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## Current Trends in Employment Dismissal Law: The Plaintiff's Perspective

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# Current Trends in Employment Dismissal Law: The Plaintiff's Perspective\*\*

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### I. EMPLOYMENT-AT-WILL DOCTRINE—HISTORICAL BACKGROUND

For the past century the employment-at-will doctrine governed the employment relationship.<sup>1</sup> It was well settled that an employer could terminate an employee "at-will" for any reason, a bad reason or no reason, with impunity.<sup>2</sup> There was an exception in the case of a contract for a definite period of time; for example, a term of one year. As

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1. Under the medieval Statute of Laborers and the English rule, there was a presumption that employment was for one year. Subsequently, the English rule required a reasonable notice period before dismissal. The English rule was displaced by the American "at-will" rule articulated by Horace G. Wood in 1877. For concise historical summaries see Committee Report, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A. BAR. CITY OF N.Y. No. 4, 170 (1981); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-25 (1980).

2. The rule was sanctified by the United States Supreme Court in *Adair v. United States*, 208 U.S. 161, 175 (1908), in which the Court referred to "the right of the employer, for whatever reason, to dispense with the services of such employee."

One court stated that an employer could discharge an employee at any time "for good cause, for no cause or even for cause morally wrong, without being

a matter of law, an employee with a contract for a definite term could not be discharged without just cause.<sup>3</sup> But where there was a general hiring and the term was indefinite in duration, the relationship was deemed "at-will" and could be terminated by either party at-will, at any time, without recourse.<sup>4</sup> Since the turn of the century, the employment relationship has generally been regarded as contractual. The employer promises to pay the employee a certain sum per hour, per week, or per month, and in exchange the employee agrees to perform or simply performs services as directed. As the United States Supreme Court recently noted, an informal contract of employment may arise "by the simple act of handing a job applicant a shovel and providing a workplace."<sup>5</sup> This contract has been deemed an "at-will" contract, terminable "at the will or pleasure of either party."

The "at-will" doctrine reflected the laissez faire economic philosophy, stressing the freedom of the employer to run its business without interference. Efficiency of the marketplace required that the employer have the absolute right to rid himself of employees deemed undesirable or who hindered the employer's ability to produce at a profit.<sup>6</sup>

## II. EXCEPTIONS TO AT-WILL DOCTRINE

There have always been exceptions to the "at-will" doctrine in cases in which the employee was able to negotiate a restriction in the employment contract or in which the legislature has established limitations by statute. Three groups of employees have traditionally been protected from wrongful discharge by such exceptions. First, company executives, entertainers, and other highly paid employees are typically protected because they have sufficient individual bargaining power to obtain written contracts of fixed and definite terms. In such situations, the employer's duty to discharge only for "just cause" is

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guilty of a legal wrong." *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884).

3. *Rosecrans v. Intermountain Soap & Chemical Co.*, 100 Idaho 785, 605 P.2d 963 (1980).

4. "[T]he rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will; and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895) (quoting H. WOOD, *MASTER AND SERVANT* § 136 (2d ed. 1886)).

5. *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984). "[T]he contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." *Id.*

6. *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

implied by law or expressly set forth in the agreement.<sup>7</sup>

Second, employees who are covered by collective bargaining agreements negotiated by their respective unions also typically are not fired except for "just cause." Most labor agreements contain a specific prohibition against "at-will" termination.<sup>8</sup> Third, public employees covered by state and federal civil service statutes generally cannot be fired except for "just cause" and not until they have been given a hearing, which is subject to court review.<sup>9</sup>

Excluding the above three groups, the remaining nonunion private sector exceeds 60% of the American work force and consists of over 65,000,000 employees. For them there has been no blanket protection from the "at-will" doctrine.

### A. Special Purpose Legislation

During the last 50 years, there has been a growth of limited protection against discriminatory discharges from special purpose legislation. Discharge because of union activity, race, religion, sex, national origin, age, and handicap has been prohibited under state and federal antidiscrimination statutes.<sup>10</sup> Retaliatory discharges of persons exercising their statutory or constitutional rights have also been outlawed.<sup>11</sup> Many government employees have job rights which are considered property rights under the United States Constitution.<sup>12</sup> They have some protection against arbitrary and discriminatory dismissal.<sup>13</sup> They also have the right to fair procedures under the United States Constitution.<sup>14</sup> In addition, government employees cannot be discharged for exercising their constitutional rights of free speech, religion, privacy, and liberty.<sup>15</sup>

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7. *Bartlett v. Doctors Hosp.*, 422 So. 2d 660 (La. Ct. App. 1982).

8. For an excellent discussion of the "just cause" provisions of labor agreements as interpreted by arbitrators see F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 650-707 (4th ed. 1985).

9. See, e.g., CAL. GOV'T CODE ANN. § 19572 (West Supp. 1988); N.Y. CIV. SERV. LAW § 75 (McKinney 1985); MASS. GEN. LAWS ANN. Ch. 31, § 41 (West 1979 & Supp. 1988). See also Federal Civil Service Reform Act, 5 U.S.C. § 7501 et. seq. (1982).

10. National Labor Relations Act (NLRA), 29 U.S.C. § 151 et. seq. (1982 & Supp. IV 1986) (Union Activity); Title VII Civil Rights Act of 1964, 42 U.S.C. § 2000 (1982) (Race, etc.); Age Discrimination in Employment Act (ADEA), 19 U.S.C. § 623 (1982 & Supp. IV 1986) (Age); The Rehabilitation Act of 1973, §§ 501, 503, 504 (1982 & Supp. IV 1986) (Handicap).

11. 19 U.S.C. § 612(d) (1982 & Supp. IV 1986) (ADEA); 29 U.S.C. § 158(a)(4) (1982 & Supp. IV 1986) (NLRA); 29 U.S.C. § 215(a) (1982 & Supp. IV 1986) (FLSA); 29 U.S.C. § 651 (1982 & Supp. IV 1986) (OSHA).

12. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

13. See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

14. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

15. *Connick v. Myers*, 461 U.S. 138 (1983) (free speech); *Schwartz v. Board of Bar*

## B. Tort Remedies

Until recently, there was no tort of wrongful discharge. The concept of dismissal in violation of public policy had not yet been applied to nonunion employees. In addition, little effort was made to invoke implied or unilateral contract analysis for victims of wrongful discharge in breach of employer promises of job security. Lastly, the old-fashioned torts of defamation, negligence, assault, privacy, and fraud were only occasionally invoked by nonunion employees and then only in outrageous circumstances.

## C. Movement for Change

The concept of "just cause" as the proper standard governing wrongful discharge cases was carefully developed by labor arbitrators who have heard thousands of discharge cases during the past half century.<sup>16</sup> Their opinions were published and popularized. Companies and workers, with experience and knowledge of union shops, came to appreciate the concept of fairness in the workplace.

Meanwhile, the "job" became more and more important. After World War II the trend of declining loyalty to home, family, church, neighborhood, and community accelerated. The job became the prime source of identity and a major social unit for millions of Americans. For many, career and workplace was the focus of their lives.

"Discharge" was labeled as the capital punishment of the industrial world. Indeed, its effects are devastating.<sup>17</sup> The average American has less than three months pay in savings. The loss of income caused by a discharge causes severe economic hardship. Employees discharged for alleged "cause" may be denied unemployment compensation. Group medical insurance coverage stops soon after the date of termination.

The discharged employee suffers intense emotional distress. He has been labeled a failure. His self-esteem, which was wrapped up with his job, is gone. A discharge for substandard performance is a severe blow to the ego.

There is harm to a discharged employee's reputation. Fellow workers, relatives, neighbors, peers, and friends are bound to think less of him. Standing in the eyes of family members suffers. From a practical standpoint, a dischargée will have difficulty in getting a new

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Examiners, 353 U.S. 232 (1957) (liberty); *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985) (privacy).

16. See Koven & Smith, *Just Cause: The Seven Tests*, (Blackacre series on Discipline & Discharge, Coloacre Publications, 1985).

17. See R. COULSON, *THE TERMINATION HANDBOOK* (1981); W. MORIN AND I. CABRERA, *PARTING COMPANY* (1982); E. GOODMAN, *ALL THE JUSTICE I COULD AFFORD* (1983).

job. Prospective employers routinely ask applicants questions about former employment. A person discharged for alleged misconduct is not a prime candidate for reemployment. A dismissal for dishonesty may destroy career opportunities forever.

Given the seriousness of the consequences of wrongful discharge, it is no wonder that pressure for change in the law began to build. The Civil Rights Act of 1964 was the catalyst for further change. The term "discrimination" was widely publicized and soon became a household word. Government investigators swarmed into American businesses questioning the fairness of discharges of minority members. The stated issue was whether there was inequality in the treatment of blacks and whites. However, every case made an inquiry into whether the employer had a reasonable, fair cause for its actions. Rank and file employees became accustomed to examining issues of discrimination and fairness on a wide variety of subjects.

By the late Sixties America had become a litigious society. The number of lawyers had skyrocketed. Citizens were willing to take on "City Hall" and other establishment institutions in the courtroom. There was a movement toward democracy in the workplace. Authoritarian, top-down, military-like methods of running a business became discredited. The idea that management could do no wrong and that nonunion workers were powerless was fading. Americans became more assertive, more selfish, and more aware of their rights as individuals.

The Nuremberg trial and the civil disobedience movement dramatically raised the issue of whether people had moral rights to disobey improper or illegal orders issued by supervisors. These concepts filtered into the workplace where employees began to question orders of superiors which were unsafe or illegal. The Vietnam War and the Watergate crisis further eroded the confidence of citizens in their institutions and in authority. No longer was loyalty to the company, to the union, an all important virtue.<sup>18</sup> A forerunner of the nonunion individual employee rights movement was the emergence of the duty of fair representation. This duty was a shield for individual union members who were victims of arbitrary grievance handling in discharge cases.<sup>19</sup>

The last twenty years have seen an explosion of interest in employee rights. The women's rights movement produced a revolution in the role of women in the workplace. Women, by protest, EEOC filings, and court action have put teeth into the antigender bias provisions of Title VII of the Civil Rights Acts. Every decision discharging

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18. *See Job Loyalty: Not the Virtue It Seems*, N.Y. Times, March 3, 1985, § 3 at 1, which discusses the demise of the concept of undivided loyalty to the corporate employer.

19. *See Vaca v. Sipes*, 386 U.S. 171 (1967).

a women is a potential source of litigation and is subject to strict scrutiny as to its fairness. Previously, women had kept quiet when they were fired for reasons related to sexual harassment. However, in recent years, such women, acting with more candor and courage, have produced more legal confrontations.<sup>20</sup> Similarly, the federal Age Discrimination in Employment Act (ADEA), passed in 1967, has become a vehicle for the white male over 40 to protest unfair discharges. In 1985, there were about 17,000 ADEA charges filed. Large jury verdicts, often in six figures, in favor of long service employees, reflect the public sympathy for the plight of the wrongfully discharged worker. State and federal legislation protecting handicapped employees from discrimination has also had a dramatic impact upon the workplace.

Americans have never accepted the idea that while it is illegal to discriminate against particular groups because of bias concerning a group, it is permissible to discriminate against individuals because of purely personal animus. To the contrary, most people believe it is illegal to discriminate for any arbitrary reason. Most workers believe that unequal treatment, solely because of a personality conflict unrelated to work, also is illegal.

Beginning in the late 1960's, there was a cry from academics to abolish the "at-will" doctrine.<sup>21</sup> There was an accompanying revolution taking place outside the workplace. More and more individuals sought to solve society's problems by going to the courthouse. Lawsuits became a national pastime. "Whistleblowers" and other rebellious workers became folk heroes. The stage was set for a revolution in the law regarding nonunion workers. In the late 1970's the employment-at-will doctrine began to collapse. The doctrine giving private employers total freedom to discharge made no sense. It may have been appropriate for Nineteenth-Century America, but not for the 1980's. Court after court began to hold that there were remedies for victims of outrageous discharge, even in the nonunion, nongovernment workplace. The judiciary responded to the public's desire to see justice in the workplace.<sup>22</sup>

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20. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

21. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

22. See, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385

Within the last decade, the courts of the majority of the states have created numerous exceptions to the "at-will" doctrine. Relying on principles of contract law, judges began looking at the totality of the circumstances at the workplace to determine whether it was reasonable for employees to expect that they would be fired only for just cause.<sup>23</sup> Verbal promises, handbooks, and policy manuals began to be enforced as contracts.<sup>24</sup> California and a few other states imposed upon employers a duty of good faith and fair dealing concerning termination decisions.<sup>25</sup> In addition, in most states the tort of wrongful discharge is now established where the employee has engaged in conduct protected by statute and the discharge undermines the public policy of the statute.<sup>26</sup> Finally, other torts and theories of recovery independent of a claim of unjust or abusive discharge began to be used more and more for the benefit of discharged employees.<sup>27</sup>

### III. RECENT DEVELOPMENTS

During the last few years the media has directed public attention to wrongful discharge litigation. National newspapers and magazines have featured stories concerning the "death of the at-will doctrine."<sup>28</sup> There have been several widely publicized million-dollar verdicts featured on television and in the newspapers.<sup>29</sup>

In reaction to the growing number of wrongful termination suits,

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(1980); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

23. See *Woolley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).
24. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 457 N.E.2d 193, 443 N.Y.S.2d 441 (1982); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984).
25. See *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); *Flanigan v. Prudential Fed. Sav. & Loan Ass'n.*, 720 P.2d 257, (Mont. 1986).
26. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). Cf. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (a leading early "public policy" case).
27. See, e.g., *Chamberlain v. Bissell Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982) (negligence); *Andrews v. Mohawk Rubber Co.*, 474 F. Supp. 1276 (E.D. Ark. 1979) (slander); *Agarwal v. Johnson*, 25 Cal. 3d 932, 160 Cal. Rptr. 141, 603 P.2d 58 (1979) (outrage); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (1985) (privacy).
28. See, e.g., *National Law Journal*, Jan. 20, 1986 at 1, col. 2; *Wall Street Journal*, Sept. 13, 1983 at 1, col. 6; *USA Today*, Feb. 18, 1986 at 34, col. 1.
29. See, e.g., *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1983) (\$1,900,000 to 3 plaintiffs); *Rawson v. Sears Roebuck & Co.*, 39 Empl. Pract. Decs. 35, 818 (D. Colo. 1985) (fifty-nine year old salesman fired after thirty-three years received a \$15 million jury verdict); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212 (1985) (verdict of \$1,300,000 awarded to four Baltimore employees in January 1984), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985). *National Law Journal*, Aug.

there have been a large number of educational seminars for the benefit of employer representatives, personnel and human resources directors, and house counsel. In addition, Bar Associations have featured seminars on the subject of wrongful discharge cases. Numerous articles and books concerning termination have been published within recent years.<sup>30</sup>

This public awareness of the emerging rights of dismissed employees has several results: (1) employees who are discharged are likely to seek legal counsel to find out their rights; (2) there are an increasing number of employees who threaten litigation; (3) there are an increasing number of lawyers specializing in employment law;<sup>31</sup> (4) law schools are broadening their curriculum to include more courses on individual rights;<sup>32</sup> and (5) there are more wrongful discharge suits.

Most employers are becoming increasingly cautious concerning discharges. Listening to the advice of their personnel directors and lawyers, employers now normally make careful investigations prior to discharge. They usually utilize progressive discipline and warnings. They are more careful to document their cases. The employers are motivated by fear of litigation and current modern concepts of ethical responsibility.

Corporate America has studied the Japanese system of employment relations which stresses unity of interest between company and employee and a paternalistic company attitude which stresses job security and lifetime employment. Corporate America is beginning to recognize that fairness to employees is good ethics and also good business. Job security, a system of just discipline, and humane severance programs help employee morale and improve productivity. Such prac-

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4, 1986, at 8, col. 1 (verdict of \$10 million awarded a former Exxon Corporation executive).

30. H. PERITT, *EMPLOYEE DISMISSAL LAW & PRACTICE* (1984); M. DICHTER, A. GROSS, D. MORIKAWA & S. SAUNTRY, *EMPLOYEE DISMISSAL LAW FORMS & PROCEDURES* (1986); C. BAKALY & J. GROSSMAN, *MODERN LAW OF EMPLOYMENT CONTRACTS* (1983); L. BOROWSKY, *UNJUST DISMISSAL LAW & PRACTICE* (1986); J. MCCARTHY, *PUNITIVE DAMAGES IN WRONGFUL DISCHARGE CASES* (1985); C. RICHEY, *EMPLOYMENT DISCRIMINATION & CIVIL RIGHTS ACTIONS* (1986); W. HOLLOWAY & M. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* (1935); A. PEPE & R. DUNHAM, *AVOIDING & DEFENDING WRONGFUL DISCHARGE CLAIMS*. (1987).
31. In 1985 a new national organization consisting of lawyers specializing in representing individual employees was formed called the Plaintiff Employment Lawyers Association (PELA) and already has over 600 members.
32. In 1982 the author, Paul H. Tobias, surveyed the curriculum of 15 leading law schools. No law school had a course labeled "Employment Law." The main course at each school was called "labor law," and covered union-company relationships, NLRB law, collective bargaining, and arbitration. Usually there was a seminar on a specialized subject such as antidiscrimination statutes, public employees, or women's rights. Today the words "employment law" are being used more and more. The law relating to the individual employee in the nonunion workplace is being examined as never before.

tices boost the image of the company and even enhance the value of the company stock. Although the number of dismissals continues to be substantial nationwide,<sup>33</sup> the proportion of cruel, outrageous dismissals has, in the opinion of the author, decreased.

Also, employers are becoming more generous concerning the payment of severance pay and other postdismissal benefits. In years past, the tradition was payment of two weeks, or at most one month severance pay. Some enlightened companies, when laying off salaried employees for economic reasons, now provide as much as two weeks pay for every year of service plus health insurance coverage for at least ninety days.<sup>34</sup> Employers are more likely to give severance pay to employees dismissed for unsatisfactory performance and noneconomic reasons. Employers are now more willing to make prelitigation settlements, involving letters of recommendation, expungement of files, and some cash.

The plight of the dismissed, older worker has captured the sympathy of the country. Willy Loman, the central figure in famous play "Death of a Salesman," dramatized the dilemma:

There were promises made across the desk! You mustn't tell me you've got people to see—I put thirty-four years into this firm . . . and now I can't pay my insurance! You can't eat the orange and throw the peel away—a man is not a piece of fruit.<sup>35</sup>

Victims of age discrimination are well protected by the ADEA and state age discrimination statutes. The right to a jury trial and the liquidated, double damages provided by the statute provide powerful incentives for management to be cautious in handling dismissals of older workers. Corporations are now forced to be scrupulously fair to all protected groups in their decisions concerning layoffs, reductions in force (RIF's), and early retirement programs.

A current phenomenon is the "window" program initiated by large corporations who wish to "cut the fat," and reduce costs by the layoff of older middle management employees.<sup>36</sup> To avoid layoff, employees fifty-five and over are now given a limited opportunity (the "window" is open for short period of time) to obtain increased pension provisions

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33. One expert estimates that of the 60,000,000 nonunion, noncivil service "at-will" employees, approximately 3% to 5% or about 2,000,000 are fired without a hearing. At least 150,000 to 200,000 employees are unjustly fired and would win cases under the "just cause standard" used by labor arbitrators if they filed claims. Stieber, *Recent Developments in Employment At Will*, 36 LAB. L.J. 557 (1985).

34. Unfortunately these programs are still in the minority. Most shut downs and mass layoffs involve insufficient notice and very little financial or emotional help for those affected. See N.Y. Times, Oct. 1, 1986 at D1, Col. 3.

35. A. MILLER, *DEATH OF A SALESMAN*, Act III at 69 (1949).

36. "In the last four years almost 500,000 able and seasoned managers have been jettisoned from the payrolls—and the futures—of America's largest corporations." Goldstein, *What Future For Middle Managers?*, INDUSTRY WEEK Dec. 8, 1986, at 45.

and generous severance pay packages. In exchange they are required to sign a release of all legal rights.

The recent wave of takeovers, buyouts, mergers, and corporate re-shuffling has made executives more and more aware of their own legal rights. Executive employment contracts for company presidents and chief executive officers now routinely contain "golden parachute" provisions protecting them from sudden termination. Because company presidents are more sensitized to the possibility of wrongful discharge of themselves, they are more likely to be empathetic to their employees who are innocent victims of buyouts and mergers.

The policy of equal treatment and no discrimination for irrelevant reasons continues to grow. It is no accident that the major component of the duty of good faith and fair dealing is the obligation of employers to treat like cases in a nondiscriminatory manner.<sup>37</sup> There are a growing number of states that prohibit discrimination because of a handicap, sexual preference, marital status, and other unfair discrimination not yet prohibited by federal law.<sup>38</sup>

In a democracy, court decisions tend to follow the "ballot box" and reflect not only the wisdom of the past, but also what the majority of the people presently desire. The law is now more responsive to "man-on-the-street" concepts of "fairness" in dismissal cases. "Fairness" is a right concept—an idea whose time has finally come to the work place.

California has led the way. In California, every employment relationship carries a duty of good faith and fair dealing. Victims of bad faith discharges can receive damages for emotional distress and loss of self esteem as well as punitive damages. The average jury verdict is in excess of \$200,000.<sup>39</sup>

In other states, victims of tortious misconduct involving breach of privacy, defamation, fraud, assault, negligence, outrage, interference with contract, or false imprisonment often receive large verdicts.

Every wrongful dismissal case is a potential defamation case. When a supervisor publishes a false reason for a termination to others who have no need to know, there may be employer liability if malice

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37. "The duty of fair dealing is, simply stated, a requirement that like cases can be treated alike." *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 247-48, 208 Cal. Rptr. 524, 529 (1985).

38. *E.g.*, CAL. GOV'T CODE § 12900 (West Supp. 1988) (marital status); N.Y. CIV. RIGHTS LAW § 47(a) (McKinney 1984 & Supp. 1988) (handicap); MASS. GEN. LAWS ANN. ch. 149, § 196 (West 1982 & Supp. 1988) (anti-polygraph exam).

39. From 1979 to 1983, fifty-one wrongful dismissal cases went to trial in California. The plaintiff won seventy percent of the decisions with an average award of \$178,184. Nineteen cases included punitive damages with the verdicts averaging \$533,317. Stieber, *Recent Developments in Employment At Will*, 36 LAB. L.J. 557 (1985); *Wrongful Discharge*, Los Angeles Daily Journal, Aug. 19, 1983, at 4, col.2. Since 1983 the average jury verdict in California has been between \$200,000 and \$400,000. 4 Empl. Rel. Weekly (BNA) 1294, (Oct. 20, 1986).

or reckless disregard for the truth is shown. The doctrine of negligence—which requires all citizens knowledgeable of risk of harm to act carefully towards others—may assist those who have been financially damaged by the reckless activity of employers and their agents.

Where a dismissal directly undermines the purpose of a state statute, the law of most states now permits suits alleging abusive or wrongful discharge. Examples include employees fired for filing workers' compensation claims, attending jury duty, refusing to commit perjury, and for "whistleblowing" (e.g., reporting crimes to government agencies). Whether the "public policy" tort encompasses violations of policies embodied in judicial decisions and community values, as well as statutes, remains a hotly debated issue.

There is an increased focus on rights of privacy in the workplace. Government workers fired because of reasons related to marriage, sex, and pregnancy claim constitutional protection. Victims of dismissals related to sexual harassment, in addition to claims of Title VII violation, can claim interference with privacy as well. There is an increased governmental and corporate effort to stamp out the use of drugs, showing little concern for individual rights. Employees fired for refusal to submit to random drug testing may indeed have grounds for suit.

Outside of California, common-law tort theories provide limited protection, but only in aggravated, outrageous cases in which there has been flagrant cruelty on the part of management in the handling of a dismissal. The victim of a run-of-the-mill unfair, arbitrary but nondiscriminatory dismissal may not be able to claim a tort. A breach of employment contract theory may be all that is available.

Most medium to large size companies have written rules, written procedures, employee handbooks, and policy manuals which contain provisions which can be reasonably construed to prohibit unjust, unfair dismissals. Millions of nonunion workers are covered by these handbooks. The lead Michigan case and its progeny set forth that these rules can be enforced in court.<sup>40</sup> Other cases have held that other indicia of employer intent—verbal promises, practices, and customs of the shop—which raise employee expectations of job security create enforceable contractual rights.<sup>41</sup>

But most employers, now sensitive to the possibility of suit, have very recently sanitized their handbooks and inserted disclaimer clauses which restate the right to fire "at-will" and negate the idea that company rules are binding or contractual. The courts are now struggling with these "disclaimer" clauses and their impact on em-

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

41. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 100, 483 N.E.2d 150 (1985).

ployee expectations.<sup>42</sup> The principles of reliance, adhesion, and legal presumptions against the draftsman may assist the employee to overcome the unfair effect of these disclaimers.

Another developing "defense" to employee litigation is the "in-house" internal appeal system, which features a complaint handling procedure similar to the grievance machinery in union shops. The employee has no union or lawyer to help him, and the "judges" are often closely allied with the "prosecutors" who fired him. However, the internal systems do give the dismissed worker a "day in court" and often lead to some adjustment.

In the last few years employers have fought increasingly hard to defeat employee dismissal claims in court. In addition to the "disclaimer" defense, employers have effectively used the federal "pre-emption" defense to try to destroy the right of union workers covered by labor agreements to take advantage of favorable state laws.<sup>43</sup> The "pre-emption" defense is also invoked where other federal and state statutes cover some of the issues raised in common-law suits.<sup>44</sup> Also, the defenses of collateral estoppel and *res judicata* have been used to defeat claims of employees forced to litigate their claims in separate administrative and judicial tribunals.<sup>45</sup>

The federal courts at one time were the leaders of progressive judicial thinking favoring employee rights. However, in recent years, appointments by Republican presidents have added a conservative hue to the federal bench. Federal judges are now more receptive to employer motions for summary judgment and directed verdict. There is a growing judicial resistance to further rapid expansion of employee rights.

Generally, the laws relating to damages do not favor the individual employee. Under Title VII, the NLRA, the ADEA, and most federal antidiscrimination acts, damages for loss of self esteem or mental anguish are not recoverable. Similarly, labor arbitrators do not award damages for pain and suffering. Also, victims of breach of employment contracts cannot recover for mental distress or receive punitive damages. Yet, the emotional wounds run deep, endure, and cry out for relief. In addition, employers have little incentive to obey contracts without the fear of large verdicts.

The duty to mitigate doctrine punishes those who are most diligent

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42. See *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987); *Thompson v. Kings Entertainment Co.*, 653 F. Supp. 871 (E.D. Va. 1987).

43. See *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 226 (1987).

44. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977).

45. See *University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

and aggressive in their postdischarge job search. Employees offered reinstatement may be too upset because of the dismissal trauma to go back to the hostile environment, yet the law requires the plaintiff to accept the job or risk losing his right to damages.<sup>46</sup>

Most employees bringing court actions are middle management personnel with the funds to pay substantial retainers to counsel. Many victims of unfair dismissals with only modest damages have trouble finding a lawyer to take their case. If there is no statutory violation there is no court awarded fee for the prevailing plaintiff. If there is no tort, there is no prospect of a large verdict. Thus, there is little incentive for the lawyer to take an ordinary case. Employee-employer cases are hard fought and time consuming. Most lawyers are not willing to take a mere breach of employment contract case on a straight contingency basis because of the risks and unlikelihood of much reward.

For the vast majority of nonunion employees, a court suit is still not an effective or readily available avenue for relief. The court system is too cumbersome, expensive, and time consuming for most cases.

There has been much academic interest in national or model state legislation providing statutory noncourt protection against unjust dismissal for nonunion employees.<sup>47</sup> Such national legislation exists in every other western nation.<sup>48</sup> Arbitration is the favored litigation tribunal, although enforcement by existing state unemployment compensation agencies, the NLRB, or a new administrative agency are reasonable alternatives. Many proposals would put a ceiling on the damages available and would eliminate the recovery of punitive and emotional distress damages.

A federal law covering the entire country and providing uniform standards would be the best approach. It offers the possibility of combining all federal antidiscrimination and other federal and state claims in one hearing, thus avoiding the present multiplicity of remedies and hearings. Most proposals favor a short statute of limitations of six months or less and a very limited right of judicial review of the arbitration or agency award. Relaxed rules of evidence, payment of attorneys' fees to the worker if he prevails, government payment of the costs and expenses of the tribunal, and flexibility concerning remedies are other desirable features.

Many management representatives favor a system which eliminates the possibility of jury trials and large punitive and emotional

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46. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982).

47. See, e.g., Stieber & Murray, *Protection Against Unjust Discharge: The Need For A Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983).

48. The English Industrial Tribunals handle some 40,000 cases per year. For the British system see L. DICKENS, M. JONES, B. WEEKES & M. HART, *DISMISSED: A STUDY OF UNFAIR DISMISSAL & THE INDUSTRIAL TRIBUNAL SYSTEM* (1985).

distress damages. Most of the plaintiff's bar opposes restrictions on jury trial and damages. A compromise might be to provide a small claims type arbitration or administrative tribunal, which would be appropriate for most cases and could be invoked by the worker at his option. However, the courts would still be open for the larger, more complicated wrongful discharge cases.

In spite of interesting debate as to the content of such a statute,<sup>49</sup> there seems to be little likelihood of state or federal legislation in the near future.

We are an affluent society which is concerned with the quality of life. Much of the important things that go on in the average American's life happen at work.

There are many emotional, social, and psychological needs which the job satisfies. As other elements of society decline in importance, the job becomes more important. Justice William Douglas once said: "Employability is the greatest asset most people have."<sup>50</sup>

Similarly, one court has stated:

Every man's employment is of utmost importance to him. It occupies his time, his talents, and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security. It bears upon his personal well-being, his mental and physical health.

In days gone by, a man's occupation literally gave him his name. Even today, a continuous and secure employment contributes to a sense of identity for most people.<sup>51</sup>

The wrongful dismissal event is a significant financial and emotional trauma—one of the great tragedies for an American family.

American nonunion workers want to have their cake and eat it too. They want the right to be free of wrongful discharge and to have a meaningful remedy for injustice. But they are unwilling to accept the detriments and sacrifices of unionism. Instead, nonunion workers have turned to private lawyers as their "business agents."

The private bar has creatively expanded the rights of employees to the point where the exceptions to the "at-will" doctrine now have almost swallowed the rule. The legal trends are walking hand-in-hand with the mood of the nation.

The current flow and trend of the common-law has slowed up somewhat during the past months. Still, the number of lawsuits increases.<sup>52</sup> We can expect the next decade to see a more orderly devel-

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49. The American Bar Association Labor and Employment Law Section, Committee on Employee Rights and Responsibilities, Subcommittee on At-Will Legislation, is studying the issues and developing "cafeteria" model statutes containing alternative options available for state legislators who may be interested.

50. *Sampson v. Murray*, 415 U.S. 61, 95 (1974) (Douglas, J., dissenting).

51. *Lowe v. Hotel & Restaurant Employees Union, Local 705*, 389 Mich. 123, 205 N.W.2d 167 (1973).

52. A recent survey showed a thirty-seven percent increase in reported dismissal de-

opment of employment law assisting dismissed employees to obtain increased rights and benefits.

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cisions in 1985 compared to 1984. Report, ABA Labor and Employment Law Section Employee Rights Committee and Judicial Subcommittee 1985 case review (1986).