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The Twilight of Employment at Will? An Update

THEODORE J. ST. ANTOINE*

INTRODUCTION

A 55-year-old white male, who has spent thirty years working his way up to a responsible middle-management position in his company, is asked for his resignation. No reason given. Even though the employee could demonstrate that he still is qualified to perform his duties, the employer's action in dismissing him would be quite unexceptionable under the conventional American common law doctrine of employment at will.¹ The situation could be even more disturbing. If the employment-at-will principle were allowed its full scope, an employee would have no recourse even if he knew he was being discharged because he had refused to commit perjury at the behest of his employer, or had refused to participate in an illegal price-fixing scheme, or had taken time from work to fulfill his civic duty of serving on a jury.

One would like to assume that these latter, more extreme cases are relatively rare. But the practical problem of the employee who is dismissed unfairly, with all the shattering economic and psychological consequences that may follow, is a sizeable one. One careful scholar has esti-

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¹Today a broad range of federal and state statutory protections apply to certain *classes* of employees. For example, the National Labor Relations Act, 29 U.S.C. § 101 (1976), prohibits discharges because of union or other concerted activity; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), prohibits discharges because of race, color, religion, sex, or national origin; and the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1976, Supp. II 1978 & Supp. III 1979), prohibits discharges because of age from 40 to 70.

mated that about one million nonunion, nonprobationary employees are discharged annually in this country, and that of this number as many as 100,000 would have viable causes of action if they were afforded the same "just cause" protections available under the usual collective bargaining agreement.²

Probably the most significant development in the whole field of labor law during the past decade has been the growing willingness of the courts to modify the common law at-will employment doctrine. The rest of this paper will briefly examine the sources of that doctrine, sketch out the main lines of recent qualifications and exceptions to it, and speculate a bit about possible future directions.

COMMON LAW OF EMPLOYMENT CONTRACTS

It is an oft-told tale that the rule making employment arrangements of indefinite duration contracts at will, terminable by either party at any time for any reason, is not a rule which has roots deep in the English common law,³ but one which sprang full-blown in 1877 from the busy and perhaps careless pen of American treatise writer Horace G. Wood.⁴ Wood has been strongly criticized for relying on dubious precedent, with no square holdings supporting him.⁵ Nonetheless, his pronouncement was admirably suited to the *Zeitgeist* of an emerging industrial nation. Before the nineteenth century was out, our courts could confidently assert: "All [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."⁶

Professor Wood has had his defenders as well as his detractors. It has been pointed out, for example, that he was anticipated by California's adoption of an at-will principle in the Field Code in 1872,⁷ and by such

²Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING 155, 160-61 (B. Dennis ed. 1980); THE EMPLOYMENT-AT-WILL ISSUE—A BNA SPECIAL REPORT 24 (Nov. 22, 1982).

³Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute* 62 VA. L. REV. 481, 485 (1976); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425-25 (R. Bell ed. 1771) (general hiring of menial labor for an unfixed term presumed to be for a year).

⁴H. WOOD, LAW OF MASTER AND SERVANT 272-73 (1877).

⁵See, e.g., Note, *Implied Contract Right to Job Security*, 26 STAN. L. REV. 335, 340-45 (1974).

⁶Payne v. Western & A.R.R., 81 Tenn. 507, 519-20 (1884). See also Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

⁷This provision now appears in slightly modified form in CAL. LABOR CODE § 2922 (1971 & Supp. 1984).

decisions as *Hathaway v. Bennett* in New York⁸ and *Perry v. Wheeler* in Kentucky.⁹ Furthermore, the traditional English rule presuming a hiring period of one year was apparently grounded in the medieval Statutes of Labourers, which were initially designed as pro-employer measures to prevent unauthorized quitting or wage-gouging by employees during the periods of severe labor shortages resulting from the Black Death.¹⁰ By the mid-nineteenth century, English courts also held that, absent an express contractual provision, either party could terminate an employment relationship upon "reasonable notice" in accordance with the "custom of the trade."¹¹

The theoretical underpinning of employment at will consists of such concepts as freedom of contract, lack of assent, and most specifically inadequacy of consideration and absence of conventional mutuality of obligation. It would, of course, be contrary to the Thirteenth Amendment to compel an individual employee to work against his will. Contemporary contract analysis has become increasingly skeptical, however, about the soundness of such doctrines as consideration and mutuality of obligation, thus clearing the way for major judicial surgery, especially in the more egregious cases.

Three quite different groups of employees have managed to escape the harsh strictures of employment at will. The first consists of the minuscule handful of persons whose knowledge or talents are so unusual and valuable—the rock star, the professional quarterback, the corporate executive—that they have the leverage to negotiate a contract for a fixed term with their employer. Second, over half of the approximately fifteen million employees of federal, state, and local governments are protected by tenure arrangements or other civil service procedural devices.¹² In addition, all public employees have certain minimum constitutional rights to free speech, due process, and so on.¹³ The third category, of course, is composed of the workers covered by collective bargaining agreements, 80% of which expressly prohibit discharge or discipline except for

⁸*Hathaway v. Bennett*, 10 N.Y. 108 (1854).

⁹*Perry v. Wheeler*, 75 Ky. (12 Bush) 541 (1877).

¹⁰See, e.g., C. BAKALY & J. GROSSMAN, *MODERN LAW OF EMPLOYMENT CONTRACTS* 2 (1983); 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459-60 (2d ed. 1923).

¹¹Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 *THE RECORD* 170, 175 (1981).

¹²Peck, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 *OHIO ST. L. J.* 1, 8-9 (1979).

¹³See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1973).

“cause” or “just cause.”¹⁴ Union membership in the United States, however, has now declined to only about 20% of the total labor force.¹⁵ We may thus assume that something like 70 to 75% of our 100-million-plus work force operates under contracts at will. The gravity of the problem of subjecting so large a group to arbitrary treatment by management, however one might resolve the problem, needs no further elaboration.

RECENT JUDICIAL DEVELOPMENTS

Overview

Different commentators will understandably differ in their analysis and classification of the burgeoning mass of judicial decisions on employment at will. By my own reckoning, jurisdictions modifying the at-will doctrine in one way or another through holdings or strong dicta now number about twenty: California, Connecticut, District of Columbia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, and West Virginia. Less definite expressions of a willingness to revise the doctrine in appropriate circumstances are found in a half dozen additional states: Arkansas, Colorado, Idaho, Iowa, Nebraska, and Wisconsin. Several states have accepted or said they would accept modifications in certain situations while rejecting them in others: Alabama, Indiana, New York, Pennsylvania, and Washington. On the other hand, about nine states have recently reaffirmed the at-will principle: Arizona, Florida, Georgia, Mississippi, North Carolina, Ohio, South Carolina, Texas, and Vermont.

In assessing the courts' attitudes in these early trail-blazing decisions, I am satisfied that most attention should be focused on the particular fact situations involved, and caution exercised about swallowing whole the abstract language of the opinions. Whether in recognizing or refusing to recognize an exception to the traditional doctrine, the courts have often spoken in much too sweeping terms. For example, I doubt whether any court would now decline to sustain at least a nominal cause of action if a discharge flagrantly violated a fundamental, legislatively declared public policy. On the other hand, despite some very broad language in opinions from such jurisdictions as California and Massachusetts, I do not believe

¹⁴Peck, *supra* note 12, at 8.

¹⁵U.S. BUR. LAB. STAT., HANDBOOK OF LABOR STATISTICS—1978, BULL. NO. 2000 at 507 (1979); New York Times, May 31, 1983, at 1, col. 1.

there is a square holding by any court that an employer may not fire an employee without a showing of just cause, except where there is a contractual provision to that effect.

Both tort and contract theories have been used by the courts, singly or in combination, to ease the grip of the at-will employment doctrine. Tort concepts are peculiarly well suited to the truly outrageous situation, where the conscience of the court is shocked and yet it would be hard to find that the employer had committed itself contractually to the employee in any way. On the other hand, a less venturesome court is likely to find contract theory more congenial. If it can be said that the employer has limited its own freedom of action, expressly or impliedly, then it is not the court that is imposing a new duty; rights are simply being enforced in accordance with the parties' voluntary undertaking.

There are important practical differences, depending upon whether a particular action is characterized as tort or contract. For example, the statute of limitations for a tort action is usually shorter than for a contract action. Perhaps most important, tort opens the way for compensatory and punitive damages, damages for mental distress, and the like, none of which are ordinarily an element of recovery in contract.

Tort Theories

Discharges Contrary to "Public Policy"

Probably the most appealing case for recognizing the tort of wrongful discharge is where the employer has violated some fundamental public policy, especially one that has been clearly enunciated by the legislature. Some courts would apparently make that second condition, namely, a legislative (or constitutional) declaration of policy, an essential element.¹⁶ Cases invoking the public policy exception fall naturally into three categories: where the employee was discharged for refusing to engage in unlawful activity, where the employee was discharged for performing a public duty, and where the employee was discharged for exercising a legal right or privilege.

¹⁶See, e.g., *Firestone Textile Co. v. Meadows*, 114 L.R.R.M. (BNA) 3559, 3561 (Ky. 1983); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W. 2d 710 (1982); *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981). Other courts, if taken at their word, have flatly declined to recognize public policy exceptions to the at-will doctrine, regarding it as a matter for the legislature. E.g., *Molder v. Southwestern Bell Co.*, 115 L.R.R.M. (BNA) 2409 (Tex. Civ. App. Dec. 29, 1983); *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 448 N.E. 2d 86 58 N.Y.S. 2d 293 (1983); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E. 2d 51 (1978).

Refusal to Commit Crime. *Petermann v. Teamsters Local 396*¹⁷ was the case that broke through the once-solid barriers of employment at will. A labor union fired one of its employees because he refused to perjure himself on behalf of the union before a state legislative committee. The California Court of Appeals recognized a cause of action, concluding that public policy would be seriously undermined if an employee could be dismissed for a refusal to commit the crime of perjury. Similarly, in *Tameny v. Atlantic Richfield Co.*,¹⁸ the Supreme Court of California sustained a cause of action when an employer discharged an employee for refusing to participate in an illegal price-fixing scheme. Although a court might be troubled in certain borderline situations, for example, when the employer did not realize it was demanding an illegal act of its employee, it is difficult to see how any court today could be so constrained by hide-bound notions of employment at will that it would not uphold a cause of action when an employee is dismissed for a refusal to participate in a clearcut instance of unlawful conduct.

Public Duties and "Whistleblowing." In a celebrated case, *Nees v. Hocks*,¹⁹ a wrongful discharge action was sustained when an employee was fired for taking time from work to serve on a jury. The most common examples of discharges for performing a public service involve so-called "whistleblowing." An employee is fired because he reports to the civil authorities, or even to superiors in his own company, concerning the wrongdoing of his employer or his co-workers. The easiest case for allowing suit is where the employee is also being importuned to break the law himself.²⁰ There are, however, substantial variations in these cases. The employee may have responded to an official subpoena, or he may have seized the initiative in speaking out. His suspicions may or may not be well-founded. He may in all good faith cause substantial damage to the reputation of an innocent party. As might be expected, the courts have re-

¹⁷*Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *But cf.* *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (alleged wrongful discharge is contract action, not tort; no violation of public policy merely because employee was discharged in part for a statement that he would testify truthfully if called as witness in sex discrimination case).

¹⁸*Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (contract and tort action upheld). *See also* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W. 2d 385 (1978).

¹⁹*Nees v. Hocks*, 272 Ore. 210, 536 P.2d 512 (1975). *See also* *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978).

²⁰*Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

sponded differently to these differing situations, upholding some actions and denying others.²¹

Legal Rights and Privileges. The most frequent situation in which employees have been discharged for exercising legal rights involves the filing of workers' compensation claims in states where the statute does not contain an express prohibition of employer retaliation. Several jurisdictions have recognized a cause of action in these circumstances, reasoning that it would frustrate the public policy behind workers' compensation if employees could assert their statutory rights only at the risk of losing their jobs.²² Some courts have gone the other way, arguing that if the legislature wished to protect employees filing workers' compensation claims against employer retaliation, such a provision could easily have been included in the statute.²³

Potentially the most expansive recent decision in this area is *Novosel v. Nationwide Insurance Co.*²⁴ The Third Circuit, purportedly applying Pennsylvania law, found actionable an employee's discharge for refusing to join his employer, an insurance company, in lobbying in favor of no-fault legislation and for privately opposing the company's position. The court concluded that "a cognizable expression of public policy" could be derived from the free speech provisions of either the Federal or State Constitution.²⁵ It is well established, of course, that the Federal Constitution's guarantees of free speech, due process, and equal protection under the First and Fourteenth Amendments operate directly only against state action and not against that of private parties.²⁶ Decisions under the various state constitutions are more mixed, however, and it has been argued

²¹Causes of action were recognized in *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E. 2d 876 (1981), and *Harless v. First Nat. Bank*, 246 S.E. 2d 270 (W. Va. 1978), but rejected in *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Campbell v. Eli Lilly & Co.*, 413 N.E. 2d 1054 (Ind. App. 1980); *Hands v. National Living Centers, Inc.*, 633 S.W. 2d 674 (Tex. App. 1982); *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 448 N.E. 2d 86, 58 N.Y.S. 2d 293 (1983). Some of the seemingly contrary decisions are distinguishable on their facts.

²²*E.g.*, *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E. 2d 425 (1973); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E. 2d 353 (1978); *Firestone Textile Co. v. Meadows*, 114 L.R.R.M. (BNA) 3559 (Ky. 1983); *Brown v. Transcon Lines*, 284 Ore. 597, 588 P.2d (1087) (1978).

²³*E.g.*, *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. App. 1978); *Green v. Amerada Hess Corp.*, 612 F.2d 212 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 356 (1980). *Cf. Meredith v. C.E. Walther, Inc.*, 422 So. 2d 761 (Ala. 1982) (lawsuit against employer for claimed employee trust assets).

²⁴*Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

²⁵*Id.* at 899.

²⁶*Civil Rights Cases*, 109 U.S. 3 (1883); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

that the free speech protections of state constitutions should properly be regarded as prohibiting the discharge of private employees for the expression of political views.²⁷ If substantive free speech constitutional provisions are to be considered expressions of public policy binding on private employers, the next step will be to maintain that procedural due process constitutional provisions are likewise binding.

Other dismissals declared actionable because an employee had been exercising a legal right or privilege included a discharge for refusing to take a lie detector test in a jurisdiction prohibiting its forcible administration,²⁸ and the discharge of a store manager for taking a statutorily guaranteed "day of rest" during which his store was burglarized.²⁹

Where the "public policy" sought to be protected is the right to engage in union activity, courts have held under the federal preemption doctrine that the NLRB has exclusive jurisdiction.³⁰ Preemption problems beyond the purview of this article could be presented if the Labor Board and the courts do not continue to insist upon a "concerted" element in employee conduct as a prerequisite to its being protected under section 7 of the National Labor Relations Act.³¹ Otherwise, the discharge of a single protesting employee, now frequently actionable under the new public policy exceptions to the at-will employment doctrine, might remain within the exclusive domain of the NLRB.³²

"Abusive" or "Retaliatory" Discharges

Some courts have gone beyond the more standard "public policy" exceptions and have recognized a cause of action when an employer has sought to exploit his position for personal advantage. The prototype of this kind of case is *Monge v. Beebe Rubber Co.*,³³ where a female worker was fired for refusing to date her foreman. Other courts have declined to

²⁷See Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L. J. 522 (1982).

²⁸*Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law).

²⁹*Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981).

³⁰*Viestenz v. Fleming Cos.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 303 (1982); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982).

³¹See, e.g., *Meyers Industries, Inc.*, 268 N.L.R.B. No. 73 (Jan. 6, 1984), *overruling Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975); cf. *NLRB v. City Disposal Systems, Inc.*, 104 S.Ct. 1505 (1984).

³²The Supreme Court has generally been quite liberal, however, in allowing state regulation in the areas of employment discrimination, *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 372 U.S. 714 (1963), unemployment compensation, *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), and similar welfare concerns, see, e.g., *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 297 (1959).

³³*Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

remedy such personal abuse or similar retaliatory conduct.³⁴ These latter courts apparently believe that the public policy exception should not be stretched to cover what are essentially disputes between individuals. On the other hand, some commentators have contended that all unjust dismissals undercut the community's interests in fairness and productivity in the workplace, and therefore should be actionable as matters of public policy.³⁵

Contract Theories

In the last few years the courts have turned increasingly to contract theory in fashioning wrongful discharge actions. As indicated earlier, more conservative courts are likely to find comfort in the notion that they are not forging new law for the parties, but are merely enforcing the parties' own promises. On the other hand, the logic of contract theory also means that an employer may generally eliminate an employee's cause of action for wrongful discharge by an express disclaimer of any right to employment.³⁶ Furthermore, the grounds for establishing many contractual claims are often likely to be restricted by their very nature to middle management and higher personnel. Contract remedies will also be much more limited, since ordinarily they will not include compensatory or punitive damages.³⁷

Express or Implied Guarantees

In the early 1980s a number of courts concluded that an employer's statement of policy as set forth in personnel manuals or employee handbooks, or an employer's oral assurances to employees at the time of hir-

³⁴*E.g.*, Fawcett v. G.C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E. 2d 144 (1976); Larsen v. Motor Supply Co., 117 Ariz. 507, 509, 573 P.2d 907, 909 (Ariz. App. 1977); Catania v. Eastern Airlines, Inc., 381 So.2d 265 (Fla. App. 1980); Givens v. Hixson, 275 Ark. 370, 631 S.W.2d 263 (1982).

³⁵Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1948 (1983).

³⁶*E.g.*, Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980); Craig v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983).

³⁷Contract damages for wrongful discharge have not been negligible. *See, e.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E. 2d 1251 (1977) (lost commissions of \$46,000); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W. 2d 880 (1980) ("legitimate expectations" of \$73,000 and \$300,000, including unexercised stock options for two plaintiffs). *But cf.* Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981) (back pay only for period during which employee was denied "contractual due process" in dismissal); Pepsi Cola Gen. Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. App. 1982) (nominal damages only for justifiable reliance in leaving prior job).

ing, could be found to constitute, either separately or in combination, an express or implied contract that the employee would not be discharged except for "just cause." The leading decisions included *Pugh v. See's Candies, Inc.*,³⁸ in California, *Toussaint v. Blue Cross & Blue Shield of Michigan*,³⁹ in Michigan, and *Weiner v. McGraw-Hill, Inc.*,⁴⁰ in New York. In the past, employer statements that an employee would not be terminated except for good cause would have been treated as simply unilateral declarations of present intent, of no legal consequence. They were like the "social promises" encountered in first-year contracts, where the fickle swain said he would meet his date under the Biltmore clock at eight on Saturday. Under the traditional view, even an employer's assurance of "permanent" employment would not change the arrangement from that of an at-will contract.⁴¹

Probably a majority of the courts that have faced the issue during the past decade have declined to recognize employee handbooks or other customary expressions of employer personnel policies as legally binding.⁴² For these courts, apparently, such employer statements are more like "puffing" or "social promises" than true contractual commitments, even though the commercial employment setting plainly differs from that of a young couple on a date. For myself, I do not find it shocking that an

³⁸*Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). *Accord: Cleary v. American Airlines, Inc.*, 111 Cal App. 3d 443, 168 Cal. Rptr. 722 (1980); *Hodge v. Evans Fin. Corp.*, 707 F.2d 1566 (D.C. Cir. 1983); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). *See also Simpson v. Western Graphics Corp.*, 293 Ore. 96, 643 P.2d 1276 (1982) (employer may justify decision to dismiss by showing good faith); *Hernandez v. Home Ed. Livelihood Program, Inc.*, 98 N.M. 125, 645 P.2d 1381 (N.M. App. 1982), *cert. denied*, 90 N.M. 336 (1982); *Adelson v. Regents of Univ. of Cal.*, 128 Cal. App. 3d 891, 180 Cal. Rptr. 676 (1982) (campus practice for nontenured employee).

³⁹*Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980).

⁴⁰*Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982).

⁴¹*See, e.g., Edwards v. Kentucky Utils. Co.*, 286 Ky. 341, 150 S.W.2d 916 (1941).

⁴²*E.g., White v. Chelsea Indus., Inc.*, 425 So.2d 1090 (Ala. 1983); *Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095 (Del. 1982); *Sargent v. Illinois Inst. of Technology*, 78 Ill. App. 3d 117, 397 N.E. 2d 443 (1979); *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 328 N.E. 2d 775 (1975); *Johnson v. National Beef Packing Co.*, 551 P.2d 779 (Kan. 1976); *Mau v. Omaha Nat'l Bank*, 207 Neb. 373, 299 N.W. 2d 147 (1980); *Reynolds Mfg. v. Medoza*, 644 S.W. 2d 536 (Tex. Civ. App. 1982); *Parker v. United Airlines, Inc.*, 32 Wash. App. 722, 649 P.2d 181 (1982); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982) (Arkansas law); *White v. International Tel. & Tel. Co.*, 718 F.2d 994 (11th Cir. 1983) (Georgia law); *Caster v. Hennessy*, 115 L.R.R.M. (BNA) 3452 (11th Cir. 1984) (Florida law). *See also Edwards v. Citibank, N.A.*, 100 Misc. 2d 59, 418 N.Y.S. 2d 269 (1979), *aff'd*, 74 A.D. 2d 553, 425 N.Y.S. 2d 327 (1980), *appeal dismissed*, 51 N.Y.2d 875, 414 N.E. 2d 400 (1980). *Edwards* was distinguished in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y. 2d 458, 443 N.E. 2d 441 (1982).

employer should be held to his word, when that is deliberately inscribed in company documents or spoken in earnest by a responsible official. This seems especially true when an employee has relied on that word by changing jobs or declining other offers.

Companies whose current personnel manuals contain language suggesting the existence of "just cause" protections for employees face a serious practical question. Left unchanged, such provisions may become the grounds for a lawsuit. On the other hand, their removal could adversely effect morale in the work force. Moreover, there is a legal question whether the unilateral elimination of such guarantees would be effective as to incumbent employees, at least as to those who could demonstrate some specific past reliance on the old provision. If existing "just cause" language is to be removed, it would be prudent to couple that, quite explicitly, with the grant of some additional compensation or other employment benefits. Regardless of these legal considerations, however, my own feeling is that whether or not these troubling provisions are to be excised should be decided largely as a matter of personnel policy, not law.

Good Faith and Fair Dealing

In *Fortune v. National Cash Register Co.*,⁴³ the Supreme Judicial Court of Massachusetts enunciated a principle which, carried to its logical conclusion, could well eviscerate the whole at-will employment doctrine.⁴⁴ The facts in *Fortune* were appalling. A veteran salesman of twenty-five years' standing had been working for some time on a five million dollar order. Just after the sale was consummated, he was fired. The jury was held entitled to find that the employer's reason for terminating the salesman was to deprive him of his full commission. In the eyes of the court, this "bad faith" termination was a breach of the covenant of "good faith and fair dealing" imposed by law on the parties to any contract.

Fortune plainly suggests a substantial extension of the traditional contract doctrine of good faith and fair dealing. Ordinarily it has not been seen as a catch-all safeguard against arbitrary conduct on the part of the contracting party, such as an unjust dismissal, but rather as a fairly spe-

⁴³*Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). See also *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Buyse v. Paine, Webber, Jackson & Curtiss*, 623 F.2d 1244 (8th Cir. 1980) (Minnesota law).

⁴⁴Arguing essentially that that is what should happen is Note, *Protecting At Will Employment Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 92 HARV. L. REV. 1816 (1980).

cific duty imposed by law that neither party do anything which will interfere with the other's performance of its contractual obligations or which will interfere with the right of the other to receive the benefits of the agreement.⁴⁵ The doctrine has not been concerned with the right to terminate a contract as such. Furthermore, resort to a novel articulation of the good faith concept was hardly necessary in *Fortune*. Good faith could have been invoked without regard to the discharge itself. Or the classic principle that full or substantial performance entitles a contracting party to the agreed price would have served quite adequately.⁴⁶

At least one California court has come very close to saying that the covenant of good faith and fair dealing does protect at least a long-service employee from discharge without just cause. In *Cleary v. American Airlines, Inc.*,⁴⁷ the employer had established an internal grievance procedure for resolving employee disputes, and the employee in question was an eighteen-year veteran at the time of his discharge. The California Court of Appeals seemed to concentrate at one point only on the latter factor when it stated: "Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts including employment contracts."⁴⁸ *Cleary* also held that a breach of the covenant of good faith and fair dealing sounds in tort as well as contract, thereby allowing compensatory and punitive damages.

Several courts have expressly rejected a broad application of the implied covenant of good faith. In *Murphy v. American Home Products Corp.*,⁴⁹ the New York Court of Appeals reasoned that any implied covenant would have to be "in aid and furtherance of other terms of the agreement of the parties." The court then went on to observe that the plaintiff's employment in this instance was at will, leaving the employer "an unfettered right to terminate."⁵⁰ The court concluded: "In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."⁵¹

⁴⁵See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); 3 A. CORBIN, CONTRACTS §§ 570-71 (1960).

⁴⁶3A A. CORBIN, CONTRACTS § 700 (1960).

⁴⁷*Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); cf. *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063 (Mont. 1982).

⁴⁸*Cleary*, 168 Cal. Rptr. at 729.

⁴⁹*Murphy v. American Home Prods. Corp.*, 58 N.Y. 2d 293, 304, 448 N.E.2d 86, 461 N.Y.S. 2d 232 (1983). *Accord*: *Walker v. Modern Reality of Mo.*, 675 F.2d 1002 (8th Cir. 1982); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); *Gordon v. Mathew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983).

⁵⁰*Murphy*, 58 N.Y. 2d at 304.

⁵¹*Id.* at 304-05.

“Negligent Performance” of Contract Duties

In what may be something of a sport, a federal district court held in *Chamberlain v. Bissell, Inc.*,⁵² that an employer could be liable for the “negligent performance” of its contract duties in discharging an employee. In this instance the performance of a previously satisfactory employee had deteriorated over time. The employer had failed to apprise the employee adequately of his substandard work. For its carelessness in carrying out its job evaluation program, the company was held partially liable under a comparative negligence theory for the financial losses suffered by the employee upon his discharge. *Chamberlain* opens up some fascinating new vistas, but so far there are no signs that other courts are prepared to follow its lead.

CRITIQUE

In General

Legal scholars have generally approved the dismantling of employment at will.⁵³ For the most part, it is a matter of simple justice. Conceptually, there is nothing to be said in favor of an employer’s right to treat its employees arbitrarily or unfairly. Practicalities, naturally, are the problem. Recognition of a wrongful discharge action will limit employer flexibility and add to the cost of doing business. Frivolous claims will be inevitable. Once past the egregious instances of employer arbitrariness, some courts will flounder without guidelines in trying to define the boundaries of public policy. Emotional juries will be carried away in awarding massive damages.⁵⁴ Finally, it will be argued that the need for

⁵²*Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982).

⁵³See, e.g., Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections*, in *NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION* 13 (H. Anderson ed. 1976); Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 *AMER. BUS. L. J.* 467 (1980); Blades, *Employment At Will vs. Individual Freedom: Of Limiting the Abuse of Exercise of Employer Power*, 67 *COLUM. L. REV.* 1404 (1967); Blumrosen, *Strangers No More: All Workers Are Entitled to “Just Cause” Protection Under Title VII*, 2 *IND. REL. L. J.* 519 (1978); Peck, *supra* note 12; Stieber, *supra* note 2; Summers, *supra* note 3; Symposium, *Individual Rights in the Workplace: The Employment At-Will Issue*, 16 *U. MICH. J. L. REF.* 199 (1983).

⁵⁴Single plaintiffs have been awarded four million dollars and more in compensatory and punitive damages. For judgments on appeal, see *Cancellier v. Federated Dep’t Stores*, 672 F.2d 1312 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 131 (1983) (\$1.9 million in actual and punitive damages, plus \$400,000 in attorneys’ fees, for three executives); *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981) (\$300,000 actual and \$1 million punitive damages awarded one managerial em-

radical measures has not really been demonstrated; the vast majority of employers treat their employees fairly. For these and other reasons, a quiet counterattack has been launched by a few commentators, who would confine if not roll back the recent revolution in unjust dismissal law.⁵⁵

On balance I think the equities tilt toward the individual employee. Recognizing a wrongful discharge action will impose some additional burdens on business; failing to recognize it will perpetuate the devastation visited annually on about 100,000 workers who are fired without just cause.⁵⁶ American business would not be placed at a competitive disadvantage in the international markets. Protection against unfair discharge is now provided by statute in about sixty countries around the world, including all of the Common Market, Sweden and Norway, Japan, Canada, and others in South America, Africa, and Asia.⁵⁷ The International Labor Organization recommended in 1963 and again in 1982 that workers not be terminated except for a valid reason.⁵⁸ The United States remains the last major industrial democracy that has not heeded the call for unjust dismissal legislation.

In my view the question for the future is not whether the modification of at-will doctrine will continue, but whether the task will be completed by the courts or the legislatures. In the past there were two schools of thought: statutes are necessary to protect employee rights because the judiciary is too encrusted by adverse precedent,⁵⁹ contrarily, the courts must act because legislation is so much the product of organized interest groups, and the individual worker is by definition unorganized.⁶⁰ With the benefit of several years' hindsight, one can say that it is not at all impossible a solution will be fashioned by the judiciary. But the courts are likely to be long on generalization and short on detail when it comes to spelling out procedures, remedies, and so on. At the same time, even

ployee). A defendants' law firm in San Francisco studied California discharge cases that went to juries in 1982 and found that 90 percent resulted in plaintiffs' verdicts, with the average award being \$450,000. Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 MICH. B. J. 776 (1983).

⁵⁵See Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U. L. REV. 881 (1983); Note, *Limiting the Right to Terminate At Will—Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201 (1982).

⁵⁶See text accompanying note 2, *supra*.

⁵⁷Association of the Bar of the City of New York, *supra* note 11, at 175.

⁵⁸*Id.* at 179-80; 1982 Convention Concerning Termination of Employment at the Initiative of the Employer, reprinted in INTERNATIONAL LABOUR CONFERENCE, PROVISIONAL RECORD OF SIXTY-EIGHTH SESSION NO. 30A (June 21, 1982).

⁵⁹Summers, *supra* note 3, at 521.

⁶⁰Peck, *supra* note 12, at 3.

though the legislatures may not wish to take the initiative for a whole fistful of understandable political reasons, they may be goaded into action by the boldness of certain courts. Furthermore, it is entirely conceivable that at some point employers themselves might support legislation on the ground the compromises and greater exactness of a statutory solution are preferable to the broad strokes and blurred outlines often produced by an innovative judiciary — not to mention the crushing damages awarded by some outraged juries.⁶¹ The upshot may be that in a number of states the process will go through two stages. The first few steps, halting, tentative, or even blundering, will be taken by the courts, and then the legislatures will be almost compelled to move in and provide a more definitive blueprint.

A critical factor in securing legislative relief may be the attitude of organized labor. It is about the only interest group one can identify that might be willing to take the lead in promoting such a cause. A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will eliminate or detract from one of the unions' prime selling points in their efforts to organize the unorganized. I cannot deny this possibility, but I think it would be as shortsighted as was organized labor's initial hostility toward the Fair Labor Standards Act.⁶² First, and not insignificantly, organized labor could profit considerably from refurbishing its image as the champion of the disadvantaged. Second, and perhaps more practically, a universal rule against dismissal without cause should actually prove beneficial to unions in their organizing drives. Now, when a union sympathizer is fired in the middle of a campaign, it must be established by a preponderance of the evidence that a motivating factor in the discharge was the exercise of rights protected by the Labor Act.⁶³ This is frequently a burden too heavy to bear. With a just cause requirement generally applicable, it would be up to the employer to show that some positive, acceptable basis existed for the discharge. Finally, I believe there is a strong likelihood that just cause standards will act more as a spur than a hindrance to union organizing. The promise of fair treatment will be held out to employees; the promise may remain a tantalizing and unrealized dream, however, unless there is present the means to actualize it. Constant, effective representation and advocacy is the surest way to ensure

⁶¹ See *supra* note 54 and accompanying text.

⁶² F. DULLES, *LABOR IN AMERICA* 283-85 (1960).

⁶³ *Miller Elec. Mfg. v. NLRB*, 265 F.2d 225 (7th Cir. 1959); *NLRB v. West Point Mfg.*, 245 F.2d 783 (5th Cir. 1957); *cf. NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

any right. That is a lesson public sector unions have already learned in representing employees in civil service proceedings.

In addition to the possible reservations of organized labor, some neutrals in industrial relations might oppose a statutory just cause requirement for fear that it would erode such worthy values as voluntarism, private initiative, and workplace creativity, and more particularly the collective bargaining process itself. I, too, treasure the unique American institution of union-employer bargaining, but when even so hardheaded an observer as John Dunlop can be found rhapsodizing on its "beauty,"⁶⁴ I think we should all be wary about being carried away by the mystique of the process. Collective bargaining, after all, is a means and not an end. The objective is the betterment of the individual working person. When only about a quarter of the labor force is currently afforded protection against unjust discipline, I feel the needs of the other three-quarters outweigh some theoretical risk to traditional bargaining processes. Even then, assuming history is any guide, we underrate the flexibility and resilience of collective bargaining if we believe it cannot adapt to, and indeed exploit, a new legal environment.

Statutory Proposals

Elsewhere I have set forth at some length my thoughts on the details of a statutory procedure for protecting employees against unjust discharge.⁶⁵ Briefly, I would recommend a "just cause" requirement for a dismissal in any establishment having more than ten or fifteen employees. Probationary employees with less than six months' service, and higher ranking, policy-making management personnel, would not be protected. Ideally, I think all discipline should be covered, but perhaps an appropriate compromise, at least at the outset, would be to cover only dis-

⁶⁴Dunlop, *The Social Utility of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 168-73 (L. Ulman ed. 1867).

⁶⁵St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in ARBITRATION ISSUES FOR THE 1980s, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 43, 52-61 (J. Stern & B. Dennis eds. 1982). For other views, see Summers, *supra* note 3; Howlett, *Due Process for Nonunionized Employees: A Practical Proposal*, in INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING 164 (B. Dennis ed. 1980); STATE BAR OF CALIFORNIA LABOR AND EMPLOYMENT LAW SECTION, *TO STRIKE A NEW BALANCE: REPORT OF THE AD HOC COMMITTEE ON TERMINATION AT WILL AND WRONGFUL DISCHARGE* (1984). In recent years "just cause" bills have been introduced in California, Colorado, Connecticut, Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania, Wisconsin, and the U.S. Congress, *See, e.g.*, Ann Arbor [Mich.] News, June 10, 1984, at C5, col. 1.

charges and "constructive discharges," *i.e.*, resignations or quits resulting from improper employer conduct.

To avoid the expense, length, and formality of court proceedings, I would create a panel of arbitrators as adjudicators. Arbitration should probably be preceded by mediation and a "reasonable cause" determination to sift out frivolous claims. Adopting the arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions since the Second World War. It would also permit the use of an established nucleus of experienced arbitrators, and of the growing number of young, able aspirants who are caught in the vicious circle of being denied experience because they have no experience. The arbitrator's cost would be borne equally by the parties, although the arbitrator might have the discretion to charge the full amount to the employer in the less defensible cases.

As remedies I would authorize the arbitrator to award backpay, reinstatement, or severance pay, as the circumstances warrant. This of course would be a trade-off that I hope might make unjust dismissal legislation more palatable to the business community. It would immediately eliminate the possibility of the catastrophic compensatory tort or punitive damage award that has already been the lot of many a hapless employer.⁶⁶

CONCLUSION

Protection against unjust discharge is fast acquiring the force of a moral and historical imperative. The common law of contract, tort, or even property needs only a small adjustment to accommodate this new concept. More to the point, statutory relief for this long-neglected abuse of the unorganized worker should now become part of the immediate agenda of conscientious legislators and of all those who labor in the field of industrial relations.

The prevention of arbitrary treatment of employees may not only be the humane approach; there is evidence it is also good business.⁶⁷ In a period when intense attention is lavished on the Japanese way of management, on the almost paternal relationship between Japanese employers and their employees, and the lifelong careers guaranteed many workers in

⁶⁶See, *supra* note 54 and accompanying text.

⁶⁷See, *e.g.*, Foulkes, *Large Nonunionized Employers*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 129, 134-36, 141-44, 155-56 (J. Stieber, R. McKersie & D. Mills eds. 1980).

Japanese companies, we should be prepared to entertain the proposition that there may be a marked correlation between a secure work force and high productivity and quality output.⁶⁸ Justice, like honesty, can be the best policy.

⁶⁸See, e.g., E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 131-57 (1979); cf. SPECIAL TASK FORCE, DEPT OF HEALTH, EDUCATION & WELFARE, WORK IN AMERICA 93-110, 188-201 (1972).