The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause

Nicole B. Porter
University of Toledo College of Law

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The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause

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I. INTRODUCTION

Losing one's job has long been recognized as one of the most stressful and traumatic experiences a person may ever endure.\(^1\) However, in many cases, the terminated employee has no remedy against his employer because the vast majority of employees in the United States are at-will employees, meaning that the employer can terminate the employee for good reason, bad reason, or no reason at all.\(^2\) Scholars and courts have criticized the harshness of the employment at-will presumption because, despite the fact that there are many statutory and common law exceptions prohibiting some of the worst reasons for termination,\(^3\) many truly egregious\(^4\) terminations are left unremed-

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1. See, e.g., Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 Am. U. L. Rev. 849, 852 (1994) (stating that the "human tragedy wrought by such wrongful terminations is immeasurable" and it is not surprising that "many employees suffer severe emotional trauma when they are discharged").


3. See infra Part II.
Other scholars criticize the at-will presumption because it forces terminated employees to rely on anti-discrimination statutes even if there is no evidence that discrimination was the motivation for the termination decision. The proliferation of these meritless claims causes many problems, including public suspicion about the necessity or effectiveness of our anti-discrimination laws, as well as an employer's reluctance to hire employees who might be deemed more difficult to fire because they can at least fashion a plausible claim against their employers (regardless of the ultimate success of that claim).

Many critics of at-will employment suggest that the United States should follow the course of unionized employers and almost all European countries and adopt a just cause standard. Such a standard precludes termination unless the employer can prove that it had just (or good) cause for the termination.

Others vigorously defend the employment at-will presumption and critique the inefficiency of a just cause standard. The primary problem with the just cause standard is that it is difficult for employers to prove, which makes it inefficient. Because of this problem of proof, many employers are forced to waste large sums of money litigating terminations or paying very large, and often undeserved, severance payments. Some employers even retain unproductive employees because it is cheaper than facing the costs of a just cause standard.


5. See infra subsection III.A.2; see also Martin Malin, The Distributive & Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts, 68 CHI.-KENT L. REV. 117, 118 (1992) (stating the at-will rule “refuses to die”).

6. See infra subsection III.A.3.

7. See infra subsection III.A.3.

8. See Model Employment Termination Act, 7A U.L.A. 306, introductory cmt. (2002) (noting that the “whole of the European Community, Scandinavia, Japan, Canada, and most of South America” have just cause protections for their employees); Slater, supra note 2, at 57 (stating that Western European and other industrial democracies use a just cause standard).


10. See infra notes 106–07 and accompanying text.

11. See infra Part III.

12. See JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 13.5 (2d ed. 2007) (stating that although “[a]ll litigation is expensive . . . employment discrimination litigation is particularly so,” these costs are enough to make many employers settle out of court simply to avoid them). Many
cause it is cheaper and easier to continue paying them than it is to terminate them.\textsuperscript{13}

This debate has been raging for years,\textsuperscript{14} but it is not the primary purpose of this Article to rehash the debate over the value of employment at-will. Instead of taking sides, I find fault with \textit{both} at-will employment and the just cause standard.\textsuperscript{15} Accordingly, the main purpose of this Article is to provide the perfect compromise between at-will employment and the just cause standard.

Under this proposed statute (which I have named the "Employment Termination Equity Act (ETEA)"), employers would be free to terminate without the burden of proving just cause, allowing them to get rid of unproductive or poorly performing employees with limited risk of litigation. However, certain enumerated reasons for termination would be unlawful. In determining which termination decisions are egregious enough to prohibit, my goal was two-fold: (1) to prohibit termination decisions that have previously been unremedied despite the morass of exceptions to at-will employment and (2) to provide some overlap protection with current statutes by using a procedural process that will be more easily accessible by employees. Yet, in the true spirit of compromise, the ETEA will provide fewer types of reme-

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European countries have a civil law system that makes termination difficult and costly; the statutes restrict the grounds of dismissal and provide redress for a violation. A survey of the European Union in 1990 found that the average termination costs employers twenty-two weeks of wages. See Thomas J. Atchinson, David W. Belcher & David J. Thomsen, Internet Based Benefits & Compensation Administration (2004), available at http://www.eridlc.com/onlinetextbook/chpt21; see also Laurie Leader & Melissa Burger, Let's Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice, 8 Emp. RTS. & Emp. Pol'y J. 87, 90 (2004) (noting that employers' costs and fees average in excess of $100,000 if an employment case is tried); Michael J. Phillips, Toward a Middle Way in the Polarized Debate over Employment At Will, 30 Am. Bus. L.J. 441, 452 (1992) (arguing that the problem with just cause is that it appears to bar "good-faith discharges based on reasonable economic considerations"). But see Guy Davidov, In Defense of (Efficiently Administered) "Just Cause" Dismissal Laws, 23 Int'l J. Comp. Lab. L. & Indus. Rel., 2007, at 1, 14 (arguing that the costs of a just cause standard are not that significant).

13. See Phillips, supra note 12, at 452 (pointing out that the threat of litigation lessens the ability to fire or discipline bad employees); see also Model Employment Termination Act, 7A U.L.A. 303, introductory cmt. (2002) (providing that the provisions of the Model Act should offer "much speedier, more informal, more expert, and less expensive proceedings").

14. A Westlaw search revealed 266 articles discussing "at-will" employment, dating back to 1980. The search was a broad one, including any article that included "at will" in its title. Obviously, some of these articles only dealt with narrow issues surrounding the at-will relationship, and some articles could have been excluded by the search if they did not use the phrase "at will" in their titles. In any event, the topic of at-will employment has received quite a bit of attention.

15. See infra Part III.
Part II of this Article will give the reader a brief overview of the state of the law, including the current status of the at-will employment rule and the many exceptions that have eroded the employment at-will presumption. Part III will discuss why both the at-will presumption and the just cause standard are problematic and why a compromise between the two is necessary. Part IV will detail the substantive and procedural provisions in my proposed statutory solution. I will explain which terminations should be prohibited and why. More importantly, I will reveal the procedural nuances in the statute that help to make it a true compromise statute. Finally, Part V will address the anticipated challenges to this proposal.

As a compromise proposal, either no one wins or everyone wins, depending on one's level of optimism. Many believe that the measure of a good compromise is when it leaves everyone unhappy. But my goal is to convince the reader to view this proposal in an optimistic light—as a massive improvement over the status quo and hopefully as the perfect compromise.

II. THE LAW

A. Employment At-Will Presumption

In 1877, H.G. Wood established the standard of employment at-will in America. In doing so, Wood abandoned the English employment standard. There has been some debate as to whether Wood's treatise was supported by then existing case law. Regardless of the merits of that debate, it is clear that courts quickly accepted Wood's at-will employment rule. However, in recent years, there has been a shift away from the strict employment at-will standard in favor of giving employees more protection against unjust dismissal. This movement has been initiated by both courts and legislators.

16. See infra Part IV.
17. See H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 282–83 (John D. Parsons, Jr. 2d ed. 1886) (1877) (discussing English rule that creates merely a presumption of employment for a year that may be rebutted by proof or presumption).
19. See Martin v. N.Y. Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) ("[W]e think the rule is correctly stated by Mr. Wood and it has been adopted in a number of states." The case lists Arkansas, Missouri, and Wisconsin as states accepting Wood's treatise).
B. Common Law Exceptions

The common law exceptions to the at-will presumption vary widely by state but basically encompass two main categories: (1) contractual claims and (2) wrongful discharge claims based in tort, alleging violations of public policy.

The first exception used by courts to ameliorate the harshness of employment at-will is recognizing implied in fact contracts. Even if there is not a formal written contract, a contractual obligation to terminate only for good cause can be implied in fact either because of oral promises given to the employee by someone in management or because the handbook or other policies give rise to an inference that the employee will only be terminated for just cause. For instance, courts may read into the contract an employee handbook, which establishes a just cause termination standard. These claims were very popular for several years, but now most employers have become savvier about the potential liability from these claims. Accordingly, employers are careful to avoid giving representations of continued employment and have modified their employee handbooks to avoid these implied in fact claims.

Another, less used contractual claim is the implied covenant of good faith and fair dealing, which applies to virtually all contracts. This contract rule prohibits one party from taking away an agreed upon benefit from another party. However, with few exceptions providing limited relief, courts have held that the implied covenant of

20. See E. Allen Farnsworth, Contracts § 7.17 (4th ed. 2004); see also Cheryl S. Massingale, At-Will Employment: Going, Going . . ., 24 U. Rich. L. Rev. 187, 195 (1990) ("An implied contract may be found in the terms of an employee handbook, policy manual, memorandum, and oral statements made by the employer.").
22. See Richard Michael Fischl, Rethinking the Triparite Division of American Work Law, 28 Berkeley J. Emp. & Lab. L. 163, 195 (2007) (stating that employers reacted to employee handbook cases by including disclaimers in handbooks and other employee manuals); Slater, supra note 2, at 98 (arguing that this claim can be avoided by using disclaimers).
25. See, e.g., Wakefield v. N. Telecom, Inc., 769 F.2d 109 (2d Cir. 1985) (recognizing terminated, at-will employee's claim that he was fired to deprive him of a large sales commission); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (allowing a terminated salesman to sue for unpaid commissions based on breach of the implied covenant of good faith and fair dealing).
good faith does not and cannot apply to a termination claim when the employee is an at-will employee. This is because a good faith standard cannot co-exist with the rule that an employer can fire an employee for no reason or even a bad reason, as is the case under the employment at-will presumption.  

The most frequently used exception to the employment at-will presumption is when an employee sues for wrongful discharge under tort law, alleging that the termination violated public policy. These causes of action vary widely by state, but there are three primary protections created by the public policy exceptions. First, courts have protected an employee’s right against termination if he refuses to break the law. Second, courts have carved out an exception when an employee is performing a public obligation, such as “performing jury duty, attending depositions, honoring subpoenas, and engaging in similar public obligations.” Finally, an employee may be protected from termination when she is exercising a legal right. This exception includes “filing workers compensation claims, suing employers, engaging in union or political activities, protesting unsafe working conditions[,] and] refusing to take a polygraph test.” Some jurisdictions have codified this public policy exception; however, in most other jurisdictions, confusion reigns as courts apply the exception haphazardly, leading to little predictability.

C. Statutory Exceptions

Legislators have also limited the scope of the employment at-will presumption. Congress enacted Title VII of the Civil Rights Act of


27. Throughout this Article, I refer to these claims as either “wrongful discharge” claims or “violation of public policy” claims. For my purposes, these terms refer to the same cause of action.

28. See Robert C. Bird, Rethinking Wrongful Discharge: A Continuum Approach, 73 U. Cin. L. Rev. 517, 539–43 (2004); Brossman, Malkin & Coppola, supra note 24, at 48; Massingale, supra note 20, at 191 (stating that some states have recognized a tort cause of action of retaliatory discharge in three categories of cases: “(1) exercise of a statutorily granted right; (2) refusal to obey employer demands to disobey the law; and (3) whistle blowing”).

29. See Mason v. Okla. Tpk. Auth., 115 F.3d 1442, 1452 (10th Cir. 1997); Anderson v. ITT Indus. Corp., 92 F. Supp. 2d. 516, 522 (E.D. Va. 2000) (“[T]he employment-at-will doctrine was not intended to serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity.”).

31. Id. at 57.
33. See infra subsection III.A.1.
1964 ("Title VII") to combat discrimination on the basis of "race, color, religion, sex, or national origin."\textsuperscript{34} Subsequent federal legislation has been passed to protect against termination on the basis of age\textsuperscript{35} and disability.\textsuperscript{36} Federal legislation has been supplemented by state statutes banning termination for discriminatory reasons.\textsuperscript{37}

Labor legislation and collective bargaining have also restricted an employer's discretion to fire at-will. In 1935, Congress enacted the National Labor Relations Act ("NLRA"),\textsuperscript{38} which allowed employees to collectively bargain.\textsuperscript{39} Most collective bargaining agreements incorporate a "just cause" standard for termination of employees.\textsuperscript{40} Just cause is typically defined in the agreement; usually, the termination must be reasonable and neither arbitrary, excessive, nor discriminatory.\textsuperscript{41}

Whistleblower statutes, based on anti-retaliation principles,\textsuperscript{42} have been enacted in all fifty states\textsuperscript{43} and at the federal level.\textsuperscript{44} The primary purpose of these laws is to "expose, deter, and curtail wrongdoing" by allowing employees protection from employer retaliation for reporting some violation of law by the employer.\textsuperscript{45} These statutes vary greatly in scope and effectiveness.\textsuperscript{46}

In addition to these statutes that prohibit termination for certain reasons, some statutes give employees just cause protection. For instance, most government employees enjoy some protection against termination based on civil service legislation.\textsuperscript{47} Furthermore, one state and two jurisdictions have attempted to directly modify or eliminate the at-will presumption. Montana directly repealed the employment at-will doctrine with the 1987 "Wrongful Discharge from Employment

\begin{itemize}
\item \textsuperscript{35} See 29 U.S.C. § 623(a) (2000).
\item \textsuperscript{36} See 42 U.S.C. § 12112(a) (2000).
\item \textsuperscript{38} See 29 U.S.C. §§ 151–169 (2000)
\item \textsuperscript{39} See id.
\item \textsuperscript{40} See Roger I. Abrams & Dennis R. Nolan, Toward a Theory of "Just Cause" in Employee Discipline Cases, 1985 Duke L.J. 594, 594.
\item \textsuperscript{41} Id. at 595.
\item \textsuperscript{43} Id. at 100.
\item \textsuperscript{45} Callahan & Dworkin, supra note 42, at 100.
\item \textsuperscript{47} See, e.g., Cottone, supra note 9.
\end{itemize}
The Act states a discharge is wrongful if it "was not for good cause." Good cause" is defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Employers were in support of the legislation because they preferred the limitation on damages more than the freedom to fire at-will. The Virgin Islands and Puerto Rico also depart from the at-will standard.

III. DISMISSING THE ALTERNATIVES

A. The Problem with At-Will Employment

Despite all of these statutory and common law exceptions, employment at-will is still alive and well and still affects, in a significant way, the employment relationship. As one scholar noted, "The employer's divine right to dismiss at any time, for any reason, and without notice has survived with vigor." This subpart will discuss the problems with the at-will presumption.

1. Inconsistency and Mass Confusion

First, because the at-will presumption is so harsh, courts have inconsistently applied the at-will rule and its exceptions, leading to much confusion and very little predictability. Many scholars have recognized that the inconsistency of the law is problematic. One

48. Moss, supra note 46; Parker, supra note 26, at 371–76.
51. See Slater, supra note 2, at 103–04.
52. V.I. CODE ANN. tit. 24, § 76(a) (1997 & Supp. 2005) (listing nine reasons why an employer may dismiss an employee and stating that "[a]ny employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged . . . ."); id. § 76(c) (1997); P.R. LAWS ANN. tit. 29, § 185b(a)–(f) (2001) (defining good cause for the discharge of an employee and stating that "[a] discharge made by the mere whim of the employer with or without cause relative to the proper and normal operation of the establishment shall not be considered as a discharge for good cause."); see also Slater, supra note 2, at 103 (naming the Virgin Islands and Puerto Rico as among those U.S. jurisdictions that "have already eliminated the at-will rule entirely . . . .").
54. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 303, introductory cmt. (2002). There are many articles that have been written about the public policy exception to employment at-will. It is not the purpose of this Article to delve into those cases. For an interesting discussion of the inconsistencies, see Moss, supra note 46.
55. See, e.g., Matthew W. Finkin, Second Thoughts on a Restatement of Employment Law, 7 U. PA. J. LAB. & EMP. L. 279, 291 (2005) (commenting on the confusion as to whether the implied covenant of good faith and fair dealing can apply in at-will employment relationships and noting that the draft restatement does not go very
scholar who has recently delved into this inconsistency notes, "States haphazardly adopt some proposed exceptions while rejecting others that similarly limit employers’ at-will discretion." This lack of predictability, of course, often leads to increased litigation because parties are unable to predict the result of the litigation, so are less willing to settle. Furthermore, from an employer’s perspective, the lack of consistency in the application of the at-will presumption and its exceptions makes it difficult for national companies to have a national policy regarding termination decisions. Of course, many areas of the law are decided on a state-by-state basis, and not all inconsistency is seen as a compelling rationale for federal legislation. Accordingly, while the inconsistency and confusion in the law is one problem with the at-will presumption, it is not the most pressing problem.

2. The Egregious Termination Cases

A more pressing problem with the at-will presumption is that there are many terminations that most reasonable people would agree are egregious and yet are not unlawful under any of the statutes or common law claims mentioned above. Below is just a sample of the termination cases I found troubling. In all of the following cases, the courts found that there was no remedy under any of the claims pursued by the plaintiffs.

Many egregious cases involve a plaintiff who was terminated for reporting troubling behavior of another employee to the employer. In one such case, Foley v. Interactive Data Corp., the plaintiff sued for wrongful discharge, alleging that he was terminated because he reported to management that his new supervisor was being investigated far to eliminate the doctrinal incoherence in the law); Rachel Leiser Levy, Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule, 72 U. Chi. L. Rev. 695, 722 (2005) (arguing that the current law governing employment terminations has become confusing and that there needs to be more uniformity across states since most companies are becoming more national); Moss, supra note 46 (providing an in-depth analysis of the doctrinal inconsistency in the law surrounding employment at-will); Christopher L. Pennington, The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application, 68 Tul. L. Rev. 1583 (1994) (arguing, as the title suggests, that the public policy exception is riddled with inconsistencies); Slater, supra note 2, at 54.

56. Moss, supra note 46, at 301.
57. See Slater, supra note 2, at 99 (stating that there is increased litigation and fear of litigation because neither side can be certain what the law will do in this area).
by the FBI for embezzlement at the supervisor's former employer. Despite the fact that the plaintiff disclosed this information because of his concern for the company, the supervisor nevertheless eventually terminated him, allegedly to silence him. The court held that the plaintiff's public policy claim failed, concluding that there is no substantial public policy prohibiting an employer from discharging an employee for reporting possible prior illegal behavior of another employee. Because precedents emphasized that the employee's behavior must protect the public, the court reasoned that "[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the [public policy claims] is not implicated."

Other retaliatory discharge cases should arguably have been prohibited by anti-discrimination laws but were not. For instance, in one case, a white employee was terminated for stating to a co-worker "Blacks have rights too." The employee apparently made this comment because he believed his employer was "fixing to physically assault the black males to get them off the property." The co-worker to whom the plaintiff said this reported the comment to Donna Dallman, the plaintiff's supervisor. According to the plaintiff, Dallman subsequently said to him, "I think you're a fucking nigger lover. Sit your God damn ass down on that fucking stool, shut your mouth, and do your fucking work." She then said, "On second thought, get your fucking ass out of here. I don't want you working for me anymore." The court in this case stated, "[I]t would appear that when Dallman finally decided to dismiss Bullard [plaintiff], it was on the basis of her personal dislike for him and her general dissatisfaction with Bullard as an employee." Even if the court was willing to accept the plaintiff's argument that he was dismissed because Dallman perceived him to be overly sympathetic toward African Americans, the court held that "Ms. Dallman was still entitled to terminate the at-will employ-

60. Id. at 375.
61. Id. at 375–76.
62. Id. at 380.
63. Id. This case is good evidence of how narrowly the public policy claim has been interpreted.
65. Id. at 632 n.3. The facts are not overly clear in this case, but it appears that, according to the court, it can be inferred that the Bigelow company had engaged in a rental policy that discriminated against African Americans, and that agents were instructed to use "deception and subterfuge to prevent African-Americans from becoming tenants in Bigelow rentals." Id. at 633.
66. Id. at 632 n.3.
67. Id.
68. Id.
69. Id. at 633.
ment." The court reasoned that only if the plaintiff had refused to engage in discriminatory behavior or had made a formal complaint to management, would he have a public policy claim. Because he made a very quiet protest to a co-worker, rather than a more prominent opposition to a supervisor, he did not have a violation of public policy claim. Even though he did not bring a claim under Title VII, his complaint, alleging retaliation for protesting racial discrimination, might have similarly failed under Title VII.

Perhaps even more egregious than terminating an employee in retaliation for making legitimate complaints is terminating an employee because she was the victim of domestic violence. In Green v. Bryant, the plaintiff was raped and brutally beaten at gun point by her estranged husband. When she returned to work and told one of the doctors for whom she worked about the abuse, the plaintiff was subsequently terminated and told that her termination was solely because...

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70. Id.
71. Id. at 634.
72. Id. In fact, one can infer from the court's opinion that the judge condemned the plaintiff because he did not make a more prominent complaint. In footnote 4 of the opinion, the court states:

Bullard's protest, or, better, protestation (if, indeed it can be called that) was pretty sickly. He apparently was not willing to make such statements in the presence of Dallman. When Dallman asked him if he had "a problem" with the company he was quick to deny it. If Bullard had ever "stood up" to Dallman and said something like, "Look here, Dallman, I am sick and tired of the way you treat Blacks around here, and I am not going to put up with it any longer," he might have had a better case. He did not come close to doing this, and as a result he cannot bring himself under [the precedent case] and show that he was discharged because he did or refused to do something in his employment that offended this state's public policy.

Id. at 634 n.4.
73. His claim would probably have failed under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) (2000), because he would have to prove that he had a reasonable belief that he has opposed practices that are unlawful under Title VII. See generally Deborah L. Brake, Retaliation, 90 Minn. L. Rev. 18, 76–86 (2005) (arguing that the reasonable belief doctrine is one of the most problematic limits to the retaliation doctrine). Professor Brake has criticized the reasonable belief doctrine for enforcing artificial lines between victims and non-victims. Id. at 94–98. For instance, in Wimmer v. Suffolk County Police Dept., the plaintiff's retaliation claim failed because he had complained about his police department's treatment of minority citizens. Id. at 95 (citation omitted). Because the court found that the white police officer did not have a reasonable belief that the department's treatment of non-employees, i.e., citizens, violates Title VII, his retaliation claim failed. Id. at 96. One can imagine a similar holding in the Bigelow case because he had complained about his employer's treatment of potential customers.

of her status as a domestic violence victim.\textsuperscript{75} She sued, alleging that the termination violated two public policies: protecting an employee's right to privacy and protecting victims of domestic violence.\textsuperscript{76} The court disagreed with her assertion that the discharge violated her privacy rights because she voluntarily disclosed the violence to one of the doctors with whom she worked, and the employer took no actions to further intrude upon her privacy.\textsuperscript{77} With regard to the public policy of protecting victims, the court stated that the statutes relied upon by the plaintiff do not create a protected employment class, and therefore, the plaintiff cannot rely on them to establish her wrongful discharge claim.\textsuperscript{78} Only if the plaintiff had been terminated for seeking assistance from the victim's rights statutes would she have possibly had a claim.\textsuperscript{79}  

Another case where an employer interfered with its employee's private life was the case of Frankel v. Warwick Hotel.\textsuperscript{80} Here, a man worked as the restaurant manager for a hotel in which his father was a part-owner.\textsuperscript{81} During his employment, the son married a woman that the father disapproved of because she was Catholic. The father told the son that he had to divorce his wife or be fired.\textsuperscript{82} Of course, the son "chose" to be fired.\textsuperscript{83} The court dismissed plaintiff's claim for wrongful discharge in violation of the public policy, stating that the plaintiff had failed to point to a public policy sufficient to support his claim.\textsuperscript{84} While some might agree with this result because the case involved a family relationship (the father and son), the court did not

\textsuperscript{75} Id. ("Ms. Green asserts that Dr. Bryant told her that the discharge had nothing to do with plaintiff's performance at work, but was based solely upon her being the victim of a violent crime.").

\textsuperscript{76} Id. at 801.

\textsuperscript{77} Id.

\textsuperscript{78} Id. Of course, if those statutes did explicitly provide for employment protection, the plaintiff would not even need to rely on the public policy claim; she could sue directly under the statute. For a further discussion of the rights (or lack thereof) afforded to employees who are terminated for being victims of domestic violence, see Nicole Buonocore Porter, Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work? 12 MICH. J. GENDER & L. 275 (2006) (hereinafter Porter, Victimizing the Abused).

\textsuperscript{79} Green, 887 F. Supp. at 801; see also Imes v. City of Asheville, 594 S.E.2d 397 (N.C. Ct. App. 2004) (holding that a male employee, who was terminated for being a victim of domestic violence after he was hospitalized when he was shot by his wife, did not state a viable cause of action for wrongful discharge based on the public policy exception to the employment at-will doctrine).


\textsuperscript{81} Id. at 185.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 186–87.
limit its result to that particular fact and never discussed the familial relationship between the parties. 85

Other employees have been terminated without a remedy for (1) refusing to end a relationship with a co-employee that was neither interfering with the plaintiff's employment nor violating an explicit work rule; 86 (2) riding a motorcycle, piloting private planes, and smoking; 87 and (3) having a child out of wedlock. 88 The above cases represent a small sampling of the cases where employees were terminated for egregious reasons and left with no remedy. These cases reveal a serious problem in need of a solution.

3. Undermines Anti-Discrimination Statutes

The third (and arguably most compelling) problem with the at-will presumption is that it undermines anti-discrimination statutes. 89 It is undisputed that plaintiffs do not fare well when bringing employment discrimination claims. 90 This fact is informative for two rea-

85. Id. I tend to agree that employment laws should not interfere with the employment relationships between family members in small, "mom and pop" businesses. However, the Warwick Hotel was not such a business. The family relationship might explain why the father cared about the religion of his son's wife, but it does not make the termination decision any less egregious.

86. See Patton v. J.C. Penney Co., 719 P.2d 854, 857 (Or. 1986) (holding that even though it might seem "harsh" that an employer can fire an employee because of "dislike of the employee[e]'s personal lifestyle," plaintiff's wrongful discharge claim fails).

87. Ann L. Rives, Note, You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation, 74 GEO. WASH. L. REV. 553, 556 (2006). Presumably, employees in these cases were terminated because their behavior was believed to lead to the increased risk of significant health care costs.


89. See Julie C. Suk, Discrimination At Will: Job Security Protections and Equal Employment Opportunity in Conflict, 60 STAN. L. REV. 73, 84 (2007) ("Most U.S. scholars see a conflict between the goals and principles underlying the employment at-will doctrine and the goals and principles underlying employment discrimination law."). It can also be argued that the at-will rule undermines the effectiveness of the National Labor Relations Act. Slater, supra note 2, at 54 ("[The at-will rule] is crippling the effectiveness of the two most important exceptions to that doctrine, Title VII of the Civil Rights Act of 1964 (Title VII) and the National Labor Relations Act of 1935 (NLRA), two of the most significant federal statutes of the twentieth century.") (footnotes omitted). However, this Article will focus only on how at-will undermines Title VII and other anti-discrimination statutes. See also Fischl, supra note 22, at 180 (stating that the at-will rule is a baseline not only in common law decision making, but also in interpreting other statutes—Title VII and the NLRA).

90. For instance, one study indicated that plaintiffs only won 27.4% of employment claims that were decided by the trial court. Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 NOTRE DAME L. REV. 889, 942 (2006). Another study indicated that only 15% of the claims filed with the EEOC resulted in some type of relief provided to plaintiffs. Michael Selmi, Why Are Employment
sons. First, it tells us that there are probably many meritorious claims that fail because of the difficult burden of proof standard under current discrimination case law. The current state of the law makes it very difficult to prove the decision-maker was motivated by discriminatory animus, especially when so much discrimination happens at the subconscious level. However, the low success rate for employment discrimination plaintiffs also speaks to another problem, which is the overuse of our discrimination laws. Assume an employee gets terminated and believes the termination was unfair. Because the employment at-will presumption precludes most other causes of action, the employee's only cause of action is likely to be a discrimination claim. Because she believes that the decision was unfair and because the employer might not have given her a reason for the termination, she assumes discrimination based on her sex, her race, her age, or medical impairment/disability must have been the motivation.

Discrimination Cases So Hard to Win? 61 LA. L. REV. 555, 558 (2001) [hereinafter Selmi, Hard to Win]. A third study indicated that “[p]laintiffs in employment cases succeeded on only 18.7 percent of the cases tried before a judge . . . .” Id. at 560; see Ann C. Hodges, The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace, 22 HOFSTRA LAB. & EMP. L. J. 601, 612 (2005) (stating that plaintiffs have limited success at every level of the judicial process). Plaintiffs in employment law cases have a lower success rate than both insurance and personal injury cases. Further, plaintiffs' victories in employment discrimination cases are reversed more frequently than defendants'. Id. Other scholars have pointed out that Title VII has not been as effective as some had hoped. See, e.g., Michelle A. Travis, Recapturing the Transformative Potential of Employment Discrimination Law, 62 WASH. & LEE L. REV. 3, 5 (2005).

91. See CYNTHIA ESTLUND, WORKING TOGETHER: How WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY, 151 (Oxford Univ. Press 2003); Fischl, supra note 22, at 183–84 (arguing that the burdens of proof in discrimination cases make it difficult to prove the required intent in order to win the case); see also infra subsection IV.E.2 (arguing that the Supreme Court's decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), has made the plaintiff's burden very difficult as the plaintiff must not only disprove the defendant's articulated reason for the plaintiff's termination, but also prove that discrimination was, in fact, the real reason).

92. See Fischl, supra note 22, at 181–82 (noting that with subconscious discrimination, it is difficult to prove intent); Slater, supra note 2, at 56 n.14, 60 (citing scholars who argue that the burden shifting framework does not uncover unconscious bias); see also infra subsection IV.E.2 (recognizing the difficulty in proving the defendant's motive).

93. See ESTLUND, supra note 91, at 151; Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 TEX. L. REV. 1655, 1679 (1996) (“Those who fit into one of the classes protected by antidiscrimination law—mainly women, minorities, older, or handicapped workers—may consequently see and claim discrimination when there is simple garden-variety unfairness.”); Fischl, supra note 22, at 181–82 (noting the problem with trying to squeeze the square peg (unfair termination) into the round hole (discrimination law)).

94. Even if a plaintiff did not initially think discrimination was at play, if she seeks advice from a lawyer because the termination seems unfair, a lawyer will ask her if she thinks the termination was discriminatory based on her sex, race, etc. She
Accordingly, many terminated employees bring discrimination claims regardless of whether there is any indication that discrimination was the motivation behind the termination decision.95

Nevertheless, establishing that plaintiffs likely bring many meritless discrimination lawsuits does not prove that this is a problem worthy of a solution. It is also necessary to explore whether and why the overuse of discrimination statutes is troubling. There are several concerns with the proliferation of unsuccessful lawsuits. First, it is simply inefficient to waste time and resources litigating meritless claims.96 Second, employees who are white males, under the age of forty, and able-bodied, are often left without a remedy, regardless of the egregiousness of their termination.97 While one might not have much sympathy for the dominant race/sex of the world, I believe there is an inherent injustice in white males not having a remedy for the exact same termination decision that might give a woman and/or a racial minority a remedy.98

Third, as Professor Cynthia Estlund has convincingly argued, the at-will presumption (and its corresponding over-use of anti-discrimination statutes) causes employees to be pitted against one another. White male employees recognize that the employer is more cautious about terminating minority or female employees than them and is likely to give minority employees more process before they are terminated.99 Of course, this type of tension in the workplace benefits no one.100

95. See Estlund, supra note 93, at 1679; Fischl, supra note 22, at 181–82.
96. See Estlund, supra note 91, at 151 (noting how expensive and burdensome litigation is); Slater, supra note 2, at 71 (arguing that replacing at-will with just cause would reduce the number of weak discrimination claims).
97. See Estlund, supra note 93, at 1680–81 (discussing how the at-will regime provides no protection to white males, who are often resentful of the “perceived” additional protections women and/or minorities get).
98. To be clear, a white man could bring a race and/or sex discrimination claim under Title VII, which protects white men as well as women and/or racial minorities. See, e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). But in a traditional workplace dominated by white men, such a claim is certain to fail, and most white men would not bother bringing it in the first place.
99. See Estlund, supra note 91, at 151; Estlund, supra note 93, at 1681 (“Employees who are not ‘protected’ by those laws may perceive fairness itself as a special privilege from which they are excluded.”).
100. Furthermore, as Richard Fischl points out, the at-will rule “racializes many employment disputes,” and makes employers and the defense lawyers angry at litigants and the plaintiff’s bar for bringing frivolous claims. Fischl, supra note 22, at 182.
Perhaps most importantly, the fourth concern I have with the overuse of our discrimination laws is that there is some truth to the assertion that employers are more cautious about firing women and/or minority employees.\textsuperscript{101} This, in turn, leads to employers hiring more white male employees because it will be easier to fire them if things do not work out.\textsuperscript{102} Studies reveal that employees are much more likely to bring discrimination claims at the firing stage rather than the hiring stage. Accordingly, a rational employer armed with this knowledge has an incentive to discriminate at the hiring stage to avoid hiring the employees who will pose a litigation threat if they need to be terminated down the road.\textsuperscript{103} This, of course, is not the result that our discrimination laws were intended to create,\textsuperscript{104} and thus, further demonstrates why the employment at-will presumption is problematic.

Finally, too many unsuccessful discrimination claims cause public suspicion about the effectiveness and necessity of our anti-discrimination laws.\textsuperscript{105} Many people believe that sexism and racism are problems of the past—not the present. This false belief might be caused in part by the failure rates of these types of claims.

\section*{B. The Problem with Just Cause}

If the at-will presumption is so troubling, then the logical solution for many is the opposite of at-will—a just cause standard. Many scholars have suggested that we get rid of our at-will presumption and adopt a just cause standard. Under this standard, employees could only be terminated by an employer for good cause—an amorphous standard, but one that has served its purpose relatively well in different contexts, including under collective bargaining agreements as well

\textsuperscript{101} See Estlund, supra note 91, at 152–53; Estlund, supra note 93, at 1679–80 (noting that once an employer hires a member of the protected group, they should and probably do take some defensive steps to prevent or defend litigation). As a prior defense side employment lawyer, I know from experience that employers often consider more carefully and offer larger severance packages to women and/or minorities (as well as those over forty) than to white males under the age of forty.

\textsuperscript{102} See Estlund, supra note 91, at 152–53; Estlund, supra note 93, at 1680.

\textsuperscript{103} See Estlund, supra note 93, at 1680.


\textsuperscript{105} See Selmi, \textit{Hard to Win}, supra note 90, at 556 (arguing that many erroneously believe that discrimination cases are too easy to win and that courts perceive Title VII claims as "generally unmeritorious, brought by whining plaintiffs").
as the laws in many other countries, including Canada and most countries in Europe.\textsuperscript{106}

Certainly, having a just cause standard would eliminate many discrimination claims because employees would realize that even if the termination was unfair and without cause, it was probably not discriminatory and would, therefore, pursue the easier claim of proving no cause. Furthermore, it is difficult to argue with the idea that employers should not make arbitrary, irrational termination decisions.\textsuperscript{107} However, I believe just cause goes too far and would unduly tie the hands of many employers who need to make employment decisions motivated by sound management principles, not the fear of proving just cause.\textsuperscript{108} The problem with just cause is again a problem of proof. Just as proving discrimination is often too difficult for employees, proving just cause is often too difficult for employers,\textsuperscript{109} especially when juries are more likely to side with employees than employers.

If the just cause standard were used, the decision-maker (juror, judge, or arbitrator) would be inclined to second-guess the employer's business decision. For instance, assume an employee is chronically late, yet every tardy is accompanied with a good excuse. Perhaps one day he has car trouble, and another day, the power goes out in his house so that his alarm clock does not wake him in the morning. If this employer has a strict attendance policy (perhaps six tardies or absences in a year lead to termination), and the employee was terminated pursuant to the attendance policy, the jurors are likely to question why the employer needs to have such a strict attendance policy. They also might be able to empathize with the tardy employee because they can imagine such misfortunes happening to them. Accordingly, jurors would be likely to reinstate the terminated employee because they think the rule is unfair, even though the application of the rule was fair and consistent. An arbitrator might similarly vitiate an employer's right to set its own business policies by considering the years of service of the terminated employee and reinstate him if the arbitrator thinks that the punishment was too harsh for the offense.

\textsuperscript{106} See sources cited supra notes 8–15.

\textsuperscript{107} See Phillips, supra note 12, at 456–57 (arguing that arbitrary dismissals are so unjust that they never should take place); cf. Malin, supra note 5, at 137–38 (arguing that the appeal for just cause has corrective justice components because the employer has treated the employee unfairly and needs to correct it).

\textsuperscript{108} See Phillips, supra note 12, at 452, 454 (noting that the problem with just cause is that the threat of litigation often limits the ability of employers to make efficient and rational termination decisions).

\textsuperscript{109} See Lawrence E. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1427 (1967) (addressing the problem of proof in cases turning on motive); Malin, supra note 5, at 135 ("It is argued that, although employers generally do not dismiss employees arbitrarily, they need the right to fire at-will because of the transaction costs and proof difficulties that they would encounter under a just cause standard.").
In fact, a review of arbitration cases reveals how often arbitrators overturn a discharge because they believe the punishment was too harsh. This in no way is intended to be a criticism of arbitration or arbitrators. Analyzing arbitration cases is the easiest (albeit perhaps not the most accurate) method of evaluating just cause in the United States because only collective bargaining agreements with unionized employers routinely use the just cause standard.

In one arbitration case, the arbitrator held that there was no just cause for terminating an employee who called his supervisor a “fucking bitch.” The arbitrator reinstated the employee. This decision was primarily due to the arbitrator’s belief that the penalty was too severe because the employee hurled the insult to his supervisor with his back turned to her.

In another case, the arbitrator held that there was not just cause to terminate a white employee who was harassing black co-workers by putting a white cotton cloth over his face to appear like a Ku Klux Klan member. Despite the employer’s assertion that the employee was aware of the anti-harassment policy and the employer’s strong interest in avoiding a harassment claim, the arbitrator reinstated the discharged employee.

110. The reason analyzing union cases might not be the most accurate method of evaluating just cause is because parties involved in union contract arbitrations have developed a practice over the years that may or may not be indicative of practices under a statute requiring just cause. For instance, it is common practice that arbitrators who are deciding cases under collective bargaining agreements have the authority to modify the discipline. If an employee is terminated, the arbitrator can decide either to uphold the termination, to reinstate the employee with full back pay, or anything in between. While this authority is not usually explicitly stated in collective bargaining agreements, it has become common practice under most collective bargaining agreements. What is unclear is whether modifying the discipline would become common practice if a statute (rather than a contract) called for just cause. Perhaps this result could be avoided by limiting the arbitrator’s authority to an all or nothing decision—either the employee’s termination is upheld or the employee is reinstated with full back pay. In any event, I think the reader will agree that in most of the cases discussed below, termination should have been upheld, and even reinstatement without back pay and with a long suspension is not a sufficient discipline.

111. One could also use international law as a comparison since many European countries have just cause as their default rule; however, this author is not an expert on such laws.


113. Id. at 1792.

114. Id.


116. Id.
Similarly, the Court of Appeals for the Tenth Circuit recently upheld an arbitrator's decision to reinstate an employee who was terminated for sexually harassing a female employee.\(^{117}\) The arbitrator found that the employee had engaged in sexually harassing conduct, but that termination was not warranted because of the employee's positive work record and potential for rehabilitation.\(^{118}\) Based on the deference given to such arbitration decisions, the Tenth Circuit refused to overturn the decision.\(^{119}\) In my opinion, this decision is one of the most troubling because it puts employers in a real quandary. If the employer in this case had not fired the employee, the victim of the harassment might have sued and would likely be able to prove that the employer failed to take prompt remedial action.\(^{120}\) To avoid that lawsuit, which would likely be very costly, the employer fired the harasser and then had to endure the time and expense of litigating the discharge. Furthermore, what happens if the grievant harasses again? Is a jury going to be sympathetic to an employer who knowingly reinstates a harasser, even when compelled to do so by an arbitrator? I am not sure of the answer to that question, but it seems to me that it is a risk an employer should not have to take.

Another example of the just cause standard leading to the inability of the employer to mete out appropriate discipline is a case where the employer fired the employee for violating company policy by sending sexually explicit material through the e-mail system.\(^{121}\) As part of a widespread investigation, the employer learned that the employee had sent jokes of a sexual nature and emails with picture attachments that the arbitrator considered to be of a pornographic nature.\(^{122}\) The employee admitted some of the actions but lied when he alleged that he had been unable to open the pictures and, therefore, was unaware of their content.\(^{123}\) Despite the arbitrator's findings that the employee's actions violated the employer's sexual harassment policy and

\(^{117}\) LB & B Assocs. Inc. v. International Brotherhood of Electrical Workers, Local No. 113, 461 F.3d 1195, 1196 (10th Cir. 2006).

\(^{118}\) Id. at 1197.

\(^{119}\) Id. at 1197–98. When parties have entered into a contract agreeing to arbitration, the court's review of the arbitrator's decision is "among the narrowest known to the law." Id. at 1197 (internal quotation and citations omitted). An arbitrator's decision is entitled to "profound deference" as long as it "draws its essence from the collective bargaining agreement." Id. (internal quotation and citations omitted).

\(^{120}\) Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (stating that "[f]or sexual harassment to be actionable, [the conduct] must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment' ").


\(^{122}\) Id. at 844.

\(^{123}\) Id. at 841.
internet usage policy and that the employee's conduct was "extremely serious," the arbitrator ultimately reinstated the employee because he had been employed for nine years and had no active discipline in his file.\(^{124}\) Even though the arbitrator realized the potential liability to the employer if it did not take its harassment policy seriously, the arbitrator, using the just cause provision in the collective bargaining agreement, stepped into the employer's shoes to decide the appropriate level of discipline. This is not a case of "he said/she said," where the fact finder is unsure whether the misconduct took place. The employee in this case admitted to many of the facts, and the arbitrator was certain he was lying about other facts yet still decided to reinstate because of the grievant's past work history and the employer's discipline of other employees in the past.\(^{125}\)

In another case, an arbitrator reinstated an employee who was guilty of both lying and cheating.\(^{126}\) In this case, the company had given OSHA-mandated training tests to many hourly employees.\(^{127}\) After discovering widespread cheating on those tests, the employer started over with the tests and issued a very stern warning to all of the employees that anyone caught cheating on the tests would be terminated.\(^{128}\) Nevertheless, the grievant wrongfully obtained answers to the test and apparently tried (unsuccessfully) to memorize the answers.\(^{129}\) He also had "cheat sheets" of the answers in his shirt pocket during the test.\(^{130}\) Upon being caught with these cheat sheets, the grievant repeatedly lied to company management.\(^{131}\) He finally came clean during the arbitration hearing and admitted to both the cheating and the lies he had told to management.\(^{132}\) Nevertheless, the arbitrator found that because the grievant had been employed for seventeen years and had never engaged in this type of offense before, he should be reinstated without backpay.\(^{133}\) Interestingly, the arbitrator noted that the grievant was an employee "inclined to make mistakes" and was not the "most capable of employees," but because "the Company has retained him for [seventeen] years, . . . he must be com-

\(^{124}\) Id. at 845 ("What grievant did was wrong and should never be allowed. However, given what has gone before and what happened to others here, I cannot conclude that grievant's acts were so much more serious than was done by any others as to warrant his termination.").

\(^{125}\) Id.


\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.

\(^{133}\) Id. (The arbitrator was also persuaded by the grievant's apparent remorse for his actions).
petent enough.”134 I find this very telling. The grievant had probably been retained despite his shortcomings because he had never done anything bad enough to warrant discharge under a just cause standard. Even when he did something extremely egregious, he was still reinstated. This case perfectly exemplifies the problem with just cause. Not only can an employer not terminate marginal employees, but apparently it cannot even terminate liars and cheaters.

One final illustration of the problem with just cause is a case where the employee, a UPS driver, was terminated for being under the influence of alcohol while working and was reinstated by the arbitrator.135 The employee was given a breathalyzer because his eyes were bloodshot, he was disheveled, and there was a strong smell of alcohol on his breath.136 Approximately two hours after his shift started, the breathalyzer revealed a blood alcohol content of 0.056.137 Because the company's policy was unclear that a level of intoxication below the criminal driving level would result in discharge, the arbitrator reinstated the grievant.138 This case, in my opinion, borders on outrageous. To say that there is an appropriate level of alcohol in the blood of a UPS driver is insane, especially given that 0.056 is quite close to the illegal level in some states. It should not take any particular notice for a UPS driver to realize that any alcohol in his blood could lead to a dangerous situation driving through the streets of America. These arbitration cases represent only a small sampling of cases where the just cause standard led to the interference with an employer’s sound business decision.139

Professor Julie Suk has revealed another justification for not using a just cause standard—it may cause more discrimination in hiring decisions.140 Suk analyzed the recent events in France to demonstrate that just cause actually contributed to the high unemployment rate among minority persons there.141 Because terminating an employee, even an unproductive or misbehaving employee, is so costly, employers are less likely to hire “risky” employees.142 She states, “The

134. Id.
136. Id.
137. Id.
138. Id.
139. But see Slater, supra note 2, at 103 (citing statistics to the contrary). I do not mean to suggest that the just cause system should not be used in collective bargaining agreements. Those contracts would not be affected by this statute, nor would individually negotiated employment contracts, such as those sometimes given to high-level executives.
140. Suk, supra note 89.
141. Id. at 95 (stating that the job security laws in France have had a disproportionate effect on racial minorities).
142. Id. at 97.
French experience shows that a general limitation on employers' firing can magnify employers' tendencies to discriminate in hiring.  

Finally, and perhaps most importantly, in addition to the above problems with using the just cause standard, such a proposal would not be politically feasible. Because most employers are aware of the difficulty and resulting high cost of proving just cause, it would be difficult, if not impossible, for legislation containing a just cause standard to ever be adopted. Accordingly, in my opinion, the just cause standard does not provide the most sensible solution to the problems with the at-will presumption.

IV. PROPOSED STATUTORY SOLUTION

This Article proposes a solution that attempts to find the middle ground between the employer-friendly at-will presumption and the employee-friendly just cause standard. In this part, I propose a statutory enactment, the Employment Termination Equity Act ("ETEA"), that would prohibit certain terminations. I quickly abandoned any attempt to arrive at a one-size-fits-all standard because it would have been too amorphous to be of much use and would, therefore, increase litigation. The ETEA, if enacted, should supersede wrongful discharge claims and the breach of the implied covenant of good faith doctrine as it relates to employment terminations, leaving only statutory prohibitions already in place, as well as the unlawful terminations in the proposed statute. The only common law exception to the at-will presumption that would remain in place is the implied in fact

143. Id. at 107.

144. For instance, my initial thought was to suggest that the statute prohibit terminations made in "bad faith." In other words, an employer could still terminate for no reason and, of course, for good reason but could not terminate if the termination was deemed to have been made "in bad faith."

145. But see Blades, supra note 109, at 1432 (arguing that it is hard to include all possible employer wrongs and thus proposing an inclusive, non-specific definition of abusive discharges).

146. In this way, the ETEA is similar to the Model Employment Termination Act, which also supersedes common law claims. See Model Employment Termination Act § 2, 7A U.L.A. 310 (2002). I realize that this may be a very controversial suggestion from the plaintiff's perspective. Wrongful discharge claims are brought under tort law and, therefore, are subject to compensatory and punitive damages if a violation of public policy is found. Because of the limitation on damages in this statute, see infra subsection IV.E.4, what may have been fertile ground for large damages awards would now disappear under this statute. But, because these cases are often the most unpredictable (caused by the variations in state law), I believe it highly unlikely that employers would support this statute if there still existed the possibility of run-away juries and enormous damages awards.

147. This statute would operate as a floor. Accordingly, any statutory provision that provides better rights and remedies to employees would survive if this statute was enacted.
contract exception, where an employer has promised implicitly to employ the employee indefinitely unless the employer has just cause to terminate. 148 Because this claim is actually being brought on regular contract principles rather than a departure from the at-will presumption, this claim would still be available under the ETEA. In reality, however, these claims are not very prevalent because employers are more careful about not making long-term employment promises and making sure their handbooks do not make promises that would give way to an implied in fact contract. 149

In determining which termination decisions are worthy of protection, I concentrated on two types of harm: (1) the harm to the human dignity and autonomy of the terminated employee and (2) the harm to the public if certain terminations were left unchecked. In many instances, the latter category is covered by public policy claims, but the inconsistency in the resolution of those claims is part of the problem this proposal is intended to solve. 150 Certainly, if the statute only used the broad parameters of offending the human dignity or harming the public, without specifying what types of terminations fall under these broad categories, this statute would be very difficult to apply and would greatly increase litigation. Thus, I begin with the discussion of these categories not to define the standard but to give the reader the broad theme by which I will classify many prohibited termination decisions.

The broad classification of “terminations that offend the human dignity” encompasses terminations based on immutable characteristics (such as race, sex, age, or physical impairment), the exercise of fundamental rights, and the right to express oneself off-duty in a manner that does not harm the employer. In fact, many of these rights can be gleaned from rights found in the Amendments to the United States Constitution: freedom of speech and association in the First Amendment, the right to privacy in the Fourth Amendment, and the right to equal protection in the Fifth and Fourteenth Amendments. Admittedly, some of the prohibited terminations are painted with a broader brush than the rights guaranteed under the Constitution, but they all find their underpinnings in these very basic and fundamental rights.

As will be evident, there is some overlap between unlawful terminations under the ETEA and other statutory laws. However, the ETEA would not make those other statutes superfluous because, as will be discussed below, the burden is easier under the ETEA. Yet, in

148. See supra section II.B.
149. See Slater, supra note 2, at 98 (arguing that “[t]he doctrine that employee manuals can become enforceable contracts . . . can easily be avoided by explicit disclaimers in the handbook”).
150. See supra notes 54–58.
the true spirit of compromise, the remedies available are less profita-
ble for plaintiffs.

A. Summary of Prohibited Terminations

This section will provide only a summary of the language of the
proposed statute so that the reader can quickly get a sense of what I
am attempting to accomplish. In the latter sections of this Part, I will
discuss in detail the rationale for including the various prohibited ter-
minations and how they would apply in certain circumstances. Under
the ETEA, the main prohibition section would read as follows:

It is unlawful for an employer to terminate an employee's employment if it
is proven\textsuperscript{151} that the reason or rationale for the termination decision was
because of:

(1) An immutable characteristic of the employee that does not affect
the employee's ability to perform his job;

(2) The employee's exercise of a fundamental right that does not affect
the employee's ability to perform her job;

(3) Behavior or conduct the employee engaged in or is thought to en-
gege in while off-duty, which does not affect the employee's ability to per-
form the job, except that an employer can terminate an employee for off-
work illegal drug use or other off-duty conduct if, because of the em-
ployee's position, the off-duty conduct is likely to substantially harm the
reputation of the employer;

(4) An attendance violation when the absence triggering termination
was caused by the serious health condition of the employee or a serious
health condition or death of a member of the employee's immediate family,
except that the employee is only protected from termination under this
provision once per year, and the absence must not exceed two weeks in
length;

(5) The employee's complaint of conduct or behavior by another em-
ployee of the company that a reasonable person would consider offensive,
harassing, or discriminatory, provided that such complaint is made in a
reasonable manner that does not overly disrupt the workplace;

(6) The employee's refusal to engage in behavior that the employee rea-
onably believes is offensive or morally wrong, when such refusal does not
harm the employer's legitimate business interests;

(7) The employee's refusal to engage in conduct that a reasonable per-
son could believe violates a federal or state law;

(8) The employee's status or potential status as a victim of a crime of
violence, unless the employer has a reasonable, fact-based, good-faith be-
lief that the employee's presence at work will likely lead to violence in the
workplace, and there are no reasonable measures that can be taken to
mitigate the threat of violence;

(9) The employee's disclosure that the employee has information or a
reasonable belief that the employer or an employee of the employer has
violated, is violating, or will violate local, state, or federal statutes pro-
vided that the disclosure is made to the employer or a representative of
the employer whom the employee reasonably believes is in a managerial

\textsuperscript{151} The statute would have a different burden of proof scheme than other employ-
ment discrimination statutes. \textit{See infra} subsection IV.E.2.
or supervisory position, and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the state's statutes, or the complaint is made to an employee of a public body or political subdivision of the state or any agency of a public body or political subdivision; or

(10) The employee's engagement in any of the following:
   a) Exercise of rights under the workers compensation statutes of the state,
   b) Service on a jury, or
   c) Exercise of voting rights.

B. Terminations that Offend the Human Dignity

Prohibited reasons one through six can be said to offend the human dignity either because they involve the termination of an employee for behavior or factors over which he has no control or because they involve an employee's behavior that our society deems worthy of protection. Below each prohibition, I will discuss the rationale for including the prohibition and how it should be applied in certain circumstances.

1. Immutable Characteristics

An immutable characteristic of the employee that does not affect the employee's ability to perform his job.

This is perhaps the easiest to defend for inclusion in this statute because our federal government, as well as most state governments, has already chosen to prohibit employment terminations based on categories that are considered immutable. This provision would include terminations based on race, sex, color, national origin, ethnicity, age, or physical impairments. Despite the fact that all of these are included as protected classifications under various federal and state laws—Title VII of the Civil Rights Act of 1964,152 the Age Discrimination in Employment Act ("ADEA"),153 and the Americans With Disabilities Act ("ADA")154—this statute would not make the others superfluous because it would provide coverage to individuals when those statutes fail to do so.

First, consider "physical impairments." Under the ADA, an individual must prove that he not only has a physical impairment, but that the impairment causes a substantial limitation on one or more "major life activities."155 Imagine that an employee is in a car accident that causes a permanent facial deformity. Assume the employer terminates him because the owner finds his appearance repulsive. Under the ADA, he likely would not be considered an individual with a disability if his facial deformity does not interfere with any major

155. Id. § 12102(2) (2000).
life activities like seeing, hearing, eating, thinking, etc. This statute would step in to provide such an individual with a remedy for this wrongful termination. There are many physical impairments that are not considered disabilities under the ADA, yet are the reason an employer chooses to terminate an employee.

The rationale for including the other immutable characteristics (sex, race, national origin, age, color) even though they are covered by other statutes is because of the difficulty plaintiffs have in proving these claims. Because this statute would utilize a different burden of proof than what is used in Title VII discrimination cases, this statute should provide protection when Title VII or its state equivalent does not.

The language in the statute, "that does not affect the employee's ability to perform his or her job," provides a defense to employers if they can prove that an employee's immutable characteristic does affect the employee's ability to perform his or her job. This defense is similar to the bona fide occupational qualification ("BFOQ") defense in the Title VII context, where an employer can avoid liability for intentional discrimination if the employer can prove that the employee being one sex over the other (as an example) is necessary for the

156. Id. ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."). Some might think he would have a claim under the "regarded as" prong of the definition of disability; however, in order to prove that the employer "regarded" a person as disabled, the plaintiff must prove that the employer believed that the impairment caused a substantial limitation on a major life activity. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). If the impairment was (as in the example) a facial deformity that caused no limitation, but rather, only offended the employer, a plaintiff would have difficulty succeeding under this theory. See Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1097–98 (7th Cir. 1998); see also Sutton, 527 U.S. at 490–91 ("[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment . . . are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.").

157. Furthermore, it is possible a court might hold that a facial deformity is not even an impairment, so impairment needs to be broadly defined to include all medical conditions, regardless of whether they result in a loss of function: "A physical or mental impairment means an illness or injury, including anatomical loss, physiological or psychological disorders, mental illness, and cosmetic disfigurement." Peter Blanck, Eve Hill, Charles D. Siegal, & Michael Waterstone, Disability Civil Rights Law & Policy § 3.2 (2004) (emphasis added) (citing 28 C.F.R. § 36.104 (2003); 29 C.F.R. § 1630.2(h) (2003)).

158. See infra subsection IV.E.2; see also Chad Derum & Karen Engle, The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment, 81 Tex. L. Rev. 1177, 1237–38 (2003) (examining employer deference and Title VII exceptions to employment at-will); Selmi, Hard to Win, supra note 90, at 562–69 (same).

159. See infra subsection IV.E.2.
employee's performance of some job criteria that is necessary for the job. In the Title VII context, this is an affirmative defense that has to be proven by the employer and has been very narrowly interpreted by the courts. It would also be an affirmative defense under this statute and should be narrowly construed.

2. Exercise of a Fundamental Right

The employee's exercise of a fundamental right that does not affect the employee's ability to perform her job.

The term "fundamental right" in this provision refers to things the U.S. Supreme Court has classified as such. These include the decision of whether to marry, the decision of whether to have children, a person's religious practice, and decisions regarding a person's re-

160. The BFOQ defense, 42 U.S.C. § 2000e-2(e) (2000), states: "[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." See also Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977) (holding that the employer was justified under BFOQ defense when it pre-vented the employment of women in a contact position at a dangerous, male maximum security prison). Race, however, is never subject to the BFOQ defense. King v. Bd. of Regents of the Univ. of Wis. Sys., 898 F.2d 533, 537 (7th Cir. 1990) (stating that race is never a BFOQ for a job). It should similarly not be the basis for a BFOQ defense under the ETEA.

161. See, e.g., Dothard, 433 U.S. at 333; Healey v. Southwood Psychiatric Hosp., 78 F.3d 132 (3d Cir. 1996) (stating that the BFOQ defense was very narrow). For instance, it is no defense under Title VII to claim that customers prefer one sex over another except in very limited circumstances. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW, 289 (1988). Similarly, it would not be a defense under the ETEA to allege that customers prefer workers of a particular race, etc.

162. See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the right to marry is a fundamental right). Other authors have argued in favor of protecting employees from marital status discrimination; see, e.g., Anna M. DePaolo, Antifraternizing Policies and At-Will Employment: Counseling for a Better Relationship, 1996 ANN. SURV. Am. L. 59 (arguing that, absent a conflict of interest, an employer should not be able to terminate an employee because of a romantic relationship the employee has with a co-worker or employees of a competitor or customer); Barbara M. Albert, Note, The Combined Effect of No-Spouse Rules and At-Will Doctrines on Two-Career Families Where Both Spouses Are in the Same Field, 36 BRANDEIS J. FAM. L. 251 (1997) (suggesting that spouses could successfully work together, as long as the company has established some safeguards). I have also argued that marital status should be a protected category under Title VII. Porter, Marital Status Discrimination, supra note 58.

163. Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the right to have children is a fundamental right).

164. Religion is a protected category under Title VII. 42 U.S.C. § 2000e-2(a) (2000). Accordingly, it is unlikely a plaintiff who feels she has been discriminated against because of her religion will need to resort to the ETEA, unless of course, she prefers to take advantage of the easier burden of proof under the ETEA. See School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 221-23 (1963) (stating
The types of terminations intended to be prohibited under this provision include termination because an employee chooses to have an abortion, termination because an employee gets pregnant and has the child out of wedlock, and termination because of an employee's marital status. Because neither marital status nor family status is a protected category under federal law and only some states protect an employee from being terminated because of her marital status or decision whether to have children, this statute would prohibit an employer from interfering with an employee's decisions in an area that is extremely personal and private. Only when employees' exercise of one of these fundamental rights makes them

that the government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs, from coercing a citizen to affirm beliefs repugnant to his or her religion or conscience, and from directly penalizing or discriminating against a citizen for holding beliefs contrary to those held by anyone else).

165. See Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman has a limited right to decide whether to terminate her pregnancy).
166. See Amador v. Tan, 855 S.W.2d 131, 133–34 (Tex. App. 1993) (refusing to create a new exception to the employment at-will doctrine when plaintiff was terminated after she counseled co-worker to have an abortion).
167. See, e.g., Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 699 (8th Cir. 1987) (affirming the district court's decision to dismiss the claims of an unmarried pregnant staff member of a private social club for girls who was discharged under the club's "negative role model" policy prohibiting continued employment of unmarried staff members who either became pregnant or caused pregnancy); Cooper v. Mower County Soc. Servs., 434 N.W.2d 494, 495 (Minn. Ct. App. 1989) (stating that plaintiff was not hired for a position because she was unmarried and pregnant); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 344 (E.D.N.Y. 1998) (noting the fact that an unmarried pregnant school teacher was fired from a church affiliated school).
168. For cases discussing such terminations, see Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 552 (Minn. Ct. App. 1986) (upholding damages award for termination of employee who lived with his girlfriend and their child on the farm at which he was employed and was told by the employer to either marry his girlfriend or he would be terminated); Frankel v. Warwick Hotel, 881 F. Supp. 183, 185 (E.D. Pa. 1995) (upholding plaintiff's termination when he was terminated for refusing to divorce his wife because his father/boss disapproved of her religion). See also Matthew W. Finkin, Life Away from Work, 66 LA. L. REV. 945, 969–70 (2006) [hereinafter Finkin, Life Away from Work] (arguing that an employee's extra-marital affair is none of the employer's business).
169. As stated earlier, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, sex, religion, and national origin but does not protect against discrimination based on marital or family status. Porter, Marital Status Discrimination, supra note 58, at 7.
170. As of 2004, twenty-two states and the District of Columbia protect against marital status discrimination. Gina Capua, Marital Status Discrimination: The Status/Conduct Debate, 50 WAYNE L. REV. 961, 962 n.8 (2004) (listing the states, as of 2004, that protect against marital status discrimination); see Phillips v. Martin Marietta, 400 U.S. 542, 544 (1971) (holding that a genuine issue of material fact existed as to whether the distinction between a woman's family obligations regarding children, as compared to a man's family obligations with children, was a bona fide occupational qualification).
unable to perform their job would an employer be justified in termi-
nating their employment.\textsuperscript{171} Many employers (non-religious entities) 
terminate employees not because the employee's exercise of a funda-
mental right interferes with the employee's job but because the em-
ployer finds the conduct morally repugnant.\textsuperscript{172} Our society's strong 
interest in our right to privacy demands that non-religious employers 
should not be making these decisions for their employees.

3. Off-Duty Conduct

Behavior or conduct the employee engaged in or is thought to en-
gage in while off-duty, which does not affect the employee's ability to 
perform the job, except that an employer can terminate an employee for 
off-work illegal drug use or other off-duty conduct if, because of the 
employee's position, the off-duty conduct is likely to substantially harm 
the reputation of the employer.

There has been a great deal of discussion regarding protection of 
an employee's private life.\textsuperscript{173} While a thorough examination of this

\textsuperscript{171} Curay-Cramer v. Ursuline Acad., 450 F.3d 130, 134 (3d Cir. 2006) (noting where 
former teacher at a private Catholic school alleged that her termination after 
signing a pro-choice advertisement in a local newspaper constituted retaliation 
for protected speech and sex discrimination in violation of Title VII and Preg-
nancy Discrimination Act). Even if an employer can prove that the employee's 
exercise of the fundamental right (i.e., having a child out of wedlock) interferes 
with the employee's ability to perform her job (perhaps because she is a teacher in 
a Catholic school), it would also need to prove that it would have made the same 
decision for a male employee who has a child out of wedlock. See Grayson v. 
Wickes Corp., 607 F.2d 1194, 1196–97 (7th Cir. 1979) (holding that district court 
did not use an improper standard under equal employment provision by requir-
ing plaintiff, who was terminated because she was an unwed mother, to show 
that unmarried male employees who fathered children out of wedlock would be 
treated differently by defendant employer).

\textsuperscript{172} See, e.g., Beecham v. Henderson County, 422 F.3d 372, 378 (6th Cir. 2005) (up-
holding plaintiff's termination from at-will employment with Henderson County 
because her intimate association with a married man was disruptive to the work-
place in which she and the wife both worked); Veenstra v. Washtenaw Country 
Club, 645 N.W.2d 643, 644 (Mich. 2002) (noting country club's former employee 
brought breach of contract and marital discrimination claims against club alleg-
ing that the club refused to renew his employment contract following his notorious 
and public separation with his wife and cohabitation with another woman); 
1984) (remanding for trial plaintiff's claim that he was discharged because he 
was a married man who had a sexual liaison with a woman other than his wife); 
ployee discharged for having an extramarital affair with a co-worker).

\textsuperscript{173} See Blades, supra note 109, at 1413, 1422–23 (arguing for a tort remedy for an 
abusive discharge when an employer fires an employee for conduct of the em-
ployee that bears no relationship to the employer); Malin, supra note 5, at 131 
(noting that a corrective justice approach to at-will should justify a legally en-
forceable limitation to an employer's power to control an employee's private life 
that has nothing to do with her job); Michael Selmi, Privacy for the Working
debate is beyond the scope of this Article, I will attempt to briefly outline the debate, where I fall in the debate, and why I chose to prohibit termination decisions that may be based on "lifestyle decisions."

Professor Matthew Finkin has written extensively on the topic of protecting an employee's right to a life away from work. Summarizing his position, he believes that the at-will presumption allows for an unwarranted interference by employers in their employees' private lives. Some states are in agreement with this position and have passed laws referred to as "lifestyle discrimination statutes" or "lawful activity laws." For instance, more than half of the states prohibit an employer from interfering with an employee's consumption of lawful products. New York has legislation allowing an employee to engage in recreational activities, and California, Colorado, and North Dakota prohibit an employer from interfering with an employee's right to engage in any lawful activity. Finkin believes that these state statutes do not go far enough because they only protect employees in particular states and do not always define with specificity what behavior is protected. This leaves courts free to infringe upon an employee's right to live his life how he chooses, without fear of interference from the employer.

On the other side of the debate are strict adherents to employment at-will, who believe that any interference with an employer's prerogative to terminate its employees for any reason not already prohibited by law is undue interference. While these critics do not believe that all off-duty conduct will harm the employer's business interests, they are worried about the possibility of such a negative effect and presum-
ably want to preempt the harm that could come from some employees’ off-duty behavior.181

I believe that the burden should be on the employer to prove that an employee’s off-duty behavior harms the employer’s interests,182 and I am also not convinced that all prohibitions on off-duty behavior are caused by an employer’s fear of the effect on the employer’s business.183 Rather, I believe many employer prohibitions are caused by an overly controlling supervisor or manager, perhaps one whose limitations on a productive employee for personal reasons are subverting, not serving the company’s interests.184

The ETEA would prohibit an employer from terminating employees because of off-duty behavior or conduct or suspected behavior or conduct, unless such behavior interferes with the employer’s legitimate business interests. This statute is intended to protect off-duty behavior such as: (1) an employee’s political activities;185 (2) an employee’s use of lawful consumable products while not working and off the employer’s premises, unless the employee is still under the effect of such consumable products when he returns to work;186 (3) an employee’s recreational activities during non-working hours;187 and (4) an employee’s personal relationships with others, romantic or pla-

181. Id. at 948–49 (citing Howie and Shapero, supra note 180); see Selmi, Privacy for the Working Class, supra note 173, at 1051 (arguing that it is difficult to reconcile workplace privacy with at-will employment relationships).
182. See Finkin, Life Away from Work, supra note 168, at 969 (stating that political speech must be shown to have a “concrete impact” on the employer’s interests).
183. Cf. Selmi, Privacy for the Working Class, supra note 173, at 1047 (arguing that an employee’s home life should remain private, even if they are using company property at home, such as a computer); id. at 1053 (arguing that courts should allow tort claims for terminations because of off-duty conduct and the employers should have to prove it had a compelling justification).
184. Cf. Finkin, Life Away from Work, supra note 168, at 969–70 (giving examples of situations where the employer objects to the employee’s off-duty conduct for moral reasons).
185. See, e.g., Finkin, Life Away from Work, supra note 168, at 968 (arguing that political speech outside of work should be protected); Rives, supra note 87, at 564 (suggesting such a prohibition in her proposed federal lifestyle discrimination statute).
186. Rives also suggests this prohibition as do some state statutes; however, I think it is not clear in her language that it is not permissible for an employee to come into work while under the influence of alcohol, even though the use of that alcohol while off work would be protected. See Rives, supra note 87, at 564. This provision also raises some employer concerns over costs of health care. For instance, some employers prohibit smoking by employees because of the increased health care costs. This statute would prohibit termination for smoking but would not interfere with other employer programs aimed at reducing healthcare costs caused by smoking.
187. See Rives, supra note 87, at 565. This, of course, is meant to prohibit an employer from terminating an employee because of their recreational activities. As stated earlier, employers might choose such an action because of the fear of increased health care costs. See Finkin, Life Away from Work, supra note 168, at 960–61.
tonic, including those with non-supervisory co-employees, except that an employer may have a policy of prohibiting romantic relationships between co-employees if they work in the same department at roughly the same hours of the day.\textsuperscript{188} If the employer had such a policy and found that two employees in the same department were dating one another, the preferred solution to this problem would be to ask the couple to choose which one of them would be willing to transfer to another department or shift, rather than simply terminating the offending couple.

This prohibition would also cover the situation where an employer terminated an employee because of his or her sexual orientation. Obviously, this is a hotly contested area, and there does not appear to be enough public support for an anti-discrimination law (such as Title VII) to protect employees against discrimination based on their sexual orientation.\textsuperscript{189} However, the ETEA is not an employment discrimina-

\textsuperscript{188} See Finkin, \textit{Life Away from Work}, supra note 168, at 965. Ann Rives' Note suggests protection for an individual's personal relationships but does not allow for any exception. Rives, supra note 87, at 565. I think romantic relationships at work can cause serious problems, and they certainly should be precluded completely between supervisors and their direct subordinates because of the perceived or real favoritism and because of the harassment suit that would inevitably follow if and when the relationship ends. See \textit{Estlund}, supra note 91, at 159 (stating that employers' policies that prohibit relations between employees and those they supervise are sensible). I would support employers' policies that precluded any person in a managerial or supervisory role from dating anyone who does not have the same level of authority and responsibility in the company. Even if the employee does not directly report to the supervisor, the concerns of perceived favoritism are likely to still exist. Even between two employees who are not in a reporting relationship with one another, a romantic relationship at work causes problems for many employers. The employees might offend other employees if they are acting inappropriately in the workplace, or other employees might feel that the couple is not pulling their weight if they are overly wrapped up in their personal relationship. Finally, and most importantly, the employer is rightfully concerned with the possible harassment issues if the couple splits. Certainly, it is possible for one employee to harass another employee who works in a different department, but it is less likely to be as severe or pervasive as it would be if the employees are working side by side. For a discussion of some of these issues, see Porter, \textit{Marital Status Discrimination}, supra note 58, at 46-47 (arguing that even though an employer should not refuse to hire or terminate an employee because of a no-spouse rule, there are some romantic relationships in the workplace that should be prohibited); see also Sharon Rabin-Margalioth, \textit{Love at Work}, 13 \textit{Duke J. Gender L. \\& Pol'y} 237, 248-49 (2006) (recognizing that while employers face too many restrictions on relationships and marriage at work, not allowing these employees to supervise one another makes sense).


Title VII has been uniformly interpreted to prohibit only discrimination on the basis of sex, not on the basis of sexual orientation. And, in fact, bills to amend Title VII to prohibit discrimination on the basis of sexual orientation have been introduced in Congress but have not been passed by either house.
tion statute. It would not force employers to hire gay and lesbian employees but would only preclude employers from firing an employee when the reason for such termination is the off-duty, lawful consensual relationship that the employee has with another person, regardless of that other person's sex. Just as the Supreme Court has said that the government does not belong intruding upon peoples' right to privacy in their own homes (unless their activities are criminal offenses such as drug activity or some violent crime), employers also should not be able to intrude upon their employees' right to privacy unless that behavior adversely affects the employer. With respect to an employee's sexual orientation, it would seem that there would be very few circumstances where that employee's behavior would negatively affect the employer.

4. FMLA Expansion

An attendance violation when the absence triggering termination was caused by the serious health condition of the employee or a serious health condition or death of a member of the employee's immediate family, except that the employee is only protected from termination under this provision once per year, and the absence must not exceed two weeks in length.

Terminations because of absences are exceedingly common. Many of those absences are caused by an employee's own illness or injury or the illness or injury of the employee's family members. Some employees are terminated for absences caused by the death of a loved one. This statute would protect an employee from being fired for attending to the death of a loved one. It would also cover those situations that may not be covered by the Family Medical Leave Act ("FMLA")

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190. From the plaintiff's perspective, that is perhaps one of the ETEA's biggest faults. It only covers termination decisions. See infra subsection IV.E.6.b. For the record, I am in favor of a Title VII prohibition against discrimination based on sexual orientation, but this argument is beyond the scope of this Article.

191. Prior to the Supreme Court decision in Lawrence v. Texas, 539 U.S. 559 (2003), an employer in some states could argue that if the employee is engaging in sodomy, such behavior is criminal. In Lawrence, however, the Supreme Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as it applied to adult males engaging in the consensual act of sodomy in the privacy of their home. Id. at 579–80. After Lawrence, a state is prohibited from having statutes making sodomy or other private sexual behavior between two persons illegal. Id.

cause the employer does not have enough employees, or the employee has not been working long enough to be covered by the FMLA.\textsuperscript{193} Certainly, this statute does not provide nearly as much protection as the FMLA, so it would only be used if the employee could not invoke FMLA protection.

5. Retaliation

The employee's complaint of conduct or behavior by another employee of the company that a reasonable person would consider offensive, harassing, or discriminatory, provided that such complaint is made in a reasonable manner that does not overly disrupt the workplace.

This prohibition overlaps with the anti-retaliation provisions in many of our civil rights statutes, including Title VII,\textsuperscript{194} the ADEA,\textsuperscript{195} and the ADA,\textsuperscript{196} among others. The retaliation literature has discussed that one of the most pressing problems with the anti-retaliation doctrine under Title VII is that a plaintiff needs to prove that she had a reasonable belief that the behavior she opposed was discriminatory.\textsuperscript{197} The problem with this rule is obvious. How are non-lawyers supposed to know what constitutes illegal discrimination? Many people have no idea which characteristics are protected or when harassment has reached the pervasive level.\textsuperscript{198} In most workplaces, most employees do not know when offensive conduct violates the law.\textsuperscript{199}

For instance, assume an overweight person is constantly harassed and teased about her weight. If she complains about it, she could be fired without recourse because a court would likely hold that she does not have a reasonable belief that being overweight is a protected class

\textsuperscript{193} The FMLA covers employers with fifty or more employees within a seventy-five mile radius and only protects employees who have worked for the employer for one year. See, e.g., Calloway v. Univ. of Louisville, No. Civ.A. 3:04CV389-S., slip op. at 1 (W.D. Ky. May 25, 2006) (upholding employer's denial of the plaintiff's request for paid leave under the FMLA because she was not employed for the requisite twelve months); Astrowsky v. First Portland Mortgage Corp., 887 F. Supp. 332, 335 (D. Me. 1995) (holding that because the employer only employed nine or ten employees, it is not an employer for purposes of the FMLA); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *5 (W.D.N.Y. Sept. 26, 2003) (holding that plaintiff failed to allege that the employer employed a sufficient number of employees to be within the meaning of the FMLA); Samadder v. DMF of Ohio, Inc., 798 N.E.2d 1141, 1155 (Ohio Ct. App. 2003) (holding that appellant only employed by employer for ten months is not an eligible employee under the FMLA).


\textsuperscript{197} See Brake, supra note 73, at 23, 76.

\textsuperscript{198} Id. at 80, 82, 93, 99–101.

\textsuperscript{199} Id. at 87–89.
even if she sincerely believes that it is (or should be) a protected class.\textsuperscript{200} Another reason retaliation cases are dismissed is because the plaintiff cannot prove that she had a reasonable belief that harassing behavior had reached the level of being severe or pervasive to qualify as illegal harassment.\textsuperscript{201} In these cases, the employee complains to management because a co-employee or supervisor had made an offensive comment, and she is subsequently terminated for complaining. Her retaliation claim will likely fail because a court will hold that she did not have a reasonable belief that one offensive comment constituted illegal harassment.

Consider this real-life example. The plaintiff complained of a racially offensive comment and was subsequently fired.\textsuperscript{202} The comment came when the news broke in October 2002 that police in Maryland had captured two black men suspected of being the snipers who had randomly shot and killed several individuals.\textsuperscript{203} One of plaintiff’s co-workers was watching the coverage on television and stated, “They should put those two black monkeys in a cage with a bunch of black apes and let the apes f—k them.”\textsuperscript{204} The plaintiff, who is black, was offended and reported the comment to management.\textsuperscript{205} Management fired the complaining employee.\textsuperscript{206} The court affirmed the district court’s opinion dismissing the case, stating that no reasonable person could have believed that the single offensive comment created a hostile work environment.\textsuperscript{207} I agree with the court that one racist comment does not create a hostile environment, but how is a non-lawyer supposed to know or understand that harassment needs to be severe or pervasive before a person can legally complain about it and be free from retaliation? Perhaps more importantly, is it not completely reasonable for an employee in the plaintiff’s shoes to want to complain about such an offensive racist comment? Employers often encourage such early reporting of harassing comments and behavior; allowing these employers to terminate employees because of complaints they encouraged seems egregiously unfair. If our retaliation laws do not protect such early disclosures of offensive behavior, at least this statute will.

\textsuperscript{200} See EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 441–42 (6th Cir. 2006) (noting that obesity, without more, is not a disability); Nedder v. Rivier Coll., 944 F. Supp. 111, 118 (D.N.H. 1996) (finding that plaintiff failed to show that her obesity substantially limited her ability to work).

\textsuperscript{201} See Brake, supra note 73, at 80, 82, 93, 99–101.


\textsuperscript{203} Id. at 336.

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 337.

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 341.
Furthermore, in cases where an employee is complaining of offensive behavior directed at others, this statute would protect this valuable behavior. In *Wimmer v. Suffolk County Police Department*, a police officer filed a discrimination claim under Title VII alleging that he was wrongfully terminated for complaining about the discriminatory treatment of minority non-employees by his co-workers. The court held that the officer's retaliation claim was "not cognizable under Title VII because his opposition was not directed at an unlawful employment practice of his employer" and noted that because Wimmer did not introduce evidence that minority employees of the Department felt that they worked in a racially hostile environment, Wimmer could not reasonably have believed that he was protesting an unlawful hostile work environment. Other scholars have argued that employees who complain in these circumstances deserve to be protected from discrimination. Professor Brake, for instance, argues that it is helpful to have persons outside the protected class challenge the discrimination because they are less likely to be perceived as overreacting or self-interested. Professor Estlund has also discussed the value of "intergroup amity and empathy." Estlund described a case where several white male police officers joined together to demand that their supervisor, who was racially and sexually abusive, be disciplined. Their decision to stand up for their co-workers led to the employer's harassment, threat to discharge them, and other retaliatory actions. Their subsequent lawsuit was dismissed. As Estlund stated, "Nothing could be more at odds with the vision of workplace cooperation and solidarity . . . ." This statute would also change the result of the case discussed earlier where the plaintiff alleged he was fired for stating, "Blacks have rights too." The court criticized the plaintiff's "sickly" protest because he did not make a more formal complaint to his boss. Contrary to that court's opinion, I do not think retaliation protection should be based on the bravado of the plaintiff. There are many reasons why an employee in the plaintiff's position may have been unwilling.

208. 176 F.3d 125 (2d Cir. 1999).
209. Id. at 135–36.
210. See, e.g., Brake, supra note 73, at 98 (stating that the law should protect those who complain of discrimination even if they are not the targets).
211. Id. at 72.
212. ESTLUND, supra note 91, at 146.
213. Id.
214. Id.
215. Id.
216. Id.
217. Bigelow v. Bullard, 901 P.2d 630 (Nev. 1995); see supra notes 64–73 (discussing this case).
218. Bigelow, 901 P.2d at 632.
219. Id. at 634 n.4.
ing to formally protest his employer's discriminatory practices against potential customers—the most notable (and obvious) being fear for his job. As long as the plaintiff does not spend her day complaining constantly in a loud, disruptive fashion, the complaint should be protected, provided it is regarding behavior of another employee or agent of the company that a reasonable person would find offensive, harassing, or discriminatory.

6. Refusal to Engage in Offensive Behavior

The employee's refusal to engage in behavior that the employee reasonably believes is offensive or morally wrong, when such refusal does not harm the employer's legitimate business interests.

This would protect an employee's desire to avoid behavior that the employee reasonably finds offensive. As an example, in one Arizona case, the plaintiff was allegedly fired because she refused her supervisor's request during a rafting trip to engage in public nudity by participating in a skit where they all had to "moon" the audience. The court in that case held that because the mooning skit could possibly be a violation of a public nudity statute, she had a public policy claim, but even if the behavior was not arguably illegal (and in fact would likely never be prosecuted), she still should have the right not to be fired for refusing to engage in behavior that she finds offensive, demeaning, or morally reprehensible.

This provision inevitably implicates the debate over "conscience" clauses—statutes that allow healthcare workers to refuse to treat a patient in a way they find amoral or allow a pharmacist to refuse to dispense contraceptives because he objects on moral or religious grounds. While some authors object to these conscience clauses because they erode employment at-will, one need not dive into this debate for purposes of this Article's proposed statute because this provision is not as broad as the typical conscience clause. One problem with conscience clauses is that they directly implicate an employee's main job duties—usually the provision of medical services. In fact, one of the main criticisms of conscience clauses is that they are absolute—they protect an employee even if he refuses to perform the most


221. Wagenseller, 710 P.2d at 1029.

222. Id. at 1035.

223. While these used to be limited to the refusal to participate in an abortion, it has been broadened to include all medical services. James A. Sonne, Firing Thoreau: Conscience and At-Will Employment, 9 U. Pa. J. Lab. & Emp. L. 235, 240 (2007).

224. Id. at 236–37.

225. See, e.g., id. at 238.
essential function of his job. This provision of the ETEA explicitly states that the employee is only protected if his failure to perform the requested task does not affect the business interests of the employer. Certainly, an employee's refusal to perform a job function would affect the employer's business interests. Instead, this provision is meant to protect extracurricular activities, like the mooning skit in the Arizona case.

C. Terminations that Harm the Public's Interest

1. Refusal to Commit a Crime

The employee's refusal to engage in conduct that a reasonable person could believe violates a federal or state law.

Under current law, the employment at-will doctrine has been subject to a public policy exception if an employee's termination is because the employee refuses to commit or participate in an illegal or wrongful act. While some courts require that the act must actually be illegal for an employee to claim retaliatory discharge, other courts only require the employee to reasonably believe that the act is illegal to sustain a claim for retaliatory discharge. Because courts have been inconsistent in applying this exception and because this statute would

226. Id. at 284.
227. See id. at 278 (arguing that public policy claims based on conscience objections are different than typical conscience clauses because they involve behavior other than the essential functions of the job).
228. See, e.g., Negron v. Caleb Brett U.S.A., Inc., 212 F.3d 666, 670 (1st Cir. 2000) (holding that discharge was actionable when a chemist repeatedly refused to make illegal changes to laboratory results and certificates that would have jeopardized her chemist's license); Haney v. Aramark Unif. Servs., Inc., 17 Cal. Rptr. 3d 336, 350 (Cal. Ct. App. 2004) (holding that an employee's allegations that he was terminated for complaining about and refusing to participate in the employer's fraudulent billing practices were sufficient to state a claim for retaliatory discharge in violation of public policy); Allum v. Valley Bank of Nev., 970 P.2d 1062, 1066-67 (Nev. 1998) (stating that discharge was actionable when the employee refused to become involved in making loans that violated Federal Housing Administration regulations).
229. See, e.g., Clark v. Modern Group Ltd., 9 F.3d 321, 332 (3d Cir. 1993) (applying Pennsylvania law, the court held that an at-will employee does not state a recognizable claim of wrongful discharge when his termination is based on a disagreement with management about the legality of a proposed course of action unless the action the employer wants the employee to take actually violates the law). But see Dunn v. Enterprise Rent-A-Car Co., 170 S.W.3d 1, 9 (Mo. Ct. App. 2005) (holding that it was not necessary for a terminated employee to "allege or prove conclusively the law ha[d] been violated" in order to state a claim for wrongful discharge under the public policy exception to employment at-will when he reasonably believed his conduct was illegal or against a clear directive of public policy (citation omitted)); Gabler v. Holder & Smith, Inc., 11 P.3d 1269, 1277-78 (Okla. Civ. App. 2000) (holding the discharge was actionable when the employee refused to produce university parking passes without the university's permission, which the employee believed (falsely) to be illegal).
supersede the violation of public policy claim, protection is warranted here.

2. Domestic Violence Victim

The employee's status or potential status as a victim of a crime of violence, unless the employer has a reasonable, fact-based, good-faith belief that the employee's presence at work will likely lead to violence in the workplace and there are no reasonable measures that can be taken to mitigate the threat of violence.

This, of course, is meant to cover the situation where employees are terminated for being victims of domestic violence, and these terminations happen more often than most people realize. Employers terminate victims of domestic violence for many reasons. Sometimes, the employee is terminated because of absenteeism or productivity issues. Sometimes, the victim is terminated because of an employer's visceral reaction against domestic violence victims. In my experience, the victim is often terminated because the employer fears that the victim's abuser will come into the workplace to harm the victim or others, and the employer is unwilling to deal with that risk. While it is true that sometimes there is a real and substantial risk that the abuser will harm his victim or others in the workplace, I believe many employers jump to that conclusion rather hastily without thoroughly analyzing the situation. For instance, in Green v. Bryant, discussed supra section III.A, the plaintiff's employer fired her almost immediately after she told her employer that she had been beaten and raped by her estranged husband. Even if the reason for her termination was the fear of violence in the workplace, it is not clear from the facts of the case that the employer did any investigation at all. Instead, as in many cases, the employer just assumed that the victim's estranged husband posed a threat to the workplace and it fired her to get rid of the threat. I believe such terminations are
offensive to not only the employee's dignity but are also harmful to
the public's interest because the public has an interest in preventing
the harm caused by domestic violence and the harm caused by termin-
ating a victim of domestic violence.

However, as I have argued elsewhere, it is not always safe or sensi-
tile to keep an employee who is the victim of domestic violence if there
is a serious threat that violence will ensue, and no reasonable mea-
Sure can be taken to mitigate the harm. There are certain situa-
tions where it is impracticable for an employer to retain an employee
when the risk of violence is so great. Unless an employer takes on
the astronomical expense of a locked down building with around-the-
clock security, the only reasonable solution may be termination.

cause it assumed she would be unable to continue to carry out her duties if she
was suffering from abuse. In my opinion, both of those latter reasons would actu-
ally be more egregious than terminating her because of the potential risk to the
workplace.

In fact, this provision could have just as easily been placed with the provisions
concerning the dignity of the employee. Many believe such actions by employers
are a form of sex discrimination, and although I find support in such a proposi-
tion, I believe this claim is better situated as one that harms the public because
the public has an interest in eliminating the harm associated with terminating
the victim of domestic violence.

See Porter, Victimizing the Abused, supra note 78, at 321.

The public has an interest in employers addressing domestic violence
. . . . [O]ne can see how failing to address workplace domestic violence
may force more women out of the workforce, thus increasing the demand
for public assistance and social services. Firing the victims would also
harm the public's interest . . . . By depriving or preventing women from
achieving the economic independence needed to leave their batterers,
employers may unknowingly force victims back into their abusers' lives,
thereby perpetuating the cycle of violence . . . . [E]mployers have a public
interest obligation to assist victims of domestic abuse because "abuse
perpetuates the societal subordination and objectification of women."

Id. (footnotes omitted) (quoting Jill C. Robertson, Addressing Domestic Violence
in the Workplace: An Employer's Responsibility, 16 LAW & INEQ. 633, 654 (1998)).

Id. at 327-28.

Imagine this scenario: the employer finds out that the employee is being abused
by an intimate partner. It discovers that the abuser has a history of violence,
involving victims other than those with whom he is in a relationship, and he has
made threats to the employee that he will kill her. He also owns a gun. The
employer offers its assistance to help her leave him and get her to safety, includ-
ing finding a shelter, providing a paid leave of absence, and/or transferring her to
an out-of-state location. She not only refuses all such help but also tells the em-
ployer that she will stay with him, and when asked to keep them apprised if he
makes any threats involving the workplace again, she flatly refuses. Under these
facts, an employer would be foolish to not fire the victim. It could be liable in tort
law if it refused to fire her and her abuser harmed somebody in the workplace.

See generally id. at 327-28 (discussing when terminating a victim of domestic
violence is warranted).
Having said that, most abusers do not pose a significant threat to the victim’s workplace. Most abusers are violent to only their loved ones and are not threatening to others outside of their intimate relationships.243 Furthermore, most abusers like to keep their violent relationships private.244 Accordingly, because the threat of violence is uncertain at worst, and unlikely at best, I have recommended elsewhere that employers borrow from the law of the ADA and use a “direct threat” analysis to determine if the employee’s abuser poses a serious threat to the workplace.245 In other words, an employer should not terminate a domestic violence victim unless it has determined that there is a serious and imminent threat to the workplace if it continues to employ the victim, and the employer cannot mitigate the risk of harm by offering the victim reasonable accommodations that do not pose an undue hardship on the employer.246

3. Whistleblower

The employee’s disclosure that the employee has information or a reasonable belief that the employer or an employee of the employer has violated, is violating, or will violate local, state, or federal statutes provided that the disclosure is made to the employer or a representative of the employer whom the employee reasonably believes is in a managerial or supervisory position, and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the state’s statutes or the complaint is made to an employee of a public body or political subdivision of the state or any agency of a public body or political subdivision.247

In legal, academic, and business circles, the topic of whistleblowing has received heightened attention because of corporate scandal and the need for employee protection.248 Some state legislatures have en-
acted private sector whistleblowing statutes enabling employees to bring a cause of action when they are terminated for "blowing the whistle" on illegal business activities that are contrary to public policy.249

Accordingly, this prohibition would protect employees who report illegal behavior of the employer or its employees, like in the Foley case where a bank employee reported that his supervisor was being investigated for embezzlement from his former employer:250 In that case, the court held that the behavior was not protected because reporting the prior criminal activity by the supervisor only benefited the company and not the public at large.251 I think this is a ridiculous distinction. Foley reported the information regarding the embezzlement investigation of the supervisor because he thought his employer would want such information. He should not be punished for misunderstanding his employer’s ethics in this regard. The other distinction sometimes made by courts is that employees are only protected if they report to a public agency but not if they report misconduct internally within the company.252 This statute is intended to cover both situations because both situations represent behavior that should be encouraged, rather than discouraged.

4. Civil Rights and Duties

The employee’s engagement in any of the following:

   a) Exercise of rights under the worker’s compensation statutes of the state;253

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249. See Cavico, supra note 248, at 547; see also Massingale, supra note 20, at 194 ("A number of states recognize an employee’s right of action for wrongful discharge under the whistleblowers exception. These states have recognized the desirability of protecting workers who are willing to speak out against dangerous conditions and illegal activity carried on by co-workers or employers.") (footnote omitted).

250. Foley v. Interactive Data Corp., 765 P.2d 373, 375 (Cal. 1988); see Linzer, supra note 23, at 382–83 (suggesting a balancing test to address competing factors at play in a whistleblower case to determine if discharged employee was wrongfully terminated).

251. Foley, 765 P.2d at 380.

252. See Slater, supra note 2, at 97.

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b) Service on a jury; or 

c) Exercise of voting rights.

This last set of prohibitions is derived from public policy claims and in fact, is the one area that most state courts would agree should be protected by public policy claims. However, because states vary in their approach to these claims and because the ETEA would preempt any state public policy claims, they need to be included here.

D. State vs. Federal

A statute’s substantive provisions are only as good as the procedures for enforcing them. In deciding on the procedures for this statute, I first needed to decide whether the proposed statute should be a model for states to adopt if they so choose, or a proposal for a federal statute. This decision involved several considerations. Having a federal statute would greatly increase consistency between states. Nationwide companies would benefit from this consistency because they could have standardized rules. Furthermore, a federal statute would eliminate states having to compete for an employer’s business. The Model Employment Termination Act, as a model for states to adopt, was not at all successful. Accordingly, because the problems with at-will employment cannot be solved if few or no states adopt the ETEA, it should be a federal statute.

One concern with a federal statute is whether state employees could sue their employers for money damages. This is a question of

254. See Call v. Scott Brass Inc., 553 N.E.2d 1225, 1226 (Ind. Ct. App. 1990) (at-will employee was terminated because the employee complied with the statutory duty to appear for jury service); see also Massingale, supra note 20, at 192 (stating that courts have protected rights conferred on employees by statute and discussing the decision of Nees v. Hocks, 536 P.2d 512 (Or. 1975), whereby “an employee was discharged for serving on a jury over the employer’s objections” and the court “reasoned that not only had the plaintiff’s individual statutory rights been infringed, but the termination also violated community purpose and societal interest”).

255. See, e.g., Gill v. Farm Bureau Life Ins. Co. of Mo., 715 F. Supp. 945, 945 (E.D. Mo. 1989) (employee discharged for supporting political candidate); MacDougall v. Weichert, 677 A.2d 162, 164 (N.J. 1996) (plaintiff terminated as a sales person for real estate firm when he voted, as a member of a local municipal governing counsel, for a parking ordinance opposed by a client of the real estate firm).

256. These provisions are also derived from the Arizona statute, Ariz. Rev. Stat. Ann. § 23-1501 (West 2007), and would likely be covered by many states’ judicially derived public policy claims.

257. See Model Employment Termination Act, 7A U.L.A. 305, introductory cmt. (2002); Rives, supra note 87, at 564 (noting that it is difficult for multi-state employers to fashion consistent rules when state law varies so much between states).

258. See Model Employment Termination Act, 7A U.L.A. 305, introductory cmt. (2002); see also McGinley, supra note 9, at 1508 (suggesting that individual states compete with one another to attract business).
constitutional law, specifically, Eleventh Amendment immunity. While a detailed analysis is beyond the scope of this Article, it is likely that the current Supreme Court would find that this statute does not abrogate states' Eleventh Amendment immunity, which means public employees would not be able to sue their state employers for money damages. However, protecting public employees is not as urgent as protecting private employees because public employees are not employees of multi-state employers, and many are subject to civil service rules that offer protection against termination.

E. Procedural Matters

1. Unique Procedural Mechanism: Choose Your Statute

As will be discussed later, one of the most significant criticisms this proposal will likely receive is the assertion that it will be too expensive for employers and will interfere with their ability to run their businesses as they see fit. These concerns will be addressed in more

259. The Eleventh Amendment of the United States Constitution precludes individuals from suing states in federal court without the state's consent. The Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. There are several exceptions to the Eleventh Amendment immunity doctrine; one is that Congress can abrogate the states' sovereign immunity if it made its intention to do so very clear in the language of the statute and the law abrogating the states' immunity must have been adopted pursuant to Section 5 of the Fourteenth Amendment rather than Congress' Article I powers. CHRISTOPHER N. MAY & ALLAN IDES, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 177 (4th ed. 2007). The first requirement could be easily met by clearly stating in the ETEA that Congress intends to abrogate states' immunity and allow individuals to sue state employers for money damages alleging a violation of the ETEA. However, the second requirement is not so easily met. It is not enough for Congress to state that it is enacting the ETEA pursuant to Section 5 of the Fourteenth Amendment rather than Congress' Article I powers. Id. at 178-79. "[T]he abrogation must be both 'congruent' and 'proportional' to the actual violation of judicially recognized Fourteenth Amendment [Section] 1 rights." Id. at 179. In other words, "Congress must identify a pattern of state violations of a judicially recognized constitutional right, create a statute that is plainly designed to ameliorate the violation of those constitutional rights, and devise a remedy that is tailored to the demonstrated pattern of state-induced constitutional violations." Id. Because the prohibitions in my proposed statute vary greatly and because many of them do not prohibit behavior that would be seen as an equal protection violation under the Fourteenth Amendment, I think it unlikely that a federal court would find that Congress had properly abrogated a state's Eleventh Amendment immunity. Accordingly, the ETEA would likely not be enforceable against a state employer in a suit for money damages.

260. See MODEL EMPLOYMENT TERMINATION ACT Act § 1 cmt. at 309 (2002) (explaining why the definition of employer in that statute can exclude public employers); Slater, supra note 2, at 30 (noting that the majority of public employees are covered by just cause rules).
detail below. If, in fact, this statute became one more claim for plaintiffs to add to their complaints, the financial concerns of employers would be legitimate. To address this concern, this proposal protects the interests of employers through a unique procedural mechanism utilized by this statute. The ETEA requires the plaintiff to choose between a suit under this statute and other statutory claims. After the close of discovery, the plaintiff would be forced to dismiss either her claim under the ETEA or her other statutory claim(s).

There are two justifications for employing this procedural requirement in the statute. First, the purpose of the ETEA is not to give employees an additional cause of action to challenge an unfair termination; the purpose is to give employees a cause of action when they otherwise would not have one. Accordingly, this statute is not meant to take the place of Title VII or other federal or state statutes that give employees the right to sue for an unlawful termination. In this way, this proposal differs from other proposals that recommend a national statute that abolishes Title VII and other employment discrimination statutes. If an employee, through discovery, has uncovered decent evidence that the decision to terminate her was discriminatory, she does and should have a good chance of succeeding in her discrimination claim, and she should drop her claim under the ETEA and pursue the claim that provides the fullest panoply of remedies.

If, however, discovery reveals that the reason the employer has given for her termination is likely untrue or is egregious enough to fall into one of the prohibited categories of terminations but there is no evidence of discrimination, the plaintiff should drop her discrimination or other claims, and pursue the ETEA claim. She will not be entitled to as much in damages, but if she was likely going to lose her discrimination case anyway, she would be better off pursuing the ETEA claim. I realize that this decision is not always going to be easy for plaintiffs and their attorneys to make. Most plaintiffs do not have a crystal ball to determine what a jury might do with either/any of the claims the plaintiff has brought. Nevertheless, after discovery is completed, most plaintiffs do know what documents exist, what various witnesses would say, and the quality and credibility of their testimony. Most attorneys know when they have a strong discrimination case and when they should settle. Here, they have a third option—to pursue a claim under the ETEA if there is evidence that the termination decision might fall into one of the prohibited categories or if the employer's stated reason for termination seems suspicious.

261. See infra section V.A.
262. See McGinley, supra note 9.
263. Obviously, it is this author's hope that simply having these prohibitions in place would go a long way toward stopping these kinds of terminations.
The other reason this procedural requirement is necessary is because it gives employers something in return for the discretion and freedom it takes away from them by prohibiting certain terminations that might not otherwise be prohibited. As the law stands right now, when a terminated employee brings a discrimination claim or a wrongful discharge claim, employers are often left with the risk of (sometimes unlimited) compensatory and punitive damages. As discussed below, this statute does not allow for compensatory or punitive damages; accordingly, if an employee chooses the ETEA claim rather than the discrimination claim, the employer can usually determine with a fair amount of certainty how much liability it faces if it loses the lawsuit. The fear of sympathetic judges or juries is gone. Therefore, with the choose your statute provision, the employer might have to defend more lawsuits initially, but those lawsuits carry a much smaller risk of liability than do discrimination or public policy claims.

2. A Word About Burdens

As stated in the Introduction, one of the goals of this proposal was to provide some overlap protection with discrimination statutes already on the books by using a procedural process that will be more easily accessible to employees. The reason such protection is needed lies in the difficulty of proving discrimination. In most cases, a plaintiff needs to prove that the employer's intent was to discriminate based on one of the protected categories. The Supreme Court made

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265. See Fischl, *supra* note 22, at 183–84 (arguing that the burdens of proof make it difficult to prove discrimination in part because it is hard to prove intent to discriminate).

266. See Wards Cove Packing Co. v. Attonio, 490 U.S. 642, 670 (1989) ("In a disparate-treatment case [of employment discrimination,] there is no 'discrimination'
this burden even more onerous when it decided *St. Mary's Honor Center v. Hicks*.267

In *Hicks*, a long-time employee made out a prima facie case of race discrimination, alleging that he was fired by a new boss because of his race.268 The employer defended by stating the firing was for performance problems, shifting the burden back to the plaintiff to prove that the employer's reason was simply a pretext for discrimination.269 The district court held that even though the plaintiff proved that the defendant's articulated reason of poor performance was false, the district court did not think that discrimination was the reason that motivated the defendant.270 Instead, the court believed that the plaintiff's supervisor was motivated by personal animosity toward the plaintiff.271 The Supreme Court upheld the district court's decision, stating that it is not enough that the plaintiff prove that the defendant's reason was false; he also must prove that discrimination was the real reason.272 Of course, both the district court and the Supreme Court failed to acknowledge or realize that the personal animosity of the supervisor might have been caused by racial prejudice.273

One of the biggest criticisms of the *Hicks* decision was that it seemingly allowed, and perhaps even encouraged, an employer to lie about the reason it terminated an employee.274 The decision also made the plaintiff's burden very difficult. The plaintiff must not simply disprove the defendant's articulated reason for the termination; she must also prove that discrimination was the real reason.275 As the dissent pointed out in *Hicks*, this involves disproving all other possible rea-

267. 509 U.S. 502 (1993); *Estlund*, supra note 91, at 150 ("In the typical Title VII case, the plaintiff must prove not simply that the decision against him or her was not justified, but that it was motivated by race or sex.").

268. *Hicks*, 509 U.S. at 504–06.

269. *Id.* at 507–08.

270. *Id.* at 508.

271. *Id.*

272. *Id.* at 514–15.

273. *Id.* at 542–43 (Souter, J., dissenting).

274. *Id.* at 539–40 (Souter, J., dissenting); Slater, *supra* note 2, at 63 n.51 (citing authors that criticized *Hicks*). Of course, employers should and usually do attempt to put their best defense forward and, therefore, have an interest in presenting a defense that they can prove. But when a supervisor takes matters into his own hands and terminates without a good reason, the *Hicks* precedent allows employers to fabricate a reason for the termination if they think that giving the real reason will not be well received by the court or the jury.

sons, even if those reasons were never clearly articulated by the defendant but rather were only alluded to in the record.\textsuperscript{276} Other scholars have argued that this difficulty in proving the defendant's motive results in many unsuccessful claims.\textsuperscript{277} Accordingly, to make my proposed statute more accessible for plaintiffs and as a quid pro quo for giving up their right to sue under other statutes, this statute's burden of proof varies from that under Title VII and most other anti-discrimination statutes.\textsuperscript{278}

Under this statute, initially the plaintiff only would have to allege that she was terminated.\textsuperscript{279} The employer would then have the burden of coming forward with its reason for termination. Finally, the plaintiff will have the burden of proving that the employer's reason is pretextual.\textsuperscript{280} Unlike discrimination law, however, if the employee proves pretext, then it is assumed that the employer's real reason must have violated the statute and, therefore, the plaintiff would win. In this way, employers cannot avoid liability by alleging false rea-

\textsuperscript{276} Id. at 534–35 (Souter, J., dissenting).
\textsuperscript{277} See, e.g., Slater, supra note 2, at 58–59 (arguing that it is difficult for a plaintiff to disprove all of the employer's possible reasons).

\textsuperscript{278} Many states have their own anti-discrimination statutes, but most of them, as well as other federal anti-discrimination statutes (such as the ADEA and the ADA), follow Title VII procedural law. See, e.g., State v. Comm'n on Human Rights & Opportunities, 559 A.2d 1120, 1123–24 (Conn. 1989); Hac v. Univ. of Haw., 73 P.3d 46, 55 (Haw. 2003); Lavani v. Ill. Human Rights Comm'n, 755 N.E.2d 51, 64 (Ill. App. Ct. 2001); Ind. Dep't. of Envtl. Mgmt. v. West, 838 N.E.2d 408, 413 (Ind. 2005); Bd. of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n, 584 N.W.2d 252, 255 (Iowa 1998); Ortega v. IBP, Inc., 874 P.2d 1188, 1196 (Kan. 1994); Venable v. Gen. Motors Corp., 656 N.W.2d 188, 190 (Mich. Ct. App. 2002).

\textsuperscript{279} Admittedly, this is a very easy burden for the plaintiff to meet. I considered requiring the plaintiff to state the alleged reason for the termination, but in most cases, the plaintiff does not know the reason. Most employees who are terminated and feel the termination was unfair do not know the specific reason for the termination. Furthermore, I think the employer should have to play its cards first. It did the terminating—it should be able to give a reason without having its reason influenced by what the plaintiff believes is the possible reason for the discharge. Cf. McGinley, supra note 9, at 1513 (stating that the employer should have the burden of persuasion under her proposed statute because the employer has exclusive control over the information regarding termination). The statute would also allow a plaintiff to sue if she quit as long as she can meet the constructive discharge test. See infra subsection IV.E.6.b.

\textsuperscript{280} The statute should also contain a "mixed-motive" provision based on Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(2)(B) (2000). That Section provides that remedies are limited to injunctive relief and attorneys' fees, but not reinstatement and back pay damages, if the employer can prove that despite its illegal motive, it would have made the same decision to terminate even absent the unlawful motive. The Model Employment Termination Act contains a similar mixed-motive instruction. \textit{Model Employment Termination Act} § 6(f), 7A U.L.A. 318 (2002).
They are forced to give the true reason for the termination.  

3. Notice Provision

The ETEA should require an employee, within a reasonable time period after termination (perhaps six months), to inform her employer of her intent to sue under the statute. The employer would then be required (within thirty days) to provide in writing the reason(s) for the employee's termination as well as any supporting documentation, including anything from the employee's personnel file that would be used to support the termination decision. In this way, employers are given the chance early-on to question the decisions made by their supervisors and managers and can remedy an unwarranted termination if it is discovered that the manager or supervisor acted in his or her own interests rather than the best interests of the company.

281. See Slater, supra note 2, at 64 (stating "it seems fair that a party loses if it lies in litigation about its act that harmed another party.").

282. In cases where the defendant is motivated by personal animosity, as in Hicks, the employer has a choice. It can either admit that reason and deal with the potential backlash of the jury, who is unlikely to be sympathetic to an employer who allows its supervisors to vent their personal animosity on their subordinates, Rutherglen & Donahue, supra note 189, at 85, or it can fabricate a reason and pay the consequences if the jury does not believe the fabricated reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 537 (1993) (Souter, J., dissenting) (“It may indeed be true that such employers have nondiscriminatory reasons for their actions but ones so shameful that they wish to conceal them.”).

283. There are several issues that arise regarding the written notice that the employer would be required to provide. One issue is the effect the writing would have on subsequent litigation. Would this writing be admissible in court? Certainly, if the employer has not changed the reason (which occasionally does happen legitimately if the company does not have very good oversight over supervisory termination decisions), the employer would be well served by admitting the writing into evidence itself. But if the employer has changed its reason because it learns that the initial, hastily given explanation (often without a lawyer's advice and without much research into the facts of the discharge) is not the real reason the plaintiff was fired, can that document be used against the employer? If so, will forcing the employer to turn over such a document be a pointless exercise because many employers would be tempted to use vague language that could be later adapted to suit many different possible explanations for the termination? If this happened, then the notice provision would not serve a very useful purpose. Regardless of the ultimate answers to these questions, I remain committed to the idea that employers and employees are better served if they learn early on the reason for a termination decision. As always, the "devil is in the details" but diving into those details is beyond the scope of this Article.

284. This notice provision finds support from a couple of places. First, the Model Employment Termination Act also requires an employer to give written notice of the reasons for termination. See Model Employment Termination Act § 5(b), 7A U.L.A. 316 (2002). Some states have similar notice provisions. For instance, Missouri has a statute requiring employers to provide a letter to a discharged employee (upon the employee's request) explaining what reason the employer had for discharging the employee. Mo. Ann. Stat. § 209.140 (West 2008).
ployees benefit from this notice provision because it might induce reinstatement and/or settlement, and they learn very early-on (before the expense of discovery) the alleged reason for the termination. Sometimes, this is all employees want—an explanation. It might also be helpful to include a grace period whereby no damages would be allowed if an employer offers unconditional reinstatement within thirty days of the notice to sue.

4. Remedies

This statute is not intended to supersede other statutory claims (including discrimination claims); rather, the purpose of the ETEA is to give terminated employees something akin to a breach of contract action using this statutory procedure. The ETEA is also intended to be a compromise statute because it would be, in today’s political climate, close to impossible for a plaintiff-friendly statute to see the light of day. For these reasons, the remedies provided by the ETEA are not as broad as the remedies available under other statutory claims or under wrongful discharge common law claims. For purposes of this Article, I use Title VII as the primary comparator, but certainly there are other statutes that provide broad remedies, including the ADEA, the ADA, state anti-discrimination statutes, as well as countless others.

Under Title VII, possible remedies include reinstatement with retroactive seniority, back pay, injunctive relief, compensatory damages (for pain and suffering), and sometimes punitive damages. For some claims brought under Title VII, compensatory and punitive damages are capped according to the size of the employer but cannot exceed $300,000. Under some state anti-discrimination statutes, the compensatory and punitive damages are not limited at all. Similarly, under state wrongful discharge claims based on public policy violations, damages for compensatory and punitive damages are unlimited.

In contrast, the remedies available under the ETEA would be limited to the types of damages a party can ordinarily be awarded in a breach of contract action. These damages are frequently described as “expectation damages,” the goal of which is to place the injured party

287. See, e.g., CAL. GOVT. CODE § 12965(c)(3) (West 2008); MASS. GEN. LAWS ANN. ch. 151B § 9 (West 2007); Baker v. John Morrell & Co., 382 F.3d 816, 827 (8th Cir. 2004) (noting that the Iowa Civil Rights Act has no cap on damages); Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 572 (3d Cir. 2002) (stating that there is no cap on damages under Pennsylvania’s statute that governs employment discrimination claims).
in the place he would have been had the contract been performed in full.\textsuperscript{288} If an employee is terminated, expectation damages would seek to put the employee in the position he would have been in had he not been terminated. This would include reinstatement, back pay damages awarded from the time of termination until the time of judgment (reduced by any amount the plaintiff earned or could have earned through reasonable efforts), and possibly front pay if the court determines that the terminated employee legitimately could not find work and may not be able to for some time in the future.\textsuperscript{289}

While attorneys' fees are ordinarily unavailable in a breach of contract action,\textsuperscript{290} they should be recoverable if a plaintiff prevails in an action under the ETEA. Because the statute does not provide for compensatory or punitive damages, plaintiffs' attorneys would likely not take cases on a contingency basis because the amount of recovery is likely to be small.\textsuperscript{291} This would result in those in need of representation the most, the rank and file employees who are unlikely to be able to afford an attorney out of pocket, being unable to get representation.\textsuperscript{292} This is also true, of course, with breach of contract cases, but the ETEA claims involve more of a public interest element, which justifies treating them differently. Accordingly, the ETEA should provide for attorneys' fees to plaintiffs who prevail.

5. \textit{Forum: Arbitration vs. Courts}

Most proposals to change or eliminate the at-will presumption suggest that the adjudication of claims should take place by arbitrators.\textsuperscript{293} The reason for this suggestion is both obvious and compelling. Labor arbitrators have been deciding discharge cases under collective bargaining agreements for decades and are, thus, very familiar with the "just cause" standard. Furthermore, arbitrators recently have begun adjudicating cases that are claiming a statutory violation rather than a violation of a collective bargaining agreement.\textsuperscript{294} As a compro-

\begin{itemize}
    \item \textsuperscript{288} \textit{Farnsworth, supra} note 20, § 12.8, at 758.
    \item \textsuperscript{289} The Model Employment Termination Act limits front pay damages to a maximum of thirty-six months, \textit{Model Employment Termination Act} § 7(a)(3), 7A U.L.A. 319 (2002), which seems a reasonable limit.
    \item \textsuperscript{290} \textit{Charles L. Knapp} & \textit{Nathan M. Crystal, Problems in Contract Law: Cases and Materials} 962 (3d ed. 1993).
    \item \textsuperscript{291} \textit{See} Fischl, \textit{supra} note 22, at 203 (arguing that most discrimination suits are brought on contingency fee arrangements).
    \item \textsuperscript{292} \textit{See Model Employment Termination Act}, 7A U.L.A. 303, introductory cmt. (2002) (explaining that attorneys fees are needed under that statute because otherwise most rank and file employees could not find representation).
    \item \textsuperscript{293} \textit{E.g.}, \textit{St. Antoine, supra} note 9, at 77–78; \textit{McGinely, supra} note 9, at 1510–11; \textit{McGowan, supra} note 9, at 183.
    \item \textsuperscript{294} Some employers have begun requiring employees to sign agreements to arbitrate all disputes arising out of the employment relationship. Because these employers do not usually have just cause contracts with these employees, the disputes sub-
mise for requiring employers to give up their right to fire at-will, most
commentators assume (correctly) that employers would prefer arbitra-
tion over litigation in court. Arbitration is believed to be a faster,
less expensive method for resolving disputes than litigation in court.
Moreover, arbitration takes away the fear of a run-away jury. It is
also a less formal process than litigation in court, which contributes to
its decreased expense. Those who have suggested replacing the at-will
standard with a just cause standard believe it appropriate to give
something to employers in exchange for taking away their right to ter-
minate at-will. That something is the arbitration procedure.

However, arbitration is not without its problems. The most obvi-
ous problem is the way that arbitrators are chosen. Arbitrators are
chosen by both parties—the employer and the terminated employee
(or the union in the case of a collective bargaining agreement). Of
course, this is different than litigation in court, where the parties have
virtually no control over the judge to which their case gets assigned.
Because the parties can choose to use or not use a particular arbitra-
tor, the parties are more likely to hire an arbitrator with whom they
have some experience or about whom they have some knowledge.
Where do they get this experience or knowledge? Most likely, a party
picks an arbitrator because the party has used that arbitrator in the
past and has achieved a good result. If the employer is being repre-
seated by a large law firm, as many employers are, knowledge about
the arbitrator is not limited to the particular attorney handling the
case. The attorney that will be litigating the arbitration does and
should seek information about the potential arbitrators from the other
attorneys in the firm.

It should be obvious that if a defendant-employer is being repre-
seated by a large firm and a plaintiff-employee is being represented by
a small firm attorney or solo practitioner, the employer's counsel is
likely to have much more information regarding the prospective arbit-
trators. Arbitrators are certainly aware of this phenomenon and may
(unintentionally) allow their opinion or judgment to be swayed by the
fact that their livelihood is dependant on the parties choosing them

295. Employers actually supported a statutory elimination of the at-will standard in
Montana, in part because the new "just cause" statute allowed them to avoid liti-
gation by having all disputes resolved in arbitration. See Slater, supra note 2, at
103–04.

296. See Fischl, supra note 22, at 173 (noting that punitive damages are seldom avail-
able in arbitrations).

297. See McGinley, supra note 9, at 1517 (stating that management would benefit
from her proposal to have a national just cause statute with arbitrators hearing
the cases because more employment disputes will be resolved in arbitration,
which is a faster, more cost efficient option than court litigation).
again or at least giving a good reference.\textsuperscript{298} I do not mean to suggest that arbitrators are incapable of making a non-biased decision regarding the merits of the case. However, if making the ultimate factual decision is difficult, it is at least possible that their decision making might be influenced slightly by the need to remain employed in the future by the parties who choose them.

This problem with arbitration does not just harm the employee. Even though I have suggested above that arbitrators might favor employers because they are more likely to be repeat consumers of the arbitrator's services, there are some disadvantages of arbitration to employers as well. The main disadvantage is an arbitrator's tendency to "split the baby" and reinstate an employee without backpay if the arbitrator thinks that the employer was justified in terminating the employee, but because of the employee's length of service and good (or at least not horrible) work history, the employee should be given a second chance.\textsuperscript{299} Under the ETEA, the judge or jury would decide whether a particular termination violated the law. If it did not, the employee's termination would be sustained, as it should be, in my opinion.

Many commentators have suggested the use of arbitration as a compromise because their proposals recommended a just cause standard.\textsuperscript{300} This proposal does not use a just cause standard and is much more lenient to employers than a just cause standard would be, so compromise in the choice of forum is not as necessary. Furthermore, the statute already contains compromise by forcing employees to choose under which statute they sue and limits employees' remedies if they prove a violation of the statute. Accordingly, the arbitration forum is not necessary as a compromise and my recommendation would be that this statute should contain a private right of action by employees in federal or state court.

\textsuperscript{298} McGinley recognizes the possible problem of the employer's potential advantage as a "repeat player" but counters it by stating that "[a]ttorneys representing employees before arbitration panels will establish specialties in the area and will become acquainted very quickly with the habits of members of the arbitration panels." McGinley, \textit{supra} note 9, at 1515. She also advises that for employees not represented by counsel or by a union, the law should require that the employer have representatives who can advise clients in a confidential manner and represent them before the arbitration panels. \textit{Id.} It is unclear to me how these representatives would not be indirectly "controlled" by the employer.

\textsuperscript{299} See \textit{supra} section III.B. Of course, the arbitrators engage in this practice of "splitting the baby" because of long-standing practice under collective bargaining agreements. Perhaps, then, this is not a criticism of arbitration but a criticism of the practices under collective bargaining agreements.

\textsuperscript{300} See sources cited \textit{supra} note 293.
6. Miscellaneous Procedural Matters

a. Minimum Number of Employees

It is obvious that, like other employment statutes, the ETEA could pose a hardship on very small employers who are often unable to afford defending even one lawsuit. Accordingly, I recommend that the ETEA follow the course of Title VII, which only covers employers with fifteen or more employees.\(^\text{301}\)

b. Termination Only (or Constructive Discharge)

As should be obvious from the title of the statute, this statute only covers termination decisions and does not address the myriad of other employment decisions, such as hiring, promotion, demotions, pay increases, or transfers, to name a few.\(^\text{302}\) The reason I chose to only cover termination decisions is because of the significance termination has on employees in the workplace, as the workplace equivalent of "capital punishment."\(^\text{303}\) Many people have their entire identity wrapped up in their job or occupation. For them, termination means not only a loss of regular paychecks, but also "dashed expectations as to future benefits, a loss of character and personal identity, and the loss of the financial security one expected."\(^\text{304}\) Another scholar has said this about termination:

Dismissal affects a person’s economic, emotional, and physical health in ways unparalleled by less drastic forms of discipline or transitory interruptions of work. Not only does dismissal have immediate financial consequences for the discharged worker, it also has an economic impact into the future . . . . The loss of one’s job is felt not only by the individual worker, but by members of his or her family and the community . . . . If the termination is the result of factors other than an employee’s conduct or performance, the loss can be devastating.\(^\text{305}\)

Even though the primary focus of the statute is actual terminations, where an employee is involuntarily terminated or forced to resign, the statute should also contain a "constructive discharge."

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\(^{302}\) Most discrimination claims these days are termination claims because people are reluctant to sue their current employer. See Fischl, supra note 22, at 180.


\(^{304}\) Schmall, supra note 303, at 278.

\(^{305}\) Young, supra note 303, at 353; see also Malin, supra note 5, at 138 (arguing that job loss is one of the most stressful experiences as "it often stifles the moral, mental and material development of the terminated employee and has severe mental and social consequences for her family."). Malin also notes that for many employees, their jobs are the only property they have and the loss of that property can be devastating. Id.
provision to cover situations where an employee quits because the employer has gone to great lengths to make the employee's working conditions so miserable as to force the resignation. This provision is necessary because, without it, employers could avoid liability under the ETEA by not terminating employees but doing everything possible to make their lives so miserable that they will quit. To add such a provision, the statute could define "termination" to include "a quitting of employment or a retirement by an employee induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire." 

V. A RESPONSE TO THE CRITICS

A. Employers' Concerns

Employers' opposition to this statute will likely be for three primary reasons. First, they will argue that by prohibiting so many terminations, I have de facto created a just cause standard that will interfere with their ability to run their businesses autonomously and efficiently. Their second concern would likely be one of cost because of the fear of increased litigation. Finally, some scholars would disagree with this alteration of the at-will standard because the default at-will rule is more efficient.

1. Criticism 1: Just Cause in Disguise

Addressing the first concern, the ETEA will not hinder an employer's ability to run its business as it sees fit. First of all, most employers do not knowingly terminate employees for reasons that are prohibited under the statute. To the extent that individual supervisors or managers are making discriminatory and often morally reprehensible termination decisions, those decisions are often not in the

307. This quoted provision is drawn from the MODEL EMPLOYMENT TERMINATION ACT § 1(8)(iii), 7A U.L.A. 308 (2002).
308. For instance, Richard Epstein has argued that an employer needs the at-will rule to protect itself from employee shirking, misconduct, and opportunistic behavior. Richard A. Epstein, In Defense of the Contract At Will, 51 U. CHI. L. REV. 947, 965 (1984); see also John P. Frantz, Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements, 20 HARV. J. L. & PUB. POL'Y 555 (1997) (arguing that the at-will employment presumption is justified because of its efficiency as compared to a just cause employment presumption).
309. See Phillips, supra note 12, at 469 (1992) (employer unlikely to arbitrarily fire productive workers); Ian Maitland, Rights in the Workplace: A Nozickian Argument, 8 J. BUS. ETHICS 951, 953 (1989) (employees may prefer employment at-will because they believe that most employers do not abuse their discretion).
best interests of the employer as an entity, and employers might benefit from learning through the notice provision requirement that a termination decision was made that does not benefit the employer and most certainly harmed the terminated employee.310

Furthermore, this statute does not create a just cause standard. If the employer has terminated an employee because it wanted to save money, such an action would not violate the statute, yet might not be considered just cause if we were under that higher standard.311 The main difference between this statute and just cause is the burden of proof. Employers would not be required to prove just cause for the termination. They only would have to defend their reason for termination, and their reason cannot have violated one of the prohibitions in the statute. Contrary to what occurs under collective bargaining agreements with just cause clauses, if the employer terminated an employee for misconduct, the statute does not allow a court to consider an employee's length of service. The employees fired for harassing others, cheating and lying, or showing up under the influence of alcohol would not be reinstated. In other words, the employer does not need a really good reason; it simply cannot have terminated for a bad reason—one of the prohibited reasons in the statute. This statute is not meant to interfere with an employer's legitimate interest in running its business as long as the reason for termination is not one of the prohibited reasons.

For those who might think that this statute really is just cause in disguise, consider the following example. In a recent arbitration case, the arbitrator discussed the seven elements to test for just cause.312 They include: (1) notice, (2) reasonable rule or order, (3) investigation, (4) fair investigation, (5) proof, (6) equal treatment, and (7) penalty.313 Under this proposed statute, numbers 2 and 7, and perhaps 3 and 4,

310. Anecdotally, I know from experience that some employers allow such decisions to stand because the supervisor is too valuable to cross (even despite his discriminatory termination decisions), but at least the employer could settle with the discharged employee.


313. Id.
would not need to be proven. The second element, reasonable rule or order, states, "Was the Employer's rules or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?" I do not believe it is an arbitrator's or other fact finder's job to second guess the reason an employer has a particular rule. As long as the employee was on notice of the rule and the rule is not applied in a discriminatory or arbitrary manner, the employer should be able to enforce the rule as it sees fit. With regard to the seventh element, I do not believe an employer should have to take account of an employee's good service when that employee has engaged in conduct that would normally result in termination. Because the ETEA does not require just cause, an employer's burden is clearly less than it would be if it had to prove these seven elements.

2. Criticism 2: Costs of Increased Litigation

In response to an employer's concern regarding increased litigation, I believe that fear is overstated. It is probably true that, initially, more employees would consider filing lawsuits, but as long as the notice provision is working as it was intended, many of these lawsuits could be avoided. First, many employees might realize that the termination decision was warranted once they are faced with the truth about the termination decision. Alternatively, the employer might realize that the termination decision was not in the employer's best interest but rather only benefited some opportunistic manager. In these cases, the employer would likely decide to either reinstate the employee or settle with the employee to avoid litigation. Even if more lawsuits are filed initially, the overall risk of liability is much less because the potential damages are less profitable for employees.

I do not mean to suggest that the fear of increased litigation is meritless. Indeed, courts and employers would be rightfully concerned about the proliferation of lawsuits under the ETEA. While my intuition tells me that, based on some of the procedural provisions in the

314. Id.
315. Sometimes even the notice requirement can be taken too far. Recall the case of the UPS driver who was under the influence of alcohol while working, but because the rules did not explicitly state that it is a violation of the rule to be under the influence of alcohol even though not over the legal limit for drunk driving, the arbitrator reinstated the employee. See supra notes 135–39 and accompanying text. As I stated earlier, an employer should have to give notice of most rules, but some things are just common sense. Most employers do not include a work rule: "You will be fired if you kill a fellow employee," but I would hope that most employees would know that even without an explicit work rule stating it.
316. See supra subsection IV.D.3.
statute, the court overload fear is overstated; I certainly cannot know that with any type of certainty. It might be that a few years after the ETEA was enacted, the courts would be drowning in lawsuits. Because we cannot know that for certain, my advice would be to take a "wait and see" stance. If the overload on courts is really too great, perhaps then we consider some type of arbitration board or specialized court to handle these and other types of employment claims.


Scholars in support of the at-will presumption will argue that at-will is an appropriate standard because it represents the contract term that employees voluntarily choose when entering into employment contracts. In other words, employees must prefer the at-will standard because if they wanted just cause protection, they would bargain for it. Professor J. Hoult Verkerke suggests that the courts should reaffirm the at-will doctrine as a default rule.\(^{318}\) His research of 221 employers in five states concluded that 52% of employers explicitly contract for at-will employment, 33% have no contractual relationship, and 15% contract for just cause protection.\(^{319}\) Professor Verkerke believes that this empirical data strongly supports a reaffirmation of the at-will default rule because an overwhelming majority of employers either explicitly contract for at-will employment or allow for the default rule of at-will employment to apply.\(^{320}\) Moreover, he argues that if employees want protection from the at-will doctrine, they should bargain for just cause protection individually with their employers.\(^{321}\) His theory assumes either that individual employees have the power to bargain with their prospective employers to reach a mutually beneficial contractual agreement, or that absent such power, individual employees will choose to only work for employers who offer just cause protection. Both assumptions are false.

As Professor Slater has pointed out, most employees without just cause protection would never bargain for it.\(^{322}\) Slater points out the absurdity of a low-level employee having the knowledge and courage to ask for a just cause standard. As Slater questions, "Who would write the agreement?" Additionally, what would a manager do if an employee asked for a just cause contract?\(^{323}\) The manager would


\(^{319}\) Id. at 867.

\(^{320}\) Id. at 913.

\(^{321}\) Id.; see also Peter Stone Partee, Reversing the Presumption of Employment At Will, 44 Vand. L. Rev. 689, 702 (1991) (arguing that while some employees do not have bargaining power, many or most do).

\(^{322}\) Slater, supra note 2, at 100; Blades, supra note 109, at 1411 (arguing that individual employees do not have bargaining power to get a just cause contract).

\(^{323}\) Slater, supra note 2, at 100.
probably think it was very odd and very annoying because it would mean that this particular employee would get some kind of special treatment. My guess is that the manager would either refuse to hire the employee, or if he was hired, the employee would have a bad reputation. For all of these reasons, individually bargained-for just cause contracts are practically non-existent (with the possible exception of highly compensated executives), but this does not mean that employees do not value job security.

In response to the second assumption above—that employees will only choose to work for employers who offer just cause—I am not alone in believing such an assumption to be false and even bordering on ludicrous. For instance, Professor Malin argues that an employer's concern over its reputation is not likely to be an effective deterrent. As Malin points out, there are no “consumer reports” rating employers. Some argue that employers do not make arbitrary employment decisions because they are deterred from doing so by the threat of losing employees who would not want to work for such an employer. However, most employees would not choose to leave an employer who discharges arbitrarily because they are not in a financial position to do so.

Commentators also argue that most employees, even if armed with information about at-will employment, would still choose it because it would presumably carry with it more money. In other words, if an employer was willing to provide just cause protection to an individual employee, such protection would come at the cost of a lower salary. Nevertheless, as Professor Phillips points out, the main problem with this argument is the “uncertainty surrounding its premise.” While some younger, riskier employees would prefer money over security, there are many others who would prefer security. While it is not

324. Id. (comparing an employee asking for just cause to a new law professor asking for the school to buy a pet pony for his child instead of paying for moving expenses).
325. Id. at 101.
326. Malin, supra note 5, at 143 (arguing that employees are not likely to have information necessary to make a decision to quit based on an employer’s no-cause terminations, and certainly new hires will lack this information); Blades, supra note 109, at 1413 (stating that an employer’s interest in maintaining a favorable reputation cannot be regarded as a very substantial deterrent). But see Sonne, supra note 223, at 287 (agreeing with Richard Posner that employers will get a bad reputation if they arbitrarily fire employees and that this fear will keep them from exhibiting predatory behavior).
327. Malin, supra note 5, at 143.
328. Phillips, supra note 12, at 469.
329. Id. at 471.
330. Id.
331. Id. at 474.
332. Id. at 474–75.
the purpose of this Article to fully exhaust the debate over the eco-
monic efficiency of the at-will default rule, suffice it to say that I do
not believe the arguments supporting at-will are strong enough to
override the compelling problems the at-will rule causes.\textsuperscript{333}

B. Criticisms from the Plaintiff's Perspective

As a compromise statute, the ETEA is likely to garner criticisms
from both sides. Plaintiffs will likely complain that (1) the proposal is
too narrow because it still allows an employer to make a bad business
decision, even if that decision is not made with a bad motive and (2)
the statute will actually decrease the number of successful discrimina-
tion or other wrongful discharge suits because plaintiffs may feel com-
pelled to choose the easier remedy of the ETEA, even though the
statute does not give them as many rights or benefits as a claim under
Title VII or under a wrongful discharge theory.

1. ETEA Is Too Narrow

The inevitable plaintiffs' criticism is that this statute is too narrow
because it does not require just cause for a termination. In other
words, if an employer makes a bad business decision, i.e., terminates
an employee it believes to be unproductive, when in reality the em-
ployee is very productive, the termination will not violate the
ETEA.\textsuperscript{334} Alternatively, if an employer fires an employee for violating
a very strict attendance rule, the employee will not be able to prove a
violation of the ETEA.\textsuperscript{335} The purpose of using the prohibitions in
this statute rather than a just cause standard is to avoid judges and
juries second guessing employers' business decisions. Even if a deci-
sion might seem terrible from a reasonable person's perspective (or
even a reasonable business manager's perspective), the difficulty in
proving just cause warrants not using that standard.\textsuperscript{336}

It is true that if an employee is fired for a reason that does not
make sense to him, the employee is likely to experience many of the
same deleterious feelings as if he had been fired for a reason that vio-
lated this statute.\textsuperscript{337} Yet, what he would not experience is the harm
to his dignity that arises from the terminations that violate the

\textsuperscript{333} See supra Part III.
\textsuperscript{334} If, however, the employee can prove that the employer's proffered reason (non-
productivity) is not true and was not the real reason for the termination, then the
employee will win.
\textsuperscript{335} The only exception to this would be if the absence fell under the FMLA expansion
prohibition. See supra subsection IV.B.4.
\textsuperscript{336} See supra section III.B.
\textsuperscript{337} See supra subsection IV.E.6.b (discussing the harmful effects of termination).
ETEA.\textsuperscript{338} Knowing that your employer made a bad business decision is not as hurtful as knowing it made a decision based on your race or because you complained of offensive behavior in the workplace. Moreover, this statute does not use just cause because doing so would certainly lead to its demise. This statute is a compromise statute, and as such, plaintiffs must be willing to give something up in exchange for getting much more protection than they have today.

2. Statute Would Undermine Discrimination Laws

The criticism that employees might choose suit under the ETEA because of its easier burden of proof may be a legitimate concern. If a plaintiff does not have very good evidence of discriminatory motive, yet has been given an obviously phony reason for the termination, many risk-averse plaintiffs are likely to choose the ETEA over Title VII or a state anti-discrimination law. To the extent that those employees would have been successful in their discrimination suits, such a result would be troubling. However, as stated earlier, most employees are not successful in their discrimination lawsuits.\textsuperscript{339} Furthermore, for many employees, receiving reinstatement and back pay (and perhaps front pay) is their primary concern. While there are some plaintiffs seeking and receiving large compensatory and punitive damage awards,\textsuperscript{340} they tend to be the exceptions rather than the norm.\textsuperscript{341} In my practical experience, many employment discrimination cases settle for a reasonable estimate of the back pay and front pay damages. Accordingly, the damages under the ETEA are not much different than the damages likely to be received in a Title VII lawsuit. Finally, I think the ETEA would have a positive effect on eradicating discrimination because it would discourage employers from fabricating reasons for dismissal. Because of the burden of proof structure under the ETEA,\textsuperscript{342} an employer can no longer escape liabil-

\textsuperscript{338} Some ETEA violations are based on the harm to the public, but with most of them, it can also be said that a termination for fulfilling a duty that benefits the public is offensive to one's dignity.

\textsuperscript{339} See supra text accompanying notes 101–05 (discussing the failure rates for employment discrimination claims).

\textsuperscript{340} See supra subsection IV.E.4.

\textsuperscript{341} First of all, proving compensatory damages is not easy and can be very invasive. An employee has to be willing to testify about very private emotions and possibly allow the defense to have access to private medical and psychological records. Second, under Title VII, punitive damages are not easy to get. The employee has to prove that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(1) (2000).

\textsuperscript{342} See supra subsection IV.E.2. Under the ETEA, the plaintiff would only have to prove that the defendant’s reason was false; it would not also have to prove that discrimination or one of the prohibited terminations was the real reason for the
ity by making up false reasons for termination. The employer is forced to disclose very early on the reason for the termination,\textsuperscript{343} and if the employer lies about its reason and the plaintiff can prove the employer's reason was pretextual, the plaintiff wins.

A related but distinct concern might be that the ETEA has preempted common law wrongful discharge claims. For individuals who might have had a strong public policy claim—for instance, because they were fired for refusing to engage in illegal behavior requested by the employer—the inability to get unlimited compensatory and punitive damages will certainly be frustrating. However, most public policy claims are not as clear cut as the one just mentioned. We saw earlier the myriad of egregious terminations left unremedied by wrongful discharge suits,\textsuperscript{344} and the courts' inconsistency in ruling on these claims makes victory for plaintiffs even more elusive. Finally, if the ETEA did not preempt state law public policy claims, it is highly unlikely that it would be palatable to businesses and, therefore, would be unlikely to gain political support.\textsuperscript{345} The ETEA is a compromise statute and this compromise is necessary.

VI. CONCLUSION

As a compromise proposal, either no one wins or everyone wins, depending on your perspective and level of optimism. Certainly, some will argue that my proposal does not provide enough benefits for employees because of the limited remedies and because it does not prohibit all bad termination decisions. Conversely, some will argue that this proposal is way too broad because at-will is the better default rule, and there are already enough limitations on an employer's ability to terminate its employees. However, if both sides compare it to the status quo today—chaos in the law, potential for outrageous damages, and the sheer magnitude of unsuccessful claims—perhaps both sides can view it in an optimistic light, as the perfect compromise.

\textsuperscript{343} See supra subsection IV.E.2. As stated above, that varies from Title VII law, where an employee does not necessarily win by proving that the defendant's alleged reason for termination is fabricated. See supra subsection IV.E.2.

\textsuperscript{344} See supra subsection IV.E.3 (discussing the notice provision).

\textsuperscript{345} This is because of the fear of unlimited damages and run-away juries.