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A SYNTHESIS AND A PROPOSAL
FOR REFORM OF THE EMPLOYMENT
AT-WILL DOCTRINE

ROBERT M. BASTRESS*

Representing a client who seeks relief for an employment discharge is a lot like playing bingo: you hope the client calls out facts that permit you to maneuver the case into the right squares of forbidden employer motive or conduct in order to win a prize. The traditional doctrine of at-will employment,¹ which gives an employer the right to fire an employee at any time for any reason or for no reason, has now been qualified in so many ways that only bad luck prevents an unjustly discharged employee from fit-

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1. “Under the law governing the relation of master and servant, an employment unaffected by contractual or statutory provisions to the contrary, may be terminated with or without cause, at the will of either party.” Bell v. South Penn Natural Gas Co., 135 W. Va. 25, 62 S.E.2d 285 (1950). The doctrine has been traced to H. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1st ed. 1877):

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. . . . [T]he 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.

The harshness of the rule is well documented in the reporters. E.g., Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (at-will employee terminated after 43 years of service for no good reason permitted to recover damages or recoup his contributions to the pension fund); Clarke v. Atlantic Stevedoring Co., 163 F. 423 (E.D. N.Y. 1908) (black stevedores discharged to make jobs available for whites did not have cause of action); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (employee, who was advised by management that it was her duty to be available for jury service and was then discharged for serving on jury, had no cause of action).
ting his termination into squares that could provide relief. It is the employer’s poor luck if the employee’s allegations fall into a category that allows tort damages, including emotional distress and punitive damages, rather than one that permits only make-whole, equitable relief.\(^2\) This pattern of haphazardly drawn squares of actionable discharges and available damages resembles those occasions in the common law when courts have produced a variety of exceptions, limitations, and factual manipulations to avoid a disfavored doctrine. Such maneuverings have invariably presaged the complete replacement of that doctrine with a simpler and fairer standard better suited to modern conditions. We now stand at that moment when the at-will rule should be discarded and major reform implemented.

The inroads on the at-will employment doctrine have been amply developed in numerous articles and books.\(^3\) This article retraces

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A recent survey of jury verdicts in wrongful discharge cases in California indicates that the average total verdict in 1986 was approximately $251,000 (this average excludes two jury awards that exceeded one million dollars). California certainly is not the only state where large jury awards have become an employer’s nightmare. For example, a Colorado jury awarded a single plaintiff over $15 million in damages in a wrongful discharge case, see Rawson v. Sears Roebuck & Co., 330 F. Supp. 776 (D. Colo. 1982), and a Florida jury awarded $3.5 million in damages ($2.5 million in punitive damages) against Southern Bell in a single plaintiff race discrimination case. . . . More modest verdicts, such as the Mississippi jury award of over $350,000 in an individual case of age discrimination, see Guthrie v. W.J.C. Penney Co., 803 F.2d 202 (5th Cir. 1986), are no less cause for concern in assessing the risks of a litigated solution. *See also*, e.g., Planigan v. Prudential Fed. Sav. & L., 720 P.2d 257 (Mont. 1986) ($1.5 million verdict, including $1.3 million in punitive damages and $100,000 for emotional distress, awarded to discharged bank teller); Gardner v. Charles Schwab & Co., No. 842297 (Cal. Super. Ct. Sept. 14, 1987) ($742,400 award, including $500,000 for emotional distress); O’Dell v. Dasabe, Daily Lab. Rep. A-6 (Idaho June 18, 1987) ($1.4 million verdict, including $1 million in punitive damages).

When the million dollar verdicts were added into the California survey that Waks and Schwartz referred to, the pool of judgments produced an average verdict of $424,527. *O’Dell*, Daily Labor Rep. A-4 (Feb. 24, 1987). Of those cases in which plaintiffs were awarded punitive damages, those damages by themselves averaged $494,517. Id. But, of all discharge actions filed, “most cases are settled out of court. . . for $5,000 or less.” *Id.*

those inroads only to synthesize them to the extent needed to substantiate its basic themes and identify recent developments.

Accordingly, Part I explores the variety of strategies courts and legislatures have used to qualify the at-will doctrine. References are made to statutory and constitutional restrictions on employer discretion, common law tort actions for dismissals in violation of public policy, and various contract-based tactics in which courts have found some sort of just cause protection for employees. Part II then argues that those strategies establish a basis for rejecting the at-will doctrine and creating a new standard that achieves fair treatment for employees, and meets employees' crucial interests in job security, yet accounts for legitimate employer concerns. Finally, Part III proposes what that new standard should look like.

I. LIMITS ON THE AT-WILL DOCTRINE

A. Statutory Restrictions

Modern regulatory laws provided the first major limits on employers' ability to hire and fire at-will. After decades of bitter, and sometimes violent, struggles, the New Deal Era produced labor-management statutes that guaranteed workers the right to or-


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ganize, form unions, and collectively bargain.⁴ Protection of employees from retaliatory discharge for their organizing and union activities provided the keystone for this legislation and marked a dramatic departure from the laissez faire property notions that had previously assured the employer’s right to do with his business what he wanted.⁵ In addition, the development of strong labor unions led to the inclusion in nearly all collective bargaining agreements of provisions requiring employers to show just cause for any employee termination. Thus, that sector of the national workforce covered by collectively bargained contracts is not affected by the at-will doctrine.⁶

Employer discretion was further eroded with the passage in the 1960’s of federal and state fair employment laws, such as Title VII of the 1964 Civil Rights Act⁷ and the Age Discrimination in Employment Act.⁸ These statutes, of course, prohibited employers from discharging workers because of a bias based on race, gender, national origin, religion, or age. Since then, federal, state, and municipal laws covering assorted groups of employers have added discrimination based on handicap, blindness, alienage, wage garnishment, veteran’s status, ancestry, and sexual preference to the list of prohibited animi.⁹

In another set of limitations, federal and state laws regulating the workplace frequently include provisions protecting employees from retaliatory discharge for invoking their rights under the act.

⁵ See infra notes 98-101 and accompanying text.
⁶ Employees who work under collective bargaining agreements have, however, invoked the common law tort theories that qualify at-will employment and that are described in Sections 1-B and -C, infra. Such efforts by unionized employees raise a substantial preemption issue under the N.L.R.A. See generally Note, NLRA Preemption of State Wrongful Discharge Claims, 34 Hastings L.J. 635 (1983). The Supreme Court has recently granted certiorari on the issue. Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 226 (1987).
Examples include statutes concerning fair employment practices,\(^\text{10}\) workers' compensation,\(^\text{11}\) wages and hours,\(^\text{12}\) occupational safety,\(^\text{13}\) and employee pensions.\(^\text{14}\) More recently, Congress and state legislatures have also included in general regulatory laws provisions prohibiting employer retaliation against persons who initiate or participate in proceedings under the act. These statutes relate to such diverse subjects as strip mining, air pollution, and energy.\(^\text{15}\)

Finally, statutes concerning government employment have substantially limited the at-will discretion of public employers. In particular, civil service\(^\text{16}\) and teacher tenure laws\(^\text{17}\) typically provide that permanent or tenured employees cannot be terminated without just cause.

The above statutes, especially the fair employment laws, take on particular significance because of their judicial interpretation. Under the analysis of *McDonnell Douglas Corp. v. Green*,\(^\text{18}\) which has been applied generally to anti-discrimination laws, the discharged employee-plaintiff establishes a prima facie case by showing: (1) he is a member of a protected class; (2) he is qualified for the position in question and performed it capably; (3) he was dismissed; (4) and the employer either sought a replacement of similar qualifications or replaced him with an individual having similar qualifications.\(^\text{19}\) In effect, the Supreme Court has stated

\(^\text{19}\) As *McDonnell Douglas* itself recognized, this set of objective factors is not the only means for establishing a prima facie case. *McDonnell Douglas*, 411 U.S. at 802 n.13. For example, a discharged employee-plaintiff could also put the burden of coming forward on the defendant by showing that, under circumstances similar to the plaintiff's, an individual of a different race or sex was retained. E.g., EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982); Johnson v. Bunny Bread
that the plaintiff’s burden in the prima facie case is to present facts that create an inference of discrimination.\textsuperscript{20} The model is designed to facilitate that showing in order to force the employer, the party with control over the primary sources of evidence, to come forward. The employer must respond to the plaintiff’s prima facie showing with some legitimate business purpose. The plaintiff then has an opportunity to show the defendant’s proffered rationale is a pretext. Typically, that forces the proof in the case to an assessment of both the weight of the employer’s reason and whether it was supported by the facts. If the employer does not have a legitimate business purpose or lacks an evidentiary basis for his purpose (\textit{i.e.,} if the discharge lacked “just cause,” then the employer runs a substantial risk of being found in violation of the particular statute). Thus, fair employment litigation effects a practical imposition of a just cause requirement. That possibility, however, extends only to employees who can claim membership in some protected class.

\begin{footnotes}

Presumably, that was thrust of the West Virginia Supreme Court of Appeal's decision in \textit{Conaway v. Eastern Ass'n Coal Corp.}, 358 S.E.2d 423 (W. Va 1986). The court there proposed a “general test” for employment discrimination cases:

1. That the plaintiff is a member of a protected class.
2. That the employer made an adverse decision concerning the plaintiff.
3. But for the plaintiff's protected status, the adverse decision would not have been made.

\textit{Id.} at 429. While use of the “but for” language could lead to confusion, given its implication that direct proof of causation might be required in the prima facie case, the court's elaboration of its test prevents that conflict with the \textit{McDonnell-Douglas} line of cases and squares it with the federal decisional law:

Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion.

\textit{Id.} at 429-30 (emphasis added). A footnote from the Court reinforces the point:

This test is no great feat of judicial construction, but merely is proof that it takes a court three sentences to say what the layman could say as well in one. A layman would say: “I was ___ (fired, demoted, etc.) because I was ___ (too old, black, a woman, etc.).” If the plaintiff can offer proof of this one sentence, he has a prima facie case, otherwise no.

\textit{Id.} at 429 n.5. Thus, a showing by the plaintiff that would lead an individual to infer there was something “fishy” in the employment decision requires the employer to come forward with some explanation of the adverse action.

The validity of that rationale.
B. Constitutional Restrictions

The relevance of federal and state constitutions to employment is largely confined to public sector jobs. In that context, however, recent constitutional law developments have had a substantial impact and have paralleled the developments taking place in the common law.

Prevailing doctrine through the nineteenth and most of the twentieth centuries viewed public employment as a "privilege," which could be withdrawn without limitation by the government. Thus, public employees could be discharged for exercising their right to speak freely or to join an organization.21 This perception, however, has now been authoritatively rejected.22 Public employees, even those engaged on an at-will basis, cannot be discharged for any reason that penalizes them for their exercise of a constitutional right.23 The first amendment also prohibits spoils systems and discharge decisions based upon employees' political affiliations, at least for the vast majority of public jobs.24 In addition, governmental entities cannot constitutionally discharge employees because of some invidious animus, such as race, gender, national origin, religion, or (in some cases) alienage.25 That is, the Constitution clearly places substantive limits on public employers' discharge decisions.

Many decisions premised on procedural due process grounds have also been generous in locating property interests for public

21. See, e.g., Adler v. Board of Educ., 342 U.S. 485, aff'd, 342 U.S. 951 (1952), McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").


employees that would entitle them to continued employment upon satisfactory performance and to a hearing upon attempted termination. These results have been obtained not only in cases involving explicit tenure or civil service systems, but also when the employee's interests must be inferred from general statutes, regulations, governmental practices, institutional practices, and personnel policies.

C. The Public Policy Tort

The most widely-adopted common law exception to the at-will doctrine imposes liability on an employer who discharges a worker for reasons that contravene a substantial public policy. To date, the cases have invariably involved employer retaliation for some action taken by the employee. Not surprisingly, then, the tort has also been referred to as "retaliatory discharge" as well as "wrongful discharge." Subsection 1, below, categorizes the cases according to the nature of the employee's conduct found to be protected from employer retaliation. Subsection 2 discusses how courts have determined whether the employer's action implicated some "substantial public policy"; that is, what makes a policy a "public policy?"

1. Protected Employee Conduct

The decisions fall into four categories of employee conduct protected from employer retaliation. Those categories, which are not wholly distinct, include: (a) employee exercise of a valuable right; (b) employee performance of a valuable public service; (c) employee exposure of, or complaints about, employer wrongdoing; and (d) employee refusal to engage in unlawful or unethical conduct. They are addressed below in that order.

(a) Employee Exercise of a Valuable Right. At present, most of the cases involve efforts by employees to invoke provisions of

statutes designed to protect employees in the workplace or in their relations with employers. Courts have found employers liable for retaliatory discharges of employees for engaging in the following activities: filing workers' compensation claims;\textsuperscript{27} efforts to enforce or invoke occupational safety laws;\textsuperscript{28} exercise of rights under labor relations laws;\textsuperscript{29} invoking rights under fair employment laws;\textsuperscript{30} and invoking privacy rights in refusing to take a lie detector test.\textsuperscript{31}

In addition to protecting statutorily created employment rights, some courts have extended the public policy concept to include employee exercise of constitutional rights. In the most significant decision to date, \textit{Novosel v. Nationwide Insurance Co.},\textsuperscript{32} the Third Circuit Court of Appeals applying Pennsylvania law concluded that an employee stated a claim for relief in alleging that he was terminated for refusing to lobby the state legislature on the employer's behalf (regarding a proposed no-fault law) and for generally taking political stands contrary to those taken by the employer. "[T]he protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a work-


er's compensation claim.\textsuperscript{33} The Oregon Supreme Court has also accorded a cause of action to a discharged employee invoking the state constitution's free speech provision.\textsuperscript{34}

Moreover, many of the retaliatory discharge cases that have drawn support from legislative policy judgments could be reformulated as implementing protections from private sector employers' abuse of their employees' constitutional rights. For example, a discharge for filing a workmen's compensation claim could also be seen as retaliation against a worker for exercising his right to petition the government for redress of grievances,\textsuperscript{35} and the firing of whistleblowers discriminates against them for their exercise of free speech.\textsuperscript{36}

These decisions recognize that private employers can exert enormous leverage over their workers because they fear losing their jobs. Many employees feel a greater threat to their personal liberties from insensitive or overbearing employers than from government officials whose "state actions" are constrained by the Bill of Rights and the fourteenth amendment.\textsuperscript{37}

\textsuperscript{33} Id. at 899.
\textsuperscript{35} See McClung, 360 S.E.2d 221.
\textsuperscript{36} See generally Halbert, supra note 34. Note, \textit{Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based upon Determinants of Public Policy}, 1977 Wis. L. Rev. 777.
\textsuperscript{37} In addition to employer impositions on employees' constitutional rights, unions can interfere with members' rights. See Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employee union members could not, upon pain of losing their jobs, be forced to support union political activity with which they disagreed); Steele v. Louisville & Nashville Ry., 323 U.S. 192 (1944) (NLRA, § 9's grant of exclusive representation to union would violate constitution if exercised by a union practicing race discrimination; therefore union owes employees a duty of fair representation); Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961) (society's interest in free speech and economic power of labor unions meant public policy was violated if the union disciplined members for practicing speech contrary to the union's official position).
(b) Employee Performance of a Valuable Public Service. In some ways, each of the categories listed here includes instances of employees engaged in activities valuable to the public. Certainly, the "whistleblowers" discussed below\(^ 38\) provide the public with a substantial benefit, as would the refusal of employees to participate in criminal activities.\(^ 39\) There are, however, a handful of cases in which the retaliated-against activities of the employee cannot be separately categorized. Those instances have involved the employee's completion of a specific duty arising out of citizenship and shared by the citizenry generally. Illustrative decisions include discharges of employees because they had served on a jury,\(^ 40\) supplied information to police about a fellow employee's suspected crime,\(^ 41\) or testified before a grand jury.\(^ 42\)

(c) Employee Exposure of, or Complaints About, Employer Wrongdoing. Under this branch of the tort, employees establish a claim for relief if they show they were discharged because they tried in good faith to protect the public interest by disclosing information, or by urging in-house reform, regarding their employer's violation of a law or regulation.

_Harless v. First National Bank_\(^ 43\) is a leading case. Harless, the manager of a bank's consumer credit department, was permitted recovery after he proved he was fired because of his efforts to force the bank's compliance with consumer credit laws. Of similar import were decisions granting relief, or recognizing a claim for relief, for employees who were discharged for complaining about procedures for handling radioactive cobalt in violation of Nuclear Regulatory Commission regulations,\(^ 44\) reporting to management

\(^{38}\) See infra text accompanying notes 43-46.

\(^{39}\) See infra text accompanying notes 47-50.


\(^{44}\) Wheeler v. Caterpillar, Inc., 108 Ill. 2d 502, 485 N.E.2d 372 (1985). The _Wheeler_ Court did not require as an element of the plaintiff's claim that he prove he had complained to the regulatory authorities.
discrepancies of a possibly criminal nature in the corporation's financial records and attempting to ensure company compliance with the law,\textsuperscript{45} complaining of substandard materials and underweight products and trying to force compliance with labeling and licensing statutes.\textsuperscript{46}

(d) Employee Refusal to Engage in Unlawful or Unethical Conduct. Several decisions have recognized a cause of action against employers by former employees who were discharged for their refusal to perform prohibited acts. These cases reflect both a desire to sustain the public policy upon which the substantive prohibition is based and a judgment that workers should not be forced to choose between committing a crime (or other actionable wrong) and their jobs. Thus, courts have upheld employees' claims of wrongful discharge for refusing to participate in a scheme to fix gasoline prices in violation of federal and state antitrust laws,\textsuperscript{47} commit perjury in legislative hearings concerning the employer's business,\textsuperscript{48} illegally adjust sampling results for state pollution reports,\textsuperscript{49} and violate an explicit provision of the state code of ethical conduct regulating plaintiff's profession (pharmacy).\textsuperscript{50}


\textsuperscript{47} Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).


\textsuperscript{49} Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978). The court ruled, however, that the trial court properly granted the employer's motion for summary judgment because the plaintiff failed to offer rebuttal evidence to the employer's affidavits.

\textsuperscript{50} Kalman v. Grand Union Co., 183 N.J. Super. 153, 443 A.2d 728 (1982). But see Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 417 A.2d 505 (1980) (no violation of a clear public policy when physician-employee was terminated for refusing to do work he contended, without explicit support in a code or regulation, was medically unethical); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982) (no claim for relief for employee allegedly discharged for his refusal to violate the Code of Ethics of the Institute of Internal Auditors or the state's regulation governing public utilities' accounting procedures because the former did not establish a public policy and the latter was not directed at conferring rights on employees).
2. The Identification of Substantial Public Policies

There is a spectrum of opinions regarding the proper bases for identifying "public policies" that limit employer discretion in the discharge of employees. In its narrowest form, public policy must be derived from clear and specific legislation designed to protect employees in their jobs. Furthermore, to state a claim the plaintiff must show the employer's actions contravened some specific provision of that legislation.\(^{51}\) Under this standard, courts assume very little discretion in identifying public policy and only minimally intrude on employer perogatives. In moving along the spectrum toward a more expansive view of public policy, courts have taken one or more of the following steps:

1. Extended the kinds of state interests to be vindicated from only those protecting workers to include general concerns regarding public health, safety, welfare, morals, etc.;\(^{52}\) and

2. Derived public policies not only from specific legislative provisions but also from broadly stated legislative goals;\(^{53}\) and

3. Expanded the sources for identifying public policies beyond those stated in legislation to include administrative regulations and executive rules, codes of ethics of professional organizations, constitutional provisions, and judicial decisions.\(^{54}\)

Within any jurisdiction, the clearer the basis for the claimed policy, the more likely a court will be to conclude it is a public policy

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52. E.g., Sheets, 179 Conn. 471, 427 A.2d 385 (food and drug labeling and licensing laws); Palmateer, 111 Ill. App. 3d 502, 444 N.E.2d 588 (corporate accounting laws); Harless, 162 W. Va. 116, 246 S.E.2d 270 (consumer credit laws).

53. See Palmateer, 85 Ill. 2d 124, 421 N.E.2d 876; Cordle, 325 S.E.2d 111.

that limits employer discretion. And courts are most likely to reach that conclusion if the policy derives from legislation.

Of these three lines of expansion, the most significant is the last; it is the most open-ended, freeing courts to promote policies the legislature has not yet addressed. The states that have recognized nonlegislative sources of public policy have produced a variety of approaches for identifying the kinds of policies to be protected.

Oregon, for example, maintains two categories of substantial public policies limiting employer discretion. The first precludes employers from discharging workers who have fulfilled a societal obligation created by statutory or constitutional provisions. Such obligations include service on a jury and refusal to join in defamatory accusations. The second category creates a cause of action for an employee who is discharged for "pursuing a right related to his role as an employee and the right is one of important public interest indicated by constitutional and statutory provisions and case-law." Thus, in Brown v. Transcon Lines, the Oregon Supreme Court held that an employee fired for filing a workers' compensation claim had a wrongful discharge remedy. In contrast, the court refused to find a claim for relief in Campbell v. Ford Industries, where the employee, who was also a stockholder, was fired in retaliation for exercising his statutory right as a stockholder to inspect corporate records. The relevant statute's primary purpose was to protect private and proprietary interests rather than public interests. Hence, "[p]laintiff was discharged for exercising a private statutory right not of great importance to society." That is, "[t]he statutory right pursued in Brown related directly to the plaintiff's role as an employee. . . . In Campbell, the statutory

55. Delaney, 297 Or. at 15-16, 681 P.2d at 117-18.
56. Nees, 272 Or. 210, 536 P.2d 512.
57. Delaney, 297 Or. 10, 681 P.2d 114.
58. Id. at 16, 681 P.2d at 118.
61. Delaney, 297 Or. at 15, 681 P.2d at 117.
right pursued by plaintiff related to plaintiff, not in his role as an employee, but in his role as a stockholder.”62

West Virginia has adopted a broader standard. It finds the sources of public policy to be, “among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people. . . .”63 On one occasion, in Yoho v. Triangle PWC, Inc.,64 the West Virginia court stated that standard applies to matters in which “there is a virtual unanimity of opinion.”65 Thus, any “issue which is fairly debatable or controversial in nature is one for the legislature and not for [the courts].”66 Yet in that same opinion, the court quoted with approval a broad definition of public policy as “that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community — the public good.”67 In the subsequent, unanimous decision in McClung, the court made no reference to the degree of consensus about the policy.68 Presumably, a general consensus prevails that all of the state’s Bill of Rights provisions identify and promote important public policies. And once the legislature addresses and enacts legislation designed to protect the public, that subject must also be conceded to be a substantial public policy. Thus, Yoho’s “virtual unanimity” language, if it persists at all,

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62. Id. at 16, 681 P.2d at 118.
64. Yoho, 336 S.E.2d 204.
65. Id. at 209 (quoting Mamlin v. Genoe, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)).
66. Id.
67. Id. (quoting Higgins v. McFarland, 196 Va. 889, 894, 86 S.E.2d 168, 172 (1955)). Yoho’s “virtually unanimous” vs. “fairly debatable” distinction must also be read in the context of a holding refusing to find a public policy. One could certainly question, too, whether the recognition in Cordle, 325 S.E.2d 111, of the public policy against lie detector usage by employers satisfied the Yoho standard. That is especially so given Cordle’s reliance on emerging, but not yet clearly delineated, notions of common law and constitutional rights of privacy.
68. McClung, 360 S.E.2d at 226-27. McClung concluded that an employee’s termination for filing a state wage claim action violated the public policies in the statute and in the state constitutional provisions creating a right to petition the government for redress of grievances and to have the courts of the state open to him.
would seem to impose few restrictions on cases that invoke constitutional or statutory protections as the source of the applicable public policy.

Other states have also adopted expansive standards. Arizona sees a public policy established in those pronouncements of the state’s founders, legislature, and courts having a "singularly public purpose" as opposed to those that are "merely private or proprietary." And Illinois has defined a clearly mandated public policy as one that "strikes at the heart of a citizen’s social rights, duties, and responsibilities."

The recognition of constitutional provisions as a source of limitation on private employers could provide a most significant expansion, particularly through protection of employees who promote controversial or unpopular causes. In addition, employees’ rights of privacy could also add a significant limitation on employers’ abilities to discharge employees for their off-duty activities.

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69. Public policy is usually defined by the political branches of government. Something ‘against public policy’ is something that the Legislature has forbidden. But the Legislature is not the only source of such policy. In common-law jurisdictions the courts, too, have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field. . . . We believe that reliance on prior judicial decisions, as part of the body of applicable common law, is appropriate, although. . . ‘courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.’

Thus, we will look to the pronouncements of our founders, our legislature, and our courts to discern the public policy of the state.

All such pronouncements, however, will not provide the basis for a Claim of wrongful discharge. Only those which have a singularly public purpose will have such force. . . . Where the interest involved is merely private or proprietary, the exception does not apply. Wagenseller, 147 Ariz. at 379, 710 P.2d at 1033-34.

70. Palmateer, 85 Ill. 2d 124, 421 N.E.2d 876; Novosel, 721 F.2d at 899.

71. Of course, statutes already provide a large measure of protection to employees that is analogous to that afforded by constitutional law. Fair employment laws, for example, prohibit various forms of invidious employer discrimination. See supra notes 7-9 and accompanying text. In addition, the N.R.L.A., §§ 7-8, 29 U.S.C. §§ 157-58, protects employees from retaliation for their participation in concerted “activities,” which encompasses the rights of association and advocacy in the employment context. See, e.g., NLRB v. City Disposal Sys., 465 U.S. 822 (1984); Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). Many statutes also prohibit employer retaliation against employees who exercise their right to petition for redress of grievances through pursuit of statutory rights. See, supra notes 10-15 and accompanying text.

72. See, e.g., Cort, 385 Mass. 300, 431 N.E.2d 908; Slohoda, 193 N.J. Super. 586, 475 A.2d 618; Cordle, 325 S.E.2d 111; Golden v. Board of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981). It would not be difficult to imagine cases arising in which, for example, an employee is discharged for fathering a child out of wedlock.
D. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

In addition to the creation of a retaliatory discharge tort action, courts have liberally construed traditional contract and related doctrines to limit the harshness of the at-will rule. These developments have taken several forms.

First, courts have been willing to accept oral promises of job security, identifying exceptions to the Statute of Frauds, which ordinarily renders unenforceable oral contracts that are not to be performed within one year. Naturally, when no termination date has been specified in the oral agreement, an employee claiming he was promised a job for as long as his performance was satisfactory would anticipate a tenure exceeding one year. Nevertheless, such contracts have been upheld through application of any one of three theories. First, and most broadly, several courts have found that so long as the contract can be performed within one year, it is outside the Statute of Fraud's purview. Thus, any contract with a contingency that could terminate the agreement at any time would not have to be in writing. At-will employment contracts necessarily include two such contingencies: the employee may be fired, or he may leave before the year is out. Second, some employees have enforced an employer's oral promises by proving they acted in reliance on the promises. Generally, a promise that the promisor

75. On that basis, the cases cited in note 74 found the Statute did not bar enforcement of an oral promise of job security. A third contingency also would apply to any personal services contract and has been relied upon by some courts to circumvent the Statute of Frauds. That is, the employee could die, which most surely would terminate the agreement. See Hodge, 823 F.2d 395; Glasgow v. Peatross, 201 Va. 43, 109 S.E.2d 135 (1959) (oral contract to furnish room and board for 15 months not within the Statute of Frauds because the contract was terminable upon the death of the promisee),
should reasonably expect would induce the promisee to act upon it, and that does induce such action, is enforceable notwithstanding the Statute of Frauds. The employee can often show reliance through evidence of moving to a new location or leaving prior employment. The third and least common method for avoiding the requirement of a written contract has been to show that the oral inducement and the failure to abide by it were part of a fraudulent scheme.

Beyond the enforcement of oral promises, the courts have been receptive to finding implied and explicit contracts in nontraditional documents. This tendency is best reflected in the cases finding promises of job security upon good performance in personnel policies and employee handbooks. Typically, such promises are located in procedures for progressive discipline (if there are no substantive limits on discipline, then why have procedures?), enumerated grounds for discipline, as well as explicit promises of continued employment upon good performance or unless just cause for discharge arises. "[A] promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable."

The final contract theory of recovery in employment discharge cases is the most expansive and potentially the most important.

This theory, the breach of the covenant of good faith and fair dealing, has also spilled over into tort theories and not inconsequentially into tort damages. The cause of action begins with the unchallenged assumption that every employment relationship is based on a contract. ("You come work for me and I'll pay you $X.00 an hour.") Under current doctrine and unless otherwise specified, the contract is terminable by either party at any time. But, like every other contract, it is also subject to the implied covenant to execute its provisions in good faith. Several jurisdictions have found that an employer's unwarranted termination of the employment contract may, at least in certain circumstances, violate that duty. Thus far, the cases fall into three general categories.

The first, and the most narrow, is the rule in New Hampshire, whose 1974 decision in Monge v. Beebe Rubber Co. was the earliest application of the duty of good faith and fair dealing to the employment context. The Monge Court recognized a cause of action for a woman who alleged she was fired for refusing to date her foreman, characterizing his motivation and the discharge as in bad faith. The opinion was written in broad terms and seemed

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79. Restatement (Second) of Contracts § 205. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment a to Section 205 states:

The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

Comment d adds:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of the types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasions of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

80. Monge, 114 N.H. 130, 316 A.2d 549.
to hold that any bad faith termination would be actionable. Subsequently, however, New Hampshire qualified the Monge rule to require the plaintiff to prove: (1) the defendant was motivated by bad faith, malice, or retaliation; and (2) the retaliation resulted from the employee's performance of an act encouraged by public policy or refusal to do an act condemned by public policy. As such, the New Hampshire law now mimics the retaliatory discharge tort.

The second category has also undergone a narrowing. In Fortune v. National Cash Register, the Massachusetts Supreme Judicial Court held that an employee with forty years of service stated a claim for relief in his allegations that his employer had discharged him to avoid paying him a $92,000 commission he had earned on a five million dollar sale. The employer, said the court, had denied the plaintiff a benefit he reasonably expected was guaranteed by his employment relationship. Subsequent Massachusetts decisions have restated the doctrine to require the plaintiff to prove his discharge would unjustly enrich the employer by depriving the plaintiff of money that he had fairly earned and legitimately expected. Arizona has also adopted this qualification on the employer's discretion.


Massachusetts has thus effectively adopted the approach advocated by Professor Krauskopf in her article, Employment Discharge: Survey and Critique of the Modern Employment at Will Rule, 51 U. Mo. KAN. CRIT. REV. 189 (1983). She would recognize a wrongful discharge action in two circumstances: (1) when the discharge is motivated by purposes ulterior to the employment, which would subsume the "public policy" tort and cases like Monge and (2) when "the discharge is motivated by a purpose to deny expectations which the parties had in entering the particular employment contract." Id. at 215.

84. Wagenseller, 147 Ariz. 370, 385, 710 P.2d 1025, 1040:
[The covenant of good faith and fair dealing] protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into. The denial of a party's right to those benefits, whatever they are, will breach the duty of good faith implicit in the contract. Thus, the relevant inquiry always will focus on the contract itself, to determine what the parties did agree to.
The Massachusetts and New Hampshire approaches are obviously cautious and limited. Other states, however, have imposed on employers a duty of good faith and fair dealing that more significantly restricts their discretion to discharge workers. California courts have led the way. Taking a hint from the state’s supreme court, 85 Cleary v. American Airlines, 86 held the substantial length (eighteen years) of an employee’s service, together with the employer’s expressly provided procedures for adjudicating employee disputes, imposed a just cause limitation on the employer’s ability to discharge the employee. The “termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts.” 87 Under that covenant, neither party may do anything to injure the rights of the other.

Following Cleary, the California courts of appeals have elaborated on the employer’s duty and held the combination of facts in Cleary was not a prerequisite to finding a breach but was only

85. Tameny, 27 Cal. 3d 167, 179, 610 P.2d 1330, 164 Cal. Rptr. 839, n.12. The footnote observed that the court’s conclusion that the plaintiff had stated a cause of action for a common law wrongful discharge made it “unnecessary to determine whether a tort recovery would additionally be available . . . on the theory that Arco’s discharge constituted a breach of implied-at-law covenant of good faith and fair dealing inherent in every contract.” The court also noted that other jurisdictions (New Hampshire and Massachusetts) had applied the theory to employment terminations and that “past California cases have held that a breach of this implied-at-law covenant sounds in tort as well as in contract.” Id.


Montana’s supreme court endorsed the Cleary perception of the good faith and fair dealing covenant when it held the employer must show just cause to justify an employment discharge if there were present “objective manifestations” that would lead the employee to reasonably believe he or she had job security. Dare v. Montana Petrol. Mktg. Co., 687 P.2d 1015, 1020 (Mont. 1984). Accord Flanigan v. Prudential Fed. S. & L., 720 P.2d 257, 261-62 (Mont. 1986) (just cause required to fire employee if the facts gave her “a clear and objective basis for believing that, if her work was satisfactorily performed, her employment would continue”). In both of those cases, the “objective” facts relied upon by the court to hold the employee could not be discharged without just cause included an unblemished work record, no warnings of problems, regular pay raises and promotions, and — most importantly — long term employment. Flanigan hints, too, that long term employment, by itself, may be enough to vest job security rights.

The Montana decisions have been superseded by statute. See infra, note 109.
illustrative.\textsuperscript{88} Relying on a California Supreme Court decision regarding the obligations of parties to a commercial contract,\textsuperscript{89} the appellate courts have evolved a standard that finds a breach of the covenant of good faith and fair dealing "whenever the employer engages in bad faith action extraneous to the contract, combined with the obligor’s intent to frustrate the [employee’s] enjoyment of contract rights."\textsuperscript{90} 

Koehrer v. Superior Court\textsuperscript{91} explained application of the duty to the employment context:

If the employer merely disputes his liability under the contract by asserting in good faith and with probable cause that good cause existed for discharge, the implied covenant is not violated and the employer is not liable in tort. . . . If, however, the existence of good cause for discharge is asserted by the employer without probable cause and in bad faith, that is, without a good faith belief that good cause for discharge in fact exists, the employer has tortiously attempted to deprive the employee of the benefits of the agreement, and an action for breach of the implied covenant of good faith and fair dealing will lie.\textsuperscript{92}

This does not impose a general just cause requirement; an employer may be mistaken about an employee’s wrongdoing or inadequate performance but can still avoid liability if the employer can prove it fairly believed there was a legitimate reason for the discharge. If the employer lacked a reasonable basis for its belief or if motivated by an irrelevant or illegitimate purpose, then it has breached the covenant. Of course, if the employee is long-term and the employer has promised procedural protections, then under Cleary the employer must establish just cause in fact.


\textsuperscript{91} Koehrer, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820.

\textsuperscript{92} Id. at 1171, 226 Cal. Rptr. at 829-30.
California and the jurisdictions using its analysis regarding the covenant of good faith and fair dealing allow for the full array of tort damages for breach of the covenant.\(^93\) Thus, prevailing employees can recover not only backpay and back benefits, but also emotional distress and punitive damages.

II. THE CALL TO DISCARD THE AT-WILL DOCTRINE

As is obvious from the foregoing overview, the at-will doctrine is reeling. In every jurisdiction, federal and state statutes have invalidated a variety of employer motives; many state courts have added common law proscriptions against retaliatory discharges; courts have generously construed contract law and juries have searched hard to find employer promises of job security; and some states have used the good faith requirement to scrutinize the reasonableness of every employee discharge. The exceptions are becoming the rule; yet they have so far produced a crazy-quilt of claims for relief that only haphazardly includes and excludes unjustly discharged workers from the winners' circle. Thus, in the scheme of common law evolution, it is time to reassess the rule. Just as the law of products liability grafted exceptions onto the requirement of privity until at last a new rule emerged,\(^94\) or as changes in conflicts of law doctrine eroded away outmoded rules,\(^95\) so too employment law has evolved to the point that the tattered at-will doctrine must give way to a rule better suited to present needs and notions of fairness.

The bases for the at-will rule, if they ever existed, have now clearly lapsed. Its premise in the facile logic of mutuality — *i.e.*, because the employee can terminate the contract at any time, the employer should also have that right — has no fair application in

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94. As Judge Cardozo stated in holding an automobile manufacturer liable despite the absence of privity, "[p]recedents from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).

the modern employment context. As courts have already recognized in construing anti-discrimination laws, a rule of superficial equality can often impose a drastically discriminatory impact.96 Indeed, the mutuality argument is reminiscent of Anatole France’s reference to “the majestic equality of the law, which forbids rich and poor alike to sleep under the bridges, to beg in the streets, and to steal bread.’97 The impact on the modern corporate employer from the loss of an employee hardly compares to the personal impact felt by an employee who is suddenly out of a job. While an employer hit with the departure of an at-will worker may lose some investment it made in providing the employee with training or experience, the discharged employee faces severe financial and emotional crises. The obvious loss of income causes an abrupt decline in life style for the worker’s family. Loss of medical benefits can threaten the family’s health. Typically, the employee suffers a substantial blow to his or her self-esteem, sense of worth, and emotional well-being. The worker experiences stress about finances and anxiety about the uncertain prospects of finding new employment in what is often a hostile market, especially for one stigmatized by termination. These emotional strains, as much as the financial losses, also redound to the detriment of the employee’s family.

The philosophical and economic bases for the at-will rule have been eroded, if not washed away. The doctrine developed in the late nineteenth century, a period dominated by natural law concepts of property and freedom of contract, laissez faire economics, and great industrial expansion.98 The prevailing natural law con-


98. See Wagenseller, 147 Ariz. at 375, 710 P.2d at 1030; Hermann & Sor, supra note 3. The source of the at-will rule apparently was the 1877 Wood treatise, quoted in supra note 1, which “cited as authority four cases, none of which supported [the rule].” Summers, supra note 3, at 485 n.20 ( Supra note 36).
cepts vested in the employer the right to do with his property as he pleased. His property included his business, and his business included his employees. Any governmental intrusion into his business relations with employees, then, violated basic notions of property.\(^99\) The freedom of contract, which purportedly extended to both employer and employee, protected the parties’ “right” to deal with each other at arm’s length.\(^100\) To externally impose a limitation on either party’s ability to terminate the contract would violate that freedom. The freedom for employees, of course, was illusory; all the bargaining power rested with management.

Today, the philosophy that gave preeminence to the property interests of employers has lost out to a recognition of the inequalities and social costs it produced.\(^101\) To be sure, we have not entirely rejected property entitlements in the operation of a business.\(^102\) We have, nevertheless, admitted that employees build certain job expectations akin (if not equivalent) to property rights. Workers perceive an entitlement to continue their employment so long as they perform well and there is work to do.\(^103\) These expectations have risen to the level of legally recognized interests in court decisions protecting the interests of individuals to pursue their chosen profession,\(^104\) preserving the vested rights of workers

\(^99\) See Coppage v. Kansas, 236 U.S. 1 (1915) (striking down state legislation prohibiting “yellow dog” contracts); Adair v. United States, 208 U.S. 161 (1908) (striking down federal law forbidding dismissal of employees because of their union membership).

\(^100\) See, e.g., Lochner v. New York, 198 U.S. 45 (1905).

\(^101\) See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), overruling Coppage, 236 U.S. 1 and Adair, 208 U.S. 161; United States v. Darby, 312 U.S. 100 (1941), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), overruling Adkins v. Children’s Hosp., 261 U.S. 525 (1923); Section I-A (canvassing modern regulatory laws limiting employer discretion).


\(^104\) E.g., Board of Regents v. Roth, 408 U.S. 564 (1972) (government violates employees’ property rights if it dismisses them in such a way as to jeopardize their future career opportunities); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (state cannot deny application for bar admission without a due process hearing); Schwager v. Board of Bar Examiners, 355 U.S. 232 (1957) (state cannot stigmatize individual in a way that will prevent him from pursuing his chosen occupation); Major, 169 W. Va. at 251-57, 286 S.E.2d at 695-98.
in their seniority systems, and acknowledging the entitlement of long-term employees to just cause protection from discharge.

Economic conditions, too, have changed drastically since development of the at-will doctrine. Employment today involves a high degree of specialization, tight job markets, limited interchangeability of jobs and job skills, a corresponding increase in the difficulty of acquiring new job skills, and concentrated economic power in large corporations. These realities raise the stakes for employees faced with unemployment. It is time, therefore, to do away with the remnants of the at-will doctrine and recognize a right in all nonprobationary employees to a job subject only to termination for just cause.

Employers would have no legitimate basis to complain of this right for their employees. Beyond the desire to resurrect outdated notions of property and to maintain some sort of in terrorem power over their workers, employers have no reason to insist on the right to willy-nilly fire people and jeopardize their well-being and that of their families. A fair, rational employer would not want to fire an employee in the absence of a legitimate business purpose. Indeed, by ensuring competent employees are not mistakenly dismissed, employers improve their personnel practices and help to sustain an effective workforce. By offering job security, employers take away a major incentive for good employees to go elsewhere and in that way mitigate any possible unfairness that might result from the loss of "mutuality" in terminating employment relationships. Meanwhile, the statutory and public policy interests described in Part I, above, could be better implemented; employees claiming discrimination would not be put to the test of proving the elusive illicit motive; and employers would find it more difficult to stifle or chill employees' exercise of statutory or constitutional rights or their satisfaction of a civic duty.


This is not a revolutionary notion. After all, civil service and school tenure systems protect most of our government employees and collective bargaining agreements assure just cause safeguards to the unionized sector of our workforce. Thus, counting only public and organized employees, a large percentage of our population already works under some just cause umbrella. Moreover, and not to be discounted, nearly every other industrialized country besides the United States today guarantees workers protection against unwarranted discharges. Yet the public employment, unionized, and foreign systems have all managed quite well, even with the burden of fair treatment of employees. At least one American state, Montana, has also enacted legislation providing job security for its workforce.


108. See Hermann & Sor, supra note 3, at 804-12; Summers, supra note 3, at 508-19. The prevailing international standard is that propounded in June 1982 by the International Labor Organization (ILO), when it adopted the Convention and Recommendation on Termination of Employment at the Initiative of the Employer. Article 4 provides:

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment, or service.

This statement reiterates the principle the ILO first adopted (by a vote of 196-14) in 1963 in Recommandation No. 119 Concerning Termination of Employment at the Initiative of the Employer. Summers, supra note 3, at 508. (The ILO is an agency in the United Nations.)


Section 4 ELEMENTS OF WRONGFUL DISCHARGE. A discharge is wrongful only if:

(1) It was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; or

(2) The discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) The employer violated the express provisions of its own written personnel policy.

Subsections (1) and (3) codify the common law, but Subsection (2) extends employee protections beyond what the Montana Supreme Court had done. See Flanigan, 720 P.2d 257; supra note 87. That extension was probably in exchange for limitations placed on damages by § 5 of the Act. Wrongfully discharged employees are limited by that provision to lost wages less mitigation and, if employer fraud or actual malice is proved by clear and convincing evidence, to punitive damages. Apparently, the legislation was provoked by the $1.5 million verdict the plaintiff-bank teller received in Flanigan, 720 P.2d 257.
What life after the at-will rule should look like is the subject of Part III.

III. A PROPOSAL FOR A GENERAL JUST CAUSE PROTECTION

While employers have no legitimate interest in retaining the right to unjustly fire an employee, they do have valid, substantial interests in maintaining a dependable workforce and avoiding both extended litigation\(^\text{110}\) and the threat of six- or seven-figure verdicts.\(^\text{111}\) Employees, on the other hand, have substantial interests in a procedure that provides a fast, affordable remedy for a wrongful discharge and in a system that does not leave their job security to the whim of the employer or the happenstance of current employment termination law. A procedure that would efficiently address a discharge’s validity would permit unfairly fired workers to escape the severe economic and emotional crunch described in Part II. The solution, then, lies in establishing an alternative system, analogous to arbitration in the collective bargaining context, that would cover most all employees.

To implement this system, employees should be accorded a cause of action sounding in tort, complete with the full range of legal and equitable remedies,\(^\text{112}\) for any discharge accomplished without just cause. Employers, however, should be able to raise as a qualified defense the offer, or actual results, of an arbitration procedure that meets certain minimum standards. The employer can, in effect, choose to buy the insurance of arbitration or run the risks of expensive litigation and a sizeable verdict.

Elaboration of this qualified defense should track in part development of the law relating to arbitration in the collective bar-

\(^{110}\) Employers have a realistic fear that establishing a tort for discharges without just cause could open the floodgates and correspondingly interfere with legitimate management needs. Fired employees feel a deep, emotional injury; the termination threatens their sense of self-worth, perhaps their raison d’etre, as well as their livelihood. In such circumstances, people naturally look for some explanation for their predicament other than their own deficiencies. Thus, even when an employer acts with good cause in discharging an employee, the employer runs a higher risk of potential litigation than in other contexts.

\(^{111}\) See supra note 109.

\(^{112}\) That is, the remedies should include not only compensation for economic losses, but also damages for emotional distress and humiliation, punitive damages, back seniority, reinstatement, and corrective or prohibitory injunctions.
gaining process.113 "Just cause" is a term of art and has been well-delineated in arbitration law.114 Analogies could also be drawn to civil service and other statutory descriptions of just cause. Certainly, the term encompasses inadequate performance, misconduct, and economic necessity. An arbitrator's decision, or the offer of arbitration,115 should bar the employee's tort recovery so long as the procedure is fair and meets the standards specified below.

To be adequate, the arbitration procedure must include:

(1) An opportunity for a full and fair hearing before an arbitrator who is (a) provided by the government; (b) selected by agreement of the employee, his representative, and the employer; or (c) selected by a neutral person or organization that is agreed upon by the employee, his representative, and the employer and that is familiar with arbitration.

(2) Provision for the employer to absorb the costs of the procedure, including fees for the arbitrator, the employee's attorney or other representative, and any expert witnesses.

(3) Discretion in the arbitrator to award partial or complete relief analogous to the make-whole remedies in arbitration law and under Title VII,116 including reinstatement, backpay, back benefits, and back seniority.

(4) Formal and timely written notice to the employee providing not only the reasons for the discharge but also a description of the full range of rights available to the employee and specifically including notice of the right to engage an attorney (or, at the employee's election, some other representative) whose fee will be paid by the employer and to have the representative join in the selection of the arbitrator.

Those elements require some explanation.

(1) Impartiality of the Arbitrator. It is essential that the employee and his representative participate in the selection of the arbitrator or that the selection be made by an agreed-upon third
party, such as a government agency or the American Arbitration Association. If the employer retains full discretion to appoint the arbitrators, the risk is excessive that those decision-makers would become "in-house" accommodators of the party who chooses and pays them. In addition, the representative should be included in the selection process because the employee is unlikely to know anything about the candidates. In arbitrations under collective bargaining agreements, the unions provide the expertise; but for at-will employees, that help is unavailable. Thus, the at-will employee must turn to his hired representative, who presumably would be an attorney with experience in arbitration and employment law.

(2) Costs to be Paid by the Employer. Without a provision for employer absorption of the costs of the hearing, discharged employees could be deterred from pursuing arbitration. Attorneys' fees must be provided because the small amount of backpay ordinarily available would make it extremely difficult for the employee to find an attorney to handle the arbitration on a contingency basis. Effectively forcing the employee who wants a lawyer to engage one on an hourly basis would discourage already unemployed workers from pursuing their arbitration remedy. Thus, in any non-frivolous case in which there is no labor organization to represent the employee or pay for his representation, the employer should be responsible for the worker's attorney's fee. In any event, the employer would still have less expense than it would incur defending against a tort action.

(3) Remedies. The object of the arbitrator's remedial powers would be to make the wronged employee whole, to put him or her where he or she would have been but for the erroneous dismissal. Because of the accelerated decisional process and the make-whole relief, there is not as great a need for damages to compensate the employee for emotional distress. And because of the general application of a just cause requirement, the need would be reduced to provide the deterrent of punitive damages against employers' conduct violating public policy. In addition, and re-
gardless of the arbitration’s result, expeditious resolution of the dispute benefits both the employee and the employer. The employee can either seek other work as soon as possible or regain his lost wages and his job. Correspondingly, the employer can proceed to hire a replacement or arrange reinstatement without extended disruption of personnel management needs.

(4) Notice. Obviously, any fair procedure requires notice to the employee of the reasons for the discharge. Just as important, however, for the system to be fair and effective, the employer must fully inform the employee about the availability of counsel and of arbitration. This information must be provided at the time of termination, and an employer who fails to give the requisite notice cannot claim the arbitration defense. In return, employers can require the worker to request arbitration within a relatively brief period of time.

An exception to this just cause protection should be made for probationary employees. An employer may legitimately require an evaluation period as a means for selecting employees for permanent hiring and achieving the best possible workforce. Thus, during or at the end of probation the employer may release individuals without the same demonstration of just cause as would be required for permanent employees. For this exception to apply, the employer should establish a formalized program including notice of the probationary status to the employees and a specific, reasonable duration for the probationary status. In addition, of course, the employer would continue to be limited by fair employment and other labor laws.

The just cause requirement for employment discharges and the necessary, attendant procedures can be implemented either judicially or legislatively. The at-will doctrine was one of judicial creation, and like every such common law rule, it is equally subject to judicial abolition. As demonstrated, the law has already riddled the doctrine with so many exceptions as to render its random operation totally arbitrary.

The legitimacy of judicial action, however, does not deny the desirability of a legislative solution. Legislative treatment, of course,
offers the chance for a more sweeping, comprehensive change. Most importantly, action by the legislature could produce both alternatives to private arbitration and measures to mitigate the procedure's costs. The state could, for example, create a labor board to hear discharge cases or expand the jurisdiction of an equal opportunities commission to hear the cases. At least partial funding for these government-run arbitration boards could be derived from the taxing of costs against employers who appear before them. It would also be fair to impose an across-the-board fee on all nonunion employees in the state to help fund the state-provided arbitration. Since that would be the group to benefit most from such legislation, asking its members to spread some of the costs among themselves makes sense.

IV. Conclusion

The common law doctrine of at-will employment, which allows employers to fire employees for any reason or no reason, has outlived its usefulness, if it ever had any. The numerous legislative and judicial qualifications to the rule have already greatly reduced it. Yet those reforms have also left the remnants to operate in a wholly arbitrary fashion. There is no reason or policy to allow employers to retain the in terrorem power over employees to discharge them for any reason. Such power leaves workers fearful of exercising valuable rights that might offend their bosses and violates fundamental concepts regarding the essential worth of every individual.

The alternative of a tort action for wrongful discharge, however, would be too costly for both employers and employees, would cause unwanted delay in resolving issues of great importance to the parties, and would threaten to clog already overcrowded court dockets. Courts and legislatures should therefore adopt, as a defense to tort actions, a decision by an arbitrator or an employer's
offer of arbitration if the available procedure satisfies certain prerequisites. Those include the selection of an agreed-upon neutral arbitrator and a right of counsel, with the costs of nonfrivolous cases to be absorbed by the employer or the government. A full array of make-whole remedies and complete notice to discharged employees of their rights should also be required. Employers who do not provide the option of an adequate arbitration procedure should remain liable in tort for discharges made without just cause. An exception could be made for probationary employees.