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Theodore J. St. Antoine

University of Michigan Law School, tstanton@umich.edu

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The Model Employment Termination Act: Fairness for Employees and Employers Alike

By Theodore J. St. Antoine

Professor St. Antoine is with the University of Michigan Law School in Ann Arbor.

The Model Employment Termination Act (META),¹ which state legislatures are expected to consider in the near future, aims to prevent the unfair firing of American workers. At the same time, the Act aims to prevent devastating financial blows to American business. For both em-

ployees and employers, META offers streamlined dispute resolution procedures that would be simpler, less costly, and less time-consuming than the civil courts. The essence of the proposal is compromise—not as a matter of political expediency but as a practical, balanced accommodation of the competing worthwhile interests of employers and employees. Workers are entitled to be free from arbitrary treatment; business is entitled to be free from

¹9A *Labor Relations Reporter* (Washington, DC: Bureau of National Affairs) IERM 540:21 (December 1991).

unnecessary expense. META would promote both objectives.

META was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws at its annual meeting in August 1991. By states, the final vote showed 39 jurisdictions in favor of the measure and only 11 opposed.² That alone attests to META's merits. The Uniform Law Commissioners (ULC) are a cross-section of influential lawyers, judges, law teachers, and legislators from around the country, with an average of about six persons in each state delegation. Bills are prepared by committees that meet two or three times a year for intensive 2-day drafting sessions. Bills are not adopted by the ULC unless they have been read line-by-line at least twice during different annual conferences. More controversial measures, like META, may take three or more readings.

The META drafting committee consisted of eleven members, with myself as "reporter" or principal draftsman. Traditionally, drafting committees are composed of generalists, with specialized expertise being supplied by the reporter and outside advisors. The META drafting committee received highly useful assistance from representatives of the American Bar Association's Labor and Employment Law Section, the AFL-CIO, the U.S. Chamber of Commerce, the ACLU, the National Employment Lawyers Association, and numerous other groups and individuals.

Unjust dismissal is a significant practical problem. Jack Stieber, former director

of the School of Labor and Industrial Relations at Michigan State University, estimates that "[s]ome 60 million U.S. employees are subject to the employment-at-will doctrine and about 5 million of them are discharged each year."³ He further calculates that around 150,000 of these workers are discharged unfairly under the standards applicable in unionized industries. Until recently, the great mass of American working people had no recourse. Employers could dismiss their employees "at will . . . for good cause, for no cause, or even for a cause morally wrong."⁴ The economic deprivation of the wrongfully discharged worker is only part of the story. Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, spouse and child abuse, and impaired social relations that follow in the wake of job loss.⁵

During the past couple of decades, the courts in 40-45 jurisdictions have employed three main theories to carve out certain exceptions to the previously prevailing doctrine of employment-at-will.⁶ Those three theories include tort violations of public policy, or "abusive" or "retaliatory" discharge;⁷ breach of an express or implied contract, embodied in a personnel manual or an oral assurance at the time of hiring;⁸ and breach of the covenant of good faith and fair dealing.⁹ For both employers and employees, however, there are serious deficiencies in these common law doctrines. They constitute a weak reed, a fragile safeguard for the worker who has been wronged. And yet in a given case they can wreak havoc on a hapless employer who runs afoul of them.

² *Ibid.*

³ Stieber, "Recent Developments in Employment-at-Will," 36 *Labor L. J.*, 557, 558 (1985).

⁴ *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884).

⁵ See B. Bluestone and B. Harrison, *The Deindustrialization of America*, 63-66 (1982); and L. Ferman and J. Gordus, *The Economy and Mental Health* (1979).

⁶ 9A *Labor Relations Reporter* (Washington, DC: BNA) IERM 505:41 (February 1992); H. Perritt, *Employee Dismissal Law and Practice* (2d ed. 1987).

⁷ *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), 38 LC ¶ 65,861; *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980).

⁸ *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 NW 2d 880 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 NY 2d 458, 443 NE 2d 441 (1982), 99 LC ¶ 55,401.

⁹ *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 1251 (1977).

The tort or public policy claim will be limited by its nature to rare, egregious situations. How many employers, especially if they have the benefit of knowledgeable counsel, are going to order their employees to commit perjury or engage in an illegal price-fixing scheme, and then fire them if they refuse? To avoid a contract obligation, all an employer has to do is refrain from making any commitments about future job security. Even if an employer has made such a commitment through a policy statement in an employee handbook, most states permit a unilateral revocation as long as there is adequate notice to the affected workers.¹⁰

The covenant of good faith and fair dealing, which is potentially the most expansive protection for employees, has been accepted by a dozen states at most. Conceptually, as New York's highest court has observed, the extension of the covenant to cover wrongful discharge would not be so much an exception to at-will employment, as a negation of the whole doctrine.¹¹ Most courts are not going to be so activist as to take that step. Finally, the great majority of successful plaintiffs are professionals or upper-level management personnel. Rank-and-file workers who are fired usually have too little money at stake to make their cases worthwhile for lawyers operating on a contingent fee basis.

On the other hand, for an employer that does get ensnared in a common law wrongful discharge action, the results can be extremely costly. Various studies of California lawsuits found that a plaintiff who could get to the jury won over 75

percent of the time and the average verdict ranged between \$300,000 and \$450,000.¹² Throughout the country, single individuals have received jury awards covering compensatory and punitive damages as high as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million.¹³ Company attorneys in Chicago, Cleveland, and Detroit tell me that even the successful defense of a discharge case before a jury will cost between \$100,000 and \$150,000, while their counterparts on the coasts say that figure can reach \$200,000. In addition, a recent RAND study indicates that the "hidden costs" incurred by American business in trying to avoid this onerous litigation, including the retention of undesirable employees, may amount to one hundred times more than the adverse judgments and other legal expenses.¹⁴

In sum, the central defects of the existing common law system are that employees' substantive rights are too limited and uncertain, the remedies against employers are too random and often excessive, and the decisionmaking process is too inefficient for all concerned. META attempts to address each of these problems. It guarantees the vast majority of workers certain irreducible minimum rights against wrongful discharge, but substantially reduces the potential liability of employers. It also substitutes the use of professional arbitrators in place of long, expensive court proceedings as the preferred method of enforcement. That can also mean the elimination of wayward verdicts by emotionally aroused juries.

¹⁰ *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 432 Mich. 438, 443 NW 2d 112 (1989), 112 LC ¶ 56,091. Cf. *Enis v. Continental Ill. Nat'l Bank & Trust Co.*, 795 F2d 39, 41 (CA-7 1986), 40 EPD ¶ 36,295.

¹¹ *Murphy v. American Home Prod. Corp.*, 58 NY2d 293, 304-05, 448 NE2d 86, 91 (1983).

¹² Palefsky, "Wrongful Termination Litigation: Dagwood and Goliath," 62 Mich. B.J. 776 (1983); "Discharge Verdicts Average \$424,527 in California," 9 *Labor Relations Reporter*, 1 *Employment Rights* (Washington, DC: BNA), No.

14, at 3 (March 3, 1987); and J. Dertouzos, E. Holland and P. Ebener, *The Legal and Economic Consequences of Wrongful Termination* 24-26, 33-37 (1988).

¹³ K. Lopatka and J. Martin, "Developments in the Law of Wrongful Discharge," in *ABA National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims* vii, 13-18 (1986).

¹⁴ J. Dertouzos and L. Karoly, *Labor Market Responses to Employer Liability* (1991).

"Good Cause" Termination

For employees covered by META, the termination of employment would be prohibited unless there was "good cause."¹⁵ Good cause could consist of either misconduct or poor performance on an individual worker's part, or the economic needs and goals of the enterprise as determined by the employer in the good-faith exercise of business judgment. The term "good cause" was chosen instead of the more common "just cause," which appears in collective bargaining agreements, in order to emphasize the economic flexibility accorded the employer, even though no difference in meaning was intended. Interpreters of the statute are directed for guidance to the arbitral precedent developed over the past half century, so the broad language has already been applied and given substance in thousands of decisions.

Examples of good cause for termination in an individual case include theft, assault, destruction of property, drug or alcohol use on the job, insubordination, excessive absenteeism, incompetence, and poor performance. An objective standard exists here, with the finder of fact making the ultimate determination. Economic decisions are primarily subjective, however, with good faith the only limitation on the employer's business judgment. Management is entirely free to determine the nature and direction of the enterprise, the size of the work force, the location of plants, and all other similar matters. About the only restriction is that an employer could not concoct a sham layoff to rid itself of an employee as to whom there was no good cause for a termination, since that would violate the good-faith requirement.

Employers are also entitled to set performance standards for positions in their establishments. Standards may be fixed at the loftiest level management desires, as long as they are not skewed to disadvantage particular individuals. In highly competitive occupations, such as professional sports or legal practice, a performance standard could call for the most proficient performer available for a given position.

META would cover most full-time employees (those working 20 or more hours a week) after one year of service with an employer.¹⁶ An exception exists for small employers, or those employers with fewer than five employees.¹⁷ Small establishments may engage in some of the most arbitrary treatment of workers, but it was still felt unwise to interfere with these mom-and-pop operations. Initially it was proposed to exclude high-level, policy-making executives, but management advisors objected. A trade-off for protection under the Act is the elimination of common law tort and implied contract actions based on prohibited terminations, and of course it is well-paid corporate officials who are the most likely to have the biggest claims. Workers subject to collective bargaining agreements are covered to the extent permitted by federal preemption law.¹⁸ The inclusion of public employees is left to state option.

Displacing Common Law Suits

As indicated, a major trade-off in META is the displacement or extinguishment of most common law suits based on terminations forbidden under the Act. These suits would include implied contract claims and tort claims grounded in such theories as defamation, intentional infliction of emotional distress, and other similar theories.¹⁹ There would be no ex-

¹⁵ Model Employment Termination Act (META) § § 1(4), 3(a).

¹⁶ *Id.*, § § 1(1), 3(b).

¹⁷ *Id.*, § 1(2).

¹⁸ Federal preemption is unlikely. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 US SCt 399 (1988), 108 LC

¶ 10,478A; and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 US SCt 724 (1985), 102 LC ¶ 55,497.

¹⁹ META § 2(c) and (e).

tinguishment of rights or claims under express contracts or under statutes or administrative regulations, such as those dealing with job discrimination, "whistleblowing," and occupational safety and health.

Remedies would be confined to those customary under the federal Civil Rights Act of 1964; namely, reinstatement with or without backpay and attorney's fees for a prevailing party.²⁰ Severance pay is allowable when reinstatement is impracticable, up to a maximum of 36 months' pay in the most egregious cases. Compensatory and punitive damages are expressly excluded.²¹

The preferred method for enforcing META is through professional arbitrators appointed by an appropriate state agency.²² Such persons have the requisite skill, training, and experience to understand the special problems of the workplace, and they will thus probably be more acceptable to employers and employees. Their efficiency in resolving industrial disputes is also likely to reduce the time and expense of the proceedings. One departure from arbitral practice in the unionized sector is that the burden of proof under META rests on a complainant employee.²³ That accords with the usual rule in the civil courts, but since the employer generally knows best why it terminated the employee, the employer must ordinarily proceed first to present its case. Arbitral awards would be subject only to limited judicial review, primarily on the grounds of corruption, an exceeding of authority, or a prejudicial error of law.²⁴

Who should bear the costs of these proposed procedures? As a matter of principle, the new public right to be free from unjust dismissal, like any other public right, ought to be enforced at public expense. But most states are financially

strapped these days, and the prospect of an additional and ill-defined fiscal burden could be the last straw for a measure that is bound to generate controversy. Recognizing this, META suggests that as an alternative to the normal filing fee the states consider imposing a substantial part of the cost on the parties themselves, perhaps with a cap on the employee's share in an amount equal to one or two weeks' pre-termination pay.²⁵

Among the most hotly debated aspects of META are provisions allowing employers and employees to waive or "opt out" of the prescribed statutory rights and procedures. Thus, by express written agreement, the parties may eliminate the good cause protections and substitute a mandatory severance payment of at least one month's pay for each year of employment,²⁶ or the parties may agree on a private arbitration procedure to resolve their dispute.²⁷

Now, "freedom of contract" is a prized American prerogative, but the waiver of statutory rights in the employment context is traditionally suspect. There is such disparity of bargaining power that workers applying for a job will commonly sign any form an employer places in front of them. There are theories available by which the courts can minimize the risks here—economic duress, contracts of adhesion, and so on. Furthermore, the fairly generous severance pay schedule and other technical features of that provision may largely confine its application to higher-ranking managerial personnel. The courts should also demand that any private arbitration system must meet stringent due process requirements before it may replace the statutory procedures.

Conclusion

Adoption of META's "good cause" standard would not put this country at a

²⁰ *Id.*, § 7(b).

²¹ *Id.*, § 7(d).

²² *Id.*, § 6.

²³ *Id.*, § 6(e).

²⁴ *Id.*, § 8(c).

²⁵ *Id.*, § 5(e) and Comment.

²⁶ *Id.*, § 4(c) (30 months' pay is maximum required).

²⁷ *Id.*, § 4(i).

competitive disadvantage in today's global market. The contrary seems to be more true. The United States is the last major industrial democracy in the world that has not heeded the call of the International Labor Organization for generalized legal protections against the wrongful dismissal of employees.²⁸ More-

over, there is considerable evidence that a secure, contented work force makes for high productivity and quality output.²⁹ In this instance, doing the right thing may also be doing the smart thing.

[The End]