Relations Court. Since the
 Act's enactment in 1971, the body of law which has developed in
 this enforcement forum considerably parallels arbitration law in
 America.²¹⁶

2. Germany

In 1951, Germany enacted a statute granting employees pro-
 tection against unjust dismissals.²¹⁷ This statute fixes a minimum

213. *Id.* § 24(2)(b).

214. *Id.* § 24(1)(b).

215. *Id.* § 24(6) (emphasis added).

216. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976). See also Hoffman, *Mediation of Unfair Dismissal Grievances: The British Example*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 171-79 (1979). Hoffman reports that Britain has adopted a system of tribunals (informal labor courts) to resolve unfair dismissal complaints and that this body handles approximately 46,000 cases per year. About 60% of the cases are settled in the conciliation stage. Of those cases adjudicated before the tribunal, in only one-third were the complaints resolved in favor of the dismissed employee. *Id.* at 174. Of particular note is the nature of the hearing. Hoffman points out that the hearing is very informal and in many ways resembles American arbitration, although in Britain the hearings are public and, at times, covered by the local press. *Id.* at 175. The hearing process usually takes 6 months, with the employee receiving an award or decision within 3 to 6 weeks after the close of the hearing. A usual remedy for an unfair dismissal is financial compensation; an order of reinstatement is less frequent. The median tribunal award is approximately £375 (\$750). For a conciliated settlement, Hoffman reports that the amounts were lower, with 75% below £300, or \$600. *Id.* at 174.

217. Law of August 10, 1951, An Act to Provide Protection Against Unwarranted Dismissals, 1951 Bundesgesetzblatt [BGBl] I 499 (W. Ger.) translated in I.L.O. Legislative Series 1951, Ger. F.R. 4. See Summers, *supra* note 216, at 511

notice period of four weeks, except in cases of "socially unwarranted" misconduct. A socially unwarranted dismissal is defined as a dismissal "not based on reasons connected with the person or conduct of the employee or on urgent service needs which precludes his continued employment in the undertaking."²¹⁸ The burden of proving the facts on which the dismissal is based lies with the employer.

This broad statutory definition has been interpreted by the labor courts to uphold discharges because of incompetence, negligence in work, repeated absences, insubordination, disruption of order, and criminal activity.²¹⁹ The general interpretation is that the conduct must be related to the job and must be such that dismissal is necessary to effective operation.²²⁰

3. Sweden

In 1974, the Swedish Parliament enacted a law that provided for "dismissal with notice"²²¹ only for "an objective cause," that must be proven by the employer.²²² No definition or elaboration of the term "objective cause" is given in the statute. Rather the definition is to be determined by a labor court.

Relying on a report on which the statute was based,²²³ the court has interpreted "objective cause" to include unexcused absence, failure to follow orders, negligence, theft, embezzlement, uncooperativeness, intoxication on the job, assault on a foreman or fellow worker, disloyalty, and revealing trade secrets.²²⁴ These "objective cause" inclusions closely parallel the just cause principles in American arbitration law.

n.141.

218. 1951 BGBI I 499 § 1(2). See Summers, *supra* note 216, at 511 n.142.

219. Summers, *supra* note 216, at 511.

220. See Schmidt, *Redundancy and Dismissal In Europe (1)*, in *LABOUR LAW IN EUROPE* 52-54 (1962), partially reprinted in Comment, *Extracts From the International Labor Office Report*, 18 *RUTGERS L. REV.* 446 (1964).

221. In Swedish, *LAGEN OM ANSTÄLLNINGSSKYDD*, SVENSK FORFATTNINGSSAMLING, 1974:12; English translation, *Act Concerning Employment Security in Sweden*. See Summers, *supra* note 216, at 517 n.180.

222. *LAGEN OM ANSTÄLLNINGSSKYDD*, 1974:12 § 5. See Summers, *supra* note 216, at 517 n.181.

223. In Swedish, *KUNGL. MAJ: TS PROPOSITION 1973:129, TRYGGHET I ANSTÄLLNING* 120. See Summers, *supra* note 216, at 517 n.185.

224. Summers, *supra* note 216, at 517.

4. *France*

French law during the nineteenth century closely resembled that of American common law. French courts used the doctrine of mutuality to reach conclusions that employment at will could be terminated by either party for any or no reason.²²⁵ However, in cases other than those involving serious misconduct, French courts read into at-will employment contracts the requirement of customary notice periods, with the employer required to give notice, or to pay damages in lieu of notice.

In 1928, France adopted a statute that essentially prohibited abusive terminations. The scope of the act's protection reaches dismissal for illness or industrial injuries, pregnancy, political beliefs, exercise of citizenship rights, strike involvement, purely personal dislike of the employee, or layoffs that disregard accepted seniority principles. Under French law the burden on the dismissed employee is to prove that the employer has committed an abusive termination.²²⁶

5. *Other Foreign Statutes*

Other countries also have enacted legislation protecting employees against unjust dismissals. In Japan, for example, workers in some large firms are guaranteed lifetime job security and other workers are protected against unjust dismissals by "good cause" requirements for all discharges.²²⁷ Egyptian law entitles a worker dismissed without justification to damages.²²⁸ In Algeria, the grounds for dismissal must be connected with the capacity or conduct of the worker, or the economic circumstances of the employer.²²⁹ Closer to America, Puerto Rico has abolished the at-will rule by substituting a standard of good cause.²³⁰ Canadian employees covered by the Labour Code are afforded protection against unjust dismissal by a 1978 amendment which, in part, provides for

225. *Id.* at 509.

226. *Id.* at 510.

227. See Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1836 (1980).

228. INT'L LABOUR CONF., 59TH SESSION, REPORT 111 (PART 2), TERMINATION OF EMPLOYMENT, SUMMARY OF REPORTS ON RECOMMENDATIONS No. 119, at 2 (1974).

229. *Id.* Also, in Italy a worker may be dismissed only for just cause or valid reason, and in Luxembourg, a worker who shows that he has been dismissed without a valid reason may recover for damages.

230. P.R. LAWS ANN. tit. 29, § 185(a) (1978).

impartial arbitration by an "adjudicator." Remedies for improper dismissal include: (1) compensation, (2) reinstatement, and (3) "any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal."²³¹

H. SUMMARY

The laissez-faire socio-economic thought that once supported the at-will doctrine has subsided. This is, in part, reflected in the enactment and application of statutory restrictions limiting an employer's absolute right to discharge. These constraints, however, are narrow and offer little protection to a large part of the work force. At the same time, a judicial limitation of unjust dismissal has been both sporadic and inconsistent. While in some jurisdictions employees may recover damages from malicious discharges or from discharges against public policy, generally employment relationships are still at will with little or no hope of relief for employees.

Most employees covered by collective bargaining agreements have protection from unjust discharge in the form of "just cause" provisions in their contracts. In interpreting and applying just cause, arbitrators have developed limitations to the employer's absolute power of discharge. Similarly, foreign countries have recognized the need to protect workers from unjust dismissals and have provided this protection in the form of statutes. Should America be different?

IV. A STATUTORY PROPOSAL

Many have argued that American workers should be accorded statutory protection against unjust discharge.²³² Such a statute

231. See Howlett, *Due Process for Nonunionized Employees: A Practical Proposal*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING 166 (Indus. Relations Research Ass'n Series 1979).

232. On April 2, 1980, Congressman Benjamin S. Rosenthal (D-N.Y.) and other co-sponsors introduced the Corporate Democracy Act of 1980 (H.R. 7010). Title IV of the proposed act was entitled "Rights of Employees" and provided as follows:

Sec. 401.(a) Section 1 of the National Labor Relations Act is amended by adding at the end thereof the following new paragraph:

"It is further declared to be the policy of the United States to protect employees in the security of their employment by ensuring that they are not deprived of such employment on the basis of their having exer-

would not be beyond the constitutional power of government. Moreover, recent judicial action circumventing the at-will doctrine supports such a proposal. Following the lead of other countries, a statute may be fashioned that applies existing arbitral principles of just cause and incorporates relevant principles of protective employment legislation. The following statute is offered as a model act which accords protection against unjust dismissals to those employees not otherwise covered by other protective statutes or collective bargaining agreements.

cised their constitutional, civil, or other legal rights, or because of their refusal to engage in unlawful conduct as a condition of employment."

(b) Section 2 of the National Labor Relations Act is amended by adding at the end thereof the following new paragraph:

"(15) The term 'just cause' shall be defined in accordance with the common law of labor contracts established pursuant to section 301 of the National Labor Relations Act, except that such term shall not include (A) the exercise of constitutional, civil, or legal rights; (B) the refusal to engage in unlawful conduct as a condition of employment; (C) the refusal to submit to polygraph or other similar tests; or (D) the refusal to submit to a search of someone's person or property, other than routine inspections, conducted by an employer without legal process."

(c) Section 7 of the National Labor Relations Act is amended by adding at the end thereof the following: "Employees shall have the further right to be secure in their employment from discharge or adverse action with respect to the terms and conditions of their employment except for just cause."

H.R. 7010, 96th Cong., 2d Sess. § 401 (1980).

The Bureau of National Affairs reports that the Michigan, Pennsylvania, and Wisconsin legislatures have introduced legislation that will erode the employment at-will doctrine. See *The Employment At-Will Issue: A BNA Special Report*, LAB. REL. REP. (BNA) Vol. 111 No. 23, at 11-12 (November 22, 1982).

Robert Howlett, a noted attorney and distinguished labor arbitrator, proposed at a 1974 meeting of the Society of Professionals in Dispute Resolution (SPIDR) that all employees in unorganized enterprises be protected under a just clause standard. See Howlett, *supra* note 231, at 164-70. In 1976, Professor Clyde Summers also proposed that such a statute be enacted. Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 159-95 (American Arbitration Ass'n, 1976); Summers, *supra* note 216, at 481. Both proposals, however, were vague in many respects and failed to offer specific statutory language.

PROPOSED STATUTE
ARBITRATION IN EMPLOYMENT ACT

AN ACT

To provide arbitration and settlement for claims regarding discharge from employment.

Findings and Policy

Section 1. The capability of some employers to discharge employees without cause may induce industrial severity, abuse of power, and unequal treatment of employees in the employment relationship. In order to facilitate the free flow of commerce, it is hereby declared the policy of the United States to make available to employees a system of industrial jurisprudence to determine whether they have received equal and fair treatment when dismissed from employment.

Purpose of Act

Section 2. The purpose of this Act is to provide a system of industrial jurisprudence available to an employee or employees, whereby an impartial arbitrator can adjudicate claims and fashion an appropriate remedy when said employee or employees are subjected to unjust discharge.

Definitions

Section 3. When used in this Act—

3.1. The term “employer” means one or more individuals, partnerships, associations, corporations, or any individual acting in the interest of an employer, engaged in an industry affecting commerce, who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, including but not limited to: a) the United States, any State or political subdivision thereof; b) a corporation wholly owned by the Government of the United States; or c) any labor organization which employs individuals for its services.

3.2. The term “employee” means an individual employed by an employer, or unemployed as a result of discharge, except the term employee shall not include: (a) any individual elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any appointee on the policy-making or

immediate advisor level of such elected individual; (b) any individual having the status of independent contractor in an employment relationship; (c) any individual employed as a volunteer, where no compensation is paid by the employer for services rendered; (d) any individual employed by one's parents, legal guardian, or spouse; (e) any individual employed in the domestic service or by a family or a person in his home; (f) any individual elected to employment position by the shareholders, board of governors, or members of an executive committee; (g) any individual who has not been continuously employed for a term of six (6) months by a single employer.

3.3. The term "discharge" means the actual or constructive dismissal or termination of an employment relationship by an employer.

3.4. The term "claim" means an action brought under this Act for purposes of arbitration.

3.5. The term "just cause" shall generally mean cause that is reasonable with respect to the facts and circumstances of each case, as determined by the arbitrator in accordance with Section 4.23 of this Act.

Enforcement of the Act

Section 4.10. The Federal Mediation and Conciliation Service (hereinafter FMCS) shall be responsible for the enforcement of this Act by:

4.11. Providing a procedure by which to file claims under the provisions of this Act.

4.12. Processing claims brought under this Act within sixty (60) days of their proper filing.

4.13. Maintaining a list of panel arbitrators available to hear claims brought under this Act, provided the development and maintenance of such list of panel arbitrators is consistent with the regulations of the FMCS set forth in the Code of Federal Regulations, Title 29, Chapter XII, § 1404.5.

4.14. Appointing an arbitrator for each claim by an objective procedure, provided each appointed arbitrator possesses the following qualifications:

(a) Disinterest and impartiality to the claim.

(b) Lack of financial or personal interest in the result of the claim.

Provided further, that if the parties agree on an alternative method for the selection of a panel arbitrator from a list of five qualified arbitrators provided by FMCS, or the American Arbitration Association, such method shall be followed.

4.15. Notifying the parties to a claim of the time and place of the arbitration hearing, and of the issued award determined by the appointed arbitrator.

4.16. Keeping accurate records of each arbitrated claim.

Section 4.20. An individual serving as an arbitrator under this statute shall:

4.21. Abide by the professional standards set forth in the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

4.22. Conduct a "full and fair" hearing for each claim, following the guidelines of Section 6 of this Act.

4.23. Make a determination as to whether the discharge was for just cause based upon the evidence presented and testimony heard at the arbitration, or otherwise incorporated in the proceedings. In making a determination of just cause, the following factors, in addition to any other relevant factors, shall be considered:

(a) Did the employer give the individual adequate and reasonable forewarning or foreknowledge of the possible consequence of the conduct for which the person was discharged?

(b) Was the discharge reasonably related to:

(1) The orderly, efficient or safe operation of the business, and

(2) The performance that the employer might properly expect of the employee?

(c) Did the employer, before discharging the employee, make an effort to discover in a fair and objective manner whether the employee did in fact violate fair and reasonable standards of conduct?

(d) Has the employer applied its criteria for discharge evenhandedly and without discrimination?

(e) Was the penalty of discharge reasonably related to the seriousness of the employee's conduct or offense?

4.24. Fashion an appropriate remedy for each claim arbitrated, provided that the remedy does not require an individual to render labor or service to an employer without the individual's consent.

4.25. Issue a written award to the FMCS within forty-five (45) days of the close of the arbitration. Should an arbitrator fail, without good cause, to issue an award within 45 days, the name of that arbitrator shall be struck from the FMCS master list of arbitrators for a period of one year. In addition, the moving party to the claim may then request, through the FMCS procedure, another arbitration.

Rights of Employees

Section 5.10. Employees shall have the right to have discharge claims adjudicated on the merits by an impartial arbitrator, provided:

5.11. An employee has not previously had a discharge claim arising from the same set of operative facts adjudicated by an arbitrator, state or federal merit or civil service commission, or an administrative or judicial tribunal.

5.12. An employee who has access to a valid and final adjudication under the arbitration provisions of a collective bargaining agreement, a state or federal merit or civil service commission, or an administrative tribunal or adjudicator, shall pursue such discharge claim in that forum provided that the scheme of remedies permits an award or judgment of reinstatement and/or other compensatory relief.

Provided further, that nothing herein contained in this Act shall be construed to prohibit an employee who has proceeded under this subsection without having such claim adjudicated on the merits in impartial arbitration, or similar adjudicatory proceeding, from exercising the rights granted in this Act.

5.13. A claim is filed with FMCS within twenty (20) days of discharge.

Section 5.20. Employees shall have the right to appear at the arbitration in person, by counsel, or by other representatives of their choosing.

Section 5.30. A party aggrieved by the failure or refusal of another to proceed to arbitration under this statute may apply to the federal district court for an order directing the parties to proceed to arbitration. The court shall order arbitration unless the claim sought to be arbitrated does not state a controversy covered by this statute.

Arbitration Procedure

Section 6.10. The arbitration shall be private, or upon the agreement of both parties, public.

6.11. The parties may present claims themselves and/or have their claims presented by counsel or representatives of their choice.

6.12. The parties may be present at the arbitration and/or be represented at the arbitration by counsel, or representatives of their choice.

Section 6.20. The employer shall have the burden of proving the discharge was for "just cause."

Section 6.30. The parties shall not be bound by the rules of evidence, whether statutory, common law, or adopted by court.

6.31. The parties may offer such evidence as they desire, and shall produce such evidence as the arbitrator may deem necessary.

6.32. The arbitrator shall be the judge of the relevancy and materiality of the evidence offered.

Section 6.40. The order of proceedings shall be as follows:

(a) The arbitration shall begin by the recording of the place, time and date of the hearing, the presence of the arbitrator and the parties and counsel, if any, and any stipulations of facts.

(b) Upon commencement of arbitration, the arbitrator shall allow the parties to make opening statements.

(c) The employee or counsel for the employee shall present its evidence first.

(d) Any party may cross-examine a witness, offer evidence and present a defense.

(e) All testimony shall be taken under oath affirmation administered by the arbitrator.

(f) The arbitrator, for good cause shown, may continue the hearing upon the request of the employee or the employer or upon his own initiative, and shall adjourn when the employee and the employer agree thereto.

(g) The arbitration may proceed in the absence of either party who, after due notice, fails to be present and fails to obtain a continuance.

(h) The arbitrator shall afford full and equal opportunity to both parties for presentation of relevant proofs or evidence.

(i) At the close of the arbitration, each party may make a closing statement (oral and/or written at the discretion of the arbitrator) incorporating arguments of fact.

(j) The arbitration shall not be considered as concluded until all evidence has been submitted and briefs, if allowed by the arbitrator, have been received by the arbitrator.

Duties and Power of Arbitrators

Section 7.10. It shall be the duty of the arbitrator to inquire fully into the facts as they relate to the matter before such arbitrator.

7.11. The arbitrator shall have the power to issue subpoenas for the attendance of witnesses and for the production of books,

records, documents and other evidence;

(a) Subpoenas shall be served by the sheriff's department in the appropriate jurisdiction, and be enforced in a manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrator may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrator, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Unless otherwise agreed, fees for the attendance of a witness shall be the same as for a witness in federal district court.

7.12. The arbitrator shall have the authority to call, examine and cross-examine witnesses and introduce documentary or other evidence.

7.13. The arbitrator shall have the power to limit lines of questioning or testimony which are immaterial, irrelevant or unduly repetitious.

7.14. The arbitrator shall have the authority to regulate the course of the hearing.

Enforcement of the Award

Section 8.10. The arbitrator's award shall be final and binding on the parties. Upon application of a party, the district court shall confirm an award unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying the award.

8.11. An application of suit under this provision of the Act shall be made within thirty (30) days after a copy of the award is presented to the parties.

Section 8.20. Upon application of a suit under Sections 8.10 and 8.11 of this Act, the reviewing district court may enforce, correct or vacate an award if any of the following apply:

(a) The award was procured by corruption, fraud or other illegal means.

(b) There was evident partiality by the arbitrator appointed as neutral, corruption in the arbitrator, or misconduct prejudicing the rights of a party.

(c) The arbitrator exceeded his powers granted in this Act.

(d) The arbitrator refused to postpone the arbitration upon sufficient cause being shown for the postponement, or conducted the

hearing contrary to the provisions of Section 6 of this Act, in a manner which prejudiced substantially the rights of a party.

8.21. Nothing in this provision shall allow the reviewing court to make judgments as to the merits of the issued award.

8.22. The fact that the remedy awarded could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

8.23. In vacating the award on the grounds stated in Section 8.20, the district court may order a rehearing before a new arbitrator chosen by the FMCS, or the district court may order a rehearing before the arbitrator who issued the award.

Burden of Payment

Section 9.10. Unless otherwise agreed to by the parties prior to the hearing, the party to the claim whose position is not sustained by the arbitrator shall pay the arbitrator's expenses and fees, together with other expenses, except counsel expenses, incurred in the conduct of arbitration.

Bribery of Arbitrators

Section 10.10. Every person who shall attempt improperly to influence anyone chosen as an arbitrator shall upon conviction be adjudged guilty of a felony and punished by fine up to one thousand dollars (\$1,000.00) or be imprisoned in a federal penitentiary not less than one year, or both.

Section 10.20. Any arbitrator convicted of accepting bribery or of being illegally influenced by a party to an arbitration or an outside party shall lose status as an arbitrator for purposes of this Act indefinitely.

Limitations

Section 11.10. Nothing in this Act shall prohibit the parties to a claim from settling such claim before it reaches arbitration under the provisions of this Act.

Section 11.20. Nothing contained in this Act shall prohibit an employer from discharging an employee for cause, or an employee from discontinuing employment.

Section 11.30. Nothing in this Act shall be deemed to exempt or relieve any employer or employee from liability, duty, penalty or punishment provided by any present or future law of any State or

political subdivision of a State, other than such law which purports to require or permit the doing of any act which would be contrary to this Act.

Section 11.40. Nothing contained in this Act shall be construed to repeal, preempt or modify a Federal, State, territorial or local statute creating employment rights or preferences not otherwise inconsistent with this statute.

Section 11.50. Nothing in this Act shall apply to military personnel "discharged" under military laws and regulations.

A. ANALYSIS OF PROPOSED STATUTE

The preceding statute is comprised of a mixture of federal and state employment legislation, foreign legislation, and established arbitral principles. Each had significant input into the drafting of this statute. The impact of these inputs is recognizable when the statute is more closely analyzed.

1. Coverage

With few exceptions, the proposed statute extends protection from unjust dismissals to those individuals in the labor force who would not otherwise have access to a mechanism for adjudicating claims of improper discharges. The considerations for this format are based on the experience and coverage scheme in existing foreign and American legislation.

In the foreign sector, employer coverage is mixed. The English statute does not apply to firms with fewer than four employees;²³³ the Swedish and German statutes have no such exceptions.²³⁴ Our social legislation, such as Title VII of the Civil Rights Act, is applicable to employers who employ fifteen or more employees.²³⁵ The NLRA, as amended, does not specify coverage in terms of the number of employees. Rather, it includes all employers "affecting commerce" and excludes public employers.²³⁶ While Summers argues that the need for protection may be greatest in small estab-

233. Industrial Relations Act, § 27(1)(a). *See supra* note 210.

234. Act Concerning Employment Security, § 1(3) and an Act to Provide Protection Against Unwarranted Dismissals, § 1(3). *See supra* notes 221 & 217, respectively.

235. Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. *See supra* note 90.

236. National Labor Relations Act, 29 U.S.C. § 152(2).

lishments,²³⁷ the close personal employment relationship inherent in truly small establishments warrants the exclusion of such employers. Constitutional considerations may preclude extending coverage to employers with less than fifteen employees. If a similar statute were enacted at the state level, however, coverage could be extended to all employers (except federal employers) regardless of the number of employees who are employed.

Public employers are included in the statutory coverage because of the lack of uniformity among the governmental entities in protecting public employees from unjust dismissal. As noted, federal civil service legislation protects federal employees from arbitrary and capricious employer action.²³⁸ State²³⁹ and local public employees are also protected by enacted legislation in some jurisdictions.²⁴⁰ The proposed statute provides coverage to those public employees who are not elected officials or appointed by elected officials. Since statutory protection from unjust dismissal is accorded to some public employees, the proposed act would prohibit those who have used their already existing statutory procedure from filing another claim under the proposed provisions. In an effort to protect all public employees, the statute extends coverage to those governmental entities that do not provide their employees with an adjudicatory scheme for the litigation of discharge claims.²⁴¹

It is important to stress that the format of coverage under the proposed statute is similar to that of the LMRA. An individual will be covered under the proposed act unless (1) that person works for a "non-employer" as defined in section 3.1, or (2) he or she is de-

237. Summers, *supra* note 216, at 525, noting Address by Robert Howlett, *Forgotten Man*, Second Annual Convention of Society of Professionals in Dispute Resolution, in BNA GOV'T EMPLOYEE REL. REP., No. 583, at E-1 (Dec. 2, 1974).

238. See *supra* text accompanying notes 111-17.

239. See *supra* text accompanying note 118.

240. See *supra* text accompanying note 119.

241. Howlett has argued that there are two major reasons why public employees should be excluded from coverage in any statute affording protection against unjust dismissal. First, public-sector employees have protections unavailable to private-sector employees through court-enforced constitutional rights, civil service, and tenure statutes in the case of public school teachers. Second, Howlett notes that political opposition to the statute will be increased if public employees are covered. See Howlett, *supra* note 231, at 167. The drafted statute does not permit serial litigation in multiple forums. As such, all public employees should not be excluded merely because some have access to remedies in other forums. Howlett's second point is well taken. Politically, it may prove advisable to exclude public-sector employees if this is a necessary trade-off to securing passage of the statute.

defined as a "non-employee" under section 3.2. In this respect, the issue of employee coverage under the proposed arbitration statute is somewhat complex. Here again, it is of note to examine the scope of coverage under foreign and domestic employment legislation.

The categories of employees and employers covered under foreign statutes are mixed. The Swedish statute excludes "employees in top management or comparable position,"²⁴² and the German statute excludes "office managers, work managers, and persons holding similar managerial positions, where they have independent authority to hire and dismiss employees."²⁴³ The English law does not have similar exceptions but excludes employees under fixed term contracts of two years or more who have agreed in writing to waive their rights under the statute.²⁴⁴ Title VII exempts only employees who are elected officials or appointed by such officials,²⁴⁵ whereas the LMRA exempts domestic servants, independent contractors, individuals employed by their parents or spouses, agricultural laborers, those employees subject to the Railway Labor Act, and supervisors as defined under the Act.²⁴⁶

Clearly, excluding supervisors, foremen and other lower or middle management personnel would not be advisable because these employees are among the most in need of statutory protection.²⁴⁷ Upper-level management and executives are also often discharged unjustly, so the statute should also protect them.

Volunteer employees, because they are not paid for their services, are excluded under the proposed statute. Also requiring exemption under the statute are domestic employees and those employed by family, because of the close personal relationship inherent in their employment situation. Moreover, because employers need a probationary period in which to judge new employees, coverage should be limited to only those employees who have

242. Act Concerning Employment Security, § 1(1). *See supra* note 221.

243. An Act to Provide Protection Against Unwarranted Dismissals, § 12(c). *See supra* note 217.

244. Industrial Relations Act, § 30(b). *See supra* note 210.

245. Title VII, 42 U.S.C. § 2000e(f). *See supra* note 90.

246. Labor Management Relations Act, 29 U.S.C. § 152(3).

247. Howlett points out that even though some of the most arbitrary and capricious discharges are those vested on supervisors, it may be politically advisable to exclude supervisors (as they are defined in the LMRA) because of opposition from the business community. *See* Howlett, *supra* note 231, at 167.

been employed by an employer for six months.²⁴⁸

Problems of employee coverage are more apparent when one considers the status of employees already covered under collective bargaining agreements. Making the statute inapplicable to employees covered by these agreements neglects situations in which a union or labor organization is unable or unwilling to provide all employees protection under the agreement. The possibility also exists that the parties may execute a "sweetheart" contract as a device for avoiding the statute. Moreover, some agreements provide no protection through arbitration against unjust dismissal, either because they contain no express or implied "just cause" provision, or because the agreement does not provide for final and binding arbitration of discharge cases. Employees, therefore, covered by collective bargaining agreements should not be excluded by that fact alone. Rather, special provisions should be drafted to include those employees who do not have access to final and binding arbitration.

Under the terms of the proposed statute, if an employee is covered by a collective bargaining agreement which contains a grievance procedure that culminates in binding arbitration, he must pursue his remedy under that agreement. Once his claim has been submitted to an arbitrator, he would not have the right to a second arbitration under the statute. Should an employee's discharge grievance be dropped by the union in the initial stages of the grievance procedure, the employee would be permitted to proceed under the proposed statutory provisions. If the discharge is justified, and the union recognizes it as such, only the most obstinate individual will continue to pursue action under the statute. If the discharge is unjustified and the union has mistakenly or arbitrarily refused to proceed to arbitration under the grievance procedure, then the employee may proceed under the statute or, consistent with section 9(a) of the LMRA, present the grievance himself to the employer.²⁴⁹ Moreover, should the union capriciously refuse to process the grievance, the employee may file suit charging that the union violated its "duty of fair representation" under the

248. The six-month period is arbitrarily selected; however, one can conceive of shorter or longer probationary periods depending upon the particular job at issue.

249. Labor Management Relations Act, 29 U.S.C. § 159(a). The Act states: "[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted"

LMRA.²⁵⁰

It is of special note that the statute mandates that an employee who has access to a valid and final adjudication (under the arbitration provisions of a collective bargaining agreement, a state or federal merit or civil service commission, or an administrative tribunal or adjudicator) shall pursue his discharge claim in that forum, provided that the scheme of remedies permits an award or judgment of reinstatement and other compensatory relief. This section will ensure that employees who have access to a procedure with power to issue an appropriate award (i.e., reinstatement with or without backpay, for example) will in fact pursue their claims in that forum. The statute also makes it clear that an individual will not be precluded from adjudicating his claim under the proposed statute if a decision is not rendered on the merits in the first forum.²⁵¹

In summary, the employees covered under the proposed statute are all employees who have been employed at least six months by an employer, excluding domestic employees, volunteer employees, individuals elected in company positions, employees of parents or spouses, elected public officials, and those employees appointed by elected public officials.

2. *Enforcement*

The Federal Mediation and Conciliation Service (FMCS) currently has procedures and regulations for facilitating parties requesting mediation or arbitration. Each of the eight regional offices of the FMCS has developed and maintains a list of panel arbitrators in their respective regions. These same lists could be used in selecting arbitrators under the proposed statute. The current functions of the FMCS in facilitating mediation and arbitration could be easily implemented in enforcing the proposed statute. Alterna-

250. The Supreme Court has established in *Vaca v. Sipes*, 386 U.S. 171 (1967), that a breach of the statutory duty occurs "where a union's conduct . . . is arbitrary, discriminatory, or in bad faith." *Id.* at 207. The arbitrary or bad faith conduct requirement is not satisfied merely by showing that the employee has a meritorious grievance and that the union refused to process it to arbitration. See generally Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Hill, *The Union's Duty to Process Discrimination Claims*, 32 ARB. J. 180 (1977).

251. For a discussion of the relationships of different forums in the labor relations area, see Vestal & Hill, *Preclusion in Labor Controversies*, 35 OKLA. L. REV. 281 (1982).

tively, jurisdiction could be vested in the Department of Labor (as suggested by one commentator).²⁵² The more difficult aspect of enforcement pertaining to the statute lies with the appointed arbitrator.

Foreign statutes generally provide for adjudication of claims by specialized labor courts. These courts are for the most part tripartite tribunals, meaning they have employer, employee and neutral representation. Appointing multiple representatives would serve to increase the costs associated with arbitration under the statute. It is therefore suggested that any arbitration statute provide for a single arbitrator rather than a tripartite system.

The appointed arbitrators are responsible for conducting a "full and fair" hearing, determining whether the discharge was for just cause, and fashioning an appropriate remedy. For each of these responsibilities, the proposed statute provides some guidelines for the arbitrators to follow. The procedures for conducting a full and fair hearing are presented in section 6 of the statute. These procedures are a composite of guidelines set forth by many collective bargaining agreements and state public-sector bargaining statutes. While some states provide rather formal procedures for arbitration,²⁵³ many collective bargaining agreements provide rather informal procedures.²⁵⁴ In order to facilitate a faster arbitration and to minimize the parties' difficulty in presenting claims in arbitration, the proposed statute accords much latitude with respect to procedures. While those parties who are represented by counsel may find the somewhat informal procedure disturbing, those presenting claims pro se will find the procedure easily understandable.

The determination by the appointed arbitrator of whether just cause exists for a particular discharge is the major component of the statute. The factors to be considered when determining just

252. See Howlett, *supra* note 231, at 167.

253. The state statutes commonly specify such matters as the qualifications of arbitrators, notice of hearings, rules of evidence, points of procedure, and methods of enforcing awards. LABOR RELATIONS EXPEDITOR, LAB. REL. REP. 16 (BNA). See, e.g., FLA. STAT. §§ 682.01-682.22 (Supp. 1983) and IOWA CODE ANN. §§ 20.1-20.30 (West 1978 & Supp. 1982-1983).

254. The formality of the hearing will depend in part on the nature of the issues, the character of the parties, and the circumstances of the dispute. Formal hearings resembling legal trials are sometimes used, but most hearings are as informal as the orderly presentation of the evidence will allow. LABOR RELATIONS EXPEDITOR, LAB. REL. REP. 20 (BNA).

cause are basically the same presented by Arbitrator Daugherty in the often-quoted *Enterprise Wire Co.* decision.²⁵⁵ The proposed statute merely requires these factors be considered for all claims. As such, the statute effectively transfers principles developed by arbitration of "private claims" to a national policy. Arbitrators, with their specialized knowledge of "industrial jurisprudence" are presumptively capable of adapting these principles of just cause for all claims brought before them.

The fashioning of a remedy by an arbitrator is also an important aspect of the statute. While the statute's language states only that an "appropriate" remedy must be determined, this is not inconsistent with the flexibility commonly granted arbitrators under collective bargaining agreements. This flexibility has allowed arbitrators to fashion a body of law pertaining to remedies in discharge cases.²⁵⁶ The statute permits the arbitrator to issue remedies on the special facts of each case, as is done in collective bargaining agreements and under foreign legislation. Remedies such as reinstatement with or without back pay, as well as probationary or conditional reinstatement, would be available under the statute. In cases where reinstatement would not be practical, the arbitrator could award other compensatory-type relief.

Judicial review, which is common in state public-sector bargaining laws, is available under section 8 of the statute. The state statutes commonly restrict judicial review to ascertaining whether the arbitration was conducted "fairly" or within the procedural regulations of the statute. A common remedy for violations of regulations or fairness is a rehearing before a new arbitrator or before the same arbitrator.

In the private sector, section 301 of the LMRA permits courts to enforce agreements to arbitrate, as well as the final award. The basic substantive law governing section 301 actions to enforce arbitration awards was set forth by the United States Supreme Court in three 1960 decisions known collectively as the Steelworkers Trilogy.²⁵⁷ Two of these decisions involved actions to enforce agreements to arbitrate, while the third²⁵⁸ involved an action to enforce

255. See *supra* text accompanying notes 145-47.

256. See M. HILL, JR. & A. SINICROPOLI, *supra* note 148, at 40-58.

257. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

258. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

an arbitration award.

In *Steelworkers v. Enterprise Wheel*, the Supreme Court declared that reviewing courts are not to pass upon the merits of the grievance or to deny enforcement of the award merely because their interpretation of the contract differs from that of the arbitrator.²⁵⁹ While this decision concerned the issue of arbitration under a collective bargaining agreement, the principles of limiting judicial review are incorporated in the proposed statute. This was done to ensure that the award will in fact be final and binding on the parties. The rationale is the parties (or party) requested the arbitration, so they must abide by the terms of the award.

3. *Fees & Expenses of Arbitration*

Under most collective bargaining agreements the parties share equally in paying the fees and expenses of the arbitrator. However, some agreements provide that the losing party pays all the fees and expenses of the arbitrator. The statutory imposition of payment on the losing party is an attempt to limit frivolous claims under the statute. If the cost of adjudicating a claim under the statute were shared equally by the parties, employees might demand arbitration for every discharge or "constructive removal." Such a provision should help eliminate unmeritorious claims.

4. *Other Considerations*

It is of note that nothing in the proposed statute precludes the parties from settling a claim before it reaches arbitration.

In addition, the statute, in section 11.30, allows states and political subdivisions to pass similar legislation. In this respect, section 11.30 of the proposed statute is almost identical to section 708 of Title VII.²⁶⁰ A statute, such as the one proposed, may be better

259. The Supreme Court stated in *Enterprise Wheel*: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599.

260. Section 708 of Title VII reads:

Nothing in this [title] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this [title].

42 U.S.C. § 2000e-7.

implemented on the state level.²⁶¹ The constitutionality of a statute enacted on the federal level which leaves all aspects of enforcement and administration to the states is questionable. As such, section 11.30 merely acts as an incentive to the states to pass similar legislation in order to alleviate the problem of unjust dismissal.

Section 11.40 is what is commonly referred to as a "saving clause." The proposed statute is in no manner an attempt to preempt existing legislation. Rights granted employers and employees under the NLRA and Title VII, among others, are not to be modified under provisions of this statute.

B. OBJECTIONS AND RESPONSES TO PROPOSED STATUTE

Many objections could be raised to the proposed statute.²⁶² One objection is that it will require the extensive use of an administrative agency with its costs and burdensome bureaucracy.²⁶³ In this respect there is a legitimate fear that the statute will produce a flood of litigation so that existing enforcement machinery will be inadequate or break down. If estimates are accurate,²⁶⁴ then cer-

261. Summers, *supra* note 216, at 522. See also Howlett, *supra* note 231, at 167 (pointing out that nearly 40 states have agencies which could administer such a statute).

262. Many of the cited objections are the major ones raised by the participants of the Wingspread Conference where Professor Summers presented his proposal. Summers presented and responded to these objections in *Arbitration of Unjust Dismissal: A Preliminary Proposal*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 190-94 (1976).

263. In Summers' preliminary proposal, the individual states were to be responsible for the enforcement of the statute. This proposed statute is administered through an existing federal agency, thus no new state or federal agency would need to be created.

264. See Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Stieber, *The Case for Protection of Unorganized Employees Against Unjust Dismissal*, in *PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING* 153-69 (Indus. Relations Research Ass'n Series 1979). Stieber points out that, of the 67 million private industry employees in 1977, approximately 17 million were covered by collective bargaining agreements. Most of these contracts will provide protection against unjust dismissal through a negotiated grievance procedure. It follows that approximately 50 million employees are left without protection. With an annual discharge rate of about 4.6 percent for manufacturing industries and assuming the same rate for nonmanufacturing industries, 2.3 million employees in the private sector alone are accordingly left with no remedy under a negotiated grievance procedure. Stieber also notes that when an adjustment is made for probationary employees (most probationary employees may be discharged without any showing of just cause), approximately one million private-sector employees with more than six months' service were discharged in

tainly the dimensions of the problem of unjust dismissals warrant such a statute. The seriousness of the problem can be illustrated in two ways. First, unions have placed a great importance on providing protection from unjust discharge and have pioneered the development of the principle of "just cause" for dismissal and of the grievance procedure ending in arbitration. Installing this system of "industrial jurisprudence" is often cited as one of the most distinctive achievements of the United States collective bargaining system.²⁶⁵ Second, the judicial considerations of unjust discharge as a tort and the changing opinions of limiting the at-will doctrine demonstrate the seriousness of the problem.²⁶⁶ That the courts are beginning to consider some discharges as "malicious" further reflects the situation's gravity.

There is no way to accurately predict how many cases may be brought under such a statute. If a flood of cases exists, the FMCS can certainly alter its procedures to accommodate the situation. Section 11.10 of the proposed statute permitting settlement prior to arbitration would work to reduce the number of cases brought to arbitration. Moreover, assessing fees and expenses against the losing party will act as a deterrent to frivolous or vexatious claims.

A second objection is that affording statutory protection to employees who do not have access to an adjudicatory scheme would interfere with the employer's ability to maintain effective control over the workplace and to eliminate unproductive employees. Through the principles developed by arbitration, employers still maintain control of their work force. The presence of a union and the resulting grievance procedure does not force an employer to keep unproductive employees. Such employees can still be discharged for cause. Moreover, the statute is aimed not at discharge for unproductive reasons, but rather at arbitrary and capricious discharges. Maintenance of a sound personnel program (presumably what most companies desire) dictates that decisions of discharge not be made on arbitrary, irrational or unfair bases. Nothing in the statute interferes with the employer's legitimate interest

1977 without the right to any kind of hearing or arbitral adjudication.

Using data generated by the Federal Mediation and Conciliation Service (FMCS), Peck maintains that between 6,000 and 7,500 at-will employees are discharged each year for reasons that arbitrators would find unjustifiable. Peck, *supra* this note, at 6-10.

265. See T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE* 348 (1980).

266. See *supra* text accompanying notes 149-209.

in hiring and retaining the best personnel available.

In this regard, perhaps the most valid criticism of such a statute is that it will effectively replace employer determination of fitness for employment with arbitral determination. This result would create havoc in the workplace, especially with respect to discharges of managerial and professional employees. Unlike production employees whose performance can be measured by objective standards, many managerial and professional employees cannot be judged according to established criteria. There are operational difficulties in ascertaining traits such as imagination, initiative, creativity or personality.²⁶⁷ Depending on the particular position, the intangible qualities may be more important for job success than any objective measures.

The validity of this argument cannot be assailed. To the extent that variables such as imagination and personality are bona fide considerations for employment, they should be recognized as legitimate criteria for employment-based decisions. It cannot be assumed, however, that arbitrators would be insensitive to the employer's interests merely because such criteria cannot be easily subjected to operational measures. For example, Playboy Enterprises has required that women working as "bunnies" maintain a "bunny image." Both the employer and the union representing these employees recognize that it is impossible to define "bunny image." Nevertheless, women are frequently discharged for failing to maintain a bunny image, and at times the determinations of management are challenged through the grievance procedure. Such criteria as personality, figure and general beauty are considered by arbitrators in bunny image cases.²⁶⁸

Other instances may be cited where arbitrators have had to rule on managerial determinations that a particular employee is not qualified for a position because of criteria that are difficult, if not impossible, to operationalize. In general, if it is determined that the employer made a good faith assessment of the qualifications of the grievant, the arbitrator will not reverse the decision of management.²⁶⁹ The important point to stress is that, based on a

267. *Blades, Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

268. *See Playboy Club of New York*, 63 Lab. Arb. 1040 (1974) (Turkus, Arb.).

269. *See, e.g., Titanium Metals Corp. of Am.*, 62 Lab. Arb. 155 (1974) (McDermott, Arb.); *Semling-Menke Co.*, 62 Lab. Arb. 1184 (1974) (Bilder, Arb.); *United States Air Force*, 65 Lab. Arb. 913 (1975) (Denson, Arb.); *Forest Home*

review of arbitral determinations in cases involving employees and their qualifications to remain in a particular position or, alternatively, to advance to another position, arbitrators have indicated that managerial determinations are not to be easily reversed, especially in cases where intangible criteria formed the bases for the decision.

It may also be argued that the statute would disrupt the existing grievance and arbitration machinery established in collective bargaining agreements through resort to the statutory procedure rather than the negotiated grievance procedure. As noted above, the statute mandates that an employee who has access to a valid and final adjudication under an arbitration provision of a collective bargaining agreement (or an alternative procedure) must pursue his discharge claim in that forum. In the case where the negotiated procedure does not *permit* an award or judgment of reinstatement and other compensatory relief, an individual employee is allowed to circumvent the negotiated grievance procedure. While this situation may be disruptive to a labor organization, the alternative is to give a union full power to block an individual's resort to a statutory procedure. Under current labor law, no labor organization has the unqualified power to prevent an individual from exercising rights under a federal or state statute. There is no evidence that a negotiated grievance procedure would lose its effectiveness under the selected cases where an individual could pursue a cause of action under the statute rather than through the grievance procedure.

Cemetery, 66 Lab. Arb. 1239, 1242 (1976) (Schoenfeld, Arb.) ("In assessing 'qualifications and ability,' the employer is by no means confined or limited to considering the technical skill or expertise required for the job but is also entitled to consider other factors that logically relate to the employee's ability to meet the other requirements of the job."); National Labor Relations Bd., 68 Lab. Arb. 279, 286 (1977) (Sinicropi, Arb.) ("In general, the rule is as follows: 'In determining questions of skill and ability, the judgments of Management should not be set aside where they have not been shown by the evidence to be arbitrary, capricious, whimsical or discriminatory . . .'" quoting PROCEEDINGS OF THE 9TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 49 (BNA 1956)); Batesville Mfg. Co., 55 Lab. Arb. 261, 268 (1970) (Roberts, Arb.) ("If there is sufficient evidence in the record on both sides of the question of ability to the extent that reasonable men could differ as to the answer, the determination will not be disturbed. This is true even though the arbitrator, had he been a management representative, would have reached a different conclusion opposite the one reached by management. In short, if management's position has reasonable evidentiary support, it will be upheld.").

An alternative fact situation is where a labor organization, acting as a representative of a discharged employee, negotiates a settlement with the employer calling for reinstatement but without backpay. If the individual employee agrees to such a settlement, there should be no problem if, at a later time, the employee reconsiders and commences an action under the statute. A bona fide settlement agreed to by the individual should preclude litigation arising under the same set of operative facts. Similar cases have arisen under Title VII and the courts have had no problem in ruling that the settlement agreement precludes further litigation.²⁷⁰

A more difficult case arises when the union, as exclusive bargaining agent under the collective bargaining agreement, negotiates a settlement agreement with the employer and that agreement is rejected by the discharged employee. Under current labor law, a labor organization would have power to bind an individual to a negotiated settlement, thus preventing a dissatisfied employee from invoking arbitration. It is reasonable to conclude that if a union considers a settlement fair, an employee would acquiesce to the judgment of the union. If, on the other hand, the union cannot convince the employee of the fairness of the settlement, under the proposed statute the employee would have the option of invoking arbitration since the settlement agreement would not be considered a final adjudication on the merits.²⁷¹ The power of the union as exclusive bargaining agent is necessarily diminished in such a case, but it is a necessary trade-off under any effective statutory scheme. The alternative is to vest in the union the power to bind an individual employee to any settlement notwithstanding its fairness, resulting in inconsistencies with the purposes of a statute prohibiting discharges for reasons other than just cause.

Another objection to statutory protection against unjust dismissal is the minimized incentive for workers to join unions if statutes replace protection now offered through collective bargaining agreements. Protection against unjust dismissal is but one clause in a collective agreement.²⁷² Unions traditionally bargain for increased wages and fringe benefits, established seniority rights to determine promotions, transfers and layoffs, and grievance procedures which provide for "industrial due process." Moreover, the

270. *EEOC v. North Hills Passavant Hosp.*, 19 Fair Empl. Prac. Cas. (BNA) 205 (W.D. Pa. 1977); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975); *Henry v. Radio Station KSAN*, 374 F. Supp. 260 (N.D. Cal. 1974).

271. See *supra* proposed statute § 5.12.

272. *Summers*, *supra* note 232, at 192.

primary growth area of unionization at the present time is in the public sector,²⁷³ an area which already enjoys some statutory protection against unjust dismissal. The mere presence of a statute would not eliminate the union's usefulness in discharge cases. Unions provide more complete representation in the grievance procedure and arbitration, which would continue with the presence of the statute.

It is of note that when a similar statute was considered by the Connecticut legislature,²⁷⁴ unions supported the proposal because they believed that all workers should have such protection, that unions should demonstrate their concern for all workers, organized and unorganized,²⁷⁵ and that adoption of the statute would provide an opportunity to extend their organization. By offering to provide representation to non-union members who had cases under the statute and by providing effective representation in those proceedings, unions could obtain a nucleus of supporters within the unorganized plant.

C. IMPLICATIONS

The enactment of a statute calling for the arbitration of discharge cases presents numerous implications for management, labor and the general public. First, employers will have to have "just cause" when discharging their employees. Requiring employers to have just cause when discharging employees is, in theory, not a major problem. Since personnel management theory has traditionally advocated the fair treatment of employees, employers should have little difficulty extending this theory to everyday practice. Other legislation, such as Title VII, has required nondiscriminatory and fair treatment of employees in the area of race, color, sex, religion and national origin. The proposed statute as drafted merely federalizes what others have argued is already a *de facto* standard.²⁷⁶

273. On the state and local government levels, membership in unions and in employee associations nearly doubled between the years 1968 and 1976. Source: U.S. BUREAU OF THE CENSUS, LABOR-MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENTS (1976 State and Local Gov't Special Studies No. 88) (Washington, D.C. U.S. Gov't Printing Office 1978).

274. Comm. Bill No. 8738, Conn. Gen. Assembly, Jan. Sess. (1973); Comm. Bill No. 5179, Conn. Gen. Assembly, Jan. Sess. (1974); Comm. Bill No. 5151, Conn. Gen. Assembly, Jan. Sess. (1975).

275. Summers, *supra* note 232, at 193.

276. See Blumrosen, *Strangers No More: All Workers Are Entitled to "Just*

Admittedly, the statute will initially create a great deal of uncertainty within personnel departments, and more than a de minimus amount of resources may be allocated by the parties in an attempt to document personnel decisions relating to discharges. While, *a priori*, the statute would appear to mandate an unduly burdensome requirement of paperwork, it is far less burdensome than the paper generation required under Title VII and corresponding state fair employment practices legislation. It is expected that adequate personnel procedures are already in place and, accordingly, few duplicative efforts will be necessary to comply with the statute.

Most troublesome is the realization that such a statute will generate another set of problems more serious than those that the statute is intended to eliminate. Whether a rule of just cause would replace Wood's monster with another that is more vicious because of its refinement has been queried.²⁷⁷ It is true that the statute gives arbitrators considerable discretion in determining policy relating to discharges. This discretion is, however, no more than arbitrators currently enjoy under most collective bargaining agreements, both in the private and public sector. For many years arbitrators have been deciding whether discharges are for cause and have, in the process, developed a body of arbitral common law applicable to industrial relations.²⁷⁸ More importantly, the courts have recognized the competence of arbitrators in interpreting the law of the shop.²⁷⁹ Indeed, Chief Justice Burger, in a recent address before the American Bar Association, called for an increase in arbitration in order to relieve the courts' case loads.²⁸⁰ Essentially, all the proposed statute would do is *permit* a recognizable body of law to reach a majority of individuals.

V. CONCLUSION

The doctrine that employees can be discharged "at will" for good reason, bad reason, or no reason was promulgated over one hundred years ago. Early twentieth century laissez-faire socio-econo-

Cause" Protection Under Title VII, 2 INDUS. REL. L.J. 519 (1978).

277. *Id.* at 556.

278. *See supra* notes 142-48 and accompanying text.

279. *See generally* *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

280. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274-77 (March, 1982).

nomic thought fostered the common law development of this often harsh rule. Although formulated on suspect origins, the at-will doctrine became the primary doctrine governing employee dismissals. Times, however, have changed and laissez-faire socio-economic thought has long since given way to concepts of government intervention.

America has repudiated the logic of this primitive legal rule for more than fifty years by enacting statutes that limit employers' absolute power of discharge on such grounds as race, sex, age, religion and union activity. Public employees have also been afforded statutory protection from unjust dismissal by legislative bodies. However, these statutory protections are generally narrow, thereby giving employees little in the way of complete freedom from unjust dismissal.

Unionized workers are afforded protection from unjust dismissal by the incorporation of "just cause" provisions in collective bargaining agreements. Negotiated grievance procedures culminating in impartial arbitration have been the impetus for the development and application of arbitral principles of just cause. However, the vast majority of American workers are unorganized and have no access to impartial arbitration. They remain unprotected from arbitrary and capricious action by employers.

The judicial system in more recent years has provided employees some protection from unjust dismissal on public policy-type grounds. Judicial limitations have been both narrow and inconsistent, thus allowing the at-will doctrine to continue. Accordingly, it is not unreasonable to conclude that American workers need statutory protection from unjust dismissal. Justice Roberts, in his dissenting opinion in *Geary v. United States Steel Corp.*,²⁸¹ stated: "[T]he time has surely come to afford unorganized employees an opportunity to prove in court a claim for arbitrary and retaliatory discharge" ²⁸²

Taking this statement one step further, if, as a matter of public policy, it is determined that the time has come to afford unorganized employees an opportunity to prove in court an arbitrary or retaliatory discharge, then that "court" should be a specialized court, one familiar with and expert in the resolution of industrial disputes. The Supreme Court has recognized the special compe-

281. 456 Pa. 171, 319 A.2d 174 (1974). See *supra* text accompanying notes 184-87.

282. 319 A.2d at 182.

tency of arbitration as a dispute-resolving mechanism.²⁸³ Moreover, it seems clear that if the Chief Justice of the Supreme Court can recommend arbitration as a substitute for litigation, the arbitral forum can adequately serve the same function in those cases where employees believe that they have been dismissed from employment without cause. Approximately sixty-five nations now impose a statutory requirement of just cause for discharge from employment, including the Common Market countries plus Sweden, Norway, Japan, Canada, and Puerto Rico, as well as others in Africa, Asia, and Latin America.²⁸⁴ It is clear that the nineteenth-century stress on social and economic individualism has now been replaced with the twentieth-century emphasis on security for the individual.²⁸⁵ The harsh realities of a market characterized by massive industrial concentration has brought about what one legal historian maintains is a shift from self-sufficiency to individual inequality and helplessness before the "accidents of life."²⁸⁶ The statute proposed herein will provide some form of industrial due process to a large group of employees who now labor under the specter of Wood's ghost. Admittedly, the concept of providing protection against unjust dismissals is not without problems. However, such a statute, which treats the American work force no differently than the work force in numerous other jurisdictions, may be defended on moral, social and economic bases.

283. See *supra* note 279. See also M. HILL, JR. & A. SINICROPI, *supra* note 148, at 13-20.

284. See AMERICAN BAR ASSOCIATION, 1982 COMMITTEE REPORT OF THE LABOR AND EMPLOYMENT LAW SECTION 19-20 (Vol. II, 1982).

285. See generally J. HURST, *supra* note 44 (1950).

286. *Id.* at 14.

