

BEWARE THE TOOTHLESS TIGER: A CRITIQUE OF THE MODEL EMPLOYMENT TERMINATION ACT

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"We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands."¹

"A power over a man's subsistence amounts to a power over his will."²

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1. FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

2. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

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INTRODUCTION

In the United States today, approximately ninety million persons are employed in nonagricultural jobs in the private sector.³ Approximately sixty million are "at-will"⁴ employees who enjoy no statutory protection from wrongful dismissal by their employers.⁵ It is

3. *Current Labor Statistics*, 115 MONTHLY LAB. REV. 80 tbl. 19 (June 1992) (estimating that 108 million people are employed in United States today).

4. Employment "at will" is terminable by either party (employer or employee) at his or her pleasure, for cause or without cause, absent either a contractual or statutory provision stating otherwise. See 53 AM. JUR. 2D *Master and Servant* § 43 (1969) ("[W]hen the employment is not for a definite term and there is no contractual or statutory restriction upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses without incurring liability.").

5. Theodore J. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right?*, 1993 PROC. OF N.Y.U. 45TH ANN. NAT'L CONF. ON LAB. 270; Jack Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985); Comment, *Comparing Kansas Employment-at-Will Law with the Model Employment Termination Act*, 41 KAN. L.

estimated that at least two million at-will employees are discharged by their employers each year.⁶ Of those so discharged, 200,000 or more are wrongfully terminated.⁷ That is, the termination is not justified by some nondiscriminatory business reason that would meet the standard of "just cause" or "good cause."⁸

REV. 169, 170 (1992). The statistics were originally developed in a study done by Professor Stieber. See Jack Stieber & Michael Murray, *Protection Against Unjust Overcharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319, 322 (1983) (estimating number of employees wrongfully discharged each year by extrapolating from U.S. Bureau of Labor statistics).

6. St. Antoine, *supra* note 5, at 270; cf. MONTHLY LAB. REV., *supra* note 3, at 73 tbl. 8. In 1990, a total of 2.3 million persons lost their jobs involuntarily for reasons other than layoff. In 1991, the number increased to 3.3 million. MONTHLY LAB. REV., *supra*.

7. MODEL UNIFORM EMPLOYMENT TERMINATION ACT prefatory note, reprinted in 9A Lab. Rel. Rep. (BNA) 21, 23 (Aug. 8, 1991) [hereinafter MODEL EMPLOYMENT TERMINATION ACT] (estimating that 150,000 to 200,000 of two million at-will employees discharged each year would have valid claims under "good cause" standard); Jack Stieber, *The Case for Protection of Unorganized Employees Against Unfair Discharge*, 32 PROC. ANN. MEETING INDUS. REL. RES. ASS'N, 160-61 (1980); Clyde W. Summers, *Employment At Will in the 1980's: A Look Ahead—The Experts Predict*, 224 DAILY LAB. REP. (BNA) 25 (Nov. 19, 1982).

8. "Just cause" is the common standard that must be met to support a discharge under the terms of most collective bargaining agreements. See WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 63 (1993) (noting that such protection exists in "approximately 95% of the collective bargaining agreements negotiated in the United States"). "Good cause," which is substantially the same as "just cause," is the standard used in the Model Employment Termination Act. See *infra* notes 258-86 and accompanying text (explaining "good cause" standard adopted by Model Act).

Two cases are illustrative of the range of circumstances surrounding discharge without just cause. The first is the story of Catherine Wagenseller, a former nurse at the Scottsdale Memorial Hospital in Arizona. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985). Ms. Wagenseller began work in 1975 as a staff nurse after she was personally recruited by Kay Smith, the manager of the emergency department. In 1978, Ms. Wagenseller was assigned to the position of ambulance charge nurse. A year later, she was promoted to the position of paramedic coordinator, a newly created management position. *Id.* at 1029.

Ms. Wagenseller's job performance evaluations had been consistently favorable. In early 1979, for example, Kay Smith had rated Ms. Wagenseller's performance as "exceed[ing] results expected," which was the second highest of five possible ratings. *Id.*

Her demise began in May 1979, when Ms. Wagenseller and Ms. Smith, who had enjoyed a friendly, professional relationship, joined a group of personnel from other hospitals for a rafting trip. During the trip, "an uncomfortable feeling" developed between the two women, which Ms. Wagenseller believed to be the result of Ms. Smith's unusual behavior. The behavior included public urination and bathing, heavy drinking, and "grouping up" with other rafters. Ms. Wagenseller did not participate in any of the activities. In addition, she refused to participate in the group's parody of the song "Moon River," in which members of the group allegedly concluded by "moon[ing]" the audience. Allegedly, the skit was repeated later at the Hospital, where Ms. Wagenseller again refused to participate. *Id.*

The relationship between Ms. Smith and Ms. Wagenseller began to deteriorate following Ms. Wagenseller's refusal to participate in the described activities. According to Ms. Wagenseller, following the river trip, Ms. Smith began to harass her, use abusive language with her, and embarrass her in the company of other staff. Other personnel reported a similar change in Ms. Smith's behavior toward Ms. Wagenseller after the trip, although Ms. Smith denied it. *Id.*

On November 1, 1979, Ms. Wagenseller was fired. No other circumstances of her employment had changed, other than her relationship with Ms. Smith. The Arizona Supreme Court reversed the decision below granting summary judgment in favor of the employer, *id.* at 1044, holding that an employer may fire an at-will employee for good cause or no cause, but not for bad cause, i.e., that which violates public policy, *id.* at 1033.

A second illustration of discharge without just cause is the case of Joseph Murphy, an assistant treasurer of the American Home Products Corporation before his discharge in 1980. Murphy

The human tragedy wrought by such wrongful terminations is immeasurable. In American culture, as in many others, we identify ourselves and find value in ourselves through our work. We introduce ourselves as teachers, laborers, carpenters, engineers, bricklayers, steelworkers, and even lawyers and law professors. Being gainfully employed thus is more than a means of earning a living: it is essential to our very "existence and dignity."⁹

It is therefore not surprising that many employees suffer severe emotional trauma when they are discharged.¹⁰ That distress frequently affects relationships with families and friends, and may cause

v. American Home Prods., 448 N.E.2d 86, 87 (N.Y. 1983). Mr. Murphy began working for the company in 1957. He served in various accounting positions and was ultimately promoted to the office of assistant treasurer. *Id.* at 87.

Prior to his discharge, Mr. Murphy allegedly uncovered improprieties in corporate accounting in which corporate personnel illegally manipulated at least \$50 million of secret pension reserves. The manipulation of the reserves inflated the company's growth in income and allowed high-ranking officers to receive unwarranted bonuses from a management incentive plan. In accordance with internal company regulations, Mr. Murphy reported the discrepancy. He also refused to participate in the alleged scheme. Thereafter, on April 18, 1980, at the age of 59, after 23 years with the company, he was fired. *Id.* The New York Court of Appeals affirmed the dismissal of Murphy's claims, refusing to recognize any exception to the employment-at-will doctrine. *Id.* at 89-90.

9. William B. Gould, IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 892. Professor Gould further observed:

One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status.

Id.; see also John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 481 n.64 (1980) ("The question of job security is the most important factor in the life of a worker.").

Professor Charles Reich has argued in a similar vein that our society is becoming one based "upon relationship and status." Reich, *supra* note 2, at 785. That status is derived primarily from our "source of livelihood." *Id.* "Status is so closely linked to personality that destruction of one may well destroy the other." *Id.* He concludes, therefore, that status should be surrounded by the safeguards once reserved for personality. *Id.*; see also PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 3 (1990) ("[T]he plants and offices in which we work are the places where we spend much of our adult lives, where we develop important aspects of our personalities and our relationships, and where we may be exposed to a variety of physical or psychological traumas.").

10. See Andrew Hacker, *Introduction to THE CORPORATION TAKE-OVER* 9 (Andrew Hacker ed., 1964) ("[W]hite collar employees . . . are psychologically unprepared for the loss of security and status following . . . unemployment."); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413 (1967) (observing that social stigma and mental anguish are normal consequences of being fired); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1198 (1991) ("[U]nemployment often causes serious psychological and medical problems.") (citing B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 62 (1982)).

permanent harm to those support networks.¹¹ At its worst, the trauma can result in permanent incapacity or even death.¹² The consequences of employment termination have been vividly described by Professor John D. Blackburn:

The societal costs of maintaining the terminable at will practice may manifest themselves in a variety of ways. Even assuming that an employer may immediately find a substitute for a wrongfully discharged employee, the discharged employee will usually qualify for governmentally distributed unemployment insurance. If the discharged employee fails to find suitable employment, he or she may become a public charge or even lead a life of crime. On a more personal level, the mental and social consequences to the discharged employee and the immediate family may be as severe as they are immeasurable. The question of job security is the most important factor in the life of a worker. The feeling of insecurity not only may be detrimental to the moral, mental and material development of an individual but it may also cause the deterioration of the moral and mental standards of the worker which in turn may cause or contribute to so many complex social problems.¹³

In addition, the discharged employee suffers adverse economic consequences due to the loss of wages. Employees may receive severance benefits from their employers, but these are not guaranteed.¹⁴ Even when benefits are available, they do not begin to replace lost wages,¹⁵ and they are of limited duration.¹⁶ Employees

11. See St. Antoine, *supra* note 5, at 270 (citing H. BRENNER, ESTIMATING THE SOCIAL COSTS OF NATIONAL ECONOMIC POLICY: IMPLICATIONS FOR MENTAL AND PHYSICAL HEALTH AND CLINICAL AGGRESSION (1976) (discussing mental and physical problems that may result from losing one's job as well as effects on social and family relationships)); see also *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (stating that ability to work and being employed are essential to ability to provide for one's family).

12. See St. Antoine, *supra* note 5, at 270 ("Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, spouse and child abuse, and impaired social relationships that follow in the wake of a job loss.").

13. Blackburn, *supra* note 9, at 481 n.64.

14. There is no federal statutory requirement for the payment of severance pay to discharged workers. Some states require the payment of severance pay to employees in the private sector who are terminated as a result of a change in corporate control, see, e.g., MASS. GEN. LAWS ANN. ch. 149, § 183 (West 1994) (providing for severance pay equal to twice employee's weekly compensation multiplied by her years of service for certain employees terminated as result of corporate acquisition), and public employees may be entitled to severance pay in the event of a reduction in force, see, e.g., MONT. CODE ANN. § 2-18-622 (1993) (providing for one to two weeks severance pay for state employees terminated because of reduction in force).

15. See, e.g., DEL. CODE ANN. tit. 19, § 3313(b) (Supp. 1992) (setting minimum for weekly benefit claims filed for unemployment compensation at \$20 and maximum at \$205); 43 PA. CONS. STAT. ANN. § 804 (1991) (setting maximum weekly benefit at \$205).

16. To be eligible for unemployment compensation, an individual must file a claim with the state agency, and these claims are only valid for a "benefit year." See DEL. CODE ANN. tit. 19, § 3314(2)(5) (1985) (setting forth criteria to receive unemployment compensation); 43 PA. CONS.

who have lost their jobs and have had their incomes reduced obviously have less money to spend as consumers. Wrongful discharge, therefore, also adversely affects the economy at large.¹⁷

Employers, too, suffer in the long run. Wrongful discharge simply does not make good economic sense.¹⁸ Employee morale is negatively affected by the observation of unjust firings.¹⁹ Employees will wonder whether their jobs are also at risk. Consequently, productivity and employee attitudes may suffer. The result is a direct impact on bottom-line profitability.²⁰

The law has been extraordinarily slow to respond to the issue of wrongful discharge. Even though the United States has more than fifty years of experience regulating employment through state and

STAT. ANN. § 801 (1991) (listing qualifications to receive unemployment benefits, including filing "application for benefits with respect to the benefit year"); see also DEL. CODE ANN. tit. 19, § 3302(3) (1985) (defining "benefit year"); 43 PA. CONS. STAT. ANN. § 753(b) (1991) (defining "benefit year").

17. See *supra* text accompanying note 13 (quoting Professor Blackburn's conclusions on impact that discharge of employee may have on society and economy) (citing E. WIGHT BAKKE, *CITIZENS WITHOUT WORK* (1940) and ELMER H. JOHNSON, *CRIME, CORRECTION, AND SOCIETY* (4th ed. 1978)). Professor Blackburn noted that these sociological studies had addressed problems arising generally from unemployment, rather than dealing specifically with results of wrongful discharge. *Id.*

18. Studies have shown "[m]arked correlations . . . between a secure workforce and high productivity and quality output." St. Antoine, *supra* note 5, at 273 (citing FOULKES, *LARGE NONUNIONIZED EMPLOYERS IN U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT* 129, 134-36, 141-44, 155-56 (Jack Stieber et al. eds., 1981); see also RICHARD T. PASCALE & ANTHONY G. ATHOS, *THE ART OF JAPANESE MANAGEMENT: APPLICATIONS FOR AMERICAN EXECUTIVES* 86 (1981) (observing that American corporate leaders are slowly changing their view of employees as "primarily interchangeable parts and units of production," and are expanding workers' responsibilities to decrease expensive personnel problems); MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note at 23 (identifying significant economic effects of wrongful discharge, such as "creation of elaborate personnel procedures, internal grievance systems, and the retention by risk-averse employers of unproductive employees"); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 518 (1989) (suggesting that lowered employee morale and litigation costs negatively affect long-term profits); cf. O'Connor, *supra* note 10, at 1209 (suggesting that if firm breaches implicit contracts with its employees, "worker distrust will develop, resulting in lower employee morale, productivity, and loyalty," and that "once a firm acquires a dishonorable reputation, employees may quit, causing the firm to incur costs recruiting replacements").

19. S. Olive Mastry, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation: Lewis v. Equitable Life Assurance Society of the United States*, 71 MINN. L. REV. 1092, 1112 (1987) ("[T]ermination without stated reasons not only frustrates employees, it also lowers employee morale and effort in subsequent employment because of insecurity and a fear of future termination for some unknown fault or shortcoming."); Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 130 (1990) ("[T]he firing or moving of an employee from a particular job could materially decrease morale.").

20. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 602 (noting that wrongful discharge creates employee dissatisfaction, which makes it difficult to hire and retain qualified employees and may impose "significant costs" on employer who must find, employ, and train replacement for terminated employee).

federal legislation,²¹ not until the 1970s and 1980s²² did courts begin to recognize exceptions to the historical, and uniquely American,²³ employment-at-will rule. Only then did employees begin to experience success in suits against their employers for wrongful discharge.²⁴ At present, many states still provide little or no judicially recognized protection for employees.²⁵ In the legislative arena, Montana is the only state that has adopted a statute to protect employees from wrongful discharge.²⁶

21. See, e.g., Railway Labor Act, 45 U.S.C. §§ 151-188 (1988) (establishing rights of railway and air carrier employees to join labor organizations and bargain collectively, and setting forth procedures for orderly resolution of all disputes concerning rates of pay, rules, or working conditions); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988) (extending to all employees employed by employer whose business affects commerce right to form and join labor organizations and to bargain collectively, and creating National Labor Relations Board to administer Act and to prosecute violations thereof); N.Y. LAB. LAW §§ 160-169a (McKinney 1986) (defining number of hours that constitute legal day's work and requiring one day of rest per week for employees); New York Minimum Wage Act, N.Y. LAB. LAW §§ 650-665 (McKinney 1988 & Supp. 1994) (establishing minimum hourly wage rates and empowering commissioner to investigate disputes arising under Act); Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (1991) (declaring that public policy of Pennsylvania is to foster employment of all individuals "in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap, or disability" and recognizing civil right to obtain and hold employment free of such discrimination).

22. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1033 (Ariz. 1985) (adopting public-policy exception to employment-at-will doctrine); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981) (holding that employee stated cause of action for wrongful discharge when he claimed that he was fired for supplying information to police for investigation of alleged criminal actions of co-worker); *Touissant v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980) (avoiding at-will doctrine by finding implied contract terms in employers' policy statements and course of conduct); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (implying "covenant of good faith and fair dealing" in employment agreements and holding that employer cannot fire at-will employee in "bad faith or malice or based on retaliation"). See generally GOULD, *supra* note 8, at 66-80 (describing erosion of at-will doctrine).

23. Over 60 countries, including Sweden, Norway, Canada, Japan, and the European Community, as well as countries in South America, Africa, and Asia, provide statutory protection from wrongful discharge. *St. Antoine*, *supra* note 5, at 272.

24. See, e.g., *Maddaloni v. Western Mass. Bus Lines, Inc.*, 438 N.E.2d 351, 355-56 (Mass. 1982) (holding that firing employee to avoid paying employee commission demonstrated bad faith and holding employer liable for amount employee reasonably expected to be paid as commissions during employment); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1332-34 (Cal. 1980) (holding that employer who fired employee for refusing to comply with employer's request to engage in unlawful conduct violated public policy and that employer may be liable for compensatory tort damages and punitive damages); *Touissant*, 292 N.W.2d at 890 (holding that employer's "express agreement to terminate only for cause" or promise to do so implied from company's policies and procedure, could give rise to right enforceable in contract).

25. There are three major recognized exceptions to the employment-at-will doctrine: the existence of an implied contract, a breach of the implied covenant of good faith and fair dealing, and wrongful discharge in violation of public policy. See *infra* notes 84-126 and accompanying text (explaining generally recognized exceptions to at-will doctrine). Forty-seven states have now adopted at least one of the three exceptions. 9A Individual Employee Rights Man. (BNA) 505:51-52 (1994). Only eight states, however, recognize all three. Twenty-five states recognize only two of the exceptions. *Id.*; see also GOULD, *supra* note 8, at 67.

26. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1993). The Montana Code provides:

In 1987, the National Conference of Commissioners on Uniform State Laws (NCCUSL) established a Drafting Committee for the purpose of creating a Uniform Employment Termination Act to provide employees with statutory protection against wrongful discharge.²⁷ The Drafting Committee presented the first draft of the

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;

(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.

Id. § 39-2-904. A few state statutes give employees limited rights, but they fall far short of protection against unjust dismissal. Missouri, for example, requires a corporation to provide any employee who has voluntarily quit or who has been discharged after at least 90 days of employment, with a letter explaining "the nature and character of service rendered by such employee to such corporation and duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service." MO. REV. STAT. § 290.140 (1993). The rule apparently does not apply to non-corporate enterprises.

In South Carolina, the Commissioner of Labor mediates disputes in wrongful discharge cases and all other industrial disputes, strikes, or lockouts. *See* S.C. CODE ANN. § 41-17-10 to 41-17-70 (Law. Co-op. 1986). In 1978, for example, there were 3129 complaints, 2621 of which involved involuntary terminations. Ninety-two percent of all complaints were resolved. Stieber & Murray, *supra* note 5, at 335 n.98.

South Dakota restricts the employment-at-will doctrine by changing the presumption of the term of employment. Employment can be terminated at will only if the employee was not hired for a specified term. S.D. CODIFIED LAWS ANN. § 60-4-5 (1978). An employer who wishes to terminate such an employee must show that the discharge is justified by "habitual neglect of duty or continued incapacity to perform or any willful breach of duty by the employee in the course of his employment." *Id.*

Many states have enacted statutes protecting whistleblowers, i.e., employees who report to the government or their superiors some wrongdoing or questionable act of their employer. *See, e.g.*, MICH. STAT. ANN. § 17.428 (West 1989) (prohibiting employer from threatening, discharging, or otherwise discriminating against employee who is about to report violation of law by employer); OHIO REV. CODE ANN. § 4113.52 (1991) (prohibiting employers from disciplining or taking retaliatory action against employee who reports violation of state or federal statute, ordinance, or regulation by another employee or his employer). Some states also protect against retaliation when an employee files a workmen's compensation claim, or when the employee complies with a subpoena or serves on a jury. *See, e.g.*, S.C. CODE ANN. § 41-1-80 (Law Co-op. Supp. 1993) (stating that employee is entitled to lost wages and reinstatement if wrongfully discharged by employer because employee brought claim under South Carolina Workers' Compensation Law or testified in compensation case); *id.* § 41-1-70 (providing that any employer who discharges or demotes employee for complying with subpoena or testifying in court proceeding is subject to civil action). Interestingly, California has codified the at-will doctrine. CAL. LAB. CODE § 2922 (West 1989 & Supp. 1994) (providing that either party may terminate employment which is subject to no specified term merely by providing notice to other party). For a thorough discussion of state statutes, see Stieber & Murray, *supra* note 5, at 334-36.

27. The Drafting Committee, chaired by Stanley M. Fisher of Cleveland, Ohio, held its first full working session in February 1988. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note at 22.

The National Conference of Commissioners on Uniform State Laws was organized in the 1890s in response to a movement by the American Bar Association for reform and unification of American law. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 355 (1973). There are currently 99 uniform acts and 24 model acts on the NCCUSL's list, along with 12 other recommended acts. One hundred forty-one other statutes have been withdrawn because they were obsolete or have been superseded. WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE:

Act to the NCCUSL in August 1989.²⁸ Two years later, in August 1991, the NCCUSL scheduled the presentation of the third and final draft of the proposed Uniform Employment Termination Act.²⁹ At that meeting, much to the surprise of many observers, the commissioners approved the statute.³⁰ Because the commissioners were sharply divided on the substance of the statute and could not reach consensus on adopting it as a uniform act,³¹ however, they approved

A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 130 (1991). For a general discussion of the operation of the NCCUSL, see James W. Day, *The National Conference of Commissioners on Uniform State Laws*, 8 FLA. L. REV. 276 (1955).

28. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note at 22. The Drafting Committee met three times in 1988 and 1989. Each meeting produced a new or completely revised draft of the Model Act. *Id.*

29. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note at 22. Between the first reading in August 1989 and the second reading in July 1990, there were two additional working sessions of the Committee that produced two additional drafts. Additional working sessions in 1990 and 1991 yielded further new drafts. The third and final reading took place at the 100th Annual Meeting of the NCCUSL in August 1991. The Model Act was formally approved on August 8, 1991. *Id.* at 21.

30. *Model Employment Termination Act's Adoption Seen as Surprise, Creating Controversy*, Daily Lab. Rep. (BNA) No. 156, at A-2 (Aug. 13, 1991). The adoption of the Model Act was characterized as a "fairly amazing turnaround." *Id.* At a 1990 meeting of the American Bar Association, attorneys had "put chances of passage at 'zero to nil.'" *Id.*

31. The NCCUSL generally promulgates uniform acts in areas of law in which it believes that uniformity among the states is desirable. Day, *supra* note 27, at 282. Model acts are adopted in areas in which there is a "demand for legislation in a substantial number of states," but where there is no "pressing need" for uniformity. *Id.* Uniform acts are recommended for adoption in all jurisdictions, while model acts are "prepared merely for the convenience of such legislative bodies as may be interested in them." *Id.* The result is that uniform acts should, ideally, be adopted by states with little or no modification. Model acts, on the other hand, serve only as a blueprint for the states, because uniformity is not deemed important. In addition, model acts are not considered by state legislatures as quickly as uniform acts. See Comment, *supra* note 5, at 172 n.20 (observing that, unlike uniform acts, model acts are often subject to greater revision by states that adopt them).

The NCCUSL has recommended the following tests to determine whether a subject is appropriate for uniform legislation:

1. The subject matter should be appropriate for state legislation, in view of the powers granted to Congress by the Constitution. If the subject matter falls within the jurisdiction of Congress, "it is not ordinarily an appropriate one for uniform legislation by the several states."
2. A subject is not appropriate for uniform legislation if it is "primarily of local or state concern and without substantial interstate implications."
3. If the subject matter is appropriate for state legislation, the Conference must inquire whether uniform legislation by the several states would promote the economic, social, and political interests of the people of each of the states that enact the legislation.

ARMSTRONG, *supra* note 27, at 67. Legislation should be adopted as a model act if:

1. the legislation "provides, on a matter of interstate interest, a comprehensive well-worked-out model," provisions of which can be lifted in whole or in part by a state; or
2. the legislation provides "uniformity of underlying principle on a point of importance." Such legislation is discouraged, however, in the absence of interstate implications; or
3. the legislation "provides a model for handling an emergent need to keep emergent legislation sane and harmonious."

the statute only as a model act.³²

This Article suggests that the Model Employment Termination Act (Act or Model Act) is really a toothless tiger that, if enacted, will deprive employees in many jurisdictions of rights won through judicial decision, thereby providing them with less protection than they currently enjoy. Additionally, the Act provides little incentive for employers to mend their ways and prevent wrongful discharges. The Article concludes that the Model Act is an ineffective means of addressing the problem of wrongful discharge.

As an alternative to the Model Act, this Article proposes a comprehensive federal statute patterned after title VII of the Civil Rights Act of 1964,³³ as amended by the Civil Rights Act of 1991,³⁴ which would allow recovery of both compensatory and punitive damages by employees who were wrongfully discharged.³⁵ The proposed statute, in combination with title VII, the Age Discrimination in Employment Act,³⁶ the Americans With Disabilities Act,³⁷ and similar statutes,³⁸ would finally provide all employees with comprehensive federal protection against the wrongful termination of their employment. Employment and wages are the "stuff of life" for employees;³⁹ the rights at issue are far too important to be left to the politics and regional agendas of fifty different legislatures. Just as Congress has

ARMSTRONG, *supra* note 27, at 67-68.

32. Randall Sanborn, *At-Will Doctrine Under Fire*, NAT'L L.J. Oct. 14, 1991, at 40. There are 300 commissioners in the NCCUSL, with six appointed from each state. The statute was defeated as a uniform act by a four-state margin. It was, however, approved as a model act by a vote of 31-19. *Id.*

33. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

34. 42 U.S.C. § 1981a (Supp. IV 1992).

35. See *infra* notes 438-64 and accompanying text (explaining rationale for amendments to title VII contained in Civil Rights Act of 1991, and asserting that same rationale also supports compensatory and punitive damages in wrongful discharge cases).

36. 29 U.S.C. §§ 621-634 (1988); see *infra* note 76 (describing Age Discrimination in Employment Act).

37. 42 U.S.C. §§ 12101-121213 (Supp. IV 1992) (prohibiting discrimination in employment against disabled persons, and requiring "reasonable accommodation" of employee's disability).

38. See, e.g., Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988) (prohibiting employers from requiring employees to take lie detector tests, and prohibiting discharge of employees on basis of results of lie detector test or because employee refused to take lie detector test); Consumer Credit Protection Act, 15 U.S.C. § 1601 (1988) (prohibiting termination of employment based on indebtedness or garnishment of wages); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988) (prohibiting discharge of employees who assert their rights under Act or who refuse to work under inordinately hazardous conditions); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988) (protecting employee pension and benefit plans and prohibiting discharge of employee for purpose of preventing her from attaining vested pension rights).

39. NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273, 280 (5th Cir. 1962).

protected the right of employees to bargain collectively⁴⁰ and to be free from invidious discrimination,⁴¹ our national legislature must now protect all employees against the threat of wrongful discharge.

Part I of this Article briefly discusses the historical development of the employment-at-will doctrine and the erosion of the doctrine that has occurred in recent years. Part II discusses the rationale for ending the employment-at-will doctrine and adopting a federal statute. Part III provides an overview of the Model Employment Termination Act. Part IV critiques the Model Act. Finally, Part V lays out the parameters of a federal statute that would protect employees from various types of discriminatory discharge.

I. THE DEVELOPMENT AND EROSION OF THE EMPLOYMENT-AT-WILL DOCTRINE

Ironically, English workers in 1349 enjoyed statutory protection unavailable to American workers today.⁴² The Statute of Labourers⁴³ prohibited both the employer from discharging the employee and the employee from quitting his employment prior to the end of the employment term.⁴⁴ The statute was later modified for some classes of workers,⁴⁵ and ultimately it was repealed.⁴⁶ Nevertheless, the common law of England continued to protect

40. National Labor Relations Act, 29 U.S.C. § 151-169 (1988); see *infra* notes 237-41 and accompanying text (discussing National Labor Relations Act).

41. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988) (prohibiting employers from failing to hire, firing, or otherwise discriminating against any individual because of "race, color, religion, sex, or national origin"); *id.* § 2000e-2(c) (making it unlawful for any labor organization to discriminate against any individual); *id.* § 2000e-2(d) (providing that on-the-job training programs may not discriminate on basis of race, color, religion, sex, or nationality); *id.* § 2000e-2(h) (permitting employers to apply different standards of compensation or conditions of employment pursuant to "bona fide" merit or seniority system, but not because of intention to discriminate); *id.* § 2000e-3 (prohibiting employers from discriminating against any employee who has participated in investigation, proceeding, or hearing under this Act). See generally 42 U.S.C. §§ 2000e-2000e-17 (establishing title VII enforcement provisions and requirements of equal employment opportunities).

42. For a detailed discussion of the evolution of the employment-at-will doctrine, see Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082 (1984); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 *AM. J. LEGAL HIST.* 118 (1976).

43. Statute of Labourers, 23 *Edw. III*, ch. 1 (1349); 5 *Eliz.*, ch. 4 (1562), cited in David L. Durkin, Comment, *Employment at-Will in the Unionized Setting*, 34 *CATH. U. L. REV.* 979, 982 n.16 (1985); see Kurt H. Decker, *At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation*, 87 *DICK. L. REV.* 477, 479 n.12 (1983) (explaining that Statute of Labourers was legislative response to extreme labor shortage caused by Black Death in 14th century).

44. Durkin, *supra* note 43, at 982.

45. See generally Durkin, *supra* note 43, at 982 n.16 (citing Conspiracy and Protection of Property Act (Imp.) 38 & 39 *Vict.*, ch. 86, sched. 17 (1875) as easing Statute of Labourers for some classes of workers).

46. Decker, *supra* note 43, at 982.

workers, viewing the employment relationship as a contractual one.⁴⁷ According to Blackstone, hiring was presumed to be for one year.⁴⁸ This presumption was rebuttable by a showing of contrary intent of the parties.⁴⁹ The strong presumption, however, was that the employment contract was for a definite term.⁵⁰

The English rule presuming employment for a one-year term was generally applied by American courts throughout the nineteenth century.⁵¹ In 1877, however, Horace G. Wood published his treatise *Master and Servant*,⁵² in which he declared that the "inflexible" American rule was that a general hiring was "*prima facie* a hiring at will."⁵³ Wood's assertion, which found no support in case law,⁵⁴ was

47. See Summers, *supra* note 42, at 1082 (explaining that English common law bound both employer and employee to presumption of employment for one year, and that "this rule of presumed duration" was only rebuttable by facts showing contrary intent of parties).

48. 1 WILLIAM BLACKSTONE, COMMENTARIES *413 ("The contract between [servants] and their master arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year . . ."). A later English edition of the treatise elaborated on the law governing discharge of an employee:

A servant may be dismissed without notice for a reasonable cause, such as moral misconduct, wilful disobedience to a lawful order; or neglect of duty; and in such cases he is not entitled to any wages from the day he is discharged, except those then due. But if wrongfully discharged, he is entitled to wages up to the end of the current period of his service. If, on the other hand, a servant who is to be paid quarterly, or yearly, or at any other fixed time, improperly leaves his service, or is guilty of such misconduct as to justify his discharge during the currency of any such period, he is not entitled to wages for any part thereof, even to the day he quits.

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 435 (R. Kerr ed. 1857); see also Blackburn, *supra* note 9, at 468 n.1 (commenting on English common-law rules that presumed that hiring of general servant was for one year, and stating that concept of at-will employment did not develop from English common law, but rather began in United States).

49. Custom in the trade and frequency of periodic payments were typical facts parties used to rebut the presumption. See Summers, *supra* note 42, at 1083 ("The effect was to reduce the contract of employment from one for a year to one for a lesser period—a quarter or a month."); see also JOSEPH CHITTY, A TREATISE ON THE LAW OF CONTRACTS 627 (10th American ed. 1873) (stating that although law presumes general hiring is for one year, this is not "an inflexible rule of law," and if there is "a usage in the particular trade, as to the time or manner of putting an end to a general hiring, such usage will be taken, in the absence of evidence to the contrary, to form part of the contract between the parties").

50. See Summers, *supra* note 42, at 1083 (although presumption was that employment contract was for one year, employment-at-will was possible if parties expressly agreed to it); see also Chitty, *supra* note 49, at 672 (maintaining that general rule in England was that general hiring was presumed to be for one year, and that rule was same even if servant were hired under written contract, provided such contract gave no evidence contrary to this presumption).

51. Summers, *supra* note 42, at 1083. But see Blackburn, *supra* note 9, at 468 n.1 (stating that in mid-19th century, according to some treatise writers, general presumption in American common law was that employment was for indefinite duration and was terminable at will).

52. HORACE G. WOOD, MASTER AND SERVANT § 134, at 271 (1877), cited in Summers, *supra* note 42, at 1082 n.6.

53. *Id.* Wood's often-quoted statement of the law provided:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time

not immediately adopted by American courts.⁵⁵ By the beginning of the twentieth century, however, this erroneous statement of the common law had become the black-letter law of employment in the United States.⁵⁶ This inflexible rule is the common law under which Americans have labored for most of this century.

Many theories have been suggested as to why the employment-at-will doctrine was adopted so quickly. The most plausible theory appears to be that the at-will doctrine reflected the laissez-faire economic

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.

Id.

54. Wood cited no cases to the contrary, though they did exist. See, e.g., *Davis v. Gorton*, 16 N.Y. 255, 257 (1857) (indefinite hiring of clerks, servants, and those in similar employments is presumed to be for one year, or from year to year); *Bleeker v. Johnson*, 51 How. Pr. 380, 381 (N.Y.C.P. 1876) (finding English rule of yearly hiring to be law in United States, and stating that no U.S. decisions contradicted presumption of hiring for one year). Wood also incorrectly cited two cases to support his rule. See *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56, 59 (1870) (observing that contract of hiring by year can only be terminated within year upon notice to other party if condition could be inferred from trade usage or prior negotiations); *Franklin Mining Co. v. Harris*, 24 Mich. 115, 116 (1871) (holding that indefinite duration by itself did not give employer complete discretion to discharge employee). For a general discussion of these cases, see Summers, *supra* note 42, at 1083, and J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 n.54 (1974).

55. American Courts were initially inconsistent in their adoption of Wood's rule. See Summers, *supra* note 42, at 1084 n.10 (citing cases where American courts followed English rule of presumed hiring for one year); see also *id.* at 1084 n.11 (citing American case law adopting Wood's rule of at-will employment). For example, the New York Court of Appeals initially followed the English rule, *Adams v. Fitzpatrick*, 26 N.E. 143 (N.Y. 1891), but then four years later adopted Wood's position, dismissing its own language in the earlier case as dictum, *Martin v. New York Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895). Williston, in the 1893 edition of *Parsons on Contracts*, accepted the English rule without comment. See 2 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 33-34 (S. Williston ed., 8th ed. 1893) (stating that employer can end hiring only after one year, unless there existed some express or implied agreement from contract, custom, or trade usage to contrary). Subsequent editors, including Williston, stated that the English rule required a month's notice, but added, "We are not aware that a similar rule exists in this country." PARSONS, *supra*, at 32-34. In a later publication, even Wood observed no difference between the English and American rules. See Horace G. Wood, *Preface to the Second American Edition of C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS* iii (8th ed. 1888) ("There is but little difference in the law relating to contracts as administered in the courts of England and this country."); see also Summers, *supra* note 42, 1084 n.9 (noting that Wood's 1888 appendix to *Addison on Contracts* failed to mention difference between English and American rules, and that table of cases did not list any of cases originally used to support Wood's proposition). For Wood's appendix to *Addison on Contracts*, see 3 ADDISON, *supra*, app. On the other hand, in his second edition of *Master and Servant*, published in 1886, Wood made no change to his text. Summers, *supra* note 42, at 1084 n.9 (citing H.G. WOOD, MASTER AND SERVANT § 136, at 283 (2d ed. 1886)).

56. See Feinman, *supra* note 42, at 126; see also Durkin, *supra* note 43, at 984 (stating that majority of American courts adopted Wood's rule by turn of 20th century). But see Andrew P. Morriss, *Exploding Myths: An Empirical & Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. (forthcoming 1994) (suggesting that Wood did not misstate the law, because presumption of at-will employment had been adopted by seven states before Wood published his treatise in 1877, and it appeared in first draft of proposed New York Civil Code drafted by David Dudley Field in 1862).

attitude of the time.⁵⁷ The nation was young and in the throes of the Industrial Revolution; freedom to contract and freedom to engage in entrepreneurial activity were watchwords for the country.⁵⁸ This was a time of expanding business, when the John D. Rockefellers and Andrew Carnegies helped the nation's economy grow and take its place in the community of nations, but often did so at the expense of the health, welfare, and well-being of employees. It was in this industrial and commercial environment, for example, that children labored long hours under dangerous conditions for minimal compensation.⁵⁹ Attempts by employees to unionize and improve their lot often met with stiff, even violent, resistance from employers, as well as criminal prosecution.⁶⁰ The idea of employees possessing rights was anathema to employers of the period. This was, of course, "The Jungle" memorialized so vividly by Upton Sinclair.⁶¹

A. *Statutory Exceptions to the At-Will Doctrine*

During the course of the twentieth century, federal and state legislation modified or abrogated the employment-at-will doctrine. The first federal legislation, the Clayton Act,⁶² which was adopted in

57. See Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 500-01 (1992) (suggesting that American courts adopted Wood's rule of employment at will to reflect expectations and beliefs of existing dominant business class and to promote industrial expansion and growth of capitalist employers by advancing employers' right to control business and labor force); Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 733 (noting that employment-at-will doctrine arose in America as result of laissez-faire philosophy and 19th century formalism). Finkin also suggests that courts assumed a relationship of "impermanence and instability" between employer and employee in light of high employee turnover rate in mid-20th century. Finkin, *supra*, at 737-39; see also *Ludwick v. This Minute Inc.*, 337 S.E.2d 213, 214 (S.C. 1985) ("[T]he doctrine, if not expressly created to subserve the laissez-faire climate of the late 19th century, has had the effect of doing so."). But see Morriss, *supra* note 56 (arguing that adoption of employment-at-will rule was not reflection of laissez-faire attitude of period, but rather was "a response of the courts as institutions to the problems of nineteenth century employment law cases," which gave courts a "simple, clear rule").

58. See Cavico, *supra* note 57, at 500 (discussing rise of "capitalist employer" as United States evolved into industrial nation during late 19th century).

59. See generally THE ADDRESSES AT THE ANNUAL MEETING OF THE NATIONAL CHILD LABOR COMMITTEE (Feb. 14-16, 1905), reprinted in 25 THE ANNALS OF THE AMERICAN SOCIETY OF POLITICAL AND SOCIAL SCIENCE 417-56 (Emory R. Johnson ed., 1905) [hereinafter CHILD LABOR] (addressing evils of child labor in United States in early 20th century, such as physical disease, negative effects on moral and mental development of children, and low wage rates).

60. ROBERT A. GORMAN, BASIC TEXT IN LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976) (explaining that concerted employee activities for better wages and working conditions were treated as common-law conspiracies in early 19th century and were viewed as illegal because of means used or ends sought by these groups).

61. UPTON SINCLAIR, THE JUNGLE (1906) (depicting life and labor experiences of Slavic immigrant working in horrid conditions of Chicago meat-packing industry in early 20th century).

62. Pub. L. No. 212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-44 (1988)).

1914, was designed to protect unions from employers' use of federal antitrust law to prevent the unions from organizing.⁶³ A few years later, Congress enacted the Railway Labor Act⁶⁴ to protect the right of railway workers to organize and bargain collectively.⁶⁵ Congress next adopted the National Labor Relations Act,⁶⁶ which began the development of the modern law of collective bargaining and labor-management relations.⁶⁷ Later, the Fair Labor Standards Act⁶⁸ secured minimum wages⁶⁹ and guaranteed overtime pay⁷⁰ and other employee benefits.⁷¹ In the meantime, the states began to develop parallel labor relations legislation⁷² and related social welfare

63. See 29 U.S.C. § 52 (1988) (prohibiting injunctions from being granted in dispute between employers and employees regarding conditions of employment); 15 U.S.C. § 17 (1988) (stating that provisions of Clayton Act shall not prohibit formation of labor organizations). After the Supreme Court interpreted the Clayton Act narrowly in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 469-72 (1921), Congress responded with the Norris-La Guardia Act in 1932, which severely restricted the right of federal courts to issue injunctions in any labor dispute. Pub. L. No. 198, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1988)). The Norris-La Guardia Act prohibits injunctions from being issued in any labor dispute unless the court finds: (1) that "unlawful acts have been threatened and will be committed unless restrained or have been committed" and will continue; (2) that "substantial and irreparable injury" will come to the property of the party seeking the injunction; (3) that if the injunction is denied, greater harm will come to the complainant than that which "will be inflicted upon defendants by the granting of relief"; (4) that the party bringing the action has no other remedy available at law; and (5) that those who are obligated to "protect the complainant's property are unable or unwilling to furnish adequate protection." 29 U.S.C. § 107 (1988).

64. Ch. 347, 44 Stat. 576 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1988)).

65. See 45 U.S.C. § 152 (granting employees right to collective bargaining "through representatives of their own choosing"); see also *id.* § 181 (extending protection of Railway Labor Act to workers on every common air carrier).

66. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)) (NLRA). Congress made significant amendments to the NLRA in 1947 in the Labor Management Relations Act, Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-166 (1988)), and in 1959 in the Labor Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 541 (1959) (codified as amended at 29 U.S.C. §§ 158, 160 (1988)). See *infra* notes 237-41 and accompanying text (discussing provisions of NLRA).

67. See 29 U.S.C. § 157 (granting employees right to collectively bargain); see also *id.* § 158 (defining prohibited activities deemed to be unfair labor practices under Act).

68. 29 U.S.C. §§ 201-219 (1988).

69. See *id.* § 206 (establishing minimum wage rates).

70. See *id.* § 207(a) (providing that any employer who requires employee to work more than 40 hours per week must pay such employee overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed").

71. See, e.g., *id.* § 206(d) (prohibiting employers from paying female employees lower wages than those paid to male workers performing same work); *id.* § 207 (prescribing maximum weekly working hours for employees); *id.* § 207(o) (allowing employees of public agencies to receive compensatory time in lieu of overtime compensation); *id.* § 212 (prohibiting child labor); *id.* § 217 (allowing injunctions to be granted against employers who violate provisions of Fair Labor Standards Act).

72. See, e.g., Labor Peace Act, COLO. REV. STAT. §§ 8-3-101, 123 (1986 & Supp. 1993); MASS. ANN. LAWS ch. 150B, §§ 1-8 (Law. Co-op. 1989); New York State Labor Relations Act, N.Y. LABOR LAW §§ 700-717 (McKinney 1988 & Supp. 1994); see also Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 492 (1976) (listing 15 states that have passed statutes similar to National Labor Relations Act).

legislation such as child labor laws.⁷³

In 1963, Congress adopted the first federal statute to protect workers from discrimination.⁷⁴ One year later, the legislators enacted the landmark Civil Rights Act of 1964, which prohibited employers from discriminating against employees based on race, sex, religion, color, or national origin.⁷⁵ Subsequent federal legislation protected employees from discrimination based upon age⁷⁶ or handicap.⁷⁷ State legislatures have also adopted statutes that parallel much of the federal legislation.⁷⁸ Indeed, many of the federal statutes provide for enforcement by states with similar statutes.⁷⁹

73. See Barbara Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1060 (1992) (citing ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE OLIVER WENDELL HOLMES DEVISE, IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 447 (Paul A. Freund & Stanley N. Katz eds., 1984)) (observing that states responded to changing societal attitudes that condemned child labor by enacting "various child labor laws").

74. Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1988)) (requiring that covered employers pay men and women equally for work requiring equal skill, effort, and responsibility).

75. 42 U.S.C. §§ 2000e to 2000e-17 (1988); see *supra* note 41 (discussing provisions of Civil Rights Act of 1964 and various unlawful employer practices).

76. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988) (prohibiting discrimination in employment against persons who are 40 years old or older). The Age Discrimination in Employment Act provides in relevant part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(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 age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter. *Id.* § 623(a); see also *id.* § 633(a) (extending freedom from age discrimination to all those who are employed by Federal Government and 40 years of age or older).

77. See, e.g., Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992) (prohibiting discrimination in employment because of physical disability or mental impairment); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796(i) (1988) (requiring most federal contractors to engage in affirmative action to hire handicapped persons, and prohibiting discrimination against handicapped persons in employment by any program or activity receiving federal funding); *id.* § 701 (stating that purpose of Act is to guarantee equal opportunity for handicapped persons and to create and implement "comprehensive and coordinated programs of vocational rehabilitation and independent living" for handicapped individuals to facilitate and maximize integration into workforce); see also 29 U.S.C. 791(b)-(c) (requiring affirmative action program plans for hiring and advancement of handicapped individuals in federal agencies and encouraging same in state agencies).

78. See, e.g., Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951-963 (1991) (establishing right to freedom from discrimination in employment, housing, and public accommodations); New York Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 1993) (creating employees' right to equal opportunity to obtain employment without discrimination because of age, race, creed, sex, national origin, color, or marital status).

79. See, e.g., 42 U.S.C. § 2000e-5(c) (1988) (requiring that persons alleging unlawful employment practices that violate title VII, but which also violate state or local law, first must commence proceedings under state or local law before filing charge with Equal Employment

In addition to the various legislation addressing collective bargaining, discrimination, wages, and myriad other matters, both state and federal governments have developed statutory and regulatory protection for government employees under civil service statutes.⁸⁰ These statutes generally protect an employee from wrongful discharge and guarantee him or her due process in any dismissal proceeding.⁸¹

B. *Common-Law Exceptions to the Employment-at-Will Doctrine*

Despite the progress made on the legislative front, courts steadfastly adhered to the employment-at-will doctrine throughout most of this century.⁸² During the last decade or more, however, state courts have begun to modify the common law and recognize various causes of action for employees who have been wrongfully terminated.⁸³

1. *Tort theories*

The oldest and most widely recognized judicially created exception to the employment-at-will rule is the tort of wrongful discharge in violation of public policy,⁸⁴ which was first recognized in a California case in which an employee was discharged for refusing to perjure himself at the direction of his employer.⁸⁵ Underlying this exception

Opportunity Commission under title VII); 29 U.S.C. § 218(a) (1988) (providing that no provision of Fair Labor Standards Act shall justify noncompliance with state law or municipal ordinance establishing standard higher than federal standard); *id.* § 633(b) (prohibiting commencement of any federal age discrimination action based on an alleged unlawful employment practice that occurred in state that prohibits age discrimination in employment, unless claimant has first commenced proceedings under state law).

80. See HENRY H. PERRITT, JR., 2 EMPLOYEE DISMISSAL LAW AND PRACTICE § 6.3, at 6 (3d ed. 1992).

81. See *id.* Public employees also enjoy some constitutional protection of their jobs. See *infra* notes 181-86 and accompanying text (discussing cases that have recognized public employee's constitutionally protected property and due process rights in employment).

82. See Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts*, 68 CHI-KENT L. REV. 117, 117 (1992) (discussing ways in which courts have begun to attack employment-at-will doctrine in recent years); Todd M. Smith, Comment, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 CASE W. RES. L. REV. 1209, 1218 (1991) (noting that not until 1980s has employment-at-will doctrine been appreciably modified by courts).

83. Today, only three states have no clearly defined exceptions to the employment-at-will doctrine: Florida, Louisiana, and Rhode Island. See Individual Employee Rights Man. (BNA) 505:51-52 (1994).

84. See Smith, *supra* note 82, at 1218.

85. *Petermann v. International Bhd. of Teamsters Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959). In *Petermann*, the plaintiff was employed by the defendant union as a business agent and was subpoenaed to testify before a California Legislative Committee. *Id.* at 26. The plaintiff alleged that he was discharged because he refused to perjure himself before the committee. *Id.* The court observed that where the term of employment is not fixed, the relationship between employer and employee is terminable at the will of either party for any reason whatsoever. The court concluded, however, that the right to discharge an employee may be limited by consideration of public policy. *Id.* Furthermore, in order to more fully effectuate the state's

is the premise that important public policies would be frustrated and their violation condoned if employers could discharge employees with impunity for reasons that violate those policies.⁸⁶ The development of the tort has followed a pattern: the courts identify employee conduct that they conclude is worthy of protection for "reasons of social utility," and then protect employees from dismissal for the exercise of such conduct.⁸⁷ A plaintiff may often recover both compensatory and punitive damages when his or her discharge violates public policy.⁸⁸

Courts have looked to statutes, constitutions, administrative regulations, and professional codes of ethics to identify the relevant public policy.⁸⁹ In defining such public policies, courts have typically required that the policy be "clear[ly] mandate[d],"⁹⁰ "well-accepted,"⁹¹ or grounded in some statutory or constitutional provision.⁹² Courts do not, however, always "strictly limit employee protection to their exercise of statutory rights or compliance with statutory duties."⁹³ Many courts have expanded the doctrine beyond instances

declared policy against perjury, civil law will deny the employer an unlimited right to discharge an employee whose employment is for an unspecified duration when the reason for the dismissal is the employee's refusal to commit perjury. *Id.* at 27-28.

Forty-three states now recognize the public policy exception. 9A Individual Employee Rights Man. (BNA) 505:51-52 (1994). Only Delaware, Florida, Georgia, Louisiana, Maine, Mississippi, and New York have either rejected the principle or not yet considered the issue. *Id.*

86. See St. Antoine, *supra* note 5, at 274 (noting that failure of courts to recognize cause of action in situations where employee is discharged for refusing to engage in illegal activity or for performing public duty would effectively condone grave violation of public policy); Smith, *supra* note 82, at 1218 (observing that courts that have recognized public policy exception to employment-at-will doctrine have rested their decisions on rationale that legislative goals and general social policies would be defeated if employees could be discharged for certain "bad reasons").

87. Malin, *supra* note 82, at 127.

88. Smith, *supra* note 82, at 1219 (stating that courts have awarded punitive damages when they find it "imperative to deter future employer conduct that might frustrate important social policies").

89. Smith, *supra* note 82, at 1218.

90. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 509 (N.J. 1980) (recognizing that action in tort for wrongful discharge might exist if there was violation of "clear mandate of public policy") (citing *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974)).

91. *Clifford v. Cactus Drilling Corp.*, 353 N.W.2d 469, 474 (Mich. 1984) (Williams, C.J., dissenting) (requiring that each public policy exception be grounded on "clearly articulated, well-accepted public policy").

92. See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (holding that public policy must be "evidenced by a constitutional or statutory provision"); St. Antoine, *supra* note 5, at 275 (noting that many courts have hesitated to articulate public policy in this area, and even those that have been more willing to embrace public policy have required that it be evidenced by constitutional or statutory provision); Smith, *supra* note 82, at 1218 (explaining that courts have generally recognized only those public policies that derive from statutory or constitutionally warranted right).

93. Malin, *supra* note 82, at 127 (describing how many jurisdictions require statutory basis for public policy but do not rigorously confine employee protections to employees who exert

where an employee is discharged for simply refusing to engage in unlawful activity. Today, an employee discharged for performing a public duty, such as serving on a jury,⁹⁴ reporting employer wrongdoing (commonly known as "whistleblowing"),⁹⁵ or exercising some legally protected right or privilege, such as filing a workers' compensation claim, may be able to assert a claim.⁹⁶

Unfortunately, courts have been wildly inconsistent in determining what employee conduct should be protected. For example, in Illinois, an employee who protests violations of state and federal safety statutes by his or her employer is protected, while one who protests an employer's violations of a municipal safety ordinance is not.⁹⁷ Similarly, Illinois law protects an employee who is fired for filing a workers' compensation claim, but not an employee who is fired for filing a health insurance claim under the employer's group plan.⁹⁸

their statutory rights or follow statutory duties).

94. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (holding that employer who discharged employee because she served on jury was liable to employee for any damage she suffered as result of discharge because of community's interest in jury system and having citizens serve on jury).

95. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (Conn. 1980) (holding that quality control director who was hired at will and who alleged that he had been dismissed in retaliation for insistence that employer comply with requirements of Food, Drug, and Cosmetic Act sufficiently alleged cause of action in tort for wrongful discharge of employment in light of expression of public policy that statute represents); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 879-80 (Ill. 1981) (holding that employee who alleged employer discharged him for informing local law enforcement officials that co-worker might be violating criminal code and agreeing to cooperate with authorities, stated cause of action for retaliatory discharge because employer's actions clearly contravened public policy). Today many states have enacted "whistleblower" statutes to protect employees from wrongful discharge for reporting violations of public policy. See *supra* note 26 (citing Ohio and Michigan whistleblower statutes).

96. See, e.g., *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 358 (Ill. 1978) (holding that employee stated cause of action in tort against employer who allegedly wrongfully discharged employee for filing injury claims under Workmen's Compensation Act); *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (holding that retaliatory discharge for filing workmen's compensation claim is "a wrongful, unconscionable act that should be actionable in a court of law").

97. Compare *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 377 (Ill. 1985) (holding that employee's allegation that he was discharged in retaliation for his refusal to handle radioactive material in operation that violated Nuclear Regulatory Commission regulations stated cause of action because unsafe conditions under which he was required to work contravened clearly mandated public policy of protecting lives and property of citizens from hazards of radioactive material), *cert. denied*, 475 U.S. 1122 (1986) with *Gould v. Campbell's Ambulance Serv. Inc.*, 488 N.E.2d 993, 994-95 (Ill. 1986) (holding that emergency medical technicians who were discharged after allegedly voicing objections that another technician was not certified as required by city ordinance, did not have cause of action for retaliatory discharge because statutory provision and ordinance failed to show existence of clearly mandated public policy). See also *Malin, supra* note 82, at 128 ("[A]d hoc evaluation of the social utility of employee conduct has produced results that to a reasonable employer or employee must appear to be incomprehensible anomalies.").

98. Compare *Kelsay*, 384 N.E.2d at 358 (holding that employee had cause of action against employer for alleged wrongful discharge for filing claim for injury under Workmen's Compensation Act) with *Price v. Carmack Datsun, Inc.*, 485 N.E.2d 359, 361 (Ill. 1985) (holding

In Pennsylvania, the law protects an employee who investigates illegal self-dealing by the president of his employer, but if the employee seeks to have an unsafe product removed from the marketplace, the employee is left unprotected from discharge.⁹⁹

Unquestionably, the tort of wrongful discharge provides a valuable remedy in some of the most outrageous employment termination cases. Only a handful of employees, however, can avail themselves of this remedy. Generally, only upper- and middle-management employees are in a position to sue under a public-policy theory of wrongful termination. Lower level workers are rarely able to succeed under this theory.¹⁰⁰ Consequently, plaintiff's lawyers have sought to expand the theories of recovery in tort. Other tort theories used successfully in employment termination litigation include intentional interference with contractual relations,¹⁰¹ intentional infliction of emotional distress,¹⁰² fraud and misrepresentation,¹⁰³ defamation,¹⁰⁴ negligence,¹⁰⁵ and invasion of privacy.¹⁰⁶

that alleged discharge of employee for filing health insurance claim under employer's group policy could not support cause of action for retaliatory discharge because it did not violate clearly mandated public policy). See generally Malin, *supra* note 82, at 128 (discussing *Kelsay and Price*).

99. Compare *Klages v. Sperry Corp.*, 118 L.R.R.M. (BNA) 2463, 2468-69 (E.D. Pa. 1984) (holding that corporate general counsel who allegedly was terminated in retaliation for having investigated self-dealing by president of company in order to establish potential violations of federal securities laws stated claim for wrongful discharge based on public policy exception to employment-at-will doctrine) with *Geary v. United States Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974) (employee who was allegedly discharged in retaliation for having alerted his superiors to unsafe nature of products had no right of action against employer for wrongful discharge where no clear mandate of public policy was violated). See generally Malin *supra* note 82, at 128 (discussing *Klages* and *Geary*).

100. William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 413-14 (1987) (stating that public policy theory has little relevance for average employee because most average employees are not in position to engage in whistleblowing or other types of conduct protected by public policy theory). Professor Lawrence Blades persuasively argued some years ago for adoption of the tort of "abusive discharge," which would reach beyond the limits of wrongful discharge in violation of public policy. Blades, *supra* note 10, at 1435 (concluding that courts could create tort remedy for abusively discharged employees that would eliminate potential for oppression inherent in employment relationship); see also Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1464 (1975) (suggesting that cause of action for wrongful discharge be grounded in tort). Although a few courts seem to have implicitly embraced the idea, Professor Blade's proposal has never been given an expansive reception.

101. HENRY H. PERRITT, JR., 1 EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.41, at 537-43 (3d ed. 1992).

102. *Id.* § 5.42, at 543-48.

103. *Id.* § 5.43, at 548-53.

104. *Id.* § 5.44, at 553-59.

105. *Id.* § 5.48, at 571-75.

106. *Id.* § 5.45, at 559-62.

2. *Contract theories*

Under contract theory, opportunities to recover damages, particularly for rank-and-file employees, are limited.¹⁰⁷ If the employee bases the claim solely in contract, she can only recover damages based on her compensation; the employee cannot recover damages for the pain, anguish, and frustration suffered as a result of the job loss.¹⁰⁸ Moreover, contract-based damage awards may be insufficient to compensate the employee's lawyer.¹⁰⁹

Nevertheless, the contract theory is the one asserted most often by discharged employees.¹¹⁰ At least thirty-four states now recognize claims rooted in theories of contract.¹¹¹ Such claims are usually based on an employer handbook, employment policy, or some other document that creates the terms of a binding contract.¹¹² For example, in one of the earliest cases to recognize this theory, the Michigan Supreme Court held that a personnel manual stating that it was company policy to discharge only for just cause created a contractual term binding the employer.¹¹³ In other cases, courts have found contractual protection for employees because of promises made at the time of employment.¹¹⁴ Even a history of good performance reviews and promotions, coupled with promises of continued employment, has led courts to grant contract protection for employees.¹¹⁵

107. See Gould, *supra* note 100, at 413 (stating that because employee's potential recovery will be based in part on employee's income, damage recoveries will be limited).

108. Gould, *supra* note 100, at 413.

109. See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 25 (1988) ("[C]ontract damages will not support a lawsuit.").

110. See generally Smith, *supra* note 82, at 1215-18 (describing implied contract theory that limits scope of employer's power to terminate employment relationship).

111. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming recognize a cause of action based in contract. 9A Individual Employee Rights Man. (BNA) 505:51-52 (1994).

112. See Smith, *supra* note 82, at 1215 ("[C]ourts have recognized that employer handbooks, policies, or other representations to the employees may form an implied contract limiting the employer's right to terminate his employees.").

113. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980).

114. See, e.g., American Bank Stationery v. Farmer, 799 P.2d 1100, 1102 (Nev. 1990) (holding that employer's statement that if employee did his job adequately he would keep his job because "that's the way [we] operate," constituted offer that included explicit promise by company to keep employee so long as he performed adequately); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 495 (N.Y. 1982) (finding oral representation that employer discharged employees only for just cause was specific promise of employment security and was sufficient evidence of contract).

115. See Foley v. Interactive Data Corp., 765 P.2d 373, 387-88 (Cal. 1988) (explaining that steady series of salary increases, promotions, bonuses, awards, and superior performance

Some courts have also allowed recovery under a theory of promissory estoppel.¹¹⁶ Although all the necessary indicia of a contract may not be present, the courts have found in such cases that the employer made promises upon which the employee relied to his detriment. For example, if an employee were induced to move from one state to another to take a job with a new employer, and the employer suddenly discharged the employee without just cause, the employee could assert a claim in several states based on a promissory estoppel theory.¹¹⁷

3. *Implied covenant of good faith and fair dealing*

Another contractual remedy available to wrongfully discharged employees is the implied covenant of good faith and fair dealing, though only a handful of states currently recognize this claim.¹¹⁸ The doctrine originated in insurance contracts, but is now commonly implied in all contracts.¹¹⁹ From an employee's point of view, the good faith and fair dealing claim is attractive because the employee may receive compensatory and punitive damages for wrongful discharge.¹²⁰ Moreover, in contrast to the claim of wrongful dis-

evaluations over six years and nine months of employment gave rise to implied-in-fact contract limiting right of employer to discharge employee arbitrarily).

116. See, e.g., *Rodie v. Max Factor & Co.*, 256 Cal. Rptr. 1, 3-5 (Dist. Ct. App. 1989) (holding that discharged employee, who gave up secure employment in one locale to transfer to new venture only after receiving assurances of job security from employer, had enough evidence to support oral modification of prior written contract that allowed employee to be fired for any cause); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 154-55 (Ohio 1985) (holding that plaintiff, who was suspended from his job until criminal charges against him were "favorably resolved," but who was discharged when trial ended in hung jury and all charges subsequently were dismissed, could assert claim of promissory estoppel). See generally 1 LEX K. LARSON, UNJUST DISMISSAL § 3.04[1] (1992) (discussing promissory estoppel doctrine and how courts have often departed from traditional contours of at-will rule in enforcing implied-in-fact contract obligations arising from employer representations).

117. See, e.g., *Unker v. Joseph Markovits, Inc.*, 643 F. Supp. 1043, 1047 (S.D.N.Y. 1986) (holding that former employee's claim that he had moved family to more expensive home in reliance on former employer's oral promise not to terminate him except for just cause was sufficient consideration to make promise enforceable); *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784, 787 (Dist. Ct. App. 1990) (ruling that employer was promissorially estopped from asserting at-will employment relationship as basis for terminating new employee before he began actively working and after he had accepted employment and moved across country).

118. Thirteen states now recognize the implied covenant of good faith and fair dealing: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Massachusetts, Montana, Nevada, and New Hampshire. Ind. Emp. Rights Manual (BNA) 505:51-52 (1992).

119. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); see also *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977) (holding that parties to contracts must act in good faith toward and deal fairly with one another). But see *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) (refusing to impose obligation of good faith and fair dealing in all contracts).

120. See *Smith*, *supra* note 82, at 1219 (noting that implied covenant exception increases employee's chances of receiving punitive damages if employee is wrongfully discharged).

charge in violation of public policy, which is available to only a small number of employees, the covenant of good faith and fair dealing, when recognized, is an implied term of employment for all employees.¹²¹

The Supreme Court of New Hampshire was the first court to recognize the covenant exception to the traditional employment-at-will doctrine in *Monge v. Beebe Rubber Co.*¹²² In *Monge*, an employee was discharged for refusing to date her foreman.¹²³ The court concluded that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [sic] the best interest of the economic system or the public good and constitutes a breach of the employment contract."¹²⁴ The logic of the decision is compelling: there is no inherent difference between an implied or express employment contract and any other contract.¹²⁵ Despite the appeal of inferring the existence of a covenant of good faith and fair dealing in every employment contract, however, only a handful of courts have embraced the doctrine.¹²⁶

Although the covenant of good faith and fair dealing is based in contract law, some courts have allowed recovery of tort damages. See, e.g., *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (Dist. Ct. App. 1980) (finding that breach of implied covenant provides for punitive damages), cited in *Smith, supra*, at 1221; *Gates v. Life of Mont. Ins. Co.*, 668 P.2d 213, 216 (Mont. 1983) (stating that punitive damages would be available for breach of implied covenant), cited in *Smith, supra*, at 1224. In a departure from the traditional approach of allowing tort damages for breach of covenant, however, the California Supreme Court held in a four-to-three decision that a breach of the covenant of good faith and fair dealing gives rise to recovery in contract only. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401 (Cal. 1988), cited in *Smith, supra*, at 1222.

121. *Smith, supra* note 82, at 1219.

122. 316 A.2d 549, 551 (N.H. 1974).

123. *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974).

124. *Id.* The court further noted: "The employer has long ruled the workplace with an iron hand The law governing the relations between employer and employee has . . . evolved to reflect changing legal, social and economic conditions." *Id.* at 551 (citations omitted). The court in *Monge* concluded that its new rule "affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably." *Id.* at 552.

125. See *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977). Commenting on the decision in *Monge*, the court in *Fortune* observed:

[T]he holding in the *Monge* case merely extends to employment contracts the rule 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 contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."

Id. (citations omitted).

126. See *supra* note 118 and accompanying text (noting that only 13 states now recognize implied covenant of good faith and fair dealing).

II. THE NEED FOR STATUTORY PROTECTION FOR WRONGFULLY DISCHARGED EMPLOYEES

A. *Changing Expectations*

The employment-at-will doctrine is a lumbering dinosaur that can no longer be rationally defended.¹²⁷ The time has come to bury it. Justice Kilgarlin of the Texas Supreme Court has eloquently described the anachronistic nature of the doctrine, observing, "Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law."¹²⁸ Perhaps at the dawn of the Industrial Revolution, when employers were small, relationships were personal, and employment was reasonably plentiful,¹²⁹ the rule had some utility. But in today's complex society of national and global corporations, where the average employee has little or no bargaining power and the corporation has lost its conscience in the belly of a large, bureaucratic structure, there is no reason to continue to deny employees statutory protection against abusive discharge.¹³⁰ The nature of employment has changed radically since the nineteenth century, from a time when long-term relationships between employers and employees were rare, to a time in which long-term relationships are expected and encouraged.¹³¹ During the nineteenth and early twentieth centuries, high employee turnover was the norm, and employers made no effort to encourage employees to stay.¹³² Americans were "alive to any new

127. *Sabine Pilot Serv. Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring).

128. *Id.* Justice Kilgarlin also observed that because the doctrine was judicially promulgated, the court had "the burden and the duty of amending it to reflect social and economic changes." *Id.*

129. *Blades*, *supra* note 10, at 1416.

130. *Blades*, *supra* note 10, at 1416. Professor Blades states:

Such a philosophy of the employer's dominion over his employee may have fit the rustic simplicity of the days when the farmer or small entrepreneur, who may or may not have employed others, was the epitome of American individualism. But the philosophy is incompatible with these days of large, impersonal, corporate employers; it does not comport with the need to preserve individual freedom in today's job-oriented industrial society.

Id.; see also Cavico, *supra* note 57, at 536 (advocating "broad, all-embracing, minimal, protective coverage for all non-probationary employees of employers over a certain size").

131. See Finkin, *supra* note 57, at 737-43 (discussing evolution from employment relationship existing in early 20th century, which was characterized by extreme employee turnover because of lack of incentives for long-term employment, to relationship that exists today that does encourage and reward long-term employee service).

132. See Finkin, *supra* note 57, at 737-38 (describing massive employee turnover in early 20th century). For example, in the early 1800s, the mean aggregate turnover rate for employees in

contingency which promise[d] to better their condition."¹³³ In light of the peripatetic nature of the nineteenth and early twentieth century worker, it is no surprise that courts viewed employment as a short-term, "at-will" arrangement.¹³⁴

Feeble efforts by employers to reduce turnover began in the early part of the twentieth century.¹³⁵ It was not until after World War II, however, that the modern long-term employment relationship began to evolve.¹³⁶ For example, in 1929, only two percent of industrial firms had pension plans, while in 1957, seventy-three percent of large firms had them.¹³⁷ In 1929, only thirty-four percent of large firms had personnel departments, but in 1963, eighty-one percent had such departments.¹³⁸ Factors influencing this trend toward encouraging employee longevity included "[t]he labor legislation instituted by the

some Massachusetts textile mills was 163%. *Id.* at 737. The railroad companies of the mid-19th century retained less than half their employees for more than six months. *Id.* In the early years of the 20th century, turnover continued to be mind-boggling by today's standards. *Id.* at 738. The majority of industrial workers changed jobs at least every three years. *Id.* At the Armour meat packing plant in Chicago, for example, the average daily payroll numbered 8000 in 1914. *Id.* In order to keep the workforce at that level, however, Armour had to hire 8000 workers during the course of the year, continuously replacing the transient workers. *Id.* at 738. Daniel Rodgers provides a detailed description of the problem:

Large surveys of textile mills, automobile plants, steel mills, clothing shops, and machine works showed turnover rates at least as high as . . . 100 percent In the woolen industry between 1907 and 1910, turnover varied between 113 and 163 percent It reached 232 percent among New York City cloak, suit, and skirt shops in 1912-13, 252 percent in a sample of Detroit factories in 1916, and the bewildering rate of 370 percent at Ford in 1913. The most extensive study, undertaken by the United States Bureau of Labor Statistics and using data from 1913-14, found a "normal" turnover rate in the factories of 115 percent, and, given the depressed economic conditions in those years, that figure, if it erred at all, underestimated the normal amount of job changing.

DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, at 163 (1978); see Finkin, *supra* note 57, at 738.

133. Finkin, *supra* note 57, at 737 (citing *THE AMERICAN SYSTEM OF MANUFACTURERS* 250 (Nathan Rosenberg ed. 1969) (quoting George Wallis in his report to House of Commons regarding visit to New York Industrial Exhibition in 1854)).

134. See Finkin, *supra* note 57, at 738-39 (noting that because of migratory tendencies of employees in early 20th century, courts assumed relationship of "impermanence and instability").

135. See Finkin, *supra* note 57, at 740-43 (discussing various methods used by employers to reduce turnover, including employing personnel departments and other types of employee welfare plans).

136. See Finkin, *supra* note 57, at 740-43 (noting how modern long-term relationship following World War II was shaped by "New Deal, the centralization and professionalization of personnel work, the impact of unionization, and the goods of personnel professionals"). The attitude of the pre-World War II era is demonstrated by the story of a foreman who reported to his superior that no one had been fired in the plant that day, at which point the superior ordered the foreman to "fire a couple of 'em' It'll put the fear of God in their hearts." *Id.* at 740 (quoting SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, at 21 (1985)) (citations omitted).

137. Finkin, *supra* note 57, at 742 (citing JACOBY, *supra* note 136, at 233).

138. Finkin, *supra* note 57, at 742 (citing JACOBY, *supra* note 136, at 233).

New Deal, the centralization and professionalization of personnel work, the impact of unionization, and the goals of personnel professionals."¹³⁹ It was not until well into the twentieth century, therefore, that the modern concept of long-term employment became the norm.¹⁴⁰

In the modern age, employers and employees enter into the employment relationship with significantly different expectations than did their predecessors.¹⁴¹ Unlike their predecessors, today's employees generally expect their employment to be long-term.¹⁴² Although employees may begin their careers in short-term jobs, most eventually settle into a long-term career with the same employer.¹⁴³ This

139. Finkin, *supra* note 57, at 741. According to Professor Finkin, the workplace has now become "bureaucratized." The clearest evidence of this bureaucratization is the explosion of employment manuals. As late as 1935, only 13% of industrial firms had such rulebooks. *Id.* at 743. By 1940, the number had risen to 30%. *Id.* A 1979 study, in contrast, showed 75% of the responding companies had employee handbooks. *Id.*

140. See Finkin, *supra* note 57, at 740-43 (discussing how employment relationship evolved to where employers began to encourage and reward long-term employee service).

141. See Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 674 (1988) (noting that presumption of employment-at-will no longer accurately reflects expectations of most employees and that employers do not presume that termination decisions should routinely be made without reference to job qualifications and performance or, in case of job elimination, valid economic factors).

142. See generally Malin, *supra* note 82, at 136-37 (noting that most employees assume that employment will continue as long as performance is satisfactory).

143. Malin, *supra* note 82, at 136. "The typical worker spends eight years on a job; more than twenty-five percent of the workforce stays with the same job for twenty years or more and the probability of turnover decreases as job tenure increases." O'Connor, *supra* note 10, at 1204. Job changes "occur at a young age; if a worker has been at a job for a number of years, the chances are that employment will continue for a long time." *Id.* at 1204 n.89 (citing Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 AM. ECON. REV. 716, 720 (1982)). In fact, 40% of workers who work at a job for at least five years will remain there for more than 20 years. *Id.* (citing Addison & Castro, *The Importance of Lifetime Jobs: Differences Between Union and Nonunion Workers*, 40 INDUS. & LAB. REL. REV. 393, 402 (1987)).

Professor Marlene O'Connor explains this long-term attachment between employee and employer in terms of "the implied contract theory." *Id.* at 1204. Implicit contracts are not legal contracts, but rather "social arrangements typically enforced through the operation of market forces." *Id.* at 1204-05. According to the implicit contract theory, "wages are not set in the external labor market. Instead large firms internalize their employment structures." *Id.* at 1205. The result is that workers are underpaid at the beginning of their tenure with their employer and overpaid at the end. *Id.* As employees continue to work for their employer, they grow increasingly dependent upon the employer and become "economically wedded" to it. *Id.*

Another reason employees remain in long-term employment is that they are "risk-averse." *Id.* If their employer experiences a temporary fluctuation in the demand for an employee's labor, the employee faces serious economic consequences from unemployment. As employees become older, their "employment opportunities tend to decrease." *Id.* Because they only have one job, employees cannot diversify their risk, but must make "risky investments of their time" in their employer. In contrast, large employers are able to provide "implicit insurance contracts" to employees to protect them from wage fluctuations. *Id.* Under this arrangement, younger workers are paid at wages lower than the marginal product they produce. By paying the lower wages in the early years of an employee's career, the employer is able to indemnify the employee by "continuing to pay a steady wage" when the employee is older and less productive. *Id.* at 1205-06. Theoretically, these "insurance premiums" protect employees when external market

contingency which promise[d] to better their condition."¹³³ In light of the peripatetic nature of the nineteenth and early twentieth century worker, it is no surprise that courts viewed employment as a short-term, "at-will" arrangement.¹³⁴

Feeble efforts by employers to reduce turnover began in the early part of the twentieth century.¹³⁵ It was not until after World War II, however, that the modern long-term employment relationship began to evolve.¹³⁶ For example, in 1929, only two percent of industrial firms had pension plans, while in 1957, seventy-three percent of large firms had them.¹³⁷ In 1929, only thirty-four percent of large firms had personnel departments, but in 1963, eighty-one percent had such departments.¹³⁸ Factors influencing this trend toward encouraging employee longevity included "[t]he labor legislation instituted by the

some Massachusetts textile mills was 163%. *Id.* at 737. The railroad companies of the mid-19th century retained less than half their employees for more than six months. *Id.* In the early years of the 20th century, turnover continued to be mind-boggling by today's standards. *Id.* at 738. The majority of industrial workers changed jobs at least every three years. *Id.* At the Armour meat packing plant in Chicago, for example, the average daily payroll numbered 8000 in 1914. *Id.* In order to keep the workforce at that level, however, Armour had to hire 8000 workers during the course of the year, continuously replacing the transient workers. *Id.* at 738. Daniel Rodgers provides a detailed description of the problem:

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DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920*, at 163 (1978); see Finkin, *supra* note 57, at 738.

133. Finkin, *supra* note 57, at 737 (citing *THE AMERICAN SYSTEM OF MANUFACTURERS* 250 (Nathan Rosenberg ed. 1969) (quoting George Wallis in his report to House of Commons regarding visit to New York Industrial Exhibition in 1854)).

134. See Finkin, *supra* note 57, at 738-39 (noting that because of migratory tendencies of employees in early 20th century, courts assumed relationship of "impermanence and instability").

135. See Finkin, *supra* note 57, at 740-43 (discussing various methods used by employers to reduce turnover, including employing personnel departments and other types of employee welfare plans).

136. See Finkin, *supra* note 57, at 740-43 (noting how modern long-term relationship following World War II was shaped by "New Deal, the centralization and professionalization of personnel work, the impact of unionization, and the goods of personnel professionals"). The attitude of the pre-World War II era is demonstrated by the story of a foreman who reported to his superior that no one had been fired in the plant that day, at which point the superior ordered the foreman to "fire a couple of 'em' . . . It'll put the fear of God in their hearts." *Id.* at 740 (quoting SANFORD M. JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, at 21 (1985)) (citations omitted).

137. Finkin, *supra* note 57, at 742 (citing JACOBY, *supra* note 136, at 233).

138. Finkin, *supra* note 57, at 742 (citing JACOBY, *supra* note 136, at 233).

able future.¹⁴⁷

The logical corollary of the expectation of long-term employment is the expectation that the employee will be protected against wrongful discharge.¹⁴⁸ Indeed, there is some evidence to suggest that employees intuitively infer that the law does, or at least should, protect them from discharge without just cause.¹⁴⁹ Just cause is a standard provision in nearly all collective bargaining agreements covering unionized employees.¹⁵⁰ Although only a small minority of American employees are represented by unions,¹⁵¹ many non-union employees have worked in unionized settings in the past, while others have worked for employers where at least part of the workforce was unionized and protected by a collective bargaining agreement that prohibited discipline or discharge without just cause.¹⁵² In addition, managers and supervisors who oversee the work of at least some unionized employees, or who have done so in the past, are familiar with the just-cause standard.¹⁵³

147. Leonard, *supra* note 141, at 674. Professor Leonard opines:

Today employers and employees normally presume that employment which is not expressly undertaken for a limited time will be long-term, provided some initial probationary stage is successfully completed, the employee's work performance is satisfactory, the employee has done nothing to damage the employer's business or reputation, and the employer still requires performance of the job at issue.

Id.; see also Finkin, *supra* note 57, at 736-43 (describing how nature of employer-employee relationship has evolved to where both parties expect employee to remain with employer over long term).

148. See, e.g., Blackburn, *supra* note 9, at 482 ("Implying a right to reasonable, good cause, discharges would serve to reflect the probable intent of the parties to the employment relationship."); Malin, *supra* note 82, at 137 ("Limiting dismissal to just cause more accurately reflects the unstated expectations of the parties than does permitting dismissal at will.").

149. Malin, *supra* note 82, at 136 ("The available empirical evidence suggests that the intuitive inferences [of a just cause limitation on dismissals] drawn from extensive workplace regulation are correct.") (citing BNA Personnel Policies Forum, PPF Survey No. 139 Employee Discipline and Discharge (January 1985) (stating that 85% of unionized employers and 79% of nonunionized employers have written expectations for employees; 94% of unionized and 93% of nonunionized employers require progressive discipline; 98% of unionized and 99% of nonunionized employers require consultation with at least one other official before supervisor may suspend or discharge employee); BNA Personnel Policies Forum, PPF Survey No. 125, Policies for Unorganized Employees (Apr. 1979) (stating that 82% of companies have written rules of conduct for nonunion employees and 80% have complaint procedures whereby employees may appeal disciplinary action)).

150. GOULD, *supra* note 8, at 63 (finding that approximately 95% of collective bargaining agreements provides "just cause" protection); Malin, *supra* note 82, at 135; see *infra* notes 258-86 and accompanying text (describing just-cause standard in Model Employment Termination Act as substantially same as standard generally applied in labor arbitrations).

151. See *infra* note 194 and accompanying text (noting that union membership has dropped from high of 35.5% in 1945 to record low of 15.8% in 1992).

152. See Malin, *supra* note 82, at 135 (noting that effects of just-cause protection in collective bargaining agreements extend well beyond rapidly decreasing percentage of employees covered by such agreements).

153. Malin, *supra* note 82, at 135.

In addition to being influenced by knowledge of the protection provided by collective bargaining agreements, the expectations of both employees and employers have been affected by extensive governmental regulation of the workplace.¹⁵⁴ "The myriad of statutes and potential common law claims which have precluded bad-cause discharges have stripped the claim that the parties intend the employment relationship to be terminable at-will of any connection to reality."¹⁵⁵ Many nonunion employers purport to dismiss employees only for just cause and practice progressive discipline similar to that applied under a collective bargaining agreement.¹⁵⁶ The view that protection against wrongful discharge is an expectation of the parties is also consistent with what labor economists observe about "how employers and employees actually interact."¹⁵⁷

In view of the significantly altered expectations of employers and employees, the anachronistic employment-at-will doctrine should be abandoned to bring the law into accord with these reasonable expectations.¹⁵⁸ The conduct required by the legal system should be "derived from societal expectations,"¹⁵⁹ rather than simply from an agreement between employer and employee.¹⁶⁰

It is true that not all law is based on, or consistent with, societal expectations. We do not systematically measure those expectations and then structure the law to reflect them.¹⁶¹ Nevertheless, societal beliefs, which are the source of obligations reflected in tort law, shape the content of the law. Indeed, it is axiomatic that "the gauge of 'reasonable' conduct, which is the touchstone of tort liability, is societal values."¹⁶²

154. Malin, *supra* note 82, at 136.

155. Malin, *supra* note 82, at 136; see also Alfred Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 520 (1978) (arguing that employment discrimination legislation alone has "imposed a de facto just cause limitation of dismissals"); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 19-21 (1979) (analyzing Professor Blumrosen's argument concerning development of just cause limitation on dismissals).

156. Malin, *supra* note 82, at 136.

157. Malin, *supra* note 82, at 136.

158. See Leonard, *supra* note 141, at 674 (commenting that at-will doctrine does not adequately reflect modern expectations of employees and employers).

159. See Elletta S. Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 AM. BUS. L.J. 455, 463 (1990) (stating that societal beliefs are relevant to law's content).

160. The need to provide protection for employees through the law rather than simply leaving them to rely upon whatever agreement they can reach with their employer is underscored by the gross inequity in bargaining power between employers and employees. See Gould, *supra* note 9, at 892-95.

161. Callahan, *supra* note 159, at 463 (stating that societal expectations sometimes need to be overridden by legal or policy considerations).

162. Callahan, *supra* note 159, at 463 (citations omitted).

Even if one rejects the premise that long-term employment and protection against wrongful discharge are empirically the actual expectations of society, one can still accept the claim that those expectations are, aspirationally, reasonable and just. The claim is less that these expectations are actually held by every employee in some demonstrable, "subjective" sense, but more that the aspirations may be attributed to every employee, and to the society as a whole, in a normative "objective" sense. Alternatively, the postmodern account might suggest that, particularly in the highly regulated sphere of employer-employee relationships, the subjective expectations of the employee are largely indistinguishable from the objective expectations constructed by law. In either view, the argument that protection against wrongful discharge is reflective of the reasonable, if not probable, intent of the parties "appeals to considerations of corrective justice."¹⁶³ If employers induce employees to work with seniority-based wage scales and fringe benefits, as well as intimations of job security, an employee terminated without just cause has been paid less than required by the original bargain.¹⁶⁴ The law should provide a remedy for the resulting "transactional inequality" "as a matter of corrective justice."¹⁶⁵

This modern change in employee expectations gives rise to two bases for rejecting the employment-at-will doctrine rooted entirely in the common law: one based on theories of contract, and the other based on theories of property.

1. *Contract theory*

Professor Clyde Summers has argued persuasively that the application of modern contract law should provide protection from unjust discharge.¹⁶⁶ Historically, employees were deemed to have no rights under an implied contract of employment because there was no

163. Malin, *supra* note 82, at 137. Professor Malin, explaining the principles of corrective justice and their application to employee termination, has observed:

Corrective justice . . . is based on what Aristotle termed an arithmetic equality, in which all individuals are treated as absolutely equal regardless of merit. Corrective justice provides for the rectification of wrongs committed by one individual that cause harm to another. Each individual who is harmed by a moral wrong committed by another has a right to rectification, regardless of distributive merit. . . . The key purpose of corrective justice is to redress damage caused by a moral wrong in a particular transaction, and all individuals have an absolutely equal claim to such redress . . .

Id. at 119.

164. Malin, *supra* note 82, at 137.

165. Malin, *supra* note 82, at 137.

166. Summers, *supra* note 42, at 1097-109.

"mutuality of obligation."¹⁶⁷ That doctrine, however, has generally been repudiated.¹⁶⁸ Today, in determining the terms of an oral or implied contract, the courts look to the intent and expectations of the parties.¹⁶⁹ Professor Summers concludes that the employment-at-will doctrine has no basis in contract law, despite its contractual overtones, because the courts "have not asked the basic contract question—what did the parties intend?"¹⁷⁰ If the court considered such intent, employment would cease to be at will.¹⁷¹

No employer can reasonably argue that an employee enters into a job with the expectation that she can be discharged at the caprice of the employer, regardless of the quality of her performance. It also seems unlikely that an employer would argue that it hires new, permanent employees with the express intention and expectation that it may discharge them for any reason at all.¹⁷² If asked at the time of employment, the reasonable employer would surely profess a desire to retain the employee so long as she performed well, and as long as the company had no need to reduce its workforce for economic reasons.¹⁷³ Likewise, the employee would almost certainly assert an intent to stay for the foreseeable future. No reasonable employee would accept a position if the prospective employer told her that she could be fired at any time, without regard to her job performance, for

167. Summers, *supra* note 42, at 1097-98 (detailing progression of mutuality doctrine through recent court decisions).

168. Summers, *supra* note 42, at 1098 n.70. The early courts reasoned that because the employee always had the right to voluntarily terminate her employment at any time without any reason, the employer must have the right to discharge the employee at will. *Id.* The ill-reasoned doctrine has been repudiated because contracts require only the exchange of consideration rather than mutual obligations. *Id.* at 1098; see also St. Antoine, *supra* note 5, at 270 ("There is probably no more discredited concept in modern contract law than the unqualified requirement of 'mutuality of obligation.'").

169. See, e.g., *First Alabama Bank v. Prudential Life Ins. Co.*, 619 So.2d 1313, 1318 (Ala. 1993) (finding that implied contract requires mutual intent of parties); *Radiology Assocs., P.A. v. St. Clair Timber Co.*, 563 So.2d 1020, 1021 (Ala. 1991) (stating intent provides basis for finding existence of implied contract); *Butler v. Walker Power, Inc.*, 629 A.2d 91, 91 (N.H. 1993) (looking to intent of parties to determine terms of implied contract of employment).

170. Summers, *supra* note 42, at 1099.

171. Summers, *supra* note 42, at 1100 ("The parties' understanding is not to be determined by looking to the employer's presumed or secret intent to reserve the right to discharge without notice or reason, but by looking to the understanding of the employee generated by the employer's conduct both before and after the hiring.").

172. See Summers, *supra* note 42, at 1103-04. But see *Murphy v. American Home Prod. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983) (finding that at-will doctrine permitted employer to discharge employee with impunity for refusing to participate in illegal manipulation of secret pension reserves).

173. See Leonard, *supra* note 141, at 674 (explaining that original expectation of at-will employer is to make termination decisions with reference to qualifications, performance, or valid economic factors).

a good reason or a bad reason or even for no reason at all.¹⁷⁴ Employers generally do not hire with the intention of firing any more than employees accept job offers with the intention of quitting.

2. *Property theory*

In addition to the contractual rights described by Professor Summers,¹⁷⁵ this evolution in the nature of the intentions and expectations of the parties when entering an employment relationship has given birth to a nascent property right or quasi-property right in employment.¹⁷⁶ In the pre-Industrial Revolution era, most workers aspired to be self-employed.¹⁷⁷ Time spent as an apprentice or employee of another was a step along the way to independence. The dominant employer-employee relationship today is a creature of the modern era.¹⁷⁸ In the nineteenth century, a worker who lost a job might have been able to survive by working a plot of land. In today's urban environment, however, the loss of a job can be catastrophic. No possession recognized by the law as "property" is more important to the average citizen than her job.¹⁷⁹

No one would argue that under Anglo-American law, a person's television, automobile, or home is not property. It seems anomalous, therefore, to conclude that an employee has no property interest in the job that provides the sole source of income to secure those

174. The reality, of course, is that employees do accept jobs with employers, even when they are aware that the employer can discharge them at will. Unfortunately, the realities of the marketplace, contrary to the assertions of the labor economists, is that many employees must accept job offers for employment that is clearly at will. See *infra* notes 197-210 and accompanying text (discussing findings of law and economics scholars with respect to at-will employment). Few employees are blessed with numerous job offers or have such bargaining power that they may exercise the choice not to accept an at-will job.

175. Summers, *supra* note 42, at 1097-109.

176. See *infra* note 191 (identifying articles arguing for existence of property right in one's job).

177. See John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. L.J. 337, 339-40 (1991) ("Prior to the Industrial Revolution, work was performed largely by entrepreneurial craftsmen"; forces that caused independent contractors to become employees were based in Industrial Revolution and development of mass manufacturing).

178. The problem of industrial relations and modern conflicts between employees and employers, for example, began to develop only after the Civil War. FRIEDMAN, *supra* note 27, at 70. For further discussion of the change in employer and employee relations in the late 19th century, see *id.* at 484-94.

179. Summers, *supra* note 72, at 532. Professor Summers argues that employment should be protected as a property right because "for most employees, their job is the most valuable thing that they possess; it is not a figure of speech but a statement of economic and social reality to say that employees have property rights in their jobs." *Id.* Professor Summers further asserts that such valuable interests "have a compelling claim to legal protection" and should be accorded statutory legal protection "just as unions have provided legal protection by contract for many employees." *Id.*

tangible items. Indeed, for many workers, a job may be their only significant "property."¹⁸⁰

It is now well established that public employees have a property right in their employment and the benefits thereof,¹⁸¹ at least where they have some reasonable expectation of continued employment.¹⁸² The Supreme Court has read the definition of property quite broadly, observing:

"[P]roperty interests" . . . are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interests in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit¹⁸³

According to the Court, the origin of the protected property right lies not in the Constitution, but in "rules or understandings that secure certain benefits and . . . support claims of entitlement to those benefits."¹⁸⁴ In the public employment context, the courts generally look to state law to find the existence of such a property right.¹⁸⁵ Property rights in employment can, however, also be created by ordinance or implied contract.¹⁸⁶

If analyzed in accordance with modern contract law, every

180. Reich, *supra* note 2, at 738. Professor Reich observes:

[T]oday more and more of our wealth takes the forms of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure. For the jobless, their status as governmentally assisted or insured persons may be the main source of subsistence.

Id.

181. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

182. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Court in *Roth* set out the guidelines for determining whether an employee has a protected property interest in his job: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

An employee cannot be deprived of such a constitutionally protected property right without procedural due process. *Id.* In addition, arbitrary or capricious dismissals, which are supported by no rational or reasonable state interest, may violate the public employee's substantive due process rights. See *Hixon v. Durbin*, 545 F. Supp. 231, 238 (E.D. Pa. 1982) (requiring showing that decision was not rationally related to legitimate interest in order to make successful substantive due process challenge to termination).

183. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citations omitted).

184. *Roth*, 408 U.S. at 577. The Court opined that such protected property interests are created and defined "by existing rules or understanding that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

185. *Id.*

186. *Bishop v. Wood*, 426 U.S. 341, 344 (1976).

employer-employee relationship includes an implied contract of employment.¹⁸⁷ The intent of the parties at the time they enter the contract is that following a short probationary period, the employment will be long-term or "permanent," so long as the employee performs satisfactorily.¹⁸⁸ This implied contract creates the property interest described by the Supreme Court in *Cleveland Board of Education v. Loudermill*.¹⁸⁹ The incentives given by many employers to induce employees to remain in their employment, such as wages and salaries based on seniority, and pensions, profit-sharing plans, and vacations tied to longevity, provide the employee additional entitlements and strengthen his property claim.¹⁹⁰

Just as the law would protect an employee if an employer attempted to take the employee's wallet or home, the law should provide protection from an employer's arbitrary or malicious discharge of the employee. The parties anticipate at the outset that termination will occur only for some legitimate reason. That premise gives the employee the expectation necessary to create a property right.¹⁹¹

The concept of treating a job as property is also a fundamental principle underlying the jurisprudence of labor arbitration.¹⁹²

187. See *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 729 (1980) (holding that employee has "certain implied contract rights to job security, necessary to ensure social stability in our society").

188. Summers, *supra* note 42, at 1105 ("The employer normally intends that if the employee proves satisfactory, she will be retained as long as needed; the employee normally assumes that if she is satisfactory, she will continue to have a job as long as she is needed."); see *supra* notes 141-65 and accompanying text (discussing current expectations of employers and employees).

189. 470 U.S. 532 (1985); cf. *Shapiro & Tune*, *supra* note 54, at 350-56 (discussing prior development of implied contract property interest in *Board of Regents v. Roth* and *Perry v. Sindermann*).

190. Leonard, *supra* note 141, at 633. Professor Arthur Leonard has suggested that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988), which governs benefit plans, has given employees "a property interest in continued employment by strengthening legally enforceable interests which [relate] to benefit entitlements." Leonard, *supra*.

191. Several authors have argued for the recognition of a property right in employment. See, e.g., Gould, *supra* note 9, at 892 (offering statutory scheme under which property right to employment would be protected adequately); Donald H.J. Hermann & Yvonne S. Sor, *Property Rights in One's Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763 (1982) (considering issue of whether salaried employee has plausible property right in her job); Philip J. Levin, Comment, *Towards a Property Right in Employment*, 22 BUFF. L. REV. 1081, 1108 (1973) (concluding that property law should protect right to employment); Note, *Unemployment as a Taking Without Just Compensation*, 43 S. CAL. L. REV. 488, 514-15 (1970) (maintaining that "job property right" would fulfill important goals of American society).

192. See Summers, *supra* note 72, at 506 (stating that process of arbitration assumes that employee has protected property right in her job). Nearly all privately negotiated collective bargaining agreements contain a provision for a grievance and arbitration procedure that culminates in binding arbitration. Such arbitration is the preferred way of resolving labor disputes in the United States. See *Boys Mts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 242-43 (1970) (emphasizing importance of arbitration to federal labor dispute resolution

Arbitration law recognizes that "an employee's job may be his most valuable asset," one that increases with the length of his service.¹⁹³ Although only a minority of American workers are represented by labor unions and protected by collective bargaining agreements,¹⁹⁴ many more have worked with union protection in the past, or are familiar with the provisions of a collective bargaining agreement from the experiences of friends and relatives.¹⁹⁵ There can be little doubt that, unlike employees of the past century, today's employee views her employment with a "sense of entitlement," and counts it as part of her acquired property.¹⁹⁶

Law-and-economics scholars have rejected the premise that an employee has a legally recognized interest in employment, arguing forcefully that the employment-at-will doctrine should be retained because it serves the interests of the marketplace.¹⁹⁷ Professor Richard Epstein, for example, hypothesizes that, because employees are free to terminate their employment voluntarily and go elsewhere if an employer acts arbitrarily and capriciously, the employer likewise has the freedom to fire at will.¹⁹⁸ He assumes that an employer who mistreats employees will develop a negative reputation within the community and will be unable to hire good employees. This

policy); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[T]he present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.") (citations omitted). After nearly 60 years of such arbitrations, a substantial body of arbitral law has been developed.

As Professor J. Noble Braden has written:

There was a time when a worker's job was a thing of the hour; he could be hired or fired at will, and his only right was to be paid for the hour he worked. Today, the job has become a thing of value . . . the worker has come to have what might be called a *property right* in his job. His wages and benefits generally accrue with seniority, which increases the value of his job as time goes on Like any other property holder in our free, democratic society, he cannot be deprived of his rights except by due process.

J. Noble Braden, *From Conflict to Cooperation*, SIXTH ANNUAL LABOR RELATIONS CONFERENCE 43 (Inst. of Indus. Rel., W. Va. Univ., 1956).

193. Summers, *supra* note 72, at 506.

194. *Proportion for Union Members Declines to Low of 15.8 Percent*, Daily Lab. Rep. (BNA) No. 25, Feb. 9, 1993, at B-3. In 1992, only 18.6 million workers were represented by unions, out of a total labor force of 103.7 million. *Id.*

195. See *supra* note 152 and accompanying text (discussing how protection afforded by collective bargaining agreements extends to nonunion employees).

196. Finkin, *supra* note 57, at 742 (citations omitted). Professor Finkin notes that our contemporary consumer credit economy reflects the assumption of a stable, continuing employment. *Id.*

197. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (maintaining that at-will contract is supported by principles of freedom of contract and rules of construction).

198. See *id.*

hypothesis, however, is the stuff of fantasy.¹⁹⁹ It completely ignores industrial reality.²⁰⁰

First, employees do not have the luxury of quitting when they feel the employer has been unfair because the probability of obtaining a comparable job is low.²⁰¹ The cold chill of that reality has been driven home by the moribund economy of recent years. Many highly qualified managers and professionals, including lawyers, as well as countless blue-collar and less skilled workers, have been unsuccessfully seeking employment.²⁰² Traditionally stalwart industrial giants such as Proctor and Gamble and IBM have recently laid off workers for the first time in their history.²⁰³ Moreover, older, more senior employees will be unable to obtain comparable employment. The economic reality is that employers are inclined to hire younger, less expensive employees rather than older, higher paid persons.²⁰⁴ For senior

199. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988). St. Antoine writes:

A wondrous Oz-like air of unreality pervades much of the . . . thesis. [The] analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgement, on the one hand, or who suffer the psychological as well as the economic devastation of losing a job, on the other.

Id.

200. See Malin, *supra* note 82, at 139-145 (stating that "prevalence of job security devices in nonunionized workplaces," among other things, undermines assertion that at-will employment doctrine efficiently allocates power between employers and workers); St. Antoine, *supra* note 199, at 67-70 (stating that in industrial setting, employees seldom quit voluntarily). Law-and-economics scholars also point to Europe, where employees enjoy statutory protection against wrongful discharge, arguing that Europe's higher rate of unemployment is directly attributable to such job-protection legislation. Gould, *supra* note 100, at 420. Employers, the conservative scholars argue, are "reluctant to hire and anxious to fire" employees "whom security has made lethargic." *Id.* at 420-21. The most obvious rebuttal of this premise is the successful German economy. Germany has pioneered social legislation for workers, but nevertheless has developed a highly successful economy. *Id.* at 421. In addition, strong evidence suggests that the cause of higher unemployment is pay compression, which makes hiring new workers an expensive proposition. *Id.*

201. See St. Antoine, *supra* note 199, at 67-68 ("[I]n the real world of industrial relations, employees seldom quit voluntarily."). Most workers "regard resort to the market—that is, a change of employers—as a disaster rather than as an opportunity." *Id.* at 68 n.74; see also Blackburn, *supra* note 9, at 470 (noting that in era of high unemployment, employee's need for steady employment undermines any theoretical power to freely terminate employment contract); Malin, *supra* note 82, at 143 ("It is far easier for a wrongfully discharged employee to obtain comparable other employment in the fertile imagination of Professor Epstein than it is in reality.").

202. James Barron, *400 Jobs for Lawyers Who Don't Want to Be Lawyers*, N.Y. TIMES, Jan. 28, 1994, at B18 (citing high unemployment rate for lawyers).

203. Barbara Koepfel, *American's Labor Lost; For Airline Workers the Crash Can Be Fatal*, WASH. POST, Sept. 5, 1993, at C1 (citing IBM announcement to lay off 85,000 workers and Proctor & Gamble's plan to lay off 15,000 workers).

204. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 415 (1988) (Kaufman, J., dissenting) ("Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. Marketplace? What market is there for the factory worker laid off after 25 years of labor in the same plant, or for the middle-aged executive fired after 25

employees, moving to another employer may result in a significant reduction in retirement benefits as well.²⁰⁵

Second, there is no *Consumer Reports* of employment.²⁰⁶ Employees simply do not have access to advertising, research, or other data that would allow them to evaluate the benevolence, or lack thereof, of prospective employers. The probability of an employer developing a reputation regarding employee discharge that would adversely affect its ability to hire is remote, with the possible exception of a large, visible employer in a small, tight-knit community.

Finally, economists ignore the economic and virtual reality of today's employment marketplace. The employment-at-will doctrine evolved at a time when young boys still served as apprentices with the anticipation of learning a trade and eventually becoming self-employed.²⁰⁷ Even large businesses were relatively small by today's standards. Currently, many major American corporations are the size of small countries.²⁰⁸ Employees are at a clear disadvantage in bargaining in the modern marketplace, even with smaller employers. Except for those few employees who may possess skills or talents that are in extraordinarily short supply, most employees are forced to take what the employer offers.²⁰⁹ Only those at the very highest level of

years with the same firm?"). Such age discrimination is prohibited by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988). The practice continues, however, to pervade the employment arena. L.M. Sixel, *Discrimination Haunts Many Older Workers*, PHOENIX GAZETTE, Aug. 18, 1993, at C1.

205. WEILER, *supra* note 9, at 65-66. Typical defined benefit plans provide a sum certain at retirement based upon years of experience with the employer and the years of highest salary. There is an exponential increase in benefits in the later years of employment. Thus, for example, an employee with 15 years experience at company A who at age 50 moved to company B and worked another 15 years, would, quite likely, receive less in combined pension benefits than if he had remained at company A for the full 30 years. *Id.*

206. Malin, *supra* note 82, at 143 (citing absence of consumer information on jobs).

207. See *supra* notes 42-126 and accompanying text (discussing evolution of employment-at-will doctrine).

208. See Ruth Weyand, *Present Status of Individual Employee Rights*, 1970 PROC. OF N.Y.U. 22ND ANN. CONF. ON LAB. 171, 215 (citing JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 76 (1967)). Weyand noted that the gross revenues of several corporations exceeded those of any single state. In fact, the revenues of General Motors alone in 1963 were "fifty times those of Nevada, eight times those of New York, and slightly less than one fifth those of the Federal Government." *Id.*

209. Blades, *supra* note 10, at 1411-12 (observing that individual workers do not have bargaining power to create contracts that provide for dismissal for just cause only); Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 166-67 (1993) (noting that most managerial and professional employees lack bargaining power relative to their employers); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 559 (1993) (noting that congressional adoption of National Labor Relations Act was premised on "the assumption that individual employment bargains [lack] legitimacy because of bargaining power disparities"); Elizabeth Flagg, Note, *Insurance Agents Slip Through the "Good Hands" of ERISA: "Employee" Defined by Agency Principles in Nationwide Mutual Insurance Company v. Darden*, 28 WAKE FOREST L. REV. 1099, 1128 (1993) (noting that

management can negotiate contracts with "golden parachutes" or other provisions to protect them from wrongful discharge.²¹⁰ For most employees, the only source of real job security and protection lies within the law.

Another often overlooked factor is the reality of the operation of large corporate employers. Many national and international employers honestly seek to treat employees fairly by conducting seminars and creating manuals in an effort to sensitize their managerial work force and to facilitate fair treatment of employees. A corporation's efforts, however, cannot control the actions of every supervisor. Some supervisors will continue to harass and wrongfully discharge employees despite the corporation's best efforts.²¹¹

In recent years, there has been a small but growing trend toward developing cooperation in labor-management relations and empowering workers by allowing them more direct involvement in decisionmaking and control over their work life.²¹² Employees are generally more concerned with working conditions and job security than with compensation.²¹³ Providing statutory protection against wrongful discharge for employees would be consistent with this modern trend toward "humanizing the workplace" by moving away from the harsh working conditions prevalent during the period of industrialization in America.²¹⁴

employers are able to abuse workers' pension rights because employees are economically dependent upon employer and therefore have "very little bargaining power," and "[a]n employee with little bargaining power has no control over the terms and conditions of the employment relationship").

210. See O'Connor, *supra* note 10, at 1215 ("Although golden parachutes often compensate upper-level managers . . . these devices rarely cover lower-level employees.").

211. For example, several years ago, the author represented an employee who filed a charge against a Fortune 500 pharmaceutical company for sex discrimination. The employee was a sales representative. Her supervisor continuously subjected her to sexually suggestive and other harassing comments. As a result, she suffered severe anxiety and depression and needed psychiatric care. The employer, however, has an outstanding record of trying to eradicate discrimination in its organization. It prides itself on treating its employees well. With thousands of employees throughout the country, however, it cannot control the acts of all.

Similarly, Professor Paul Weiler tells the story of a low level management employee of IBM, a company that is the "paragon of a nonunion firm," who was discharged by her superior for dating an employee of a smaller competitor of IBM. WEILER, *supra* note 9, at 62 n.31. The discharge occurred despite the elaborate policies IBM developed to protect the rights and interests of employees. *Id.*

212. See WEILER, *supra* note 9, at 191-224 (discussing increase in employee involvement throughout development of American unions but recognizing need for reform to further foster worker participation).

213. See *Quality of Work Environment Important to U.S. Workers, Study Says*, 1993 Daily Lab. Rep. (BNA) No. 170, at D-13 (Sept. 3, 1993).

214. Leonard, *supra* note 141, at 678.

B. The Need for a Federal Statute

Courts in many states, endeavoring to recognize some protection for employees, have applied modern jurisprudence to the antiquated employment-at-will doctrine.²¹⁵ Nonetheless, few if any courts have felt sufficiently empowered to bury the doctrine completely. In three states, employees still have no protection at all.²¹⁶ In seventeen states, employees have no clear contractual protection.²¹⁷ In the majority of states, employees have no protection against employer bad faith or malevolent conduct.²¹⁸

In the absence of a statute, wrongfully discharged employees are left in a state of chaos and uncertainty, "the worst of all possible worlds."²¹⁹ First, they must find an attorney who is familiar with the various theories of recovery in employment-at-will cases.²²⁰ The attorney is then faced with the task of searching employment manuals, pension plans, letters, and other documents in an effort to find some basis for a claim premised on a written contract.²²¹ Even if there appears to be some basis for a claim of wrongful discharge in violation of public policy, there is no guarantee that the court will recognize the public policy at issue.

Moreover, there are limits to what even the most progressive court can do. Prevailing employees are not generally entitled to recover attorney's fees.²²² Yet, the litigation costs may well approach or exceed the amount of recovery.²²³ Without a statute, recovery will be limited to middle- and upper-management employees because only

215. See, e.g., *Amos v. Oakdale Knitting Co.*, 416 S.E.2d 166, 170 (N.C. 1992) (recognizing public policy exceptions to at-will doctrine); *Rogers v. Targot Telemarketing Serv.*, 591 N.E.2d 1332, 1334 (Ohio Ct. App. 1990) (citing promissory estoppel exception to at-will doctrine). Some critics would argue that the erosion of the employment-at-will doctrine represents a prime example of judicial activism. But see *Finkin*, *supra* note 57, at 751 (noting that eroding at-will doctrine was not so active or creative; rather erosion was an adaptation of business to societal changes).

216. See *supra* note 83 and accompanying text (noting Florida, Louisiana, and Rhode Island as three states without exceptions to employment-at-will doctrine).

217. The following states have no case law, or other clear expression of policy, that would provide contractual protection to employees: Delaware, Florida, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Pennsylvania, Rhode Island, Tennessee, and Virginia. 9A Lab. Rel. Rep. (BNA) 505:51-52 (1994).

218. See *supra* note 118 and accompanying text (listing comparative few states that recognize implied covenant of good faith and fair dealing).

219. Gould, *supra* note 100, at 413.

220. This task is growing easier with the evolution of the National Employment Lawyers Association, an organization composed primarily of plaintiffs' employment lawyers. The number of such lawyers in many areas, however, is quite small.

221. Gould, *supra* note 100, at 413.

222. See Gould, *supra* note 100, at 413.

223. See Gould, *supra* note 100, at 413.

their incomes, and the potential damages they might be awarded for lost income, are large enough to provide contingency-based compensation for an attorney.²²⁴ Under the current system, the fifteen, twenty, or thirty thousand dollar-a-year worker simply cannot find anyone to represent him, unless his attorney is willing to undertake the matter on a pro bono basis.²²⁵ In addition, the costs of employment litigation, exclusive of attorney fees, can be substantial. Travel costs, depositions, photocopying, expert witnesses, and similar costs can easily run into the tens of thousands of dollars.²²⁶ Because the plaintiff cannot recover these costs at common law, she must pay them from any recovery obtained.²²⁷ Unless the unemployed plaintiff has substantial cash reserves, or the attorney is in a position to advance those costs, the litigation cannot proceed.

There are those who naively assume that employers generally do not mistreat employees or arbitrarily dismiss them, and, as a result, see no need for a change in the law. One need only look at the impact of title VII of the Civil Rights Act of 1964,²²⁸ however, to understand the importance of statutory protection for employment. Prior to the enactment of title VII, many employers discriminated as a matter of course on the basis of gender, race, religion, and ethnic origin. The impact of the statute on the workforce is evidenced by the positions occupied by women, blacks, and other minorities that were, just a generation ago, the bastion of white males. Despite these legal advancements, however, employment discrimination continues to exist.²²⁹ Congress has responded by enacting the Civil Rights Act of 1991,²³⁰ which, among other things, allows employees to recover damages from employers who violate the law.²³¹

The authors of the Model Employment Termination Act, as well as several commentators, view state statutes as the most appropriate

224. See Gould, *supra* note 100, at 413.

225. See Gould, *supra* note 100, at 413; St. Antoine, *supra* note 5, at 277-78 ("Rank and file workers who are fired usually have too little money at stake to make their case worthwhile for lawyers operating on a contingent fee basis.").

226. See Gould, *supra* note 100, at 413 (estimating litigation costs exclusive of attorney's fees at \$10,000 in 1987).

227. See Gould, *supra* note 100, at 414.

228. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

229. See Amy Saltzman, *Trouble at the top*, U.S. NEWS & WORLD REP., June 17, 1991, at 40 (discussing government report that concluded that in major corporations "women's routes to the top are blocked by a 'glass ceiling' of subtle discrimination" that limits their opportunities).

230. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2, 29, and 42 U.S.C.).

231. 42 U.S.C. § 2000e-5(g).

means of addressing the problem of wrongful discharge.²³² Only a federal statute, however, will provide employees with the protection they need and deserve. Conceptually, the Model Act is a step in the right direction, but it is not enough.

First, our national experience with uniform and model acts suggests that it will be years before any appreciable number of states adopt the Model Act and that many states will never adopt such legislation.²³³ Over the last several years, at least ten states have considered employment termination legislation,²³⁴ but only one state has actually adopted it.²³⁵ There is no reason to believe that any appreciable number of states will adopt the Model Act or any variation thereof anytime soon.²³⁶

Second, our experience has shown that the most effective way to address employment issues of national import is through federal legislation. Congress has the power, under the Commerce Clause,²³⁷ to regulate employment.²³⁸ It has seen fit to do so in myriad ways.²³⁹ For example, in 1935, Congress adopted the National Labor Relations Act (NLRA),²⁴⁰ which recognized the

232. See, e.g., St. Antoine, *supra* note 5, at 218 (identifying defects existing in common-law regime and promoting enactment of state statutes as remedy).

233. Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 658-59 (1991) (suggesting that only one state has been successful in passing wrongful termination legislation because threat to employers under common law is not great enough in most states to provoke sufficient support for legislation and nontrivial waiting period is often required before legislation can be steered through legislature).

234. The 10 states are California, Colorado, Connecticut, Michigan, Montana, New Jersey, Pennsylvania, Vermont, Washington, and Wisconsin. Krueger, *supra* note 233, at 650. At least 40 states and territories have introduced bills in the past decade concerning "employment termination, at-will employment, or a related subject." MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, at prefatory note 540:23.

235. Krueger, *supra* note 233, at 650.

236. For example, a "uniform termination act," which prohibited certain employers from terminating certain employees without good cause, was introduced into the New Hampshire Legislature in 1993. H.R. 513, N.H. Leg. (1993). On March 17, 1993, the legislature rejected it.

Ironically, New Hampshire courts have taken some leadership in the area of wrongful discharge litigation. The state was the first to recognize an implied covenant of good faith and fair dealing in the employment relationship. See *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (holding that employer's termination employment-at-will employee is not in best interest of economic system or public good where termination is motivated by bad faith).

237. U.S. CONST. art. I, § 8, cl.2.

238. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 7-9 (1937) (holding that Congress' power to regulate employment is vested in its ability to enact statutes that make labor disputes part of "commerce").

239. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151-188 (1988) (setting standards and prohibitions for employers and employees with respect to organization and representation); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988) (imposing wage and hour standards).

240. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-188 (1988)).

inequality of bargaining power between employees and employers and the need for employees to unite if they were to have any hope of balancing the inequality.²⁴¹

Third, federal legislation in this area will promote uniformity of decisions among the states,²⁴² which is, of course, also a compelling argument asserted in support of the Model Act.²⁴³ In this modern era of complex interstate and international commerce, the notion of uniformity demands attention. A corporation with production facilities in both Kansas and Pennsylvania should not be subject to two separate statutes governing discharge of its employees. The logic that gave birth to the National Labor Relations Act, title VII, and a generation of other employment legislation²⁴⁴ now obliges us to provide federal protection for all employees against wrongful discharge.²⁴⁵ Such legislation should follow the title VII model and allow states to establish their own laws and enforcement mechanisms, so long as the federal legislation establishes minimum standards.²⁴⁶ But the impetus must come from Congress.

The United States stands alone among the world's major industrialized nations in failing to protect employees from wrongful discharge

241. 29 U.S.C. §§ 151, 157. Unfortunately, unions have not been the answer for most American employees. Union membership has steadily declined over the last few decades. Only three-fifths of union members are now in the private sector, where they make up just 11.5% of that workforce. The remaining members are in government, where they constitute 36.7% of the workforce. Daily Lab. Rep. (BNA) No. 25, at B-3 (Feb. 9, 1993).

Although there are various reasons for the decline in union membership, a substantial share of the responsibility must be attributed to the increasingly "no-holds barred" resistance exhibited by American business toward unions. See WEILER, *supra* note 9, at 114.

242. Cf. Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J. L. REF. 319, 336 (1983) ("[A]ny attempt to introduce protection against unjust discharge into a single state would almost certainly be met with the argument that the additional burden on employers would make that state less attractive to industrial and commercial development").

243. See generally MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (discussing conference findings favoring creation of uniform Act).

244. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992) (prohibiting discrimination in employment because of physical disability or mental impairment); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988) (prohibiting discrimination in employment against persons over age of 40).

245. See Blades, *supra* note 10, at 1433. Professor Blades writes:

[I]t seems anomalous that these [civil rights and fair employment commissions] provide relief to an employee who is discharged because of his race or religion yet do not grant similar relief to an employee who is discharged because he exercised his right of free speech or because he refused to commit some fraud or crime at his employer's behest.

Id.

246. See 42 U.S.C. § 2000e-7 (1988) (providing that under title VII, state law shall continue in force provided that it is not inconsistent with federal act).

through federal legislation.²⁴⁷ Such protection was first proposed by the International Labor Organization (ILO)²⁴⁸ in 1963.²⁴⁹ In 1982, the ILO's recommendation was modified and approved as a Convention.²⁵⁰ The time has come for us to join the community of nations in protecting employees from wrongful termination.

III. THE MODEL EMPLOYMENT TERMINATION ACT

A. *Adoption of a Model Act Instead of a Uniform Act*

The Model Employment Termination Act is unquestionably a creature of compromise, a compromise necessary to gain support from both employer and employee interests.²⁵¹ The efforts to find consensus, however, have emaciated the statute. For example, the Model Act was originally designed as a uniform act.²⁵² The goal of a uniform act is to achieve uniformity among the states so that multistate employers will not have to comply with an array of different statutes.²⁵³ With a uniform act, it is understood that states will adopt the act substantially as written, without material modification.²⁵⁴ A *model act*, on the other hand, provides more of a blue-

247. See St. Antoine, *supra* note 199, at 68-69; see also *supra* note 23 (noting that more than 60 countries provide statutory protection from wrongful discharge).

248. The International Labor Organization (ILO) is the oldest independent arm of the United Nations. There are currently 150 member countries in the ILO. INTERNATIONAL LABOR ORGANIZATION, FACTS FOR AMERICANS 5 (1989). Member nations are represented by teams from management, labor, and government. *Id.*

249. See INTERNATIONAL LABOR ORGANIZATION, TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER: RECOMMENDATION 119 (1963). An ILO Recommendation is not intended to be ratified, but is to be "used as a guideline for national policy and action." Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 51 (1989). ILO recommendations are utilized when the subject matter is new and the standard is exploratory. *Id.* Recommendations are intended to influence national legislation. *Id.* at 58.

250. See INTERNATIONAL LABOR ORGANIZATION, TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER, CONVENTION 158 (1982) [hereinafter CONVENTION 158]; INTERNATIONAL LABOR ORGANIZATION, RECOMMENDATION CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER (1982).

Convention 158 requires that 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." CONVENTION 158, *supra*. It also provides for a pretermination hearing, absent unusual circumstances, reasonable notice to the employee to be terminated, and severance or unemployment benefits. *Id.* at arts. 4, 8, 11, 12. The United States refused to sign or ratify Convention No. 158. Int'l Labor Conference, 68th Sess., 1982, Termination of Employment at the Initiative of the Employer, Report V(1) and (2).

251. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (describing Act as result of compromise among competing interests).

252. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

253. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

254. See *supra* note 31 and accompanying text (comparing uniform act to model act).

print for the states.²⁵⁵ State legislatures are free to modify a model act to reflect their own needs and attitudes.²⁵⁶ Changing the uniform act to a model act has compromised the commissioners' often-stated goal of uniformity,²⁵⁷ thereby significantly weakening the Act.

B. *The Good Cause Requirement*

The heart of the Model Act lies in section 3, which provides that an employer may not discharge an employee without "good cause."²⁵⁸ The concept of "good cause" is substantially the same as the standard generally applied in labor arbitrations.²⁵⁹ Good cause requires both "a reasonable basis" for termination of an employee "in view of relevant factors and circumstances"²⁶⁰ and the "exercise of business judgement in good faith" by the employer.²⁶¹ Relevant factors and circumstances that may be considered in determining good cause include the employee's duties and responsibilities,²⁶² the employee's conduct on the job "or otherwise,"²⁶³ and the employee's job performance or general employment record.²⁶⁴ Examples of good cause include "theft, assault, fighting on the job, destruction of property, use or possession of drugs or alcohol on the job, insubordi-

255. See *supra* note 31 and accompanying text (recognizing that model act provides guidelines, but is not usually adopted in full).

256. See *supra* note 31.

257. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (discussing deliberations and noting desirability of uniformity).

258. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 3. Section 3 of the Model Act, entitled Prohibited Terminations, provides that "[u]nless otherwise provided in an agreement for severance pay . . . or for a specified duration . . . an employer may not terminate the employment of an employee without good cause." *Id.*

259. See St. Antoine, *supra* note 5, at 281 (noting that "good cause" requirement in Act and in labor arbitrations, both "emphasize the economic flexibility accorded the employer").

260. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(i).

261. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(ii). The Model Act defines "good cause" as follows:

(i) [A] reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgement in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

Id. § 1(4).

262. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(i).

263. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(i).

264. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(i).

nation, excessive absenteeism or tardiness, incompetence, lack of productivity, and inadequate performance or neglect of duty.”²⁶⁵ The employee’s conduct need not occur during working hours or at the employer’s place of business. An employee’s off-duty conduct can constitute good cause for discharge if it is relevant to job performance, the employer’s business reputation, or similar concerns.²⁶⁶

The Act also protects employees who lose their jobs through dismissal, layoff, or suspension for more than two consecutive months by providing a remedy if these discharges lack good cause.²⁶⁷ “Dismissal” is defined as termination resulting from the elimination of a position.²⁶⁸

The Act takes the additional bold step of protecting employees against constructive discharge, which occurs when an employee quits or retires because of intolerable circumstances created by an employer.²⁶⁹ For example, an employee who is the victim of continuous sexual or racial harassment and who quits or retires because of the stress created by the harassment would still have a claim under the Act.²⁷⁰

Under the Model Act, reasons of race, gender, religion, or other statutorily prohibited discrimination do not constitute good cause.²⁷¹ In fact, findings from discrimination-based proceedings may be used as evidence in proceedings under the Act.²⁷² A finding that a particular discharge does not constitute statutorily prohibited discriminatory conduct does not, however, preclude a finding that the discharge was without good cause as defined in the Act.²⁷³

To defend the discharge of an employee under the Act, an employer would have to do more than merely demonstrate that the

265. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

266. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4. This provision is consistent with the general approach in labor arbitration. An employer cannot usually discharge an employee for off-the-job conduct unless the conduct has some relationship to or bearing on the employee’s work. See generally FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 656-57 (1985) (addressing issue of employee conduct away from plant).

267. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(8) (defining “termination”).

268. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(8)(i).

269. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(8)(iii) (providing that quitting or retirement induced by intolerable act or omission of employer, after notice to employer of act or omission without appropriate relief by employer, constitutes termination of employment). The notion of intolerable employment may consist of more than one act or omission or course of conduct by an employer. *Id.*

270. Such an employee would also, of course, have a claim under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), which prohibits discrimination based, *inter alia*, on gender or race.

271. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 3 cmt. a.

272. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 3 cmt. a.

273. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 3 cmt. a.

employee did something wrong. The Act borrows from the tradition of labor arbitration by requiring the fact finder, when determining good cause, to consider mitigating factors, such as whether the violated company rule was reasonable and whether the seriousness of the infraction warranted discharge of the employee.²⁷⁴ In contrast to traditional labor arbitrations, however, the Act places the burden on the employee to prove that the discharge was not for good cause,²⁷⁵ although the employer will normally present its case first in the proceeding.²⁷⁶

The Act is not a plant closing bill,²⁷⁷ and it takes pains not to infringe on an employer's right to make legitimate business decisions that may result in employee discharge or layoffs.²⁷⁸ In fact, the Act

274. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4. Under the Act, the fact finder must consider the following factors when determining good cause:

... the reasonableness of the company rule violated, the employee's knowledge or warning of the rule, the consistency of enforcement of the rule and the penalties assessed, the use of corrective or progressive discipline, the fullness and fairness of the investigation including the opportunity given the employee to present his or her views prior to dismissal, and the appropriateness of the penalty in light of the conduct involved and the employee's employment record.

Id.; cf. ELKOURI & ELKOURI, *supra* note 266, at 670-88 (evaluating due process and procedure in disciplinary action); Gould, *supra* note 100, at 408 (stating that under just cause standard, employers "must use progressive discipline, that is they must warn, counsel, and even suspend employees before [dismissing them]").

Under the Model Act, consideration is also given to "the character of the employee's responsibilities," including the character of his work, the management level of the employee's position in the business, and the importance of the position to the success of the employer's business. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

275. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 6(e). The employee also has the burden of proof in cases alleging that an employer breached an agreement for severance pay. *Id.*

The Act has an interesting provision whereby an employer can, in effect, seek a declaratory judgment based on a claim that it has good cause to discharge an employee. *Id.* § 5(c). In such cases, the burden of proof falls on the employer. *Id.* § 6(e).

276. The requirement that the employer "go first" in the proceedings applies in all cases except those in which the employee alleges that "a quitting or retirement was a termination" as defined in § 1(8) of the Act. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 6(e).

277. Model Employment Termination Act, *supra* note 7, § 1(4) cmt.

278. See, e.g., MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4. The Act provides that good cause shall include:

(ii) the exercise of business judgement in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions. This list of employer prerogatives is intended to "invoke the principle of *ejusdem generis*" in determining the parameters of employer freedom.

Id. This employer prerogative includes the right to entirely shut down its operation. If, however, an employer discriminates against certain employees in deciding whom to lay off, or if the layoff is a sham, the employer would not meet the good cause requirement. *Id.*

expressly acknowledges the employer's right to set "economic or institutional goals"²⁷⁹ so long as it acts in "good faith."²⁸⁰ The employer also remains free to set standards of performance for its employees.²⁸¹ The Act anticipates that standards will depend on the nature of the particular position.²⁸² For instance, the standard of "the most proficient performer available for a particular position"²⁸³ is acceptable in fields that are "traditionally or inherently highly competitive," like professional sports, the entertainment industry, the professions, and university teaching.²⁸⁴ In addition, the employer may change the standard at any time, provided that the employer communicates the changes to employees.²⁸⁵ The Act also allows the employer and the employee to agree by contract that the employee's failure to meet "specified business-related standards of performance" or "the employee's commission or omission of specified business-related acts" will constitute good cause.²⁸⁶

C. *Persons Covered by the Act*

The Act does not reach all employers or all employees. Only employers who have five or more employees are covered.²⁸⁷ In addition, the Act excludes state, municipal, and other governmental entities, as well as employment settings in which the employee is a member of the employer's immediate family or related to anyone having a controlling interest in the employer's business.²⁸⁸ Employees are protected only after one year of employment, and only if they work at least half-time.²⁸⁹ The statute does not apply to the termina-

279. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4)(ii).

280. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(5) (defining "good faith" as "honesty in fact"). The question of what constitutes "good faith" generated extensive discussion among the Commissioners at their 1990 meeting. The major debate centered over whether the standard was an objective or subjective one. The comments advise that business decisions must reflect "honest business judgment." *Id.* § 1(4) cmt.

281. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4 (noting that although employer may change standards for any employment positions, altered standards must be clearly communicated to employees).

282. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

283. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

284. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

285. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1 cmt. 4.

286. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(b).

287. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(2) (providing that employers are only covered if they have had five or more employees for at least 20 weeks during preceding two years).

288. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(2).

289. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 3(b) (requiring that employees work at least 520 hours during 26 weeks preceding termination, and total of one year or more of work). Layoffs or other breaks in service do not count in calculating the one-year period. *Id.* The 26 weeks exclude time attributed to layoffs of one year or less, paid vacations,

tion of employment at the expiration of an express contract of employment.²⁹⁰

Those employees who are covered under the Act, however, lose virtually all "common law rights and claims"²⁹¹ that arise from a termination or "acts taken or statements made that are reasonably necessary to initiate or effect the termination."²⁹² For example, the Act precludes an employee from making any tort claim for defamation,²⁹³ intentional infliction of emotional distress, or wrongful discharge, or from filing suit against her employer under a contract theory.²⁹⁴ Except for other independent statutory remedies that may be available,²⁹⁵ employees are completely limited to seeking recovery under the Model Act.²⁹⁶ Employees who are not protected by the Act, such as part-time workers and employees with less than one year's tenure, retain their common-law rights.²⁹⁷

Union employees are, of course, protected by the terms of their collective bargaining agreement. The Act recognizes that state law cannot interfere with union employees' rights established under federal law.²⁹⁸ To the extent that there is no preemption problem,²⁹⁹ however, union employees may also enjoy the benefits of the

authorized leaves, or labor disputes. *Id.*

290. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(b).

291. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(d); *see also id.* § 2 cmt. c (abolishing tort actions in favor of statutory protections).

292. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(c). The employee does, however, retain the right to assert independent tort actions for such actions as assault, malicious prosecution, and false imprisonment "if there are independent facts separate and apart from the termination itself to support such causes of action." *Id.*

293. The Act specifically addresses one employer's report to another regarding an employee's performance, and deems it governed by the doctrine of qualified privilege. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(c) cmt.

294. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(c) cmt. This comment clarifies that the nature of the tort is not at issue. Rather, the inquiry is whether the basis of the tort is the actual termination or statements made that effect the termination. *Id.*

295. *See* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(e) (noting that Act does not displace claims arising under state or federal statutes or administrative rules or regulations). Other remedies would include discrimination claims brought under title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1988), and the Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (Supp. IV 1992). Employees can also bring claims predicated on rights provided under whistleblower laws that protect employees who report an employer's wrongdoing. *See, e.g.,* MICH. STAT. ANN. § 17.428(2) (Callaghan 1982) (protecting employees who report employer's wrongdoing); OHIO REV. CODE ANN. § 4113.52 (Baldwin 1991) (providing that employee has right to report violation of law by employer or fellow employee).

296. *See* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(e) (providing that rights enumerated in Act are only rights plaintiffs may assert in wrongful termination action).

297. *See generally* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2 (providing general scope of Act).

298. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2 cmt. e.

299. *See* *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988) (holding that application of state law is preempted by § 301 of National Labor Relations Act of 1947 only if

Model Act.³⁰⁰

D. The Waiver Provision

One of the provisions of the Act likely to spark significant controversy is section 4(c), under which an employee may completely waive by written agreement the requirement of good cause for termination of her employment.³⁰¹ In exchange, the employer must agree to provide the employee upon discharge for any reason other than willful misconduct, with severance pay equal to at least one month's pay for each year of employment.³⁰² Such a contractual agreement constitutes an express waiver by both the employer and the employee of the right to a civil trial to resolve the termination dispute or the entitlement to severance pay.³⁰³ Under the statute, the mere existence of such an agreement constitutes a stipulation that such disputes will be subject to the procedures and remedies of the Act.³⁰⁴ Such agreements must, of course, be entered into and performed in good faith.³⁰⁵ The drafters of the Act did not intend for the waiver provision to apply to "contracts of adhesion."³⁰⁶ They anticipated that the use of the waiver agreement would most likely be limited to management employees, key professionals, and others not likely to be laid off.³⁰⁷

E. Procedure

The Act borrows the short 180-day statute of limitations used in title VII³⁰⁸ and many state statutes.³⁰⁹ The statute is tolled, however,

such application requires interpretation of collective bargaining agreement).

300. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2 cmts. d, e.

301. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

302. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c). The Act limits severance pay to 30 months' pay. *Id.* The basis for determining the proper amount an employer must pay under this scheme is the rate at which the employee is being paid immediately prior to termination. *Id.*

303. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

304. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

305. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(g) (noting that agreement "imposes a duty of good faith in its formation, performance and enforcement").

306. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4 cmt. (stating that intent of § 4 is "not to allow . . . contracts of adhesion to be used to waive or otherwise circumvent employees' rights under the Act").

307. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4 cmt. c (noting that use of waiver agreement was, "as a practical matter, likely to be confined to . . . persons not subject to periodic layoff" because employer would otherwise incur risk that employee laid off for more than two months would be apt to consider layoff as termination making employee eligible for severance pay).

308. Compare MODEL EMPLOYMENT TERMINATION ACT *supra* note 7, § 5(a) (requiring terminated employee to file complaint and demand arbitration within 180 days after effective date of termination) with 42 U.S.C. § 2000e-5(e) (providing that "charge . . . shall be filed within

while an employee pursues internal remedies.³¹⁰ Exhaustion of internal grievances is not a prerequisite for asserting a claim under the Act.³¹¹

Arbitration is the preferred forum for resolving claims under the Act.³¹² The drafters recognized that by drawing on over fifty years of labor arbitration experience, a body of law and breadth of experience can be applied to employment termination cases that would not necessarily be available to courts.³¹³ Nevertheless, the Act does provide an alternative scheme in which a state agency or a state court may hear cases arising under the Act.³¹⁴

As a matter of principle, the Act states a preference for state funding as the method of financing enforcement.³¹⁵ In recognition, however, of the financial pressures many states face,³¹⁶ the Act provides an optional provision under which states would be permitted to charge a filing fee.³¹⁷ States could therefore elect to have the parties bear a substantial part of the cost themselves.³¹⁸

one hundred and eighty days after the alleged unlawful employment practice occurred").

309. See, e.g., Georgia Fair Employment Practice Act, GA. CODE ANN. § 45-19-36 (Michie 1990) (providing that complaints by individuals "claiming to be aggrieved by an unlawful practice" are barred unless filed within 180 days of occurrence of such alleged unlawful practice); Indiana Civil Rights Act, IND. CODE ANN. § 22-9-1-3(O) (Burns Supp. 1993) (stating that complaints concerning alleged discriminatory employment practices are not valid unless filed within 180 days after occurrence).

310. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(a).

311. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(a).

312. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 6.

313. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (anticipating that proceedings employing professional arbitrators will be "more expert" than those employing courts and juries); see also Summers, *supra* note 72, at 499 (explaining that statutory protections against unjust terminations are "completely overshadowed by the body of law created by arbitration under collective agreements" and further noting that arbitration has already developed efficient procedures, has determined standards for just cause and for reviewing penalties, and provided employees with effective remedies for unjust terminations).

314. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (recognizing that Act gives states "several alternatives" and that enforcement procedures may vary among states); *id.* app. Alternative A (providing for enforcement by state department, commission, or service); *id.* app. Alternative B (providing for judicial remedies).

315. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(e) cmt. (stating opinion that right not to be discharged without good cause is public right best financed by public treasury).

316. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(e) (explaining that periods of "financial stringency" may cause states to seek alternative funding to avoid assuming full responsibility for cost of new administrative procedure).

317. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(e).

318. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(e) cmt. The Act suggests that if costs are charged to the parties, the statute might implement a cap on the employee's contribution equal to one or two weeks' pretermination pay. *Id.* Alternatively, a state could impose a special "employment termination tax" on businesses covered by the Act. *Id.* The tax would be imposed like an unemployment insurance tax, based on the experience rating of the employer's claims history. *Id.*

The Act allows parties to appeal arbitration decisions to a court of general jurisdiction in the jurisdiction where the termination occurred or where the employee resides.³¹⁹ A court may vacate or modify an arbitrator's award only if it finds that: (1) the award was procured by "corruption, fraud, or other improper means"; (2) there was "evident partiality" on the part of the arbitrator, or other misconduct that prejudiced the rights of a party; (3) the arbitrator exceeded her powers; (4) the arbitrator committed a "prejudicial error of law"; or (5) "some other ground exists" for setting aside the award under the Uniform Arbitration Act or an equivalent state arbitration statute exists.³²⁰

The scope of judicial review under the Act may be greater than that allowed in federal labor cases.³²¹ Generally, a labor arbitrator is not bound by the law.³²² Her sole task is to interpret the agreement.³²³ A court may not set aside an arbitrator's award, even where the results seem egregious, unless it finds that the award fails to "draw its essence" from the contract³²⁴ and concludes that no reasonable person could reach the arbitrator's decision in interpreting the particular contract at issue.³²⁵ In contrast, under the Act, a

It is estimated that the total cost of arbitration in a wrongful termination case would be about \$15,000. Todd H. Girshon, *Wrongful Discharge Reform in the United States: International and Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L.R. 635, 648 (1992).

319. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(a).

320. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(c).

321. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(c)(4) cmt. Under § 301 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185 (1988), federal courts have jurisdiction to review arbitration awards. The scope of review, however, is quite limited. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (stating that in cases involving collective bargaining agreements, "courts play only a limited role when asked to review the decision of an arbitrator"); see also *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stating that lower court's refusal to review arbitration award on its merits was "proper approach" in accord with federal policy). Under § 301, state courts have concurrent jurisdiction with federal courts, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962), but they must apply federal law. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

322. See generally *ELKOURI & ELKOURI*, *supra* note 266, at 366-77 (discussing broad powers of arbitrators to decide questions of substantive law, but noting that courts will generally not enforce awards clearly illegal or against public policy).

323. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 56 (1974) (stating that arbitrator's "source of authority is the collective bargaining agreement" and identifying duty as being "to effectuate the intent of the parties rather than the requirements of enacted legislation").

324. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

325. See *Enterprise Wheel*, 363 U.S. at 597 (clarifying that mere ambiguity in opinion accompanying award, which suggests that arbitrator may have exceeded his power, is not sufficient to set aside award). An example of the freedom enjoyed by arbitrators is shown in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). One of Misco's plant rules provided that possession or use of controlled substances on company property was grounds for discharge. *Id.* at 31. In apparent accord with this rule, an employee was discharged after being caught by police while sitting in the back seat of someone else's car in Misco's parking lot "with

court may set aside an arbitrator's award on the ground that the arbitrator "committed a prejudicial error of law."³²⁶ One rationale supporting this expanded scope of review is that, although arbitration in the traditional labor relations context is voluntary and completely a creature of contract,³²⁷ arbitration under the Act is mandatory.³²⁸ Moreover, where individual statutory rights are at issue, as they are under the Act, less deference is given to arbitration awards and courts have greater authority to interpret the law on review.³²⁹

F. Remedies

The damages remedies under the Act are patterned after those available under title VII of the Civil Rights Act of 1964.³³⁰ Under

marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray." *Id.* at 33. The arbitrator ordered the reinstatement of the employee with back pay and full seniority, concluding that the marijuana cigarette incident was insufficient evidence to establish that the employee had used or possessed marijuana on company property. *Id.* at 34. The arbitrator refused to allow the admission of evidence of the discovery of the marijuana gleanings in the employee's car because Misco was not aware of gleanings at the time of the employee's discharge. *Id.*

Misco appealed the decision to federal district court, where the arbitrator's award was vacated on the grounds that reinstating the employee would violate public policy against operating dangerous machinery while under the influence of drugs. *Id.* at 34-35. The Court of Appeals affirmed. *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739, 743 (5th Cir. 1985), *rev'd*, 484 U.S. 29 (1987). The Supreme Court, however, reversed, determining that the appellate court's formulation of policy was arrived at based on "general considerations of public interest," and not by reference to law or precedent. *Misco*, 484 U.S. at 44. The Court was also unwilling to set aside the award because the arbitrator could reasonably have concluded, under all the circumstances, that the employer did not have just cause for discharge. *See id.* at 44-45 (noting that even if court of appeals' policy formulation was correct, there was no showing that reinstatement would violate that policy because presence of marijuana gleanings in employee's car did not prove that he had operated machinery while using drug).

326. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(c)(4).

327. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (finding arbitration "matter of contract" to which parties who have not so agreed cannot be required to submit).

328. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(c)(4) cmt. (stating that Act "imposes" arbitration as enforcement method on parties).

329. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 8(c)(4) cmt.; *cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (holding that employee's right to bring suit under title VII is not foreclosed by previous arbitral award); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740-44 (1981) (holding that petitioner's individual rights under Fair Labor Standards Act were independent of contractual rights required for vindication under arbitration, and that "arbitral procedures are less protective of individual statutory rights than judicial procedures").

330. Prior to the 1991 amendment, plaintiffs in title VII actions could not recover damages. 42 U.S.C. § 2000e-5(g) (1988). Remedies were limited to equitable remedies, including reinstatement, back pay, and in some cases, front pay. *Id.*; *see PERRITT, supra* note 101, at 98 (stating that many circuits now permit awards of front pay as remedy under title VII "in appropriate cases"). In addition to title VII, the Civil Rights Act of 1991 also amended the Americans With Disabilities Act of 1990 to allow limited damages. 42 U.S.C. § 1981a (Supp. IV 1992).

the Model Act, an employee forfeits all rights to recover traditional tort or contract damages, as well as the right to recover punitive damages.³³¹ The preferred remedy under the Act is reinstatement.³³² In addition, an arbitrator may award full or partial back pay, including reimbursement for lost fringe benefits.³³³ Where reinstatement is not awarded, the Act authorizes a lump-sum severance payment for a period not to exceed thirty-six months, plus the value of lost fringe benefits.³³⁴ The Act reduces awards of back pay by interim earnings³³⁵ and reduces awards of severance pay by likely earnings and benefits from employment elsewhere.³³⁶ In calculating the award, the arbitrator must consider "equitable considerations" such as the employee's length of service and the reason for termination.³³⁷ A prevailing plaintiff may also recover attorney's fees under the Act.³³⁸ An employer, however, may also recover attorney's fees if an arbitrator dismisses an employee's complaint because it is "frivolous, unreasonable, or without foundation."³³⁹

331. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(d) (stating that arbitrators "may not award damages for pain and suffering, emotional distress, defamation, fraud or other injury under the common law" or punitive or compensatory damages).

332. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3).

333. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2).

334. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2).

335. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2).

336. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3).

337. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3).

338. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(4).

339. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(e). The provision for attorney's fees under the Act mirrors the standards for attorney's fees that have been applied under title VII. 42 U.S.C. § 2000e-5(k) (1988); *see* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, §§ 7(b)(3), (c)(2), (e), & (f) cmt. (stating that Act's language "deliberately tracks language of Title VII and of Supreme Court cases interpreting Title VII"); *see also* *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (concluding that, under title VII, prevailing defendant may be awarded attorney's fees only if plaintiff's claim is "frivolous, unreasonable or groundless," or if plaintiff continued litigation after claim had become so); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (noting that public interest in bringing equitable actions to eradicate discriminatory employment practices could be vindicated by awarding attorney's fees to plaintiffs in all but special circumstances). The commissioners have suggested that when calculating reasonable fees under the Act, tribunals look to "the prevailing market rate," a measure commonly used in federal cases that include requests for attorney's fees under the Civil Rights Attorneys Fee Awards Act of 1976, 42 U.S.C. § 1988 (1988). MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3) cmt. Under the prevailing market rate approach, in cases of small monetary claims, attorney's fees can exceed the amount of the plaintiff's recovery. *See City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) (finding no evidence that Congress intended to require that attorney's fees in civil rights cases be proportionate to plaintiffs' recoveries of damages); *cf. Blum v. Stenson*, 465 U.S. 886, 895 (1984) (finding that under 42 U.S.C. § 1988, "reasonable fees" are to be calculated according to prevailing market rates, regardless of whether plaintiff is represented by private counsel); *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (indicating that formula for determining attorney's fees should be "reasonable hours times reasonable rate," but that fee can also be adjusted upward or downward to reflect other factors including "results obtained").

IV. A CRITIQUE OF THE MODEL ACT

A well-drafted employment termination statute should do, at a minimum, the following: (1) deter employers from wrongfully discharging employees, (2) punish employers who wrongfully discharge employees, (3) make whole employees who are wrongfully terminated, (4) provide access to a tribunal for all employees who have been wrongfully discharged, and (5) protect employers from specious claims by employees who were terminated for good cause. The Model Act accomplishes the last two goals. The arbitration system proposed under the Act would generally be accessible to all employees.³⁴⁰ In addition, the Model Act provides employers some protection against specious employee lawsuits by allowing employers to recover attorneys' fees in such cases³⁴¹ and by placing the burden of proof on the employee.³⁴² Moreover, by severely limiting recovery by wrongfully discharged employees, the Model Act gives employers significant protection against both meritless lawsuits and extraordinarily large recoveries by successful plaintiffs.³⁴³

The Model Act falls far short, however, of meeting the first three goals. The remedies contained in the Act do not allow sufficient economic recovery to punish or deter employers or make aggrieved employees whole. In many cases, the limitations imposed on a successful employee-plaintiff by the Act will result in a recovery far smaller than the actual pecuniary loss experienced by the aggrieved employee.³⁴⁴ Because of the limitations the Act places on an employee-plaintiff's recovery, and its absolute prohibition against the recovery of compensatory or punitive damages, the Act provides no effective deterrent to employers. In fact, an employer may see the claims of such employees as nothing more than minor inconvenienc-

340. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 5(a) (indicating that any terminated employee may file complaint and demand for arbitration under Act).

341. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(e) (stating that arbitrator who finds employee's complaint to be "frivolous, unreasonable or without foundation" may award "reasonable attorneys fees and costs to the prevailing employer").

342. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 6(e); see also *supra* notes 275-76 and accompanying text (explaining that employee bears burden of proving lack of good cause for termination or breach of agreement for severance pay under § 4(c)).

343. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(d) (disallowing recovery of compensatory and punitive damages); see also *supra* note 331 and accompanying text (listing common-law injuries for which arbitrators are precluded from awarding damages).

344. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b) (giving arbitrator discretion to award reinstatement, full or partial back pay, a lump sum severance payment if reinstatement is not awarded, or attorney's fees, or a combination of remedies). An award of only one of the permissible remedies will obviously result in some amount of unreimbursed loss to the employee.

es, a cost of doing business. The Act also invites abuse by allowing employers to require employees to waive the right to just-cause protection against wrongful discharge in exchange for a modest severance payment,³⁴⁵ and by giving employers unfettered freedom to set standards of job performance.³⁴⁶

As a result of these deficiencies in the Act, employees in many states are better off under the current common law than they would be under the new statute. Many elements of the Model Act are commendable and desirable. Adopting the good cause standard³⁴⁷ and anticipating application of the established jurisprudence of labor arbitration³⁴⁸ is an excellent idea. Seeking to reduce the complexity and cost of litigation by encouraging arbitration³⁴⁹ is another positive step. Unfortunately, the Act's giant leap forward in providing these substantive standards is undermined by the inclusion of exceptions to the good cause standard, by the remedy portions of the statute, and by its waiver provision.

A. *The Good Cause Standard*

Adoption of the good cause standard was a prudent decision. Arbitration has been the preferred method of resolving disputes under collective bargaining agreements between unions and employers for more than fifty years.³⁵⁰ Discipline cases, which include discharge cases, are the most frequently arbitrated cases under collective bargaining agreements,³⁵¹ and they are generally governed

345. See *supra* notes 301-07 and accompanying text (discussing Model Act's waiver provision).

346. See *supra* notes 281-85 and accompanying text (explaining that employer is free to select and change standards of job performance in accordance with requirements of particular industry as long as decisions are made in good faith). Under the § 4 waiver provisions, employers and employees can also agree that failure to meet such employer specified performance standards constitutes "good cause." MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(b).

347. See *supra* notes 258-66 and accompanying text (defining parameters of Act's good cause standard).

348. See *supra* note 313 and accompanying text (discussing Act's preference for arbitration because of expertise that labor arbitrators have previously developed).

349. See *supra* notes 312-14 and accompanying text (reviewing Act's preference for arbitration). Although the author does not favor the arbitration remedy as currently drafted, see *infra* notes 376-423 and accompanying text, this Article does favor encouraging and providing a system that is equally accessible to lower level, lower paid employees, as well as to highly paid middle- and upper-management employees.

350. See generally ELKOURI & ELKOURI, *supra* note 266, at 2-7 (summarizing historical development of labor arbitration in America in association with development of collective bargaining from its beginnings in late 19th century through its "rapid advance" since World War II).

351. See Summers, *supra* note 72, at 507 (stating that discipline cases are "by far the largest category of cases brought to arbitration").

by a just cause standard.³⁵² Consequently, the Model Act's standard can draw on over half a century of arbitral experience. Arbitrators have already considered everything from the level of proof to be required in such cases³⁵³ to the kind of nonwork activity that should justify a discharge.³⁵⁴ The principles are now well enough established that even an inexperienced trier of fact would be well guided in reaching a decision.

In addition, under the good-cause standard of the Model Act, the arbitrator is called upon to determine whether the discharge was justified under the totality of the circumstances.³⁵⁵ Thus, if an employee were discharged for tardiness, the arbitrator would consider not only whether the employer had a rule against tardiness and whether the employee violated the rule, but also whether the employee knew of the rule, whether it was regularly enforced, and whether the employee had been warned in the past about tardiness, as well as similar equitable factors.³⁵⁶

1. *Performance standards*

The shortcomings in the good cause standard of the Model Act are twofold. First, the Model Act gives an employer *carte blanche* in setting performance standards.³⁵⁷ An employer could, for example, significantly increase the speed of an assembly line or set unrealistic sales targets with impunity. Any employee who failed to meet the new standards could be terminated, regardless of longevity and competence. In the traditional union setting, such changes in standards would generally be subject to collective bargaining with the un-

352. See GOULD, *supra* note 8, at 63 (noting that 95% of collective bargaining agreements protected employees from discharge without just cause); see also *Burlington N.R.R. v. Individual Grievant*, 101 Lab. Arb. Rep. (BNA) 144, 147 (1993) (referring to customary just cause standard in collective bargaining agreements).

353. See ELKOURI & ELKOURI, *supra* note 266, at 324-25 (discussing application of "doctrine of burden of proof" in arbitration).

354. See ELKOURI & ELKOURI, *supra* note 266, at 656-58 (reviewing employers' rights to discharge employees for conduct outside work facility).

355. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 1(4) cmt. (listing relevant factors that may be taken into account in determining good cause); see also *supra* notes 260-66 and accompanying text (discussing factors that may be taken into consideration in totality of circumstances test).

356. See generally ELKOURI & ELKOURI, *supra* note 266, at 670-88 (identifying and considering most prominent factors relevant in reviewing or evaluating penalties assessed for employee misconduct).

357. See *supra* notes 281-85 and accompanying text (discussing broad latitude employers have in setting job performance standards).

ion.³⁵⁸ The nonunion setting governed by the Model Act, however, provides no such organizational mechanism to protect employees from the imposition of arbitrary or unreasonable standards. The opportunity for employer abuse in the nonunion context is quite real.

To counteract these opportunities for abuse, the Model Act should stand silent on the issue of modification of performance standards. If an employer modified its standards rationally and in good faith, and an employee failed to meet them, an arbitrator might well find a discharge justified. If the employer had manipulated the standards or otherwise acted in bad faith, however, the arbitrator could consider that fact as well. By expressly addressing the issue as it does, the Model Act invites abuse and consequent litigation.

2. *The waiver provision*

A second, and potentially greater, shortcoming of the good-cause standard is the waiver provision. Under the Act, an employer and an employee may enter into a written agreement to waive the good-cause standard, so long as the employer agrees to pay the discharged employee severance pay equal to one month's pay for each year of service, up to a maximum of thirty months' pay.³⁵⁹ As previously discussed, the Act also allows employers and employees to contractually define good cause to include the employee's failure to meet "specified business-related standards of performance" or the employee's "commission or omission of specified business-related acts."³⁶⁰ In addition, the good cause requirement does not apply to the termination of an employee at the expiration of an express oral or written agreement "of employment for a specified duration related to the completion of a specified task, project, undertaking, or assignment."³⁶¹ Notwithstanding contrary assertions in the comments to the Act,³⁶² these provisions are an open invitation to

358. Under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988), employers are required to bargain with the union regarding "wages, hours, terms and conditions of employment." *Id.* § 158(d). Matters that fall within these "mandatory" bargaining subjects include seniority, United States Gypsum Co., 94 N.L.R.B. 112 (1951), fringe benefits, 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 865-82 (Patrick Hardin et al. eds., 3d ed. 1992), and grievance and arbitration procedures, *id.* at 885. An employer who makes unilateral changes in a mandatory subject violates section 8(a)(5) of the NLRA. 29 U.S.C. § 158 (a)(5).

359. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c); *see also supra* text accompanying notes 301-07 (discussing waiver provisions).

360. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(b).

361. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(d).

362. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c) cmt. (stating drafters' belief that, for practical reasons, waiver agreements are likely to be used only with management or key employees).

employers to enter into convenient "contracts of adhesion"³⁶³ with all employees.

The possibility that an employer may pressure an employee to waive her legal rights is not far-fetched. For example, it was enough of a problem for older employees that Congress amended the Age Discrimination in Employment Act³⁶⁴ to provide employees with some protection against coerced waiver of their statutory rights.³⁶⁵ Under this amendment, an employer who seeks to obtain a waiver of an employee's rights to sue in the event of discharge must, among other things, give the employee twenty-one days in which to seek the advice of counsel.³⁶⁶

The problem with the waiver requirement is aptly illustrated by the facts of a case currently being litigated in federal court in Ohio.³⁶⁷ The employee, Jason Miller, began working for the defendant employer (the company) in 1961, at the age of nineteen. He began as an hourly employee in the bargaining unit represented by a major international union. In 1970, the company promoted Miller to a managerial position outside the bargaining unit. He held various managerial positions within the plant until 1992. In late 1992, Miller was summoned to the office of the company's Manager of Human Resources and offered the choice of either taking early retirement by signing and accepting a separation agreement or being terminated immediately. The company never provided any clear explanation for the termination.³⁶⁸

363. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4 cmt. (stating that circumventing rights of employees is not intent of § 4, but also implicitly admitting possibility that severance pay agreements could be considered "contracts of adhesion"); see also BLACK'S LAW DICTIONARY 40 (6th ed. 1990) (defining "adhesion contract" as contract offered in circumstances in which one party lacks bargaining power and under conditions such that that party cannot obtain desired result without acquiescing to other party's terms).

364. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).

365. See Age Discrimination in Employment Act, 29 U.S.C. § 626(f) (Supp. IV 1992) (providing that individuals "may not waive any right or claim . . . unless the waiver is knowing and voluntary").

366. *Id.* § 626(f)(1)(E).

367. This case is being litigated by the author's close friend, who practices in Ohio. The case is still in the discovery stage. Although the matter is now one of public record, in the interest of preserving some modicum of privacy for both the plaintiff and the defendants, the names of the litigants have been changed. Case materials are on file with the U.S. Federal District Court for the Northern District of Ohio.

368. Mr. Miller had in the past experienced some personality conflicts with the Manager of Human Resources, who had allegedly expressed his desire to see Miller discharged. Miller, however, had received satisfactory performance reviews overall. In addition, within the 12 months preceding his discharge, the company had made Miller Acting Plant Manager for a period of time when the Superintendent of the plant was away.

Following Miller's termination, and after six months of investigative work by both Miller and his attorney, Miller asserted, *inter alia*, the following tort, contract, and statutory claims: (1)

The proposed agreement provided Miller with six months' severance pay and medical, dental, and prescription drug insurance coverage. Under its terms, Miller would be required to retire formally when his severance pay expired.³⁶⁹ If Miller had accepted the employer's offer, however, he would have been required to waive his right to pursue statutory and common-law claims against the company.³⁷⁰

Instead of accepting the forced resignation and retirement,³⁷¹

promissory estoppel, based on company promises that Miller could return to the bargaining unit at any time if he was unsuccessful in his supervisory position and could work until retirement; (2) breach of contract, based on company employment manuals and other documents that promised employees that the company would provide continuous employment, consistent with business conditions, and that employees would be treated fairly; and (3) age discrimination (state and federal claims), based on the company's alleged practice of coercing senior, higher paid employees to retire early.

369. The Agreement provided that "[Miller] shall, at the appropriate time, and at his request, as determined by the pension plan and all applicable laws, make application for and execute all documents necessary for participation in the pension plan pursuant to the pension plan's provisions to become effective May 1, 1993."

370. In this respect, the Agreement provided:

In consideration for the benefits and payments described herein, [Miller] hereby releases and forever discharges the Company . . . and the officers, shareholders, directors, employees, representatives, and agents of the foregoing, from all liability, claims and demands, actions and causes of actions, damages, costs, payments and expenses of every kind, nature or description, that [Miller] may have based on his employment with the Company or the termination of that employment. [Miller] understands and agrees that he is releasing any and all claims in tort or in contract (express or implied) arising from any alleged violation by the Company of any federal, state or local statutes, ordinances or common laws, including, but not limited to, the Age Discrimination in Employment Act, 29 U.S.C. [s]ections 621 to 634, and Ohio Civil Rights laws, Ohio Revised Code Title 41, [s]ections 4112.01 to 4112.99 and 4101, et. seq. This Separation Agreement and Release do not constitute a waiver of any rights or claims that may arise after the date when [Miller] signs this document.

The Agreement did, as required by the Age Discrimination in Employment Act, 29 U.S.C. § 626(f)(1)(E) (Supp. IV 1992), advise Miller to consult with an attorney, and gave him the statutorily required 21 days to do so. It also, however, included the following provisions:

X. [Miller] agrees to indemnify and hold the Company harmless from and against any and all liability including, but not limited to, any and all losses, costs, damages, expenses or attorney's fees arising out of any breach of this Agreement by [Miller]. In the event of any breach of this Agreement by [Miller], [Miller] agrees to return to the Company immediately all payments made to him and all other costs incurred under this Agreement for [Miller's] benefit.

XI. The parties agree that the terms of this Agreement shall be confidential and shall not be discussed with or revealed to, any persons, and in no event shall said Agreement or its terms be published or publicized in any manner whatsoever. [Miller] further agrees that, in the event that [Miller] and or his agents or attorneys reveal to any person or entity or in any manner whatsoever cause any of the terms of this Agreement to be published or publicized, except as required by law, the company shall be entitled to legal and or equitable relief and damages in an amount to be determined by a court of competent jurisdiction.

XII. [Miller] hereby waives any and all claims to future employment or reinstatement by the Company or any person or entity released hereby and any and all claims to benefits based in whole or in part on his prior employment by the Company, other than those benefits described herein.

371. The Agreement suggested in its recitals that the document represented a negotiated understanding:

Miller elected to undertake the risk of litigation. His motivation was twofold. First, at the time of his termination, Miller was only fifty years old. He enjoyed his work immensely and did not intend to retire for at least another twenty years. Second, although the law purports to protect employees against age discrimination, the reality is that age discrimination is common throughout the labor market.³⁷² Few employers would have hired Miller to do the same kind of supervisory work at the same salary that he earned at the company. Like many of his contemporaries, Miller does not have a college degree, and he would be competing in a recessionary economy against younger, less expensive employees who did have college degrees.

Prior to his termination, Miller was earning, with overtime, between \$65,000 and \$85,000 annually. He anticipated working at least until age seventy. In the current market, Miller is likely to earn, at most, \$38,000 to \$47,000 per year, if he is willing to relocate. If he desires to stay in Ohio, where he has lived all his life, his earning potential drops below \$30,000 per year. His estimated financial loss, reduced to present value, is in excess of \$500,000. The severance package offered by the employer was worth perhaps \$40,000. In addition, there is no way to quantify Miller's loss of self-esteem and personal enjoyment, nor to fully reimburse him for such a loss.

If employers reserve the right to treat any employee they choose as an at-will employee, subject only to a statutory requirement to provide severance pay,³⁷³ there will continue to be thousands of Jason Millers nationwide. Under the Model Act, if Miller had signed a waiver agreement, he would have received a full thirty months' pay, one for each year of service.³⁷⁴ This lump sum severance payment would have been at his "rate of pay in effect immediately before the termination."³⁷⁵ The total payment to Miller would have been approximately \$125,000. Miller's base rate for determining the severance payment, however, would not reflect the significant overtime he has historically worked. Nor would the total payment

WHEREAS, the parties desire to terminate [Miller's] employment with the Company on October 20, 1992 on terms acceptable to [Miller] and the Company; and

WHEREAS, the parties have negotiated this written Agreement in order to effectuate such terms and to resolve any and all matters in dispute between them;

In fact, the Agreement was a "take it or leave it" proposal.

372. See Sixel, *supra* note 204, at C1 (proffering experts' opinions that employers very often hire, promote, or fire based on age of employees, despite illegality of such practices).

373. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

374. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

375. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 4(c).

compensate Miller for foregone opportunities to move to another employer when he was younger, for most of the years beyond age fifty during which he had expected to continue productive employment, for the negative impact on his pension, or for numerous other factors.

The Model Act's waiver provision would allow an employer to require every employee to sign such an agreement at the commencement of his employment, so long as the requisite statutory severance pay was promised. An employee like Miller who alleges that he was wrongfully terminated would have no recourse under state law. Unless there was evidence of race, sex, age, or other discrimination prohibited by federal statute, the employee would be without any remedy.

B. The Statutory Procedure

The Model Act favors arbitration as the forum for resolving employment termination disputes.³⁷⁶ In favoring arbitration, the drafters of the Act are in agreement with numerous commentators who have argued that arbitration is the best way to resolve wrongful discharge disputes.³⁷⁷ This Article, however, proposes a different approach. Instead of arbitration, this Article urges that the procedure for seeking remedies be patterned after title VII, with some modifications.

Arbitration is a fundamental tenet of labor policy and jurisprudence in the United States. Both Congress³⁷⁸ and the Supreme Court³⁷⁹ have affirmed the importance of arbitration in resolving labor disputes time and again. The Court has viewed arbitration as a forum

376. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, at 68, prefatory note (indicating that arbitration is "preferred method of enforcement . . . [which] should provide . . . speedier, more informal, more expert and less expensive proceedings").

377. See, e.g., Gould, *supra* note 100, at 43 (stating that although arbitration has some drawbacks, it is very useful model); Summers, *supra* note 72, at 521 (asserting that "[l]egal protection against unjust dismissal can best be built upon the standards and procedure of our existing arbitration system").

378. See generally PERRITT, *supra* note 101, at 203-06 (enumerating 1888 Arbitration Act, 25 Stat. 501 (1888), 1920 Transportation Act, ch. 91, 41 Stat. 456 (1920), Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) and § 301 of Labor Management Relations Act of 1947, ch. 120, 61 Stat. 156 (1947) as statutes in which Congress recognized importance of arbitration in resolving grievance disputes).

379. See, e.g., *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 242-43 (1970) (emphasizing importance of arbitration as "instrument of federal policy for resolving disputes between labor and management"); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (noting that "federal policy is to promote industrial stabilization through the collective bargaining agreement" and "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement"); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stating that federal policy encourages settlement of labor disputes through arbitration).

desirable primarily to unions, assuming that the arbitration clause is for the union the quid pro quo for the no-strike clause sought by the employer.³⁸⁰ One of the reasons for relying so heavily on arbitrators is that they are viewed as understanding the "common law . . . of . . . the shop"³⁸¹ and the culture that is inherent to each industry.³⁸²

In the nearly sixty years since the NLRA³⁸³ gave employees a federally protected right to organize and bargain collectively,³⁸⁴ arbitration has become a way of life in the union setting. Approximately ninety-six percent of all collective bargaining agreements have provisions for final and binding arbitration of most disputes, including discharge.³⁸⁵ Most of those agreements establish a standard of "just cause" for discharge.³⁸⁶ So strong is the tradition of just cause in arbitral jurisprudence that many arbitrators have inferred the existence of a just-cause standard in agreements that did not expressly state such a standard.³⁸⁷

380. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (stating that agreement to arbitrate is "plainly . . . the *quid pro quo* for an agreement not to strike"). This presumption is so strong that if an agreement contains an arbitration clause, the court will infer the existence of a no-strike clause. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962). The author disagrees with this premise: the presence of an arbitration clause merely indicates that both parties favor arbitration as an expedient, relatively inexpensive means of resolving the dozens of disputes that regularly arise in the workplace.

381. See *Warrior & Gulf*, 363 U.S. at 581-82 (stating that arbitrators are usually chosen because parties trust their judgment in considering factors peculiar to industry but not expressed in contract as criteria for judgment).

382. See *Enterprise Wheel & Car*, 363 U.S. at 596 n.2 (describing development of particular industries as "miniature societies") (citing Charles R. Walker, *Life in the Automatic Factory*, HARV. BUS. REV., Jan./Feb., 1958, at 111, 117).

383. 29 U.S.C. §§ 151-169 (1988). The original version of the National Labor Relations Act was known as the Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

384. See 29 U.S.C. § 157 (1988) (giving employees "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives . . . and to engage in other concerted activities for the purpose of collective bargaining").

385. See Jack Stieber, *Termination of Employment in the United States*, 5 COMP. LAB. L. 327, 330-31 (1982) (noting that arbitration procedures most commonly are 2-, 3-, or 4-step procedures that result in binding arbitral awards).

386. See ELKOURI & ELKOURI, *supra* note 266, at 652 (discussing requirements for discipline and discharge that are contained in most collective bargaining agreements). In one survey conducted in 1975, 79% of collective bargaining agreements contained general statements that employees could be discharged for "cause" or "just cause." Summers, *supra* note 72, at 499 n.104. Many arbitrators, however, will find an implicit "just cause" limitation in the agreement. See ELKOURI & ELKOURI, *supra* note 266, at 652 (stating that "many arbitrators would imply just cause limitation into any collective agreement" because to do otherwise would "reduce to a nullity the fundamental provision of a labor-management agreement the security of a worker in his job"). William Gould, the recently confirmed chairman of the National Labor Relations Board, estimates that 95% of all agreements protect employees against discharge without just cause. GOULD, *supra* note 8, at 63.

387. See *Cameron Iron Works*, 25 Lab. Arb. Rep. (BNA) 295, 301 (1955) (stating that "'just cause' basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in modern collective bargaining agreement"); see also *United Food & Commercial Workers Int'l v. Gold Star Sausage*, 487 F. Supp. 596, 600 (D. Colo. 1980) (upholding arbitrator's

Discharge is viewed as the "capital punishment" of the shop.³⁸⁸ In deciding a discharge case, the arbitrator seeks to dispense justice and mercy by weighing numerous mitigating factors in making her decision to uphold or overturn the discharge.³⁸⁹ It is not uncommon for arbitrators to "split the baby in half" by reinstating the discharged employee to his former job while denying him back pay or allowing only partial back pay.³⁹⁰

This established system has worked quite well chiefly because it exists in a two-party environment. Labor arbitration is simply a proceeding between the union and the employer, even in discharge or individual rights cases.³⁹¹ The union pays the costs of the proceeding and represents the employee at the hearing.³⁹² If the union retains counsel, the union pays counsel fees.³⁹³ The processing of grievances is so integrated into the totality of the labor-management relationship that it is not uncommon for the union and the employer to resolve at the bargaining table employee grievances, which would otherwise go to arbitration.³⁹⁴

Although this comprehensive dispute resolution system may work well in the traditional labor-management environment, where arbitration is a part of the unionized industrial culture,³⁹⁵ it is not appropriate for wholesale adaptation in the arena of wrongful discharge.³⁹⁶ Many labor arbitrators, who are chosen in part for

inference of presence of just cause provision in agreement with no clear restrictions to contrary); *Shearson v. Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 (7th Cir. 1981) (stating that courts have "repeatedly held" that agreements to arbitrate employee discharge disputes "imply[] requirement that discharges be only for just cause").

388. *Universal Frozen Foods*, 100 Lab. Arb. Rep. (BNA) 24, 26 (1992); *University of Pennsylvania*, 99 Lab. Arb. Rep. (BNA) 352, 360 (1992).

389. See ELKOURI & ELKOURI, *supra* note 266, at 666-67 (discussing function of arbitrator in reviewing discharge).

390. See generally ELKOURI & ELKOURI, *supra* note 266, at 688-91 (discussing arbitral remedies in discharge cases).

391. See ELKOURI & ELKOURI, *supra* note 266, at 6-9 (discussing arbitration setting).

392. See ELKOURI & ELKOURI, *supra* note 266, at 19 (noting costs associated with arbitration proceeding). It is common for the employer and the union to split the cost of the arbitration proceeding equally. *Id.*

393. See ELKOURI & ELKOURI, *supra* note 266, at 20 (explaining who typically pays counsel fees in arbitration proceedings). Many unions, particularly smaller, less affluent locals, use staff representatives from the national union or other nonlawyers to handle the arbitration. *Id.* at 241-42. Employers, on the other hand, seem to use lawyers more frequently. *Id.* at 242.

394. See Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies, and Sanctions*, 10 HOFSTRA LAB. L.J. 245, 246 (explaining utility of arbitration in labor culture).

395. See Gould, *supra* note 100, at 418 (reviewing fit between arbitration and labor-management dispute resolution).

396. As Professor Gould has noted, "Arbitration in the organized sector is voluntarily bargained for and shaped to the peculiar needs of the labor-management relationship involved. This can never be true of a system imposed by law." Gould, *supra* note 100, at 418.

their expert knowledge of the world of industry, are not lawyers.³⁹⁷ Consequently, arbitration proceedings can vary widely in terms of the formality of the hearings,³⁹⁸ whether or not rules of evidence apply,³⁹⁹ and how much weight the arbitrator accords precedent.⁴⁰⁰ In fact, arbitrators are not obligated to follow the law expressly.⁴⁰¹ A reviewing tribunal will generally uphold an arbitrator's decision, so long as it draws "its essence" from the collective bargaining agreement.⁴⁰² In addition, arbitrators generally do not award damages, nor do they tend to exercise broad equitable powers other than ordering reinstatement of a discharged employee.⁴⁰³

The act of wrongfully terminating an employee for an arbitrary, capricious, or even morally objectionable reason is no different in effect from discharging an employee because of age, sex, race, handicap, or any other discriminatory reason. In drafting the Model Act, the commissioners recognized these similarities and fashioned certain parts of the Model Act after title VII.⁴⁰⁴ All of the federal statutes prohibiting discrimination now follow a well-established procedure in which a discharged employee must first file a charge with the applicable state agency, if there is one.⁴⁰⁵ Thereafter, the employee must file a complaint with the Equal Employment Opportunity Commission (EEOC).⁴⁰⁶ If the EEOC finds evidence of discrim-

397. See Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8, '78 (explaining that law experience is not precondition for arbitration appointment).

398. See Berger, *supra* note 394, at 254 (discussing often informal nature of arbitration proceedings).

399. See ELKOURI & ELKOURI, *supra* note 266, at 296 (explaining that individual arbitrators are free to set evidentiary rules).

400. See ELKOURI & ELKOURI, *supra* note 266, at 419-21 (stating that there is no clear doctrine of stare decisis in labor arbitration).

401. See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (stating that courts do not judge legal error of arbitrator); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984) (deferring to arbitration decision even when arbitrator's award is not "totally consistent with Board precedent").

402. See *supra* notes 324-26 and accompanying text (discussing circumstances under which court will set aside arbitrator's award).

403. See generally ELKOURI & ELKOURI, *supra* note 266, at 688-91 (outlining remedial powers of arbitrators).

404. See *supra* notes 309, 330 and accompanying text (explaining how procedural and damages sections of Model Act are modeled after title VII).

405. E.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1988); Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (1988); Americans with Disabilities Act, 42 U.S.C. § 12117 (Supp. IV 1992).

406. 42 U.S.C. § 2000e-5(c); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. If there is a state agency, charges must also be filed with the EEOC within 300 days after the discharge occurred. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. If there is no state agency with jurisdiction, the charge must be filed with the EEOC within 180 days. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d); 42 U.S.C. § 12117.

ination, the agency will investigate the dismissed employee's charge and then seek a conciliation agreement with the employer.⁴⁰⁷

In contrast to the EEOC, many state agencies have the power to adjudicate claims, subject to judicial review in state courts.⁴⁰⁸ A decision by a state court on the matter, however, will bar any additional action by the EEOC and will preclude the employee from seeking redress in federal court.⁴⁰⁹ Alternatively, the EEOC may bring suit on the employee's behalf,⁴¹⁰ or the employee may file suit on her own.⁴¹¹ This procedure, which offers the aggrieved employee a choice between a government-funded administrative resolution of her claim and litigation, is ideally suited for use in wrongful discharge cases.

The Model Act has adopted state-funded arbitration as the preferred method for resolving wrongful discharge claims.⁴¹² "For states concerned about the possible extra expense of outside arbitrators,"⁴¹³ the Act also provides an alternative method, Alternative A,⁴¹⁴ which utilizes hearing officers and is similar to the method currently used by many states for discrimination cases.⁴¹⁵ Additionally, for those "states concerned about possible constitutional

407. 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(b); 42 U.S.C. § 12117; see PERRITT, *supra* note 101, at 96 (discussing conciliation as EEOC alternative). In practice, the EEOC often delays any actual investigation until the state investigation is completed. PERRITT, *supra*.

408. See, e.g., ARIZ. REV. STAT. ANN. § 41-1481 (1991) (describing enforcement procedures for discrimination in employment); COLO. REV. STAT. § 24-34-3 (1988) (discussing remedial procedures of Civil Rights Division); OHIO REV. CODE ANN. § 4112.04 (Anderson 1991) (providing Ohio Civil Rights Commission with power to adjudicate claims subject to review by state court).

409. *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 476 (1982).

410. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. Generally, the EEOC will only file suit in particularly egregious cases, or where there is evidence of a pattern or practice of discrimination. See John A. Tisdale, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Opportunity*, 64 B.U. L. REV. 151, 158 (1984) (comparing level of cause statutorily required before EEOC action with actual commission practice).

411. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. Under title VII, the EEOC has 180 days to conduct its investigation before the employee may bring suit. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. If the agency finishes the investigation and declines to take action, it will issue a "right-to-sue" letter to the employee. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. The employee, however, has the right to demand the right-to-sue letter at any time after the expiration of the 180 day period. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. The employee then has 90 days within which to file suit. 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(d); 42 U.S.C. § 12117. The title VII action may be filed in either state or federal court. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) (concluding that states hold concurrent authority to adjudicate title VII claims). See generally PERRITT, *supra* note 101, at 95-99 (describing briefly entire title VII procedure).

412. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

413. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

414. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, at app. (Alternative A).

415. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

problems concerning the right to jury trial, access to the courts, etc.,⁴¹⁶ the Act provides yet another alternative, Alternative B,⁴¹⁷ which leaves enforcement in the hands of civil courts.⁴¹⁸

This Article proposes that given the many years of experience with the title VII procedure, the Act should be modeled after title VII. An aggrieved employee should have the option first to pursue a claim entirely through the state administrative process, subject to judicial review in state court.⁴¹⁹ This procedure would reflect the considerations encompassed by Alternative A under the Model Act.⁴²⁰ In addition, or in the alternative, an employee should have the right to bring a civil suit. Arbitration should only be available to the parties, as an alternative to state administrative or civil proceedings, if it has been chosen as an option by mutual agreement.⁴²¹

The alternative this Article proposes, like Alternative A, utilizes existing administrative machinery, reduces costs, and eliminates any controversy over the constitutional right to a trial by jury in state courts.⁴²² By offering arbitration as an alternative, the proposed statute would conform with traditional labor relations principles that require arbitration only where agreed upon by the parties.⁴²³

C. The Toothless Tiger: Remedies Under the Model Act

Under the Model Act, the preferred remedy for wrongfully discharged employees is reinstatement.⁴²⁴ In addition, an arbitrator may award back pay and reimbursement for lost fringe benefits.⁴²⁵ Such awards, however, are reduced by the amount of compensation earned by the discharged employee between the time of discharge

416. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

417. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, at app. (Alternative B).

418. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note.

419. See Blades, *supra* note 10, at 1433 (proposing that claims of abusive dismissal be heard by civil rights or fair employment practices agencies rather than by courts and juries). Although not currently practiced under the title VII mechanism, states could charge parties who file a claim a small filing fee in an effort to deter the most frivolous claims.

420. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, at app. (Alternative A).

421. The author, of course, prefers a federal statute. See *infra* notes 465-76 and accompanying text (discussing need for federal statute). Such a statute would, like title VII, allow the aggrieved employee to file a claim with both the EEOC and the appropriate state agency and/or file a suit in state or federal court. See 42 U.S.C. § 2000e-5(f).

422. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, prefatory note (detailing benefits of Alternatives provided for in Model Act).

423. See ELKOURI & ELKOURI, *supra* note 266, at 6-9 (discussing traditional use of arbitration in labor setting).

424. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3) cmt.

425. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2).

and the date of the award.⁴²⁶ In lieu of reinstatement, the arbitrator may award a lump-sum severance payment.⁴²⁷ The severance payment, however, may not exceed a total of thirty-six months of pay, and it must be reduced by the "likely earnings and benefits from employment elsewhere."⁴²⁸ The arbitrator may also award attorney's fees and costs.⁴²⁹ The arbitrator is expressly prohibited under the Act from granting any other monetary award or equitable relief.⁴³⁰ It is this severely restrictive scheme for damages that makes the Act truly a toothless tiger.

The experience of being wrongfully discharged from her employment can prove devastating to an employee. Under traditional tort law, we readily compensate victims of legally recognized torts for physical injuries and accompanying pain and discomfort. An employee's wrongful termination can cause catastrophic emotional upheaval that is just as traumatic as the pain and suffering or mental distress suffered by an accident victim.⁴³¹ The employee's dignity and sense of self-worth are often undermined. The economic strain caused by the employee's loss of wages compounds this emotional trauma.⁴³² The ramifications of wrongful discharge far exceed those

426. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2). An arbitrator may award "full or partial backpay and reimbursement for lost fringe benefits, with interest, reduced by interim earnings from employment elsewhere, benefits received, and amounts that could have been received with reasonable diligence." *Id.*

427. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3).

428. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3). Section 7(b)(2) provides:

[I]f an employee is not reinstated, the arbitrator may award a lump-sum severance payment at the employee's rate of pay in effect before the termination, for a period not exceeding [36 months] after the date of the award, together with the value of fringe benefits lost during that period, reduced by likely earnings and benefits from employment elsewhere, and taking into account such equitable considerations as the employee's length of service with the employer and reasons for the termination.

Id.

429. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(4).

430. MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(d). Section 7(d) provides:

An arbitrator may not make an award except as provided [herein]. The arbitrator may not award damages for pain and suffering, emotional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award. In making a monetary award under this section, the arbitrator shall reduce the award by the amount of any monetary award to the employee in another forum for the same conduct of the employer. In making an award, the arbitrator is subject to the rules of issue, fact, and judgment preclusion applicable in courts of record in this State.

Id.

431. See *supra* notes 10-13 and accompanying text (describing severe emotional trauma associated with discharge).

432. See *supra* notes 15-17 and accompanying text (detailing financial consequences of discharge).

of a host of other injuries for which we readily provide compensation.⁴³³ Yet under the Model Act, a wrongfully discharged employee can recover nothing for the physical and/or psychological harm she has suffered.⁴³⁴ Her recovery is limited to little more than a few dollars back pay. Under the Act, it is the victim of the employer's wrong who bears the non-wage costs of the employer's act, not the employer.⁴³⁵

The Act as presently written does not begin to make victims whole for the injury inflicted by their employer,⁴³⁶ nor does it provide any deterrence against future wrongful conduct by the employer.⁴³⁷ On the contrary, the Model Act turns wrongful termination suits into an easily valuated cost of doing business. As a result, it may cause more harm than good to many employees throughout the nation.

As originally adopted, title VII provided nothing more than the "equitable" remedies of back pay and reinstatement.⁴³⁸ Like the

433. See, e.g., Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 337 (1994) (discussing "make-whole" remedy in defamation cases).

434. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(2)k (detailing remedies available under Model Act).

435. Cf. H.R. REP. NO. 40(I), 102d Cong. 1st Sess. 66 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 604 ("Who should bear the non-wage costs of intentional, illegal discrimination: the perpetrator of the discrimination or the victim? Under current Title VII law, it is the victim.").

436. See *supra* notes 424-30 and accompanying text (discussing inadequacy of damage remedies under Model Act). Prior to the 1991 amendments, title VII, like the Model Act, limited recovery to back pay and reinstatement. See *infra* notes 438-54 and accompanying text (reviewing changes to recovery made under 1991 amendments to title VII). In hearings on the 1991 amendments, the House Committee on Education and Labor heard the testimony of Carol Zabkowitz. H.R. REP. NO. 40(I), *supra* note 435, at 67, 1991 U.S.C.C.A.N. at 605. Ms. Zabkowitz had been an employee of West Bend Co., where she suffered sexual harassment. *Zabkowitz v. West Bend Co.*, 584 F. Supp. 780, 784 (E.D. Wis. 1984), *aff'd in part, rev'd in part on other grounds*, 789 F.2d 540 (7th Cir. 1986). The harassment led to emotional and physical complications, including vomiting, severe nausea, and other gastrointestinal disorders. *Id.* When she became pregnant, her doctor advised her to take a medical leave of absence, which she did. *Id.* Thereafter she sued for harassment under title VII and won. *Id.* The federal court observed that Ms. Zabkowitz had been the victim of "sustained, vicious, and brutal harassment [which was] malevolent and outrageous." *Id.* Nevertheless, the court could award her only \$2763 in back pay for the 2-month absence from work during her pregnancy. *Id.* at 785. Ms. Zabkowitz's testimony before the House Committee is compelling:

I have heard that Title VII is supposed to make victims "whole" for the harm they have suffered because of discrimination. Well, I was not "made whole." Not only did I have to pay a lot of medical bills and suffer a great deal of medical harm because of the harassment, but I was robbed of my dignity. Today, in 1990, several years after leaving West Bend, I am finding the healing process is far from over. Title VII did not make me "whole" for the harm I suffered.

H.R. REP. NO. 40(I), *supra* note 435, at 67, 1991 U.S.C.C.A.N. at 605. Ms. Zabkowitz's comments could be similarly directed to the Model Act.

437. See *supra* notes 344-75 and accompanying text (criticizing Act and discussing lack of deterrent value).

438. 42 U.S.C. § 2000e-5(g) (1988) (amended 1991).

Model Act, the statute did not provide for any type of compensatory or punitive damages.⁴³⁹ Victims of race-based employment discrimination, however, were able to sue their employers for compensatory and punitive damages under a Reconstruction-era civil rights statute, § 1981 of title 42, that pre-dated title VII by nearly a century.⁴⁴⁰ In 1991, Congress concluded that persons who were victims of discrimination based on factors other than race should also have access to such remedies.⁴⁴¹ Monetary damages are necessary, Congress concluded, "to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity."⁴⁴²

Congress also recognized the need to provide a deterrent to future discrimination⁴⁴³ because the remedy of back pay simply had not been a sufficient deterrent.⁴⁴⁴ In order to deter employers from discriminating against employees, it was necessary to make them liable for "all losses—economic and otherwise" that were suffered by the victims of discrimination.⁴⁴⁵ There was substantial testimony before the House Education and Labor Committee in support of the premise

439. *Id.*

440. 42 U.S.C. § 1981 (1988). Section 1981 was originally enacted as part of the Civil Rights Act of 1866. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27 (current version at 42 U.S.C. § 1981 (1988)). It provides that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *Id.* In *Johnson v. Railway Express Agency*, the Supreme Court concluded that § 1981 would support a federal cause of action for racial discrimination in employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). As a result, since 1975 employees who have been victims of racial discrimination have been able to assert both title VII and § 1981 claims. See PERRITT, *supra* note 80, at 202 (noting ability of complainant to litigate in several different forums). Plaintiffs may recover both compensatory and punitive damages under § 1981. See PERRITT, *supra* note 101, at 117-19 (discussing remedies available under § 1981).

441. See H.R. REP. NO. 40(I), *supra* note 435, at 65, 1991 U.S.C.C.A.N. at 603 ("Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the same for purposes of making victims whole, encouraging private enforcement, and deterring future violations of federal law."). Under title VII, employees are protected against discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988). The Americans with Disabilities Act of 1990 incorporated title VII's remedies. 42 U.S.C. § 12117 (Supp. III 1991). Consequently, employees who are victims of discrimination based on handicap are also entitled to the "make-whole" remedy of compensatory and punitive damages. *Id.*

442. H.R. REP. NO. 40(I), *supra* note 435, at 65, 1991 U.S.C.C.A.N. at 603. The House Education and Labor Committee also observed: "Victims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result." *Id.* at 66, 1991 U.S.C.C.A.N. at 604.

443. H.R. REP. NO. 40(I), *supra* note 435, at 69, 1991 U.S.C.C.A.N. at 607.

444. See H.R. REP. NO. 40(I), *supra* note 435, at 69, 1991 U.S.C.C.A.N. at 607 ("Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent . . .").

445. H.R. REP. NO. 40(I), *supra* note 435, at 69, 1991 U.S.C.C.A.N. at 607. Congress was proceeding on the theory that "[m]aking employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination, and which are proved at trial, will serve as a necessary deterrent to future acts of discrimination." *Id.*

that allowing compensatory and punitive damages would deter employer discrimination.⁴⁴⁶

Opponents of the 1991 Civil Rights Act, including employers, argued that allowing compensatory and punitive damages would "open the floodgates" and lead to many frivolous lawsuits and astronomical awards.⁴⁴⁷ The Committee found the argument unpersuasive, however, because the history of § 1981⁴⁴⁸ revealed no evidence of litigants either filing an inordinate number of frivolous lawsuits or recovering astronomical awards.⁴⁴⁹ There are two likely explanations for the Committee's findings. First, plaintiff's lawyers, who receive payment only if the plaintiff recovers damages, will not waste time and money pursuing meritless and unprofitable claims;⁴⁵⁰ and second, filing a meritless claim could subject the attorney to sanctions by the court.⁴⁵¹

The House Committee thus concluded that permitting victims of discrimination to recover damages would "enhance the effectiveness of title VII by making victims of intentional discrimination whole for their losses, by deterring future acts of discrimination and by encouraging private enforcement."⁴⁵² In reaching the compromise necessary to pass the legislation, however, Congress established statutory limits on the damages that an employee may recover.⁴⁵³ In an attempt to balance the need to protect employees from discrimination against the need to protect employers from catastrophic awards and financial ruin, these limits are related to the size of the employer.⁴⁵⁴ The goal of such damages, of course, is to punish, but

446. See H.R. REP. NO. 40(I), *supra* note 435, at 69-70, 1991 U.S.C.C.A.N. at 607-08 (detailing support of "[n]umerous courts, commentators and witnesses before the committee" for compensatory and punitive damages).

447. H.R. REP. NO. 40(I), *supra* note 435, at 70, 1991 U.S.C.C.A.N. at 608.

448. 42 U.S.C. § 1981 (1988).

449. H.R. REP. NO. 40(I), *supra* note 435, at 71, 1991 U.S.C.C.A.N. at 609. The House Committee reviewed a report by the law firm of Shea & Gardener, which found that of the 594 § 1981 cases decided between 1980 and 1990, compensatory or punitive damages were awarded in only 69. *Id.* at 72, 1991 U.S.C.C.A.N. at 610. In two-thirds of these 69 cases, the total damages awarded were \$50,000 or less. *Id.* In only four cases did the award exceed \$200,000. *Id.*

450. See H.R. REP. NO. 40(I), *supra* note 435, at 71, 1991 U.S.C.C.A.N. at 609 (calling worry over frivolous claims "fanciful").

451. See FED. R. CIV. P. 11 (detailing sanctions available against attorneys who bring meritless claims).

452. H.R. REP. NO. 40(I), *supra* note 435, at 70, 1991 U.S.C.C.A.N. at 608.

453. See 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992).

454. *Id.* Section 1981 was amended in 1991 to allow a plaintiff to recover compensatory and punitive damages, subject to a cap based on the number of persons employed by the defendant. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a (Supp. IV 1992)). The maximum damages available against an employer with 15 to 100

not ruin the employer.

The impact of wrongful discharge on an employee is substantially the same, whether the employee is discharged because of race, sex, or religion, or other statutorily prohibited discrimination, or for a nonstatutorily prohibited reason. The same reasons that compelled Congress to allow victims of statutorily prohibited discrimination to recover compensatory and punitive damages compel that such remedies be provided for in the Model Act.⁴⁵⁵ Unfortunately, neither proposal was adopted.

The damages suffered by a wrongfully discharged employee can easily exceed the statutory limits established by the Civil Rights Act of 1991, as illustrated by the Jason Miller case.⁴⁵⁶ In light of the fact that our national experience with § 1981 suits strongly suggests that employers' fears of astronomical verdicts are unfounded,⁴⁵⁷ the Model Act should not contain any limits on damages at all. The statute should allow discharged employees to recover compensatory and punitive damages calculated in accordance with traditional common-law standards.⁴⁵⁸

In recognition of the arduous battle in Congress over the damages provision of the Civil Rights Act of 1991,⁴⁵⁹ and in view of the virtual certainty that neither Congress nor a state legislature is likely to adopt a statute embracing unlimited compensatory or punitive damages, however, this Article proposes that the Model Act provide for compensatory and punitive damages with caps similar to those in the Civil Rights Act of 1991.⁴⁶⁰ The Act should, however, tie the caps to the employer's gross revenue rather than to the number of employees. Such caps would be more equitable to all parties because the limits would be related to ability to pay, not to an arbitrary personnel

employees are \$50,000; with 101 to 200 employees, \$100,000; with 201 to 500 employees, \$200,000; with over 500 employees, \$300,000. 42 U.S.C. § 1981a. The damages are recoverable in addition to the traditional equitable remedies of back pay, front pay, and injunctive relief. *Id.*

455. The Study Committee for the Model Act had originally proposed punitive damages for "malicious violations of public policy or malicious, bad faith failures to follow the employer's own policies, procedures, or assurances." MODEL EMPLOYMENT TERMINATION ACT § 6(b)(8) cmt. (Draft February 22, 1989). The February draft also contained a provision allowing an arbitrator to award liquidated damages not greater than the back pay awarded. *Id.* § 6(b)(3); cf. Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (Supp. IV 1992) (allowing liquidated damages equal to back pay).

456. See *supra* notes 367-75 and accompanying text (citing *Miller* case as example where actual damages suffered exceeded statutory limits for recoverable damages).

457. See *supra* note 449 and accompanying text (providing statistics concerning § 1981 suits).

458. See *supra* notes 82-126 and accompanying text (discussing common law standards applicable to employment).

459. See *supra* notes 438-54 and accompanying text (discussing legislative history of title VII).

460. See *supra* notes 452-54 and accompanying text (discussing title VII damages caps).

count.

Finally, the Model Act should abandon the preference for reinstatement as a remedy.⁴⁶¹ It simply does not work. If an employer is hostile to an employee and wrongfully discharges the employee, a court or administrative order returning the employee to work will not change the hostility of the environment. Studies have shown that reinstated employees do not fare well; they generally stay only a short time following reinstatement.⁴⁶² Generally, reinstatement should not be favored for many of the same reasons that the common law will not order specific performance of employment contracts.⁴⁶³

Proponents of reinstatement point to its relative success as a remedy in the arena of labor arbitration.⁴⁶⁴ The proponents overlook, however, the fact that an employee reinstated as a result of an arbitration under a collective bargaining agreement will continue to work under the protection of his union. The employer must welcome the employee back to the fold or face strained relations with the union representing its employees. In contrast, a nonunion employee who is wrongfully discharged has no one looking out for her interests and no ally to support her if the employer continues to deal with her in a hostile manner. This is not to say that reinstatement should not be an option if the employee requests it. In some settings it may work well. It should not, however, be the presumptive remedy for wrongful discharge.

461. See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 7(b)(3) cmt. (describing reinstatement as preferred remedy under Act).

462. See generally Warren H. Chaney, *The Reinstatement Remedy Revisited*, 32 LABOR L.J. 357, 363-64 (1981). Professor Chaney studied the effectiveness of reinstatement as a remedy under the National Labor Relations Act for victims of anti-union discrimination. *Id.* at 357. Of the 217 employees in the study who were ordered reinstated, 59% refused reinstatement; 88% of those refusing reinstatement cited fear of employer backlash as the reason. *Id.* at 359 tbls. I & II. Of the employees who were reinstated, 86.9% left within the first year. *Id.* at 360 tbl. IV. Approximately 65% of those departing cited unfair treatment by the employer as the reason for leaving. *Id.* tbl. V; see also Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 28-44, 65 (criticizing reinstatement as remedy based upon empirical studies showing its deficiency in cases of wrongful discharge and proposing, among other things, "a significant monetary award" as an alternative). Presumably it is because of the problems inherent in reinstatement that the remedy is not generally favored among Western European nations. See Gould, *supra* note 100, at 414 (noting European practice disfavoring reinstatement).

463. See Leonard, *supra* note 141, at 685 (discussing reasons common law disfavors specific performance of contracts).

464. See West, *supra* note 462, at 38-40 (noting that reinstatement has been successful in labor arbitration context). In contrast to the general tendency of employees to decline reinstatement as a remedy under the NLRA, see *supra* note 462, only 10% to 14% of employees awarded reinstatement by arbitrators decline to return to work. *Id.* at 38. Of those who accept reinstatement, most have remained with the company for two years or more. *Id.* (citing studies that found that 47% to 75% of employees reinstated by arbitrator remained with employer at least two years following reinstatement).

V. PROPOSAL FOR A NEW FEDERAL STATUTE

In order to protect American employees from wrongful discharge, Congress should adopt a Federal Employment Termination Act that is modeled after title VII, as amended by the Civil Rights Act of 1991, and that prohibits the discharge of any employee without good cause. The proposed statute should employ a definition of "good cause" similar to that of the Model Act.⁴⁶⁵ In contrast to the Model Act, however, employers should not be able to arbitrarily set performance standards.⁴⁶⁶ All employer actions, including the establishment of job performance criteria, should be subject to a reasonableness standard similar to that used in traditional labor arbitration.⁴⁶⁷

The right to be protected against wrongful discharge is as important as the right to be protected from invidious employment discrimination. Therefore, in contrast to the Model Act, the federal act should prohibit any advance agreements between employers and employees that would serve to waive the employee's statutory protection.⁴⁶⁸ An employer could, of course, enter into a written contract with an employee for a finite period of time, in which case there would be no obligation to retain the employee when the contract expires, so long as the agreement was entered into in good faith.

In contrast to the Model Act, the federal act should protect all employees, including state and local government employees and persons employed by small employers.⁴⁶⁹ Many Americans work for small employers and their economic and personal tragedy in the event of wrongful discharge is no different from the tragedy endured by an employee wrongfully discharged from a large multinational corporation. The economic effect of such claims on small employers would be tempered by the limits Congress would establish for compensatory and punitive damages.⁴⁷⁰

One new provision not contained in either title VII or the Model Act should be added to the federal act: a requirement of notice. An employer should be required to give an employee at least thirty days advance notice of his termination, except where unusual circumstanc-

465. See *supra* notes 258-86 and accompanying text (discussing Model Act's good cause requirement).

466. See *supra* notes 281-85 and accompanying text (discussing freedom of employer under Model Act to set performance standards).

467. See ELKOURI & ELKOURI, *supra* note 266, at 222-36 (explaining reasonable standard of labor arbitration).

468. See *supra* notes 359-75 and accompanying text (criticizing waiver provision of Model Act).

469. See *supra* notes 287-90 and accompanying text (listing employees covered by Model Act).

470. See *supra* notes 331-39 and accompanying text (discussing limits on remedial measures of Model Act).

es make it impractical to give such notice.⁴⁷¹ In lieu of the notice, the employer could provide severance pay for a time equal to the notice period. Such notice would allow the employee to pursue internal grievance remedies before leaving his employment, as well as provide the discharged employee some opportunity to seek new employment before his old employment terminates.

All of the procedural and administrative aspects of title VII should apply to cases of wrongful discharge.⁴⁷² An aggrieved employee would first file a charge with the EEOC, which would then investigate the claim. When the agency's investigation has been completed, or when the statutory investigation period has expired, the employee would receive a "right to sue" letter, after which she could, if she chooses, proceed to litigation. The federal scheme would be integrated with state wrongful termination statutes, including those patterned after the Model Act, in the same way in which title VII is currently integrated with state discrimination statutes.⁴⁷³ In contrast to title VII, however, the federal act should provide an arbitration option under which the parties could, upon mutual agreement, arbitrate a wrongful discharge claim.

The proposed statute would provide American employees with needed protection against wrongful discharge. The availability of damages would hopefully deter employers who might otherwise discharge without cause. The administrative structure and procedure already in place for discrimination claims would provide access to a tribunal for all employees, regardless of their economic circumstances.⁴⁷⁴ It would also provide employers some protection from specious claims because employees would have to allow the state or federal agency to investigate the claim before commencing litigation. In addition, the proposed federal act would protect employers from the threat of dual claims under title VII and the Model Act when the wrongful discharge was allegedly for discriminatory reasons.⁴⁷⁵ Adoption of such a statute would finally provide employees with the

471. Cf. CONVENTION 158, *supra* note 250. The Convention, like many European statutes, requires notice prior to termination. *Id.*

472. See *supra* notes 405-11 and accompanying text (discussing procedural aspects of title VII). This would also be consistent with Congress' approach in amending the Americans with Disabilities Act. 42 U.S.C. § 12117 (Supp. IV 1992).

473. See *supra* notes 408-09 and accompanying text (explaining interplay between federal and state anti-discrimination statutes).

474. See *supra* notes 405-11 and accompanying text (laying out procedural structures of discrimination claims).

475. *Contra* MODEL EMPLOYMENT TERMINATION ACT, *supra* note 7, § 2(e) (allowing employee to assert both claims).

type of protection that "qualifie[s] as a basic labor standard" and stands as "the hallmark of a decent society."⁴⁷⁶

CONCLUSION

The law governing employment in America has moved forward a great deal in the last century. One hundred years ago, employees had no right to bargain collectively; they were guaranteed neither a minimum wage nor a humane schedule, and they enjoyed no protection against discrimination of any kind. The United States has recognized both that employees have rights vis-à-vis employers, and that those rights should be protected by law. Consequently, Congress has guaranteed the right to bargain collectively and has taken great strides toward eliminating discrimination. Yet the nation clings tenaciously to the ancient, ill-conceived doctrine of employment at will. Millions of Americans serve solely at the pleasure of their employers, subject to discharge for a good reason, a bad reason, or no reason at all. Courts have made some inroads into this chaos, but the time has now come for a statutory solution.

The Model Employment Termination Act marks a step in the right direction. It is significant that the National Conference of Commissioners on Uniform State Laws concluded that the employment-at-will doctrine should be replaced by a statute. In their attempt to draft an acceptable statute, however, the commissioners have compromised too much and have created an inadequate statute that provides many employees with less protection than that which they currently enjoy under the common law. The Model Act fails to make innocent victims of wrongful discharge whole and provides no deterrent to wrongful discharge in the future. Furthermore, crafting the statute as a Model Act, to be adopted on a state-by-state basis, is an anachronistic solution. In this world of national and multinational corporations, only a federal statute will effectively address the problem. The proposed federal statute would treat all wrongful discharges equally, whether motivated by invidious discrimination, arbitrariness and capriciousness, or other reasons.

The United States is the only industrialized nation in the world that does not have national legislation protecting employees from wrongful discharge.⁴⁷⁷ The time has come for us not only to join our interna-

476. Gould, *supra* note 9, at 892 n.16a (quoting *AFL-CIO Executive Council, The Employment-At-Will Doctrine* 3 (Feb. 20, 1987) (press release)).

477. See *supra* note 247 and accompanying text (explaining lack of national legislation outlawing wrongful discharge as problem faced uniquely by American workers).

tional colleagues, but to demonstrate leadership by adopting a federal statute that truly protects employees from wrongful termination and provides those employees with meaningful remedies.