Reforming At-Will Employment Law: A Model Statute

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More than sixty percent of the American workforce has no reliable protection against unjust dismissal. Subject to the common law rule of at-will employment, these individuals may be dismissed by their employers without reason or prior notice. Despite the grave injustice that this rule has wrought on numerous employees, efforts at reform have been few and ineffective. Most efforts have involved judicially created exceptions to the at-will rule based on contract law, public policy considerations, and tort law. These judicial remedies, however, have not succeeded in protecting employee job security interests. Formalistic concepts of consideration and reliance often constrain courts from applying contract theories. Courts formulating public policy and tort exceptions have been reluctant to provide relief except in the rare situation where an employer expressly violates a legislatively mandated public policy or breaches a duty owed to the employee.

1. This figure is derived by subtracting the number of employees protected against unjust dismissal from the total workforce. Union members working under collective bargaining contracts and certain public sector employees are the major groups protected against dismissal. Union members constitute less that 22% of the total workforce. BUREAU OF LABOR STATISTICS, BULL. No. 2000, HANDBOOK OF LABOR STATISTICS 1978, at 507 (1979). The number of public sector employees receiving protection under statutorily authorized collective bargaining, see, e.g., 5 U.S.C. §§ 7101-7135 (Supp. II 1978); Mich. Stat. Ann. § 17.455(1)-(16) (Callaghan 1982), civil service laws, see, e.g., 5 U.S.C. §§ 7511-7514 (Supp. II 1978); Pa. Stat. Ann. tit. 71, § 741.807 (Supp. 1982), or constitutional due process, see, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972), is more difficult to measure. One commentator has estimated that over 90% of the 2,879,000 federal civil service employees and over half of the 12,169,000 state and local government employees are covered by some kind of just cause protection. Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 Ohio St. L.J. 1, 8-9 (1979) (citing 1976 figures). These people make up approximately 11% of the nonagricultural workforce. Additionally, a small percentage of employees have fixed-term contracts affording some measure of job protection. Id. By adding these groups together it is clear that approximately 34%-39% of the workforce is covered, id., and 61%-66% is without coverage.


3. The unfairness that frequently results from this rule is illustrated by two recent cases. In Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981), an employee — testifying in an administrative hearing at his employer’s behest — was fired for revealing evidence under oath that proved damaging to his employer. Similarly, in Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), an employee was fired after voicing concern over the safety of a product manufactured by the company for which he worked.
It is clear that a pressing need exists for well-defined, uniform, and predictable protection for at-will employees. Workers must have comprehensive job-security safeguards, and employers must have reliable guidelines indicating when dismissal is proper. Whatever the means used to achieve reform, it must ensure speedy, informal, and inexpensive resolution of disputes. Court adjudication of these disputes cannot satisfy these goals. Too many courts are either unwilling or unable to provide necessary protections, and even if they were to grant relief on a more consistent basis, the attendant costs, formality, and delay would prevent many employees from vindicating their rights.

Effective relief for at-will employees can only be achieved through statutory reform. Although specific legislation has been proposed on the federal\(^4\) and state levels,\(^5\) none of these bills have been sufficiently comprehensive to provide optimal relief. Moreover, those commentators who have called for a statutory remedy have failed to explain precisely what the mechanism for dispute resolution should be, or how it should operate.\(^6\) This Note, therefore, proposes a model statute utilizing mediation-arbitration to provide consistent, informal, and economical protection for at-will employees. Part I explores the development of the at-will rule and the deficiencies of current judicial reforms. Part II sets forth the proposed Act. Accompanying each section is commentary designed to elucidate the intent and meaning of specific provisions.

I. DEVELOPMENT AND APPLICATION OF THE AT-WILL RULE

A. The Rationale Behind the Rule

The traditional rule of at-will employment allows employers to "dismiss their employes at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."\(^7\) The rule arose from a late nineteenth century transformation in employment law. Prior to that time, the rights of employer

\(^4\) See Corporate Democracy Act, H.R. 7010, 96th Cong., 2d Sess. (1980) (proposed amendment to the National Labor Relations Act) [hereinafter cited as the federal bill]. For a discussion of this bill, see infra text accompanying notes 79-81; see also THE EMPLOYMENT AT-WILL ISSUE, 111 LAB. REL. REP. (BNA) No. 23, at 9 (Nov. 22, 1982) [hereinafter cited as BNA REPORT].

\(^5\) See infra note 82.


\(^7\) Payne v. Western & A. R. R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). This rule was first enunciated in the
and employee were based upon status principles rather than contract law. Like the feudal bond between lord and tenant or master and servant, the relationship of employer and employee was deemed to impose reciprocal rights and duties protective of both parties. These status-oriented principles, however, were ill-suited to the economic conditions of the time. The late nineteenth century was a period of tremendous industrial growth and intense competition in which employers needed the ability to adjust the size of their workforce quickly to meet fluctuating market demands at a competitive cost.

The law soon granted employers this power by reformulating the foundations of employment; rather than viewing the employer-employee relationship as status-based, courts began to consider the relationship as contractually based. This shift was consonant with prevailing laissez-faire principles that advocated free economic competition as a means of attaining broad social benefits. The effects were simple and direct; as long as an employer had not agreed to hire an employee for a contractually specified length of time, either party could terminate the relationship "at-will." It was thus presumed that each party was free to contract for a specified term, and failure to do so indicated a mutual desire to retain the freedom to end the contract at any time.

Doctrines of mutuality of obligation and consideration were used to provide additional support for the at-will rule. Applying the mutuality doctrine, courts held that if the employee could quit his job at any
treatise H. Wood, MASTER AND SERVANT § 134, at 272 (1877). Although Wood cited four cases as authority, none actually supported his proposition. See Annot., 11 A.L.R. 469, 476 (1921).
9. See Feinman, supra note 8, at 133-34; Note, Common Law Action, supra note 8, at 1440-41.
10. See Feinman, supra note 8, at 133-34; Vernon & Gray, Termination At-Will — The Employer's Right to Fire, 6 EMP. REL. L.J. 25, 26-27 (1980).
11. See J. Hurst, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY U.S. 3-32 (1956); Note, Common Law Action, supra note 8, at 1442; Note, Protecting Employees, supra note 8, at 1826.
12. See P. Selznick, supra note 8, at 131; Note, Protecting Employees, supra note 8, at 1825; cf. Feinman, supra note 8, at 130 (suggesting that this presumption was not based on a contractual model of intent, but on a pragmatic concern of the judiciary that employers be given full control over their workforce). This approach assumed there would be a rough equality of bargaining power. See generally Pound, Liberty of Contract, 18 YALE L.J. 454 (1909). Ironically, the presumption became strong enough to induce courts to rule that employment contractually specified as "permanent" was legally indefinite. See, e.g., Lord. v. Goldberg, 81 Cal. 596, 22 P. 1126 (1889); Faulkner v. Des Moines Drug Co., 117 Iowa 120, 90 N.W. 585 (1902); Perry v. Wheeler, 75 Ky. 541 (1877); Sullivan v. Detroit, Y. & A.A. Ry., 135 Mich. 661, 98 N.W. 756 (1904). See generally Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335, 345 (1974).
time for any reason, so too should the employer have the right to fire
the employee for any reason.13 An employee could offer additional
consideration for the right not to be fired at will. Yet, daily wages
were generally held to be full consideration for daily and accrued services
and consequently it was difficult for the employee to show he had pro-
vided such additional consideration.14

During the twentieth century, legislators and courts began to recognize
that the free economic competition encouraged by laissez-faire economics
and formalistic contract law had resulted in a disparity of bargaining
power between the individual employee and large industrial employers.
Congress acted first, passing legislation designed to equalize bargaining
power by aiding employee organization.15 Under this legislation —
culminating in the National Labor Relations Act ("NLRA")16 — many
private sector employees were able to obtain job security through col-
lective bargaining provisions allowing dismissal only for "just cause."17
Similar rights were soon granted by state legislatures to employees not

13. See, e.g., Meadows v. Radio Indus., 222 F.2d 347 (7th Cir. 1955); Lord v. Goldberg,
81 Cal. 596, 22 P. 1126 (1889); Hope v. National Airlines Inc., 99 So. 2d 244 (Fla. App. 1957),
cert. denied, 102 So. 2d 728 (Fla. 1958); Rape v. Mobile & O.R.R. Co., 136 Miss. 38, 100 So.
585 (1924). See also Blades, supra note 2, at 1419-21; Menneemieer, supra note 6, at 53-54; Note,
supra note 12, at 342 n.58.

14. See, e.g., Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) (find­ing
employee's surrender of own business to enter long-term employment contract was not suffi-
cient consideration to support job security); St. Louis, I.M. & S. Ry. Co. v. Matthews, 64 Ark.
398, 42 S.W. 902 (1897) (employment contract held not binding where employee gave no addi-
tional consideration for job security provision); see also Blades, supra note 2, at 1420; Note,
supra note 12, at 342 n.58; Note, Employment Contracts of Unspecified Duration, 42 COLO.

15. In 1898, Congress passed the Erdman Act outlawing "yellow dog" contracts in the railway
industry. Ch. 370, 30 Stat. 424 (1898). Although the "yellow dog" provision was subsequently
nullified by the Supreme Court in Adair v. United States, 208 U.S. 161 (1908), additional reform
legislation soon followed; the Newlands Act, ch. 6, 38 Stat. 103 (1913) (repealed 1926) (current
version at 45 U.S.C. §§ 151-158 (1976)) (establishing a permanent board of mediation and con-
ciliation for railroad labor disputes); the Adamson Act of 1916, ch. 436, 39 Stat. 721, (current
the eight-hour day); the Railway Labor Act, 45 U.S.C. §§ 151-188 (1926) (mediation for adjust-
ment of railway disputes); the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932) (forbidding
federal court injunctions of peaceful collective employee action); and finally, the National Labor
Relations Act, 29 U.S.C. §§ 151-168 (1976). All of this legislation reflected a repudiation of
the economic and legal principles underlying the at-will rule. The view that free competition
would benefit all members of society was firmly rejected, along with the notion that formalistic
contract law could be applied to the employment setting. Since the passage of this legislation,
mutuality of obligation and consideration problems have also given way; the employer's freedom
to dismiss employees has been curtailed by collective bargaining, yet employees are still free to
quit at any time for any reason. See Summers, supra note 6, at 492.


17. Ninety-six percent of collective bargaining agreements have provisions concerning discharge
and discipline. 2 COLLECTIVE BARGAINING: NEGOTIATIONS & CONT. (BNA) 40:1, at 63 (Dec. 28,
1978) [hereinafter cited as COLLECTIVE BARGAINING (BNA)]. Yet, as noted earlier, unionized
employees constitute less than 22% of the total workforce. See supra note 1.
within the jurisdiction of federal laws. In addition, public sector employees received protection, first under civil service laws, and later under constitutional due process protections and federal and state public employee bargaining laws.

Although these laws continue to provide important protection for many workers, sixty to sixty-five percent of American workers are ineligible for coverage because they are neither organized nor public employees. Thus, the majority of workers do not have any form of comprehensive job protection. The only protection they receive stems from a patchwork of narrow legislation aimed at safeguarding limited classes of employees. As a result, these individuals are often terminated unfairly and without recourse. The consequences of such discharges may be serious. Workers today are highly dependent upon steady employment; frequently having developed only limited skills, they may experience severe difficulty in obtaining new work if fired.


22. See supra note 1 and accompanying text.


24. Fewer opportunities for self-employment as well as an increased demand for specialization have contributed to this dependency. As one commentator has noted: "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 . . . . For our generation, the substance of life is in another man's hands." F. Tannenbaum, A Philosophy of Labor 9 (1951). See also Glendon & Lev, Changes in the Bonding of the Employment Relationship: An Essay on the New Property, 20 B.C.L. Rev. 457, 475-79 (1979).

25. See Mennemeier, supra note 6, at 55 & n.28; Blades, supra note 2, at 1405 & n.9.
who lose their jobs also lose entitlement to seniority and retirement benefits. Moreover, job loss can have severe psychological consequences; an employee's social standing and self-esteem inevitably suffer, and he may feel stigmatized when seeking new employment. All of these factors point to the need to provide protection against unjust dismissal.

B. Current Attempts at Judicial Reform

1. Judicial Exceptions—Some courts have developed theories based on contract law, public policy, and tort law to ameliorate the harshness of the at-will rule. None of these theories, however, provides adequate protection for job security.

27. See Special Task Force, Department of Health, Education and Welfare, Work in America 4-10 (1973) [hereinafter cited as Work in America].
28. See Peck, supra note 1, at 4-7; BNA Report, supra note 5, at 24.
29. Courts in 29 states have granted exceptions to the at-will rule. BNA Report, supra note 5, at 8. These states include California, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia (federal bankruptcy court), Washington, and West Virginia. In addition, courts in Alabama, Colorado, District of Columbia, Iowa, Mississippi, and Vermont have specifically left open the possibility of permitting exceptions under certain circumstances. But see ABA Comm. on Dev. of the Law of Individual Rights and Resp. in the Workplace, ABA Sec. Lab. & Employment Law 1, 16 (1982) [hereinafter cited as ABA Committee Report], for a somewhat different classification of the states granting exceptions to the at-will rule. For an excellent survey of case law development in this area, see DeGiuseppe, The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits, 10 Fordham Urb. L.J. 1 (1981-82).

Although cases generally can be divided into three areas for analytical purposes, there are a number of instances where the courts or the parties fail to distinguish accurately the theory upon which they are suing. For example, in Pstragowski v. Metropolitan Life Insurance Co., 553 F.2d 1 (1st Cir. 1977), the plaintiff brought a suit in contract. The court, however, found the discharge was motivated by malice, a traditional tort element. In Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980), the court recognized a tort cause of action for breach of an implied covenant (contract) of good faith and fair dealing. A few years earlier in the landmark case of Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), the plaintiff asked for mental suffering damages (only given in tort actions) in a suit based on contract theory.

In many cases, neither contract nor tort theory is mentioned by the plaintiff or the court. Suit is simply brought for "wrongful discharge," "abusive discharge," "malicious discharge," or the like. In these cases, it is difficult to discern what standards — if any — the courts are using to determine if an actionable wrong has taken place. See, e.g., Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) (wrongful termination); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (wrongful discharge); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979) (wrongful discharge without cause, in bad faith, with malice, and in retaliation for employee's assertion of her rights); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (wrongful discharge).

A few employees have also brought unjust dismissal actions based on antitrust law and courts have granted standing. See, e.g., Bravman v. Bassett Furniture Indus. 552 F.2d 90 (3d Cir. 1977) (antitrust violation alleged when salesman in a restricted territory was fired for breaching agree-
a. **Contract analysis**—Because there typically is no written contract in at-will employment situations, courts have experienced difficulty applying traditional contract principles. Consequently, courts have been forced to use various techniques to imply a promise by the employer to dismiss only for good cause. First, some courts have looked for evidence that a promise to dismiss only for just cause was part of the original employment agreement. In *Toussaint v. Blue Cross & Blue Shield of Michigan*, for example, the Michigan Supreme Court held that oral representations of job security and written statements in the employee policy manual had become part of the employment contract. The employees, therefore, had a legitimate expectation of continued employment even though some had never read the manual. The more common situation, however, is for courts to treat these representations as policy statements that are not contractually binding and subject to change at any time without notice by the employer. Regardless,
employers can avoid giving employees even the smallest measure of job security in a number of ways: they can force employees to sign statements acknowledging that the employees may be dismissed at will; they can remove all reference to just cause or job security from employee manuals; or they can simply announce that their policies are subject to unilateral change. 37

Second, many courts will imply a promise to dismiss for good cause if the employee confers extra consideration on the employer. 38 In actual practice this means that the employee must provide the employer with more than a day's labor. Courts have strictly construed "additional consideration" to mean something with monetary value. Thus, courts have indicated that extra consideration exists where an employee transfers property to the employer's business, 39 transfers his business to the employer, gives up his business to work for the employer, 40 or waives a tort claim or other cause of action in return for a promise of continued employment. 41 Other types of extra consideration may

37. See Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880, 894-95 (1980). The Toussaint court recommended that employers specifically state in their employment manuals that employment policies are subject to unilateral change by the employer. A similar recommendation has been made by authorities in labor law. See, e.g., BNA REPORT, supra note 5, at 19-20 (remarks of Charles G. Bakaly, Jr. delivered at the American Bar Association's Media Labor Law Seminar in Washington, D.C., February 1982, proposing the elimination of both grievance procedures and reasons for discharge from employee manuals); id. at 21 (interview with Barbara Brown, member, Pepper, Hamilton, Scheetz, Washington, D.C., recommending that employers omit references to "tenure," "right to continue," "career position," and "permanency" from personnel manuals, brochures, and offer letters).

38. See, e.g., Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) (recognizing rights of employees to permanent employment if they have given additional consideration); Weber v. Perry, 201 S.C. 8, 21 S.E.2d 193 (1942) (upholding an exception to the at-will rule when the employee has given independent consideration); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (additional consideration needed to find an exception to the at-will rule); Note, Protecting Employees, supra note 8, at 1819.

39. See, e.g., Bussard v. College of Saint Thomas, Inc., 294 Minn. 215, 266 N.W.2d 872 (1936) (holding plaintiff's gift of stock valued at $350,000 to be extra consideration); Lopp v. Peerless Serum Co., 382 S.W.2d 620 (Mo. 1964) (holding plaintiff's transfer of property to employer's business to be sufficient additional consideration).

40. See, e.g., Chatelier v. Robertson, 118 So. 2d 241 (Fla. 1980) (holding plaintiff's transfer of manufacturing business to the employer to be sufficient additional consideration for the guarantee of lifetime employment); Weber v. Perry, 201 S.C. 8, 21 S.E.2d 193 (1942) (employee who gave up his business to work for employer provided independent consideration). Contra Orsini v. Trojan Steel Corp., 219 S.C. 272, 64 S.E.2d 878 (1951) (employee who gave up his job to work for employer did not give independent consideration); Page v. Carolina Coach Co., 667 F.2d 1156 (4th Cir. 1982) (employee who gave up a job with union benefits for a management position had not given sufficient consideration for promise of permanent employment).

41. See, e.g., Eggers v. Armour & Co., 129 F.2d 729, 732 (8th Cir. 1942) (stating in dicta that a contract for life employment may be made in consideration of settlement of a claim for damages); Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37 (D.C. Cir. 1941) (stating in
also protect the employee from termination at will when combined with some evidence of an implied promise in the original employment contract. As a general matter, however, it is very difficult for an employee to show that more consideration has been given to an employer than the value of the wages received.

Third, some courts recently have held that employees discharged on the eve of the accrual of benefits are protected by an implied covenant of good faith and fair dealing that exists in all employment contracts. This theory applies to long-term employees who are approaching the vesting of pension or other benefits as well as to salespeople whose dicta that relinquishment of the right to recover for damages suffered would be sufficient consideration for the promise of continued employment); Morris v. Park Newspapers of Ga. 149 Ga. App. 674, 255 S.E.2d 131 (1979) (denying employee who purchased a vehicle and equipment to run a distributorship and was later fired recovery because of state failure to recognize doctrine of additional consideration).

42. See, e.g., Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (finding an action for breach of implied covenant of good faith based on the length of the employee's service and an employer policy to utilize certain procedures); Rabago-Alvarez v. Dart Indus., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (finding plaintiff's employment not terminable at will because of oral guarantees to terminate only for good cause and if independent consideration exists); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979) (trier of fact may conclude that employer meant to extend employment contract for a reasonable time if the employee can show reliance on such representations by his superiors and/or that his sacrifice of other job offers constituted additional consideration).

43. See, e.g., Hope v. National Airlines, Inc., 99 So. 2d 244 (Fla. Dist. Ct. App. 1957) (finding no additional consideration where the plaintiff, a pilot, continued to work through a strike after assurances that he could keep his job as long as the company was in business); Bullock v. Desert Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P.2d 559 (1960) (no additional consideration found where the employee took a reduction in salary, incurred expenses in moving to job site, and lost other benefits).

At least one court has ignored the requirement of additional consideration. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (holding no additional consideration required for a "permanent" contract).


income depends on commissions earned in a previous year. The covenant concept, however, has not been widely used, and a mere showing that an employee was discharged near the time when benefits would have vested may be insufficient to trigger liability on the part of the employer.

b. Public policy analysis— Some courts have recognized an exception to the at-will rule where the employer has violated public policy in dismissing the employee. Public policy exceptions, for example, have been applied where an employee was discharged because of opposition to illegal or unethical activities, exercise of a statutory right, refusal to take a polygraph test, or service on a jury. Courts, however, frequently limit application of the public policy exception to instances


47. See, e.g., Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (13-year employee dismissed 7-1/2 months before pension vested could not prove reason for his discharge was solely to defeat pension benefits); cf. Kruzer v. Giant Tiger Stores, Inc., 39 Ohio Misc. 129, 173 N.E.2d 70 (1974) (22-year employee terminated two weeks before his pension was to vest failed to prove his dismissal was designed to defeat his pension benefits).

48. The "public policy" exception has been applied in cases where the courts treat a public policy violation as a breach of contract, as a tort, or simply as a "wrongful discharge." There are still, however, jurisdictions that do not recognize a public policy exception to the at-will rule. See, e.g., Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981) (upholding dismissal where employee was fired for testifying truthfully at an administrative hearing); Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. 1978) (upholding dismissal of employee for filing a workmen's compensation claim).


50. See, e.g., Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (employee had a statutory cause of action when she asserted she had been discharged for filing a workmen's compensation claim); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (same). But see Martin v. Tapeley, 360 So. 2d 708 (Ala. 1978) (employee did not state a statutory cause of action when he claimed his dismissal was punishment for filing a workmen's compensation claim).


52. See, e.g., Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (awarding damages to employee who was fired for serving jury duty); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (employee entitled to damages if he could show that dismissal was punishment for serving on a jury).
where employer action violates "clearly mandated public policy."\textsuperscript{53} Often this means that the employee must show either that a statute prohibits the discharge and provides a civil cause of action,\textsuperscript{54} or that the dismissal was for refusing to participate in illegal activities.\textsuperscript{55}

This limited application of the public policy exception reflects a general reluctance of many courts to make policy decisions if they feel such decisions would be better left to the legislature.\textsuperscript{56} Indeed, in several instances where the employee was denied relief for failure to show that the policy violated was "clearly mandated," the court explicitly stated that recovery would have been granted if a statute existed that espoused the specific policy in question.\textsuperscript{57} In practice, then, it is clear that the usefulness of the public policy exception to the at-will rule is limited by the willingness of the legislature to enact new statutes enunciating policies consistent with the protection of at-will employees.

c. \textit{Tort analysis—} Finally, some courts have permitted an exception to the at-will rule based on tort law.\textsuperscript{58} A variety of theories have been advanced,\textsuperscript{59} the most successful of which is the retaliatory discharge

\textsuperscript{53} See, e.g., Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (A "clearly mandated public policy" is defined as one that "strikes at the heart of a citizen's social rights, duties, and responsibilities."); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (employee discharged as a result of his relationship with another employee not allowed to recover because there was no violation of a "clearly-defined, well established public policy").

\textsuperscript{54} See, e.g., Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. Pa. 1977) (Conduct contravening public policy not enough to warrant creation of a judicial remedy for wrongful dismissal; rather the discharge must violate some well-defined public policy, and the statute stating the policy must provide a civil remedy.); Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967) (no recovery for employee who failed to allege that a statute prohibited his discharge); Fawcett v. G. C. Murphy & Co., 46 Ohio St. 2d 245, 75 Ohio Op. 2d 291, 348 N.E.2d 144 (1976) (no recovery for an employee discharged in violation of an Ohio statute prohibiting discharge of employees between the ages of 40 and 65 because the statute provides no remedy for its breach).

\textsuperscript{55} See supra note 49; Murg & Sharman, supra note 44, at 347. Indeed, if an employee does not allege an explicitly illegal act was involved, a court is not likely to find a public policy exception. ABA COMMITTEE REPORT, supra note 29, at 16.

\textsuperscript{56} See, e.g., Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. 1981) (Public policy exceptions and covenants of good faith and fair dealing must be adopted by the state legislature or the Supreme Court before the Tennessee courts will recognize them.).

\textsuperscript{57} See, e.g., Scrogan v. Kraftscor Corp., 551 S.W.2d 811 (Ky. App. 1977) (employee discharged for announcing he would attend night law school not permitted to recover on public policy grounds because the latter is a matter for legislative determination); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (no clear violation of public policy where employee discharged for informing his superiors that a product he was supposed to sell had not been properly tested and was dangerous).

\textsuperscript{58} Tort theory has been recommended by a number of commentators as the optimal protection for unjustly dismissed at-will employees. See, e.g., Blades, supra note 2, at 1413; Comm. on Labor & Employment Law, \textit{At-Will Employment and the Problem of Unjust Dismissal}, 36 REC. A.B. CTR. N.Y. 170, 191-93 (1981); Note, \textit{Common Law Action}, supra note 8, at 1454. In their view, tort theory is the most flexible of the common law doctrines. This theory, however, has not proved to be as useful as these commentators may have anticipated, largely because of the courts' reluctance to extend existing tort law.

\textsuperscript{59} Courts have recognized such theories as malicious discharge and disinterested malevolence,
tort used to protect "whistleblowers." To recover under this theory, employees must show they were dismissed either for reporting a violation of the law or for exercising a statutory right. Some courts may also allow this type of tort for a violation of an important public policy.

In some cases, courts have granted relief for the tort of intentional infliction of emotional harm. Under this theory, an employee must show that the employer's conduct was so outrageous that no person could be expected to withstand it. Establishing such a case, however,


60. See, e.g., Kelsey v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1979) (recognizing retaliatory discharge as a separate and independent tort).

61. See, e.g., Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (granting relief to employee who was discharged for exercising his right under Pennsylvania law not to take a polygraph test); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (granting relief to employee fired for filing a workmen's compensation claim under the Indiana workmen's compensation statute).

There is considerable overlap between judicial treatment of tort actions for "retaliatory discharge" and the public policy exception. See, e.g., Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (holding that employer who discharged employee for supplying information to police regarding criminal activities of his co-workers was liable in tort for a violation of public policy); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (holding that employer who discharged employee for reporting to his superiors that he knew the bank had intentionally overcharged customers and yet failed to make rebates was liable in tort for a violation of public policy).


64. See generally Restatement (Second) of Torts § 46 comment j (1965). The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all
poses significant problems of proof.\textsuperscript{65}

As a general matter, however, courts are reluctant to grant relief in these cases because of the nature of the at-will doctrine; the employer has no obligation to the employee, and it is, therefore, difficult to find the breach of duty required in most other tort cases.\textsuperscript{66} Moreover, all tort theories based on public policy violations — like the public policy exception itself — are applicable only in instances where the employer’s actions breach a clear judicial or legislative mandate.

2. Systemic problems— Although each of the judicially created exceptions to the at-will rule has proved inadequate in providing protection for job security, the problem may lie more with the judicial nature of the remedy sought than with the particular theory upon which the exception is based. Certain systemic problems are common to all judicially created, as opposed to legislatively created, remedies. To begin with, courts have been inconsistent in their application of judicial exceptions. Some jurisdictions allow contract, tort, and public policy exceptions, while other jurisdictions only allow one of the three. This inconsistency is significant when it comes to evaluating the damages to which an unjustly dismissed employee is entitled. Under a contract theory, an employee would be entitled to back pay, lost benefits, and possibly reinstatement.\textsuperscript{67} A successful plaintiff in a tort action, however, may — in addition to these damages — be entitled to punitive or mental suffering damages.\textsuperscript{68} Yet, for a plaintiff suing under a more general public policy exception theory, there are no guidelines for determining the nature of the court’s award. In short, because the law is unsettled, employers will have difficulty anticipating both when and to what extent they may be liable.

Furthermore, using a judicially created exception to resolve unjust dismissal cases creates significant problems of proof for employees.
For example, to establish that a discharge is unjust, an employee must have information regarding company policies that is not readily available. Often the employee will only know what happened in his own area of the employer's business. The employee may be unaware of information that is critical to an accurate determination of whether the employer's practices constitute a business-related justification. Thus, even where a court permits an exception to the at-will rule, the employee must overcome significant burdens if he is to triumph. 69

In addition, problems of judicial administration make courts unsuitable for resolving dismissal cases. First, the traditional courtroom setting and procedure are too formal. Employees, unversed in the technicalities of using courts to assert their rights and generally convinced that judges sympathize with employer sentiments, may be inhibited from bringing their claims to court. 70 Moreover, the formalities of the courtroom heighten adversarial reactions that may make it difficult to reestablish a good working relationship if reinstatement is ordered as a remedy. 71

Second, court delays and backlogs — which have already reached intolerable proportions 72 — pose special problems in the employment setting. Long delays intensify antagonistic feelings and undercut settlement possibilities, 73 thereby significantly diminishing the opportunity for reinstatement. In addition, delays cause hardship for the many employees who are unlikely to find alternative work while waiting for their cases to come to court. Employers, too, may be harmed; long delays followed by a trial resulting in a back-pay award force the employer to pay large sums of money for which no services have been rendered. 74

Third, the costs of court adjudication, for both the public as a whole

69. See, e.g., Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (denying relief to employee who failed to prove that he had been fired for refusing to alter pollution control reports); Kruzer v. Giant Tiger Stores, Inc., 39 Ohio Misc. 129, 317 N.E.2d 70 (1974) (22-year employee dismissed two weeks before his pension was to vest could not prove he was fired to defeat his pension benefits).

70. See Mennemeier, supra note 6, at 65-66.

71. Id. at 66-67.


73. Mennemeier, supra note 6, at 67; cf. Gregory & Rooney, Grievance Mediation: A Trend in the Cost Conscious Eighties, 31 LAB. L.J. 502, 505 (1980) (noting that in labor arbitration under collective bargaining agreements "[t]ime delays, for any reason, may widen the rift between the parties and harm present and future relations").


These delays will only become more serious as employees realize they may have a cause of action for unjust dismissal and bring suits in greater numbers.
and the individual parties, make the courts an impractical forum for dismissal cases. If judicial remedies were readily available, unjust dismissal cases would flood the courts, requiring an expansion of the court system at enormous cost to the public. These extra costs would come at a time when court expenditures are already viewed as overly burdensome. As a result, courts would not receive the funding necessary to deal effectively with dismissal cases. Delays, and their attendant problems, would only increase.

Costs to the individual parties are also likely to impose significant barriers. Going to court requires paying for an attorney, discovery, and witnesses. For an employee who has just lost his job, these expenses are overwhelming. Indeed, an employee may feel that any savings must be applied toward finding new employment rather than risked by exercising a right to sue.

II. Proposals for Reform: Mediation-Arbitration

Judicial failure to provide adequate protection for at-will employees is not the result of societal objections to reform of the at-will rule. Indeed, the employment security enjoyed by unionized and public employees has long been accepted as a productive solution to dismissal disputes. The real difficulty is that courts are not equipped to provide the necessary protection.

The obvious way around this problem — as commentators have pointed out — is to establish statutory rather than judicial protection for at-will employees. Several efforts at developing such a solution have already been made. On the federal level, it was proposed that unjust dismissal be made an unfair labor practice under the NLRA. This bill, which was rejected the same term it was introduced, had several impractical features. By adopting the jurisdictional exclusions of the NLRA, the bill would have left a large number of deserving employees without coverage. Moreover, utilizing NLRA procedures

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75. Professor Stieber and Professor Summers both estimate that 200,000 employees are unjustly dismissed each year. BNA REPORT, supra note 5, at 24-25. Even if only one-quarter to one-half of these employees were to bring suit an expansion of judicial resources would be required.

76. Current employment law rejects the legal concepts that once supported the at-will rule. See supra notes 15-21 and accompanying text.

77. Job security "has earned acceptance as an essential element of a tolerable and humane employment relation, and it expresses an increasing recognition that employees have valuable rights in their jobs that society ought to protect against arbitrary action." Summers, supra note 6, at 520.

78. See generally Mennemeier, supra note 6; St. Antoine, supra note 6; Summers, supra note 6.


80. The NLRA is not applied to employees working for employers doing insufficient business to meet the National Labor Relations Board’s jurisdictional standards. See R. Smith, L. Merrifield & T. St. Antoine, LABOR RELATIONS LAW CASES AND MATERIALS 48-50 (6th ed. 1979).
would have been prohibitively expensive. On the state level, legislation has been proposed in Colorado, Connecticut, Michigan, New Jersey, Pennsylvania, and Wisconsin. These proposed bills, however, have serious flaws. Some retain the expense and inefficiency of court adjudication, while others, though recognizing the benefits of an alternative means of dispute resolution, do not provide for sufficiently economical procedures.

The statute proposed in this part of the Note goes beyond existing bills. It is designed to provide quick, fair, and effective relief for the widest range of employees possible while avoiding the problems encountered in state and federal proposals.

A. Operation of the Model Statute: An Overview

The proposed model statute applies existing just cause standards developed under collective bargaining agreements through unified mediation-arbitration proceedings. Under this plan, claims are presented by the parties to a single mediator-arbitrator. The proceedings are informal; rules of evidence are relaxed and the parties are free to state their claims without attorney representation. The mediator-arbitrator is expected to take an active role, asking questions and clarifying issues as each party makes its case.

Upon completion of both presentations, the parties recess while the mediator-arbitrator makes a preliminary assessment of the case. The

In addition, certain types of employees — including all supervisory agricultural and domestic workers — are statutorily excluded from coverage. 29 U.S.C. § 152(3) (1976).

81. The investigative and adjudicative costs of the National Labor Relations Board are paid by the government. By utilizing Board procedures then, the cost of settling dismissal disputes would rest entirely on the public. This contrasts sharply with the alternative mechanisms proposed in this Note and various state bills. These mechanisms would minimize public expense by localizing the cost of resolution on the parties to the dispute.


83. See the Colorado and New Jersey bills, supra note 82.
84. See the Connecticut, Michigan, and Pennsylvania bills, supra note 82.
parties then reconvene and commence mediation. At this point, to facilitate mediation, the mediator-arbitrator is permitted to give his initial impressions of the case based on the evidence that has been presented. If after a reasonable time the mediator-arbitrator concludes that no settlement is possible, he is required to adjourn the proceedings and, within thirty days, write an opinion deciding whether the employee was dismissed for "just cause." The mediator-arbitrator's decision will be based on the law of unjust dismissal as it has developed in arbitration under collective bargaining agreements and in cases decided under this statute. These earlier opinions, however, are non-binding and leave the mediator-arbitrator free to tailor an award to the particular facts of a case.

Although the mediator-arbitrator's decisions are binding, they are also appealable to the local state court of general jurisdiction. On review, the court will decide whether the award is supported by "substantial evidence," yet in practice the courts are expected to give broad deference to the mediator-arbitrator's evaluation of the merits of the dispute.

B. Advantages of the Model Statute: An Overview

The proposed statute is similar to many of the state bills in that it utilizes the law of unjust dismissal developed under collective bargaining agreements as a basic standard for evaluating claims. This statute also follows some of the state proposals in the broad sense that it removes dismissal disputes from the courts.

85. Commentators have debated whether an individual who has the power to resolve a dispute by rendering an arbitration award should be allowed to mediate between the parties prior to making a final decision. See F. Elkouri & E. Elkouri, How Arbitration Works 78-80 (3d ed. 1973); Taylor, Effectuating the Labor Contract Through Arbitration, in BNA, The Profession of Labor Arbitration 20, 35 (1957) (arguing that mediation should be a part of the arbitrator's work in resolving disputes); O'Connell, Should the Scope of Arbitration Be Restricted, 18 Proc. Ann. Meeting Nat'l Acad. Arb. 102, 103-04 (1965) (arguing that allowing arbitrators to mediate confuses the arbitrator's role and causes him to make decisions beyond the scope of authority granted him by the parties).

The concerns underlying this debate are inapposite in the context of a statutory remedy that does not apply to collective bargaining agreements. There is no danger that the arbitrator will overstep the boundaries of authority granted him by the parties because his authority is derived from a legislative act, not an agreement made by the parties.

86. The standards developed in arbitrating dismissal disputes under collective bargaining agreements are designed to preserve the employer's prerogative to manage while prohibiting arbitrary or unequal treatment of employees. For a full discussion of the general principles behind these standards, see Summers, supra note 6, at 499-508. For a discussion of how just cause standards currently operate under collective bargaining agreements, see generally D. Beeler, Discipline & Discharge (1978).

87. See, e.g., Connecticut bill, supra note 82 (proposing establishment of an administrative board to resolve dismissal disputes); Michigan bill, supra note 82 (proposing separate mediation and arbitration procedures); New Jersey bill, supra note 82 (proposing utilization of existing labor relations dispute resolution mechanism); Pennsylvania bill, supra note 82 (proposing separate mediation and arbitration procedures).
Yet, the statute has advantages not found in any of the existing proposals. First, combining mediation and arbitration maximizes the possibility of settlement. After the parties have presented their cases, they have a more realistic perception of the weaknesses in their respective positions and are likely to be less confident that the mediator-arbitrator would rule in their favor. 88 Parties in this situation are more likely to strive earnestly to reach an agreement through mediation than they would be in a separate mediation hearing where their confidence is not tested by the prospect of an imminent arbitration ruling.

Second, mediation-arbitration is designed to encourage self-imposed remedies. The mediator-arbitrator's role is that of a catalyst; an award is imposed only when parties have clearly manifested their intransigence. 89 This is especially important in the employment setting where parties who work together frequently develop close ties. These ties are more likely to survive the trauma of dismissal disputes if the parties are able to create their own solution than if they are forced to submit to a remedy imposed by a third party at the conclusion of adversarial proceedings. 90

Third, the model statute is more economical than comparable state proposals. By combining mediation and arbitration both time and money can be saved. Ideally, under either this proposal or state proposals providing for separate hearings, the conflict would be settled early through mediation. In that event, the time and expense involved in each method are equivalent. Yet, in those cases where both mediation and arbitration are necessary, this proposal eliminates the burden of a second hearing. 91 In addition, public costs are saved by charging the parties for the proceedings. 92 Reducing delay will protect employees left jobless

88. In this respect mediation-arbitration functions exactly like traditional mediation. The chief characteristic of that procedure, as stated by Professor Fuller, is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." In this way the reorientation encourages a voluntary settlement. Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305, 325 (1971).

89. See infra note 164 and accompanying text.

90. Cf. McEwen & Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 ME. L. REV. 237, 239 (1981) (noting that proponents of mediation claim that parties were more satisfied with voluntary small claims mediation settlements than small claims court judgments); Gregory & Rooney, supra note 73, at 505 (arguing that mediation settlements are easier to live with than arbitration awards imposed by a third party). A solid employment relationship is central to the success of reinstatement as a remedy. See infra note 167 and accompanying text.

91. Aside from the obvious costs saved by eliminating this second hearing, considerable time may be spared. This may be illustrated by comparing the time requirements of separate hearing bills to those of the model statute. Under both the Michigan and Pennsylvania systems, supra note 82 — notwithstanding the time for selecting the separate mediators and arbitrators — a claim may take up to 120 days to process. In contrast, under the model statute, even after guaranteeing the parties 30 days to prepare for the hearing, the maximum time for an award would be 90 days.

92. These fees will not actually place an added burden on the parties, however, because the attorney fees they would otherwise have to pay will be reduced or eliminated. Attorney's fees
and may also substantially decrease an employer's backpay penalty. 93

Fourth, the model statute offers more refined employee coverage than existing state proposals. These protections are better tailored to the needs of both employees and employers, and extend only to those employees whose significant interest in their jobs justifies giving them a cause of action.

The model statute embodies these advantages while giving explicit guidelines for conducting hearings. The statute specifies the precise process by which the parties will air their grievances and the adjudicator will make a determination. There are also provisions defining the jurisdiction and powers of the mediator-arbitrator. These explicit guidelines will aid legislators in drafting reform proposals capable of providing comprehensive and effective relief. Furthermore, they will directly aid the decisionmaker in resolving these disputes.

C. Model Statute

PREAMBLE

An Act Prohibiting Unjust Dismissal of Employees, Providing for Mediation-Arbitration Proceedings, and Providing for the Enforcement and Review of Mediator-Arbitrator Awards

SECTION 1: DEFINITIONS

For the purposes of this Act, the following words and phrases shall have, unless the context clearly indicates otherwise, the meanings ascribed to them in this section:

1(a) “Employee” means a person who has either
   (i) worked an average of less than twenty hours per week for eighteen months or longer; or
   (ii) worked an average of twenty or more hours per week for six months or longer; and
   (iii) is not an individual guaranteed comprehensive protection against unjust dismissal by civil service or tenure, or an

93. See supra text accompanying note 74.
individual whose dismissal was fully arbitrated under a collective bargaining agreement.

Comment

This section is designed to extend just cause protection to the maximum number of employees practicable. All employees except those new to the job, protected by civil service, or subject to a collective bargaining arbitration award will be covered.

1. Probationary period—Starting employees are exempted from coverage under the Act because the employer's need for discretion in selecting workers outweighs the employee's claim to protection of job security in the early stages of the work relationship. The hiring employer can never be certain that a new employee will perform satisfactorily. Accurate determination of whether an employee has the capability both to handle the job and get along with other workers requires on-the-job evaluation. Consequently, the employer must be able to fire employees at will during the probationary period if he is to build a productive and compatible workforce.94 Balanced against this need is the employee's interest in maintaining his job. That interest, however, has yet to be developed; the recently hired employee has not demonstrated either ability or loyalty and therefore cannot justifiably rely on the employer to guarantee his job. Not until the employer has tacitly expressed his approval of an employee by employing him for some time can the worker legitimately claim a right to be protected against at-will dismissal. Only then will the employer be presumed to have accepted the employee and held to a just cause standard.

Preserving employer discretion during a "probationary period" will benefit employees traditionally discriminated against in hiring.95 The employer, for example, can hire employees with minimum qualifications knowing that he is not risking liability should it be necessary to dismiss them shortly after beginning work.96 Similarly, the probationary period exemption allows the employer to hire large numbers of employees on

94. Even unionized employees are not protected from unjust dismissal during a probationary period. See COLLECTIVE BARGAINING (BNA), supra note 17, § 55:61; St. Antoine, supra note 6, at 36. The bills proposed in Michigan and New Jersey, supra note 82, provide for six-month probationary periods. The Connecticut bill, supra note 82, in effect provides for a five-year probationary period because an employee is defined as an individual employed for at least five consecutive years. The Pennsylvania and Colorado bills, supra note 82, do not provide for a probationary period.

95. Although many of those traditionally discriminated against receive special statutory protection, see supra note 23, some, such as ex-convicts, do not. These individuals will be aided only if present fears that hiring ex-convicts entails establishing a permanent commitment are overcome. See Mennemeier, supra note 6, at 82.

96. See Mennemeier, supra note 6, at 82.
a temporary basis to meet short-term business demands without fear that liability will be incurred if they are fired when demand recedes.

For full-time employees, six months should be a sufficient probationary period.97 Part-time employment, however, requires a longer period. Employees often seek part-time employment to fulfill short-term needs or earn temporary income while looking for a permanent position. Likewise, employers frequently hire part-time employees to meet short-term business demands. Thus, for both the employee and the employer there is not the same expectation of permanency that is associated with full-time labor. Consequently, in the case of part-time employment it makes sense not to apply a just cause standard until later in the relationship when it is clear that the work will be permanent. For this reason, the statute provides an eighteen month probationary period for part-time workers.98

2. Civil service and tenured workers—Government employees covered by civil service laws or tenure provisions99 are exempted from coverage to preserve the government's special interest in retaining control over its workers. Extension of a state's proposal, such as this Act, to federal employees would be prohibited as impermissible state interference with federal government activities.100 In contrast, states have a legitimate interest in maintaining tight control over the working conditions of their own employees. In fact, most states have enacted a wide range of specialized regulations designed to meet the exigencies of state employment.101 Because these regulations are tailored to state labor conditions, and because they usually provide employees with substantial protection from unjust discharge, there is little need to

97. Both St. Antoine, supra note 6, at 36, and Summers, supra note 6, at 525, agree that a six-month probationary period should be adequate. Although this period is longer than the 30, 60, or 90 day provisions most common in collective bargaining agreements, COLLECTIVE BARGAINING (BNA), supra note 17, § 55:61, this is necessary to give employers not accustomed to evaluating new employees a chance to develop confidence with the probationary system. If, at a later date, it becomes apparent that the period is unnecessarily long, it may be shortened.

98. This provision is not found in the proposed state legislation. The Michigan and Connecticut bills, supra note 82, exclude part-time employees from coverage. The Pennsylvania, Colorado, and New Jersey bills, supra note 82, do not. In Pennsylvania and Colorado, where there is no provision for a probationary period, it appears that part-time employees will have just cause protection immediately upon acceptance of a job offer.


100. Cf. Johnson v. Maryland, 254 U.S. 51 (1920) (state may not require a federal postal worker driving a mail truck to carry a state driver's license); Jaybird Mining Co. v. Weir, 271 U.S. 609, 613 (1926) (stating in dicta that "[i]t is elementary that the Federal government in all its activities is independent of state control"); Mayo v. United States, 319 U.S. 441, 445 (1943) (holding that the supremacy clause requires that the activities of the federal government be free from state regulation).

101. State regulation of state employment is typically designed to avoid interruption of necessary services such as fire and police protection. See generally 1 PUB. EMPLOYEE BARGAINING REP. (CCH) ¶¶ 400-451 (1979).
broaden the coverage of this statute to state government workers.

3. **Unionized workers**— Unionized employees present a more difficult question. No objection may be raised to extending protection to unionized employees who do not receive contractual just cause security. 102 Failure to cover these workers would be penalizing them for their union activity — a sanction that is clearly contrary to federal and, in many cases, state labor policy. 103

Coverage should also be extended to employees who, though protected under a collective bargaining agreement, are unable to obtain relief because their union has refused to take their claim to arbitration. Although the unionized worker in this situation can sue either the employer or the union under section 301 of the Labor Management Relations Act ("LMRA"), 104 it is difficult to obtain relief as courts have developed narrow requirements for section 301 suits. In short, the employee may be denied relief despite the fact that the dismissal claim was valid. 105

102. Before extending statutory just cause protection to unionized employees, however, it is vital to ascertain whether state regulation of the dismissal of union workers — normally a subject of collective bargaining agreements — would be preempted by federal labor law. Although this issue has not been resolved conclusively by the courts, a recent article by Professor Cox suggests that were the issue to be litigated today courts would likely determine that "the NLRA leaves the states free to regulate employment conditions, provided that the state legislation does not discriminate against collective bargaining." Cox, Recent Developments in Federal Labor Law Pre-Emption, 41 Ohio St. L.J. 277, 297 (1980). Professor Cox argues that the NLRA is primarily concerned with the method by which employment terms are established: "[s]erious interference with the substitution of one method for another would not result from allowing a state to outlaw substantive conditions of employment that the state regards as undesirable without regard to the method by which they are established." Id. at 297. In other words, by regulating a specific term of employment such as dismissal, the state does not directly interfere with the negotiating method and thus does not interfere with federal labor policy.

Professor Cox acknowledges, however, that Teamsters Union v. Oliver, 358 U.S. 283 (1959), does not support his theory. 41 Ohio St. L.J. at 298. In *Oliver*, the Court held that state anti-trust laws could not be applied to enjoin implementation of a collective bargaining agreement that set wages and working conditions in violation of the state law. 358 U.S. at 295-97. Yet Professor Cox notes that *Oliver* was limited in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), where the Court held that state pension laws could supersede contrary pension terms of a collective bargaining agreement. 41 Ohio St. L.J. at 298-300.

Other commentators who have sided with Professor Cox include Professor St. Antoine, who argues that extension of a state unjust dismissal statute to unionized workers would entail only a "slight risk" to collective bargaining. See St. Antoine, *supra* note 6, at 36. Such a risk, he contends, would not lead to preemption, given the current orientation of the Supreme Court. *Id.* at 36. See also Summers, *supra* note 6, at 530 (arguing that state legislation of this type would be "state protective legislation [which] has never been considered preempted because it establishes minimum standards for mandatory subjects of bargaining"); *cf.* Note, Common Law Action, *supra* note 8, at 1460-63 (suggesting that related extension of state judicial remedy for unjust dismissal to unionized workers would not preempt federal labor policy).

103. The stated policy of the NLRA is to encourage collective bargaining. 29 U.S.C. § 151 (1935). Similar policies may be found in many state labor laws. See generally 1 & 2 Lab. L. Rep. (CCH). These policies would be undercut if employees were encouraged to remain unorganized to obtain just cause protection.


105. Vaca v. Sipes, 386 U.S. 171 (1967), requires that a wrongfully discharged employee
By covering unionized workers caught in this position, the statute would equalize protection and recognize the rights of all workers to job security.

A different conclusion is required, however, where the unionized worker has gone through the entire union grievance procedure and had a claim rejected by an arbitrator. Arbitration carried out under a collective bargaining agreement is covered by just cause standards and is likely to be heard by the same labor arbitrators who will serve as mediator-arbitrators. Thus, allowing the employee to initiate statutory action after arbitration would be granting a second and undeserved

bringing a § 301 suit against his employer prove that the union breached its duty of fair representation when processing the grievance. Id. at 186. To prove that the union breached its duty of fair representation, Vaca requires the employee to do more than show that his claim is meritorious; he must demonstrate that the union's conduct in handling the claim was "arbitrary, discriminatory, or in bad faith." Id. at 190. Justice Black, dissenting, argued that this rule "puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy." Id. at 210. Commentators generally agree that individual employee rights have been unfairly compromised by the Vaca rule. See, e.g., Flynn & Higgins, Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee, 8 SUFFOLK U.L. REV. 1096 (1974); Lewis, Fair Representation in Grievance Administration: Vaca v. Sipes, 1967 SUP. CT. REV. 81; Tobias, A Plead for the Wrongfully Discharged Employee Abandoned by His Union, 41 U. CIN. L. REV. 55 (1972); Note, The Individual Worker's Right to Sue in His Own Name in a Collective Bargaining Situation, 17 S.D.L. REV. 217 (1972); Note, Individual Control Over Personal Grievances Under Vaca v. Sipes, 77 YALE L.J. 559 (1968). Many of these commentators, however, reacted against decisions - based on Vaca — holding that negligent processing of a grievance does not constitute a breach of the duty of fair representation. See, e.g., Woods v. North Am. Rockwell Corp., 480 F.2d 644 (10th Cir. 1973); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970), cert. denied, 402 U.S. 952 (1971); Sharp v. Ryder Truck Lines, 465 F. Supp. 434 (E.D. Tenn. 1979); Cooper v. Westinghouse Elec. Corp., 416 F. Supp. 13 (S.D. Ind. 1976); Papillon v. Hughes Printing Co., 413 F. Supp. 1313 (M.D. Pa. 1976). Although there is some evidence that courts are becoming more sensitive to claims based on negligent union conduct, see, e.g., Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978); Milstead v. Teamsters Local 957, 580 F.2d 232, 235 (6th Cir. 1978), cert. denied, 454 U.S. 896 (1981); Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975); De Arroyo v. Sindicato de Trabajadores Packhousing, 425 F.2d 281, 287 (1st Cir.), cert. denied, 400 U.S. 877 (1970); Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 760 (E.D. Mich. 1976); concern for protection of individual worker's rights still exists. "Concern for the protection of worker's individual rights is an important but overlooked aspect of federal labor policy. A need for reform in the area of union handling of grievances is apparent." Note, The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent, Arbitrary or Perfunctory Grievance Administration, 46 Mo. L. REV. 142, 162 (1981). See generally Note, Can Negligent Representation Be Fair Representation? An Alternative Approach to Gross Negligence Analysis, 30 CASE W. RES. 537 (1980).

Extension of statutory protection against unjust dismissal to unionized workers deprived of union representation would insure them protection in those critical instances when their job is at stake. Furthermore, protection would be granted without weakening union control of grievances — a result that is feared if a more stringent duty of fair representation is invoked. The union would remain able to block frivolous claims, keep costs down, and preserve union management relations by limiting grievances. For a discussion of the problems facing a union operating under a strict fair representation standard, see Cox, Rights Under a Labor Agreement, 69 HARV. L. REV. 601 (1956); Levine & Hollander, The Union's Duty of Fair Representation in Contract Administration, 7 EMP. REL. L.J. 193, 205-06 (1981).
chance to gain relief.\(^{106}\) Moreover, allowing such an action would violate federal labor policy\(^{107}\) by undermining the finality of arbitration awards.

An additional question concerns whether union employees should be required to exhaust union remedies before initiating statutory action. The advantages of an exhaustion requirement include reduction of public costs by eliminating most union cases from statutory treatment,\(^{108}\) preservation of union control over internally developed grievance procedures,\(^{109}\) and elimination of forum-shopping between union and statutory remedies.

Opponents of exhaustion argue that it will encourage “sweetheart contracts” with unions that have rigged their grievance mechanisms so as to deny employees protection.\(^ {110}\) Employees, forced to use these grievance procedures because of the exhaustion requirement, would be left without a state statutory remedy. This argument, however, fails to consider existing employee protections from union treatment of this sort. First, the formation of “sweetheart contracts” between spurious unions and employees is an unfair labor practice under the NLRA.\(^ {111}\) Second, the employee would likely be able to prove unfair union representation and would thus be able to bring suit against his employer under section 301 of the LMRA.\(^ {112}\) Thus, any danger entailed by an

\(^{106}\) Cf. Summers, supra note 6, at 528 (noting that an employee should not be allowed to pursue statutory arbitration if contractual arbitration has already taken place).

\(^{107}\) Cf. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1959) (holding that court scrutiny of labor arbitration awards should be minimal to further the federal policy of making arbitration the last word in labor disputes).

\(^{108}\) Only in cases where the union has decided not to process the employee’s grievance will the employee be able to seek statutory relief. Union refusal to process a claim, however, will often prove helpful to the employee insofar as it offers a good indication of whether the claim has merit.

It is always possible, however, that a union will deliberately refuse to process dismissal claims to reduce its own costs. Yet this fear is groundless, primarily because union employees are not likely to tolerate loss of union representation in dismissal cases; indeed, these workers will feel less secure defending themselves under a statute than they will having the union protect them under the contract. See BNA Report, supra note 5, at 9.


\(^{110}\) “Sweetheart” contracts exist where employers aid union organization or actually contribute financially to the union in exchange for favorable terms in collective bargaining contracts, or other special treatment.

\(^{111}\) The formation of “sweetheart” contracts is an unfair labor practice under § 8(a)2 of the NLRA, 29 U.S.C. § 158(a)2.

\(^{112}\) Union refusal to process a grievance because the union has agreed with the employer not to process or to process negligently such claims would be a clear violation of the rule set forth in Vaca v. Sipes, 386 U.S. 171 (1967).
exhaustion requirement is insufficient to outweigh the clear advantages of including it in the procedure under this Act.

4. Managerial employees—Views differ over how far a statute of this kind should extend in protecting managerial employees. Some commentators have argued that managerial employees should be excluded\(^{113}\) because the discretionary and subjective nature of managerial work makes it difficult to evaluate.\(^{114}\) Insofar as a just cause statute offers few objective criteria to determine whether an employee failed in his work or was fired arbitrarily, it does not provide an answer to this problem. In addition, some commentators argue that because managerial employees do much to share and direct a business, restricting a business owner's right to fire such workers would indirectly invade an "ownership" right to direct the business as he sees fit.\(^{115}\)

Although these arguments make a strong case for giving respect to employer decisions concerning upper-level workers, they do not necessarily lead to the conclusion that managerial employees must be stripped of all coverage. In some situations, managerial and shop workers are indistinguishable. It makes no more sense, for example, to fire a high-level employee for serving on a jury than it does to fire a lower-level worker for the same reason. In short, denying all coverage to managerial employees essentially discriminates against a large number of high-level employees simply because they are capable of the most subjective and valuable work.

The proposed statute provides protection for managerial employees precisely to avoid this kind of unjust treatment. Indeed, the statute is particularly well-suited to achieving this end. The mediator-arbitrator will be well-versed in the subtleties of employment dynamics; in applying the just cause standard to managerial dismissals he will be fully aware of the difficulties of evaluating upper-level employees and will give wide deference to employer decisions. At the same time, employees will be protected from purely arbitrary dismissals.\(^{117}\)

\(^{113}\) Some commentators contend that employers should continue to have the right to dismiss upper-level employees at will. See, e.g., Mennemeier, supra note 6, at 79. The Michigan bill, supra note 82, subscribes to this view; it excludes managerial employees from coverage. All other proposed state legislation, however, provides no guidance either way.

\(^{114}\) See Mennemeier, supra note 6, at 78-80; Summers, supra note 6, at 526.

\(^{115}\) Mennemeier, supra note 6, at 78-79.

\(^{116}\) Managers and administrators constitute 11,458,000 workers out of a total workforce of 100,683,000. BUREAU OF STATISTICS, U.S. DEP'T OF LAB. EMPLOYMENT AND EARNINGS, July 1982, at 24 (1982). Of this number, approximately 3,774,000 are government employees already covered under civil service. Id. at 75-76. Although these figures are not entirely accurate — primarily because "managers and administrators" is not clearly defined in the statistics — they nonetheless give an idea of how large the number of managerial employees actually is.

\(^{117}\) Coverage of managerial employees, though desirable, is likely to evoke considerable concern in the business community. Employers are not likely to trust mediator-arbitrators to make a fair determination in a dismissal controversy. As a result, it is possible that business lobbyists will work to insure that, if a statute is passed, it excludes managerial workers. A political
5. **Confidential employees**— Existing statutory proposals are divided over whether confidential employees should be protected against unjust dismissal. The Michigan bill excludes these employees from coverage — apparently because the drafters copied a similar provision from the NLRA.118 Two concerns led to the exclusion of confidential employees from NLRA coverage. First, confidential employees may be faced with a conflict of interest when negotiating under collective bargaining agreements because of their close relationship with management. Second, they may use their special access to confidential information to gain an unfair advantage at the bargaining table.119

These arguments, however, are inapposite in the ordinary unjust dismissal setting because conflicts of interest and underhanded bargaining are not likely to occur.120 At-will employees negotiate their employ-
ment terms on an individual basis that is highly informal. They do not bargain collectively and thus normally cannot exert the same kinds of pressure on an employer as union workers. An at-will employee who blackmails an employer by threatening to divulge confidential information will, in all probability, be fired. If, after the termination, the employee vindictively tries to leak information, he may be held liable under state trade secrets law. 121

Yet, the proposed statute covers confidential employees not only because the arguments for exclusion are inapplicable in the at-will context, but because such a provision actually protects the employer. There is less chance that the employer will be confronted with the release of confidential information by vengeful ex-employees if the employees feel their claims will be satisfactorily addressed in a statutorily provided hearing. 122

1(b) "Employer" means a person or organization that employs ten or more persons.

Comment

Ideally, employee job security should not depend on the size of the employer. Yet there are arguments against immediate application of the statute to small businesses. First, although arbitrary employer actions are likely to be common in the small business setting, 123 many individuals might feel that, because the small employer has so few employees, they all play the same major role in his business as managerial workers do in a larger business. Consequently, to interfere with the small businessman's right to dismiss these workers would unduly interfere with the right to control and direct his own business. 124 Second, some people may feel that, to be profitable, a small business demands better relations between employees than necessary in a large corporation. The employer consequently requires an extra margin of discretion in making personnel shifts if he is to keep his business financially afloat.

Neither of these arguments, in themselves, is sufficient to block

121. "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other." RESTATEMENT OF TORTS § 757 (1934). Twenty-one states have enacted criminal statutes regulating disclosure of trade secrets. See F. DESSEMONTET, LEGAL PROTECTION OF KNOW-How (2d rev. ed. 1976).

An employer can also enjoin an employee from divulging sensitive information. See, e.g., E.I. duPont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917).

122. Cf. Mennemeier, supra note 6, at 81 (noting that the opportunity to be heard in an arbitration hearing would minimize the chance that an employee would vindictively disclose confidential information).

123. See Summers, supra note 6, at 525; St. Antoine, supra note 6, at 36.

124. See Mennemeier, supra note 6, at 83.
coverage of smaller employers. The small businessman’s need for discretion in guiding his business and maintaining good employee relations are both factors that the mediator-arbitrator could consider in applying the just cause standard.\textsuperscript{125}

A better argument for initial exclusion of small businesses is that experience should be gained under the statute before it is applied to all employers. This would ensure that the mediation-arbitration mechanism is not overburdened before it is established. As efficiency and expertise are gained, coverage may be extended. Such a step-by-step approach is common in social legislation. Title VII, for example, was originally applicable only to employers with twenty-five or more employees but has now been modified to cover employers having fifteen or more workers.\textsuperscript{126}

The model statute embodies this theory by commencing coverage at the ten-employee level. This size limit should balance the goals of smooth establishment of mediation-arbitration and maximum employee coverage.

1(c) "Dismissal" means an involuntary discharge from employment. Dismissal includes constructive dismissal in the form of a resignation that results from unreasonable action or inaction by the employer.

\textit{Comment}

A definition of "dismissal" that includes constructive dismissal is necessary if the broad protective aims of this proposal are to be realized. Transfers, demotions, or reassignments are ordinarily made only in response to business exigencies, but they may become punitive in character, especially when used to force an employee to quit. The prohibitions of this statute would be emasculated if the employer could circumvent them by humiliating an employee into resignation rather than dismissing him outright.

This provision, however, does not permit an employee to prevail in an unjust dismissal case whenever an employer action is merely unfavorable. The employer action must be serious enough to force the employee to resign. Some of the just cause legislation that has been proposed does not require that the employee resign prior to initiating

\textsuperscript{125} Cf. Summers, \textit{supra} note 6, at 525 (noting that the close personal relationships of small businesses and the problems they raise could be considered by an arbitrator applying a just cause standard).

\textsuperscript{126} 42 U.S.C. § 2000e(b) (1976).
action. The effect of these provisions will be to encourage frivolous claims. Conversely, requiring resignation will force the employee to consider carefully the chances of success prior to initiating action.

SECTION 2: DISMISSAL OF EMPLOYEES

2(a) An employer shall not dismiss an employee except for just cause.

Comment

Dismissal cases typically involve a wide variety of fact situations and claims. A statute that attempts to enumerate the specific circumstances and actions on which an employee could base a claim can never be exhaustive; inevitably it will exclude situations not considered by the legislature. To ensure full protection against unjust dismissal, a more flexible provision is needed. The most practical standard is that of "just cause." This standard has already been shaped by arbitration awards under collective bargaining agreements, yet at the same time its meaning is not so firmly established that it cannot be adapted to novel circumstances.

An additional advantage of a just cause standard is that it would require the employer to develop objective criteria with which others may evaluate his business decisions. The employer who fails to act in accordance with established policies will be open to accusations of capriciousness. For example, if an employer reduces the workforce without applying seniority principles, his actions are likely to be viewed as discriminatory. Although, requiring the development of objective criteria encroaches somewhat on management prerogative, it is a small price to pay to ensure the protection of employees.

2(b) Notice— if an employer discharges an employee, or if the employee resigns, the employer shall notify the employee by registered mail within fifteen days after the discharge or resignation of the reasons for the termination of his or her employment and of his or her right to relief under this Act. Information contained in the notice shall be privileged and may not be disclosed by the employer to a third party without the employee’s consent.

127. See New Jersey bill, supra note 82.
128. For a full discussion of the just cause standard, see D. Beeler, supra note 86.
Comment

The purpose of this section is twofold: to alert all employees of their rights under the Act, and to aid the employee in evaluating the likelihood of prevailing should he elect to pursue an unjust dismissal claim. Consistent with the first of these goals, the statute requires the employer to send notice even if the employee quits; to do otherwise would jeopardize just cause protection of employees who have been constructively discharged. 129 Indeed, it is likely that an employee who feels compelled to quit because of actions taken by the employer will not realize that he may have a cause of action under this statute and thus he has a greater need for notification than an employee who is dismissed outright.

As a general matter, including a written statement of the reasons for dismissal in the notice will provide the employee with valuable insight into the motives behind the employer’s decision. Consequently, the employee will be in a better position to evaluate the merits of his claim. Even if the employee is unable to make this evaluation on his own, the employer’s statement will assist the employee’s attorney in assessing the claim and preparing for discovery. The end result will be an increase in the efficiency of the mediation-arbitration process through the creation of an additional means of screening out unnecessary, meritless claims.

The information contained in the dismissal notice should be kept confidential so the employer is free to be explicit about the reason for the dismissal, even if it reflects badly on the employee. Employers should be prohibited both from disclosing information contained in dismissal notices and from asking employees to provide such information so these notices do not become a liability to the employee when he searches for another job. This prohibition will serve to maintain the integrity of the notice procedure and keep confidential any reasons for dismissal which might provoke embarrassment if disclosed.

SECTION 3: FILING OF UNJUST DISMISSAL COMPLAINTS

3(a) Time for filing— An employee who believes that he or she has been discharged in violation of section 2(a) may file in the state court of general jurisdiction, by registered mail or in person, a written complaint. The complaint must be filed not later than thirty days after receipt of the employer’s written notification of discharge and right to relief as provided

129. The Michigan and Pennsylvania bills, supra note 82, require that the employer send notice to the employee upon discharge only.
in section 2(b). The complaint shall contain the names, addresses, and telephone numbers of the employer and of the employee, the date of the employment termination, and a short statement of the reasons for filing the complaint.

Comment

The employee is required to decide quickly whether to pursue a remedy under this Act.\textsuperscript{130} Holding the hearing shortly after the discharge will optimize the possibility of reinstatement if the claim is found to be unjust. Equally important, the employer will immediately know whether to hire another worker or keep the position open for the discharged employee.

Requiring the employee to file a complaint in court may necessitate retaining an attorney. Although this may increase the cost of bringing a suit, the total cost will not be prohibitive because mediation-arbitration will result in faster settlements.\textsuperscript{131} Consequently, the expenses of excessive attorney time and court costs will likely be avoided.

The information required to be included in the complaint is designed to facilitate the job of the mediator-arbitrator and the court clerk in arranging the mediation-arbitration proceeding pursuant to section 4(c)(1) of this Act.

3(b) Extension where notice requirements are not met— If an employer:

(i) fails to provide the employee with notice pursuant to section 2(b) of the reasons for his termination and his or her right to relief under this Act, or

(ii) has failed to post a copy of this Act pursuant to section 7 of this Act in a prominent place in the work area for at least six months prior to the date of the employee's termination,

the employee's time for filing a complaint under subsection (a) shall be extended to ninety days.

Comment

Although the existence of this statute may become a matter of general public knowledge within the state, extra care should be taken to en-

\textsuperscript{130} Other statutes, such as Title VII, 42 U.S.C. \textsection 2000e-5(e), allow for 180 days to file a claim. Although such an extended period is appropriate for advancing the type of broad social policy embodied in Title VII, it does not give adequate deference to both the employee's and the employer's interest in speedy claim resolution to be functional in the context of this statute.

\textsuperscript{131} See supra text accompanying notes 90-92.
sure that the employee is fully aware of his rights under the Act. Thus, this section requires that notice be sent to the employee and that a copy of the Act be posted in the work area. If the employer fails either to post or send notice, this provision protects the employee by allowing him an additional sixty days to file a claim. The extension is limited to sixty days both to avoid exposing the employer to liability indefinitely and to promote quick settlement of dismissal disputes.

SECTION 4: MEDIATION-ARBITRATION PROCEEDINGS

4(a) Appointment of mediator-arbitrator— Upon receipt of a complaint from a discharged employee, the court shall select a mediator-arbitrator to hear the dispute. The court may adopt, by administrative order, a procedure for selection of mediator-arbitrators that includes the setting of minimum qualifications.

Comment

The selection of the mediator-arbitrator is placed in the hands of the court for reasons of consistency and convenience. Every state has courts experienced in exercising an appointment power. It would be difficult to identify another body presently in existence that is equally competent to make this selection. Some states, however, may already have executive or administrative commissions that are better equipped to appoint a mediator-arbitrator than the courts. For this reason, any other appropriate body may be statutorily delegated the responsibility of making the selection. The Michigan bill, for example, provides that the State Employment Relations Commission choose mediators and arbitrators. Practically, this makes sense. The Employment Relations Commission has been operating since 1939\textsuperscript{132} and thus can make an experienced and competent choice while simultaneously relieving an already overburdened court system from performing yet another administrative function.

4(b) Disqualification of the mediator-arbitrator— The rule for disqualification of a mediator-arbitrator shall be the same as provided for the disqualification of a state judge.

Comment

Because the mediator-arbitrator performs the same function in

presiding over hearings under this Act that a judge does in ordinary
court adjudication, it is reasonable to hold the mediator-arbitrator to
the same standard of conduct as a judge. Thus, this provision requires
that the rules for disqualification of the mediator-arbitrator be the same
as those provided in the state’s judicial code of ethics.

4(c) Primary procedures—
   (i) Once selected, the mediator-arbitrator shall designate a time
and place for the hearing. The court clerk shall send notice
to the parties not less than thirty days before the date set.

Comment

Although speedy dispute resolution is of critical importance, the
parties must have sufficient time to prepare properly for the hearing.
Thirty days is the period ordinarily granted to gather evidence and
prepare witnesses for compulsory mediation or arbitration hearings.133
This period should also be sufficient in the similar context of mediation-
arbitration.

(4)(c)(ii) Within fifteen days after the mailing of notice of the
mediation-arbitration hearing date, each plaintiff and each
defendant must send to the court clerk a check for $300.00
made payable to the mediator-arbitrator.

Comment

Insofar as both parties make use of mediation-arbitration to vindicate
their rights, it is equitable that the cost be evenly divided between them.
The $300 fee will be used to compensate the mediator-arbitrator for
his services. By requiring the parties to shoulder the expense of hiring
a mediator-arbitrator, the aggregate cost to the public of the entire
proceeding will be significantly diminished. Moreover, requiring the
employee to share the expense will help deter frivolous suits; the amount
is substantial enough to discourage the employee who does not seriously
believe a violation has occurred, yet it is not so substantial that it will
prevent worthy claims from being heard.134

133. See, e.g., Mich. Ct. R. 316.6 (granting parties thirty days prior to mediation hearing);
Cal. R. Ct. 1611 (providing thirty-days notice prior to arbitration hearing); Pa. R. Civ. P.
1303 (same).

134. Although a fee of this size may in a rare instance deter an employee with a legitimate
claim from bringing suit, there is no other way to ensure equitable and just treatment to both
employees and employers.
When there are multiple plaintiffs and defendants each individual party will be required to pay the fee. As a practical matter, where funds collected exceed the amount needed to compensate the mediator-arbitrator for his services, the excess should be used to help defray other costs of the mediation-arbitration program. For example, this fund could be used to pay the fees of indigent plaintiffs with colorable claims. 135

(4)(c)(iii) A party who produces a witness at the mediation-arbitration hearing shall pay the statutory fees of that witness. Where the mediator-arbitrator calls a witness pursuant to subsection 4(d)(i), or where more than one party requires the presence of the same witness, the parties shall divide equally the fees of that witness.

(iv) At least ten days before the scheduled hearing date, each party shall submit a list of witnesses to be called at the hearing and one copy of all documents pertaining to the issues in dispute to the court clerk, as well as to the opposing party or any attorney that the opposing party may have secured. At the same time, each party may also submit to these individuals a concise brief or summary setting forth that party’s factual or legal position on issues pertinent to resolution of the dispute.

Comment

Each party will bear the cost of his own witnesses as part of the expense of preparing the case. The fees should be set by the state legislature on a scale commensurate with statutory fees paid to witnesses in state court cases. This burden is imposed on the parties for two reasons. First, it will decrease the overall cost of the proceeding to the public. Second, it will cut down the number of witnesses asked to appear at the hearing and thus will keep the proceeding from becoming overly complex.

When the mediator-arbitrator calls a witness whose presence has not been requested previously by either of the parties, both parties will share in payment of the fees. This provision may lead some parties to attempt to decrease the cost of calling a witness by waiting until the mediator-arbitrator calls the witness himself. This incentive to avoid calling a witness, however, is counterbalanced by the ever-present risk that the party who neglects to call a witness will lose valuable testimony.

135. Alternatively, a legislature may wish to consider attaching a waiver provision to this section so that an employee who can establish indigence may still be able to bring suit.
that ultimately may cost him the case.

The parties are required to send each other and the mediator-arbitrator copies of all relevant documents and a list of prospective witnesses to ensure that the hearing is conducted on an open and informed basis. Although it is not required by the statute, the parties are free to draw up and distribute a legal brief setting forth their position. The desirability of drafting a brief will depend on the complexity of the fact situation involved and the importance of the case.

4(d) Conduct of the mediation-arbitration hearing—
(i) The proceedings shall be informal. The mediation-arbitration hearing will not be open to the public. The mediator-arbitrator will determine who shall be allowed to attend the hearing. The mediator-arbitrator may conduct the hearing in whatever manner he or she believes will permit a full and expeditious presentation of the evidence and arguments of the employer and the employee. Technical rules of evidence shall be relaxed. The mediator-arbitrator may admit any evidence or other data that he or she considers to be relevant to the issues under consideration at the hearing.

**Comment**

1. *Closed hearings*— Closed hearings are critical to the establishment of informal proceedings. Without the pressures of public scrutiny, the parties are more likely to confront the dispute in a candid and open manner. Discussions before the mediator-arbitrator under these conditions will be uninhibited. By encouraging informality in this manner, the statute will improve the possibility of settlement; a free-wheeling discussion is more likely to result in the parties working together than a traditional public proceeding where the parties will be worried about creating an appearance of having compromised or capitulated.

2. *Relaxed rules of evidence*— This proposal permits the mediator-arbitrator to use relaxed rules of evidence in the hearing as is

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136. Of the state proposals, only the Michigan bill, *supra* note 82, provides for limited attendance at the hearings.

137. Use of relaxed rules of evidence would entail, for example, the admission of evidence which may be deemed irrelevant or incompetent in a court. It may also include admission of confessions, permissible inferences from failure to testify or produce documents, as well as the admission of illegally obtained evidence. For good discussions of evidentiary problems in labor arbitration, see Edwards, *Due Process Considerations in Labor Arbitration*, 25 *ARB. J.* 141 (1970); Fleming, *Some Problems of Evidence Before the Labor Arbitrator*, 60 *MICH. L. REV.* 133 (1961).
commonly done in other non-jury adjudicatory forums. This provision thus gives the mediator-arbitrator discretion to dispense with technical hearsay, materiality, and exclusionary rules, in favor of a general standard of fairness.

There are two major advantages in applying relaxed rules of evidence. First, they enhance the possibility of settlement. The mediator-arbitrator may allow the parties to talk freely without strict regard to whether their remarks are relevant to the dispute. As a result, the parties will stand a better chance of working out frustrations and hostility that might freeze the dispute.

Second, relaxed rules will relieve the mediator-arbitrator and the parties of procedural burdens that would otherwise jeopardize speedy dispute resolution. Requiring technical rules, for example, would force a mediator-arbitrator — who is not a judge and may not even be a lawyer — to undergo training in the use and application of state and federal rules of evidence. Such training would increase the overall cost to the public of the mediation-arbitration proceeding. Equally important, parties unfamiliar with technical rules of evidence will be discouraged from cost-saving pro se advocacy. Technical rules would also cause delay in the pre-hearing stages because the parties and their attorneys would be required to sift through the evidence to determine what is admissible and what is not. Finally, technical rules would create inflexibility in the proceedings; use of an exclusionary-type rule, for example, would impair the mediator-arbitrator’s ability to draw out the relevant facts.

Of the state proposals, only the Michigan bill, supra note 82, provides for the use of relaxed rules of evidence.

138. Relaxed rules of evidence are used in nonjury trials, administrative tribunals, see generally K. Davis, Administrative Law Treatise 218-75 (3d ed. 1980), and labor arbitration, see generally F. Elkouri & E. Elkouri, supra note 87, at 252-96.


140. R. Lorch, Democratic Process & Administrative Law 137 (1980). Lorch discusses the use of relaxed rules of evidence in administrative proceedings, as well as the drawbacks of using technical rules of evidence. His comments are applicable to mediation-arbitration of at-will employment discharge disputes. See infra text accompanying notes 151-52.

141. R. Lorch, supra note 140, at 137.

142. See Edwards, supra note 137, at 146. See generally F. Elkouri & E. Elkouri, supra note 87, at 252-56.

143. A clearer picture can often be gained by allowing the parties to discuss what they feel is important.

The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that apparent rambling frequently discloses very helpful information which would otherwise not be brought out.

Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1017 (1955). See also F. Elkouri & E. Elkouri, supra note 85, at 255.
The advantages of relaxed rules can be gained without sacrificing fundamental fairness to the parties. The mediator-arbitrator will have sufficient discretionary power to prevent any violation of the traditional concerns underlying the rules that would place one party at a clear disadvantage. At any point in the proceeding the mediator-arbitrator may exclude or simply disregard evidence that is unduly repetitious, irrelevant, or improper. In addition, the mediator-arbitrator may allow each side to cross-examine witnesses and rebut evidence presented at the hearing. Cross-examination will help ensure that fairness is protected in two ways: it will increase the accuracy of the testimony and provide a more complete presentation of the facts.

The relaxed rules of evidence proposed here are not a new concept; they have been used with considerable success in several proceedings that are analogous to the mediation-arbitration hearing: arbitration pursuant to a commercial contract or a collective bargaining agreement, administrative law proceedings, and non-jury court adjudication. In commercial or labor arbitration, arbitrators frequently create their own evidentiary standards or follow the relaxed rules promulgated by the American Arbitration Association. In these cases, arbitrators use a modified due process standard, comparable to the one advocated

144. One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material.

3 K. DAVIS, supra note 138, at 229 (quoting Donnelly Garment Co. v. NLRB, 123 F.2d 215, 224 (8th Cir. 1942)).

145. See F. ELKOURI & E. ELKOURI, supra note 85, at 256; R. LORCH, supra note 140, at 136-37.

146. The mediator-arbitrator's discretionary power in allowing cross-examination is similar to that of an administrative law judge. Although the Administrative Procedure Act, 5 U.S.C. § 556 (1976), expressly provides for cross-examination, case law in the administrative setting indicates that cross-examination is not always provided as of right; rather it is subject to the discretion of the court or examiner. See, e.g., Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978); American Public Gas Ass'n. v. Federal Power Comm'n, 498 F.2d 718 (D.C. Cir. 1978). Some commentators argue that cross-examination is not always necessary to a fair hearing. See Friendly, Some Kind of a Hearing, 123 U. PA. L. REV. 1267, 1285 (1975) (noting that some scholars have overestimated the value of cross-examination); R. LORCH, supra note 140, at 142-43 (discussing the circumstances where cross-examination may not be necessary).

147. Arbitrators have established the pattern of ordered informality; performing major surgery on the legal rules of evidence and procedure but retaining the good sense of those rules; greatly simplifying but not eliminating the hearsay and parole evidence rules; taking the rules for the admissibility of evidence and remolding them into rules for weighing it; striking the fat but saving the heart of the practices of cross-examination, presumptions, burdens of proof, and the like.


149. See Getman, What Price Employment? Arbitration, the Constitution, and Personal
by this proposal, and decide evidentiary questions according to common sense and fairness. Similarly, under the Administrative Procedure Act ("APA") administrative tribunals are free to use relaxed rules of evidence, also subject to general principles of due process. Finally, judges presiding at non-jury trials often admit evidence indiscriminately, ruling on weight and relevance only after all the facts have been presented. Because the technical rules of evidence are designed primarily to prevent a jury from being unduly influenced by evidence that is both prejudicial and irrelevant, few objections have been raised to the use of relaxed rules in non-jury trials. Clearly, this rationale supports the use of relaxed rules in the mediation-arbitration setting.

(4)(d)(ii) The mediator-arbitrator may administer oaths and require the attendance of witnesses. The mediator-arbitrator may also require the production of books, papers, contracts, agreements, and documents that he or she considers to be necessary for a complete understanding and determination of the issues in dispute. To ensure compliance with the requirements of this provision, the mediator-arbitrator may issue subpoenas. In the event an individual or a party to the dispute refuses to obey a subpoena, be sworn, testify, or otherwise cooperate with the mediator-arbitrator, the mediator-arbitrator may invoke the aid of the local court of general jurisdiction to issue an appropriate order. The court may punish a failure to obey the order as contempt.


150. See Edwards, supra note 137, at 169.
152. See Fairbank v. Hardin, 429 F.2d 264 (9th Cir.), cert. denied, 400 U.S. 943 (1970) (technical rules of evidence are not applicable in administrative hearings); Wherley v. Gardner, 374 F.2d 9 (8th Cir. 1967) (administrative agencies are not required to use rigid rules of evidence); Rosedale Coal Co. v. Director of U.S. Bureau of Mines, 247 F.2d 299 (4th Cir. 1957) (relaxed rules of evidence may be used as long as principles of fundamental fairness are not violated); Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951) (administrative agencies may use relaxed rules of evidence if they adhere to principles of due process). See generally 3 K. Davis, supra note 138, at 235-38.
153. F. Elkouri & E. Elkouri, supra note 85, at 255.
154. For example, hearsay, evidence of past misconduct, and opinions of witnesses can all prejudice a jury even though that evidence itself does not bear directly on the fact to be proved. For this reason the standard of relevancy was developed, with all its attending evidentiary rules. 1 J. Wigmore, Evidence § 9, at 290 (3d ed. 1940). See also Fleming, supra note 137.
155. Concerning the rules of evidence, Charles McCormick said that "[as] rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury." 5 Encyc. Soc. Sci. 637, 641 (1931), quoted in 3 K. Davis, supra note 138, at 225. See also 3 K. Davis, supra note 138, at 224-33; 1 J. Wigmore, supra note 154, § 4 (b), at 27; Fleming, supra note 137, at 134.
Comment

A complete understanding of the issues and positions of both sides is critical if the mediation-arbitration process is to succeed. Thus, the mediator-arbitrator is permitted to swear in witnesses. In addition, the mediator-arbitrator is empowered to call any witness or subpoena any documents that, notwithstanding the wishes of the parties, he or she feels may contribute to a fuller understanding of the case. To ensure that this provision is enforceable, the mediator-arbitrator is free to request a court order from a local state court.

(4)(d)(iii) The mediator-arbitrator, for good cause shown, may adjourn the hearing upon his or her own initiative or upon the request of a party, and shall adjourn the hearing when both parties agree to the adjournment.

(iv) The mediation-arbitration hearing may proceed in the absence of one of the parties, if, after due notice, the party in question fails to appear at the hearing, and fails to obtain an adjournment of the hearing as provided in subsection (iii). A mediator-arbitrator shall not grant or deny an award solely on the default of a party. Rather, the mediator-arbitrator shall require the non-defaulting party to submit evidence, as necessary, to support an award in its favor.

Comment

The mediator-arbitrator may temporarily adjourn the hearing if he or she concludes that it is necessary to the preservation of fairness for one or both of the parties. The mediator-arbitrator should not postpone the hearing for frivolous reasons or if it appears that the request for adjournment is merely a delaying tactic. If both parties agree to adjourn, however, the decision no longer rests in the hands of the mediator-arbitrator, and the hearing will be adjourned automatically. Clearly, if both parties agree to adjourn, there is no danger that one party will be able to abuse the rules to harass the other.

To expedite dispute resolution and avoid unnecessary delays, the

156. A similar rationale has lead to granting the power to administer oaths to arbitrators, see, e.g., Cal. R. Ct. 1614(a)(1); Pa. R. Civ. P. 1304(b), and administrative law judges, see, e.g., 5 U.S.C. § 556 (1976); N.Y. State Admin. Proc. Act § 304(1) (1976), both of whom serve in a similar capacity to mediator-arbitrators.

157. In granting the mediator-arbitrator the power to issue subpoenas, the model statute parallels many state statutes which grant subpoena power to arbitrators, see BNA, Problems of Proof in Arbitration 140 (1967), and administrative law judges, see, e.g., N.Y. State Admin. Proc. Act § 304(2) (1976); Wash. Rev. Code Ann. § 34.04.090(9)(b) (West Supp. 1982).
mediator-arbitrator is authorized to proceed ex parte\textsuperscript{158} if one party fails to appear without first having requested and obtained an adjournment. Nevertheless, because an award must be based on substantial evidence,\textsuperscript{159} the non-defaulting party will still be required to present his case.

4(d)(v) When presentation of the evidence has been completed, the mediator-arbitrator shall begin mediation between the parties. In conducting mediation, the mediator-arbitrator may speak to the parties together or separately. To facilitate mediation, the mediator-arbitrator may give the parties a preliminary assessment of their respective legal positions. This assessment must, however, be based on the law of just cause as developed in previous dismissal cases. Any agreement which the parties reach must be put into writing and signed by the parties or their respective attorneys.

Comment

After the evidence has been presented, both parties should see more clearly the weaknesses in their respective positions. At this point their views are likely to have softened, creating an opportunity for settlement.\textsuperscript{160} The mediator-arbitrator must capitalize on this moment. If he or she has developed a solid knowledge of the case, it should be possible to convince the parties to work together to resolve their dispute.

If, however, mediation proves difficult to initiate, the mediator-arbitrator may give the parties a preliminary assessment of the case. Such an assessment would illuminate the weaknesses in each party's legal position that had not been emphasized previously. To avoid the danger that this assessment process might be used to coerce the parties into a settlement, the mediator-arbitrator will be required to base the assessment upon straightforward legal conclusions drawn from previous dismissal cases.

4(d)(vi) If, after a reasonable time, the mediator-arbitrator determines that settlement is unlikely, he or she may close the hearing. Either party may request a continuance of mediation, subject to the discretion of the mediator-arbitrator.

\textsuperscript{158} This provision is similar to state rules allowing for ex parte abitration. See, e.g., CAL. R. Cr. 1610(b); PA. R. Civ. P. 1304(a).

\textsuperscript{159} See infra text accompanying note 169.

\textsuperscript{160} Cf. Fuller, supra note 89, at 26 (noting that the time between presentation of evidence and the granting of an arbitration award is an "especially propitious moment for settlement").
Comment

After handling a number of dismissal cases, the mediator-arbitrator should have sufficient experience to determine when a case no longer holds potential for settlement. If, however, one of the parties demonstrates that additional time is needed to achieve a settlement, it is only equitable and reasonable to permit the mediator-arbitrator to give weight to those considerations when deciding whether to grant a continuance. Ultimately, however, the mediator-arbitrator must make the final decision; allowing the parties to obtain a continuance upon request alone could potentially lead to intolerable delay and stalling.

(4)(d)(vii) The mediator-arbitrator shall tape-record the hearings. This tape recording shall serve as the official record of the hearings and shall be deposited with the court clerk.

(viii) The employer, the employee, or both, may, after the scheduled hearing, request the court clerk to make a typed copy of the transcript. The party that requests a copy of the official record shall bear the costs necessary for its preparation.

Comment

These provisions are designed to provide a record of the proceedings from which an appeal may be made. The use of a tape recorder by the mediator-arbitrator will help reduce costs without violating principles of due process.

SECTION 5: EFFECTS OF MEDIATION-ARBITRATION

5(a) If the parties sign a written agreement during the mediation-arbitration proceedings, or reach a private settlement in
writing any time prior to the rendering of an award by the
mediator-arbitrator as described in subsection 5(b), that set­
tlement will be enforced in the local state court of general
jurisdiction. Such a settlement shall preclude any further
state common law actions against unjust dismissal.

Comment

This subsection is designed to permit flexibility in obtaining set­
tlements. Thus, the statute allows the parties to reach their own
negotiated settlement any time prior to the rendering of the mediator-
arbitrator's award. To prevent unnecessary litigation and encourage
efficient dispute resolution, the subsection provides that a private set­
tlement shall automatically preclude the employee from initiating any
additional action to recover for an unjust dismissal under state law. 164

5(b) If the parties fail to reach a settlement before, during, or
after the hearing, the mediator-arbitrator shall, within thirty
days after the close of the hearing, render a signed opinion
and make an award based on the issues and evidence
presented during the hearing. The mediator-arbitrator’s
award shall be final and binding on the parties.

(5)(c) If an employer or an employee willfully disobeys or offers
resistance to an arbitration award, the local state court of
general jurisdiction in the jurisdiction in which the dispute
arose or in which the employee resides is authorized, upon
the request of either party, to issue an order enforcing the
award. If the party against whom the order was issued
disobeys or resists compliance with that order, that party
may be held in contempt. The court may use its discretion
to fine the party on a per diem basis for the duration of
the violation. In no case may the fine exceed $250.00 per day.

Comment

Subsection (b) sets forth the arbitration procedure employed in
mediation-arbitration. In the event it becomes necessary for the
mediator-arbitrator to impose a decision on the parties, this section
ensures that, though there will be ample time for careful considera­tion

164. Presumably, the parties could also incorporate a waiver of federal rights under title
VII, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974), or § 301 of the LMRA
into a private settlement.
of the case, the decisionmaking process will be completed without inordinate delay.

Fairness considerations necessitate that the mediator-arbitrator base the decision only on evidence presented at the hearing. Without this requirement the parties would not have an opportunity to rebut evidence deemed critical to the outcome of the case. Similarly, because the decision of the mediator-arbitrator is final and binding, a reasoned opinion is required to promote the appearance of rationality and fairness in the decisionmaking process.

The parties are given a choice of jurisdictions in which to enforce the mediation-arbitration award. The purpose of this provision is to protect those employees who work in a jurisdiction far from that of their legal residence, and who would find it unduly burdensome to obtain a court order in the jurisdiction where they are employed.

Finally, subsection (c) places enforcement power in the hands of the court. Guidelines for imposing fines are established to prevent excessive punishment while at the same time indicating to the judge the importance which the state legislature attaches to cooperation with the mediator-arbitrator. A maximum fine of $250.00 per day is large enough to force even a sizable company to comply.

(5)(d) Remedies—The remedies the mediator-arbitrator may select include, but are not limited to, the following:

(i) The sustainment of the discharge.

(ii) Reinstatement of the discharged employee with no back pay.

(iii) Reinstatement of the discharged employee with partial back pay.

(iv) Reinstatement of the discharged employee with full back pay.

(v) A severance payment.

Comment

This section is designed to give the mediator-arbitrator broad power and discretion in formulating an award. The possibilities listed are not exclusive, and the mediator-arbitrator may formulate remedies to fit the specific facts of the case before him. Reinstatement is included

165. See Friendly, supra note 146, at 1282. Judge Friendly argues that the right to have a decision based only on the evidence presented at the hearing is a prerequisite to a fair hearing. See infra note 168.

166. See 3 K. Davis, supra note 138; at 110-16. A reasoned opinion is also necessary to facilitate judicial review. Id. at 103-05; cf., Friendly, supra note 146, at 1291-92.
as a possible remedy, despite the controversy it has recently evoked under collective bargaining agreements, because in some situations it may be the only effective alternative available. A sixty-year-old employee, for example, will not be well served by a severance payment; unless he is reinstated, he will likely be left jobless for the rest of his life.

SECTION 6: JUDICIAL REVIEW

The state court of general jurisdiction for the jurisdiction in which the dispute arose or in which the employee resides may review an award made by the mediator-arbitrator, but only for the reasons that the award is not supported by substantial evidence on the record as a whole; or that the mediator-arbitrator was without or exceeded his or her jurisdiction; or that the award was procured by fraud, collusion, or other similar and unlawful means. The pendency of a proceeding for review shall not automatically stay the award of the mediator-arbitrator.

Comment

This section of the statute grants a limited right to review in state court for either party. To withstand judicial review, the mediation-arbitration award must be supported by substantial evidence. This

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168. Judicial review is granted instead of a trial de novo because a jury trial is not required to resolve disputes when a new cause of action has been created by the legislature. In Atlas Roofing Co. v. OSHA, 430 U.S. 442, 461 (1977), Justice White, writing for the majority, held that "[Congress will have] created a new cause of action [through an administrative tribunal], and remedies therefor, unknown to the common law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved. The Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law." Although the Court was referring to the enforcement of new rights in administrative tribunals, the same rationale applies for a mediation-arbitration hearing provided fundamental requirements of due process are met.

Judge Friendly argues that, to be constitutional, a "fair hearing" must include (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons that the proposed action should not be taken, (4) the right to call witnesses, (5) the right to know the evidence against one, (6) the right to have the decision based only on the evidence presented, (7) the right to counsel, (8) the making of a record, (9) a statement of reasons by the decision maker, (10) public attendance, and (11) judicial review. Friendly, supra note 146, at 1279-95. Of these 11 "requirements" Judge Friendly contends that all but the first three are dispensable in certain cases. Id. at 1279-95. The mediation-arbitration process satisfies all the requirements of a fair hearing except an "open forum."

169. The Administrative Procedure Act requires judicial review of agency decisions that are
review on the merits furthers the important goal of contributing to the parties' perception that the procedure is fair by putting a check on the discretionary powers of the mediator-arbitrator. 170

The standard of review prescribed by this proposal is broader than that ordinarily accorded arbitration awards. Most state arbitration statutes allow review of procedure, and no review of the merits. 171 These statutes, however, apply only to the review of awards made pursuant to arbitration proceedings to which both parties contractually consented. 172 In contrast, mediation-arbitration is a statutorily mandated procedure. It is compulsory and nonconsensual. Thus, it is not clear that review confined to procedure will satisfy basic principles of due process.

The use of a standard of limited judicial review in administrative agency hearings supports the approach taken here. The rationale for a limited review in the administrative agency setting is that administrative judges have a superior knowledge of the subject matter of the disputes within their agency, and thus deserve considerable deference. 173 Mediation-arbitration proceedings are similar to administrative proceedings in this respect; the mediator-arbitrator has a well-developed and specialized knowledge of employment relations which should be accorded heavy deference. Thus, the rationale for using a limited review in the administrative agency context is clearly applicable to mediation-arbitration. 174

"unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2)(e) (1976). Many state statutes and constitutions, however, require review only where the ruling is "unsupported by competent, material, and substantial evidence . . . ." E.g., MICH. CONST., art. VI, § 28; WASH. REV. CODE § 34.04.130 (1974) ("unsupported by material and substantial evidence . . . ."). Because the model statute is intended to serve as a state statute, the constitutional requirements of a particular state may mandate that a different scope of review be incorporated into that state's version of this statute. See St. Antoine, supra note 6, at 37; see also R. LORCH, supra note 140, at 178-79 (discussing problems with the substantial evidence test).


173. See Friendly, supra note 146, at 1294-1304. 174. But see Mennemeier, supra note 6, at 86-89. Mennemeier, however, in commenting upon the Michigan proposal, argues that the "competent, material, and substantial evidence" standard would give inadequate deference to the arbitrators' expertise in employment matters and would undercut the interest in finality. Thus, Mennemeier concludes that only review of jurisdiction and abuse of arbitrator discretion should be available. Yet, Mennemeier also notes that if the object of arbitration of at-will employment dismissal cases is not to make use of the arbitrator's expertise, but rather to relieve congestion in the courts by getting rid of the easy cases, then a "substantial evidence" test is appropriate. Id. Mennemeier does not consider the question of whether a review of the merits might be required in the case of non-consensual arbitration. A court in this setting would likely consider the important interests at stake for both parties, as well as the relatively insignificant burdens entailed in review. These factors may lead the court to infer a right of judicial review from...
This review process, however, must not be used as a means by which the employer may delay paying damages; nor may the employer use the threat of that delay to coerce employees into making unreasonable settlements. To insure against this possibility the statute provides that the award will not be automatically stayed pending the appeal.175

SECTION 7: POSTING OF THIS ACT

An employer shall post a copy of this Act in a prominent place in the work area. Directly above the copy of the Act, an employer shall post a sign in capital letters not less than two inches tall stating the following: STATE LAW PROTECTS EMPLOYEES FROM UNJUST DISMISSAL. The employer's failure to post a copy of this Act will result in a $500 fine payable to the state.

Comment

The purpose of this section is to inform employees of their rights under this statute. A similar provision is included in both the Michigan and the Pennsylvania bills. Unlike these existing bills, however, the section proposed here adds a supplementary requirement that a large-lettered sign be placed over the notice to attract the employee's attention.

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Per Ramfjord

legislative silence in this area. Moreover, Mennemeier overlooks the fact that the parties will still be subject to the findings of the mediator-arbitrator. Consequently, review would not render the award or the proceedings meaningless.

175. Mennemeier, supra note 6, at 88 (noting that review on the merits would tend to prolong the adversarial relationship between the parties; providing that the award will not be stayed pending appeal does little to solve this problem).