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The Michigan Experience with Employment-At-Will

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The Michigan Experience With Employment-At-Will

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I. INTRODUCTION

The United States stands alone among industrialized nations in its insistent espousal of the employment-at-will doctrine for employees not protected by statutes or collective bargaining agreements. The strength of American employer opposition to any limitation on at-will employment was dramatically illustrated during the International Labour Organization's consideration of a 1982 proposal providing that employment of a worker shall not be terminated except for a valid reason.¹ The United States government and employer delegates were

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1. *Convention on Termination of Employment Adopted by ILO Convention in Geneva*, 121 Daily Lab. Rep. (BNA) A-1 (June 23, 1982).

joined by representatives of Iraq, Saudi Arabia, Lebanon, Brazil, and Chile as the only delegates voting against this proposal. AFL-CIO delegates supported the convention.²

Explaining his vote, the American employer delegate said: "The U.S. business community is opposed to this erosion of the principle of termination of employment at will. . . . We stand alone with this type of system and in view of this we will oppose the convention . . ."³

The importance of at-will employment to employers is understandable in view of the large number of employees who are terminated for noneconomic reasons in the United States. United States Labor Department data indicate that the annual discharge rate in manufacturing is in excess of four percent.⁴ If this percentage were applied to the private sector labor force as a whole, it would suggest that about three million employees are discharged each year.⁵ A 1980 study of Michigan employers stratified by industry, size, and union/nonunion status found a discharge rate of 6.8 percent for nonoffice workers and 5.3 percent for office employees.⁶ "Discharge occurred most frequently among service employees (10.5 percent) and was lowest for employees in financial organizations (3.7 percent). The rate in manufacturing and construction was 4.8 percent."⁷ For all categories of employees, the discharge rate for nonunionized employees was twice that of unionized workers.⁸ While there are no reliable comparative data, there is little doubt that noneconomic terminations, usually referred to in the United States as "discharge for cause," occur more frequently in the United States than in other industrialized nations.⁹

The Michigan experience with employment-at-will and the continuing controversy over individual employment rights in the United States must be considered within the context of the extraordinary importance that employers attach to maintaining at-will employment and the extent of noneconomic terminations in this country. After California, Michigan is often cited as the state which has experienced the greatest erosion of the employment-at-will doctrine in the United

2. *Id.* The total delegate vote was: 356 in favor, 9 against, and 54 abstentions.

3. *Id.* (statement of employer delegate: Paul J. Weinberg).

4. See Medoff, *Layoffs and Alternatives Under Trade Unions in U.S. Manufacturing*, 69 AM. ECON. REV. 380, 389 (1979).

5. See Rodgers & Stieber, *Employee Discharge in the 20th Century: A Review of the Literature*, 108 MONTHLY LAB. REV. 35, (1985).

6. Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 559 (1985).

7. *Id.*

8. *Id.*

9. Hepple, Rojot, Weiss, Treu, and General Discussion among Conference Participants, *The Foreign Experience and Appendices A-D*, in PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 46-80, 135-68 (J. Stieber and J. Blackburn eds. 1983). (Proceeding of a Conference held at Michigan State University, Sept. 28-30, 1980).

States.¹⁰ This impression is mainly due to the 1980 Michigan Supreme Court decision *Toussaint v. Blue Cross & Blue Shield*.¹¹ There, the court held that when an employer has agreed that an employee hired for an indefinite term shall not be discharged except for cause, the employer may not terminate the employment without cause.¹² *Toussaint* was significant in its treatment of the effect of handbooks and personnel manuals on the employment relationship. The case departs substantially from the weight of authority set forth in other courts' decisions.¹³

Prior to *Toussaint*, Michigan had followed several other states in recognizing the public policy exception to employment-at-will. However, Michigan has not adopted the covenant of good faith and fair dealing exception which courts in several other states have either accepted or indicated a willingness to consider.¹⁴

This article will examine the Michigan courts' approach to indefinite employment contracts in the 19th century, pre-*Toussaint* decisions on at-will employment, the supreme court's reasoning in *Toussaint*, court interpretations of *Toussaint* through 1986, and public policy exceptions to employment-at-will. The article will also discuss proposed legislation and guidelines for a law to provide just cause protection against wrongful discharge for all employees.

II. APPLICATION OF WOOD'S RULE IN MICHIGAN

In an 1877 treatise,¹⁵ Horace G. Wood articulated a view regarding an employee's job security which soon became the general rule throughout the United States. Wood's rule, as it came to be called, stated that a hiring for an indefinite period was presumptively a hiring at will which could be terminated at any time by either party.¹⁶

One of the four authorities cited by Wood in support of his rule was a Michigan case, *Franklin Mining Co. v. Harris*.¹⁷ However, a careful reading of that case yields little support for the view that an employment contract had to be for a definite period in order to be binding.

10. Wald & Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB. LAW. 533, 534 (1985).

11. 408 Mich. 579, 292 N.W.2d 880 (1980).

12. *Id.* at 609-10, 292 N.W.2d at 890.

13. A.B.A., EMPLOYMENT-AT-WILL: A 1985 STATE-BY-STATE SURVEY 185 (D. Cathcart and M. Dichter eds. 1985).

14. The following states are listed as recognizing the covenant of good faith and fair dealing in *A Survey of Wrongful Discharge Cases in the United States* (M. Dichter, A. Gross, & M. Banks eds. Sept. 1985): Alaska, Arizona, Arkansas, California, Connecticut, Iowa, Massachusetts, Montana, Nevada, New Hampshire, and Oklahoma.

15. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272-73 (1877).

16. *Id.*

17. 24 Mich. 115 (1871).

Plaintiff Harris had given up his previous job to accept employment at Franklin Mining.¹⁸ Harris was to be paid \$1,800 per year and was assured by Franklin Mining's agent that he need not fear the company's frequently changing management might jeopardize his continuing employment.¹⁹ Yet, he was discharged eight months after starting the job — prompting him to sue for four months' pay under his alleged one-year contract.²⁰ On the ground there was evidence of a contract for at least one year duration, the Michigan Supreme Court unanimously affirmed the trial court's judgment entered on the jury verdict for the plaintiff.²¹ This may have led to Wood's belief that an employment contract must have a definite duration in order to avoid an employment-at-will characterization. But the court did not say this. It simply treated the case as a matter of basic contract law and not as a case centering on the employment relationship. Indeed, in describing Harris' previous job as "apparently a permanent one,"²² the court might even be said to have supported the concept of binding indefinite employment contracts.

Further evidence that the Michigan Supreme Court did not follow Wood's rule is found in the 1894 case of *Chamberlain v. Detroit Stove Works*.²³ Plaintiff Chamberlain claimed his employment with the company "was distinct and separate from the [elective] office of secretary"²⁴ — to which he was not reelected.²⁵ The court held that while the defendant had a right to terminate the plaintiff's official position as secretary, "it does not conclusively follow that another relation did not exist, dependent upon the engagements and contracts of the parties."²⁶ As to such other relationship, the court said:

[W]e think the circumstances might warrant the conclusion that the parties mutually understood that the employment was to continue. What the relation was, and how long it was to continue, depended upon the original hiring, the subsequent relation, the nature of the services performed, and the mutual understanding of the parties. As to duration, we think it was competent for the jury to determine from the evidence that the hiring was annual, and not subject to revocation or change by the board of directors or the president. It perhaps goes without saying that a contract for a year could not exist unless the circumstances warrant the inference that the parties so understood it. Such agreement or understanding may be inferred from a custom or usage which the parties may be considered as having contemplated. We think that the court properly left this question to the jury.²⁷

18. *Id.* at 115-16.

19. *Id.*

20. *Id.*

21. *Id.* at 116-17.

22. *Id.*

23. 103 Mich. 124, 61 N.W. 532 (1894).

24. *Id.* at 129, 61 N.W. at 534.

25. *Id.* at 127, 61 N.W. at 533.

26. *Id.* at 129, 61 N.W. at 534.

27. *Id.* at 129-30, 61 N.W. at 534 (citations omitted).

Chamberlain appears to have been a forerunner of the "implied contract exception" articulated eighty-six years later in *Toussaint*.

In 1896 the Michigan Supreme Court again affirmed the jury's right to find an oral employment contract for a year or longer in *Graves v. Lyon Bros.*²⁸ Plaintiff Graves argued that, although for the first two years he had been a month-to-month employee, his status changed when:

On January 4, 1893 . . . the manager of the defendant informed him that his 'pay would have to be reduced to \$600 for the year;' that he replied, 'If that was all he could pay he [plaintiff] would go on doing his work.' About the middle of March plaintiff was discharged.²⁹

The defendant denied the existence of the conversation and that there had been any change in plaintiff's employment status.³⁰ Nonetheless, the court held that "it is a fair inference . . . that the contract was one for a year."³¹ Were the Michigan Supreme Court following Wood's rule, it is doubtful that the mere mention of what might well be termed only a *rate* of pay would have sufficed to override the employment-at-will presumption.

Starting in 1904 with *Sullivan v. Detroit, Ypsilanti & Ann Arbor Ry.*,³² the Michigan Supreme Court increasingly adhered to Wood's rule. In the summer or fall of 1897, after being promised that he would be the "permanent attorney" of the company if it turned out to be successful, Sullivan provided legal advice and services to incorporate the defendant railway.³³ If the railway was not a success, Sullivan was to receive no compensation other than expenses.³⁴ On March 15, 1898, the railway's board of directors passed a resolution that Sullivan be employed as attorney for one year at an annual salary of \$1,500.³⁵ Sullivan was paid \$125 per month for one year, after which he submitted a bill of \$15,000 for services rendered from November 1897 to March 1898.³⁶ The company denied liability, but at trial Sullivan received a verdict and judgment for \$9,028.³⁷ On appeal the issue was whether "permanent" meant employment for life or at least as long as the company continued to exist absent cause for dismissal. The court noted that the life of the corporation was for 30 years, and it therefore "follows that this contract was either a contract binding for 30 years upon the defendant, or else it was terminable at the will of

28. 110 Mich. 670, 68 N.W. 985 (1896).

29. *Id.* at 671, 68 N.W. at 986.

30. *Id.*

31. *Id.*

32. 135 Mich. 661, 98 N.W. 756 (1904).

33. *Id.* at 661-62, 98 N.W. at 756.

34. *Id.* at 662, 98 N.W. at 756.

35. *Id.* at 664, 98 N.W. at 757.

36. *Id.*

37. *Id.*

either party.”³⁸ The court cited various authorities for both viewpoints, and decided it was “impossible to conclude that the parties who made this contract contemplated that the plaintiff was to be employed for 30 years, or as long as he was able to do the legal work of the defendant.”³⁹

While *Sullivan* opened the door to recognition of Wood’s rule, it was not until 1937 that the rule was fully accepted in Michigan. In *Lynas v. Maxwell Farms*,⁴⁰ the plaintiff had agreed to sell his restaurant to become manager of Maxwell Farms. Despite the fact that “[a]t the time he accepted the offer of Mr. Case [defendant’s president] it was understood that he was to have a permanent lifetime position with the defendant,”⁴¹ Lynas was dismissed after 14 months.⁴² Although there was differing testimony as to the reason for his dismissal, the jury returned a verdict for the plaintiff.⁴³ The court, however, entered judgment notwithstanding the verdict (J.N.O.V.) for the defendant.⁴⁴

On appeal, the Michigan Supreme Court affirmed the judgment and summarized the prevailing American view of permanent employment contracts: “In general it may be said that in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, such contracts are indefinite hirings, terminable at the will of either party.”⁴⁵ The court found that Lynas’ sale of his restaurant at far below its real value in order to accept employment with the defendant could not be deemed the “special consideration other than the services to be performed by the employee” necessary to overcome the employment-at-will relationship.⁴⁶ According to the court, Lynas’ “sacrifice” of his restaurant provided him no greater rights than any other at-will employee.⁴⁷ Although Lynas’ employment was termed “permanent,” it actually was for only so long as his services were satisfactory, and “whether or not the services were satisfactorily performed was a question to be determined by defendant and not by the jury.”⁴⁸

A year later, in *Adolph v. Cookware Co. of America*,⁴⁹ the supreme court — citing *Lynas* as controlling precedent — found another per-

38. *Id.* at 675, 98 N.W. at 760-61.

39. *Id.* at 676, 98 N.W. at 761.

40. 279 Mich. 684, 273 N.W. 315 (1937).

41. *Id.* at 686, 273 N.W. at 316.

42. *Id.* at 686-87, 273 N.W. at 316.

43. *Id.* at 687, 273 N.W. at 316.

44. *Id.*

45. *Id.*

46. *Id.* at 688-89, 273 N.W. at 317.

47. *Id.*

48. *Id.* at 689, 273 N.W. at 317.

49. 283 Mich. 561, 278 N.W. 687 (1938).

manent oral employment contract to be terminable-at-will. Adolph, a practicing chiropractor, had agreed to write a health book for the defendant and then to become head of its health extension department.⁵⁰ The court sustained Adolph's subsequent discharge and held that even if the plaintiff had an oral contract for permanent employment, "[s]uch a contract is for an indefinite period and, unless for a consideration other than promise of services, the employment was terminable at the will of either party."⁵¹ Echoing *Lynas*, the court asserted, "[t]he action of plaintiff in giving up the practice of his profession was but an incident necessary on his part to place himself in a position to accept and perform the contract and not a price or consideration paid to defendant for the contract of employment."⁵²

Twenty-four years later, in *Ambrose v. Detroit Edison Co.*,⁵³ the supreme court reiterated its holdings in *Sullivan*, *Lynas*, and *Adolph* that an agreement for "permanent employment" was actually equivalent to one for an "indefinite period" subject to termination at the will of either party. In *Ambrose*, however, the court went beyond its previous position to rule that the defendant's written in-house discharge procedures were not subject to judicial review because the defendant was acting on its own to provide extra protection which was not mandated by law.⁵⁴

III. *TOUSSAINT v. BLUE CROSS & BLUE SHIELD*

Since 1980, Michigan law in wrongful discharge cases alleging violations of an implied employment contract has been based on *Toussaint v. Blue Cross & Blue Shield*.⁵⁵ Courts in other states as well as federal courts have often referred to *Toussaint* in rulings on wrongful discharge suits. It is therefore important to set forth in some detail the majority holding in this landmark decision.

Toussaint joined two separate cases with similar but somewhat different surrounding circumstances.⁵⁶ Plaintiffs Toussaint and Ebling were middle management employees who were discharged after serving five and two years for Blue Cross and Masco Corporation respectively.⁵⁷ Both claimed that they had inquired and were assured orally of job security when hired.⁵⁸ When Toussaint was hired in 1967, he

50. *Id.* at 564-66, 278 N.W. at 687-88.

51. *Id.* at 568, 278 N.W. at 689.

52. *Id.*

53. 367 Mich. 334, 116 N.W.2d 726 (1962).

54. *Id.* at 338-39, 116 N.W.2d at 728.

55. 408 Mich. 579, 292 N.W.2d 880 (1980).

56. The companion case was *Ebling v. Masco Corp.*, 408 Mich. 579, 292 N.W.2d 880 (1980).

57. *Id.* at 595, 292 N.W.2d at 883. Prior to 1975 Blue Cross and Blue Shield were separate organizations. In 1975 they were consolidated into a single company.

58. *Id.* at 595, 598, 610, 292 N.W.2d at 883, 884, 890.

was also handed a "Supervisory Manual" and a pamphlet of "Guidelines" which contained personnel policies and stated that it was the policy of the company to release employees "for just cause only."⁵⁹ Toussaint alleged he was discharged without cause and the jury awarded him \$73,000 after the trial court denied the defendant's motion for a directed verdict.⁶⁰

Ebling alleged that he was discharged before the third anniversary of his employment in order to prevent him from exercising a stock option which had appreciated substantially in value. A jury awarded Ebling \$300,000 and the court denied a motion for judgment notwithstanding the verdict.⁶¹ In 1977, different appeals court panels reversed *Toussaint*⁶² and affirmed *Ebling*.⁶³ Consolidating the cases, the supreme court reversed *Toussaint* and affirmed *Ebling*.⁶⁴ Although all seven judges voted to affirm *Ebling*,⁶⁵ three also would have affirmed the court of appeals in *Toussaint*.⁶⁶

The majority decision noted that the court of appeals in *Toussaint* saw *Lynas* as mandating reversal on the ground that a contract for permanent employment or employment for life is one for an indefinite period terminable at will, and cannot be made otherwise by a provision that an employee will not be discharged except for cause.⁶⁷ On the other hand, in *Ebling* the court of appeals held that the plaintiff's discharge should be distinguished from the general rule of employment-at-will because his employment agreement contained "distinguishing features or provisions or a consideration in addition to the services to be rendered."⁶⁸

The supreme court considered the two cases to be factually indistinguishable and presenting an issue submissible to a jury as to whether or not there was a valid agreement to terminate for cause only.⁶⁹ If anything, the court regarded Toussaint's case as stronger because of the Handbook statement that it was company policy to release employees "for just cause only," while Ebling was only told that he would not be discharged if he did his job.⁷⁰ The court held that:

- 1) a provision of an employment contract providing that an employee

59. *Id.* at 638-40, 292 N.W.2d at 903-04 (Ryan, J., dissenting).

60. *Toussaint v. Blue Cross & Blue Shield*, 79 Mich. App. 429, 432, 262 N.W.2d 848, 850 (1977).

61. *Ebling v. Masco Corp.*, 79 Mich. App. 531, 532, 261 N.W.2d 74, 75 (1977).

62. *Toussaint v. Blue Cross & Blue Shield*, 79 Mich. App. 429, 262 N.W.2d 848 (1977).

63. *Ebling v. Masco Corp.*, 79 Mich. App. 531, 261 N.W.2d 74 (1977).

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

65. *Id.* at 636, 292 N.W.2d at 902 (Ryan, J., concurring).

66. *Id.* at 651, 292 N.W.2d at 909 (Ryan, J., dissenting).

67. *Id.* at 596, 292 N.W.2d at 883-84.

68. *Id.* at 596, 292 N.W.2d at 884.

69. *Id.* at 597, 292 N.W.2d at 884.

70. *Id.*

shall not be discharged except for cause is legally enforceable although the contract is not for a definite term — the term is "indefinite," and

2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

3) In *Toussaint*, as in *Ebling*, there was sufficient evidence of an express agreement to justify submission to a jury.

4) A jury could also find for *Toussaint* based on legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies.⁷¹

The supreme court distinguished *Toussaint* from previous cases where the issue was whether, assuming a contract for "permanent" employment, that employment was terminable at the will of the employer.⁷² The issue in *Toussaint* was whether, "assuming an employment contract for an indefinite term, the employment *must* be terminable at will so that the employer could not enter into a legally enforceable agreement to terminate the employment only for cause."⁷³

The following points in the opinion have provided guideposts for decisions in later cases:

1. Employers are free to enter into terminable-at-will contracts without regard to cause. However, an employer's express agreement to terminate only for cause, or statements of policy to that effect, can give rise to rights enforceable in contract.

2. When an employer gives up its right to discharge at will, an employee, if discharged without good or just cause, may bring suit for wrongful discharge.

3. There is no public policy against providing job security or prohibiting discharge except for cause. Consequently, there is no reason why a contract for an employee without a definite term should necessarily be unenforceable and against public policy and beyond an employer's right to contract.

4. If the employers in *Toussaint* had desired, they could have established company policies requiring employees to acknowledge that they served at-will and thus have avoided misunderstandings and litigation.

5. No pre-employment negotiations need take place and the parties' minds need not meet on the subject [personnel policies]; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices,

71. *Id.* at 598-99, 292 N.W.2d at 885.

72. *Id.* at 609, 292 N.W.2d at 890.

73. *Id.* (emphasis in original).

they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation 'instinct with an obligation.'⁷⁴

6. Having announced a just cause policy, presumably with a view to obtaining positive employee attitudes and behavior and improved performance, the employer may not treat the policy as illusory.

7. A promise to terminate for cause only would be illusory if the employer were to be the sole judge and final arbiter of the propriety of the discharge. There must be some review of the decision if the cause contract is to be distinguished from the satisfaction contract. It is for the jury to decide if discharge for specific misconduct was for the reason stated. The jury must be permitted to determine the employer's true motive for discharge and to decide whether the reason for discharge amounts to good cause and is the kind of behavior that justifies terminating the employee.

8. Employers who enter into a discharge for cause contract may set their own standards of employee performance. The jury then decides only if the employer had a rule and whether or not the employee violated it.

9. The employer can avoid having to confront a jury by providing an alternative method of dispute resolution, such as arbitration, on the issues of cause and damages.

IV. POST-TOUSSAINT CASES

We have found forty-four reported cases in which wrongful discharge was the sole or predominant basis in decisions by the Michigan Court of Appeals, the Michigan Supreme Court, or federal courts interpreting Michigan law.⁷⁵ Excluded from this analysis are suits based primarily on state and federal antidiscrimination statutes. Thirty-five cases were based on an implied contract exception, seven on a public policy exception, and two claimed both implied contract and public policy exceptions to the general rule that — absent distinguishing features or provisions or a consideration in addition to services rendered — contracts for "permanent" or "life" employment are construed as indefinite hirings terminable at the will of either party.⁷⁶

74. *Id.* at 613, 292 N.W.2d at 892 (footnote omitted) (quotation refers to *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), and *McCall Co. v. Wright*, 133 A.D. 62, 117 N.Y.S. 775 (1909)).

75. See *infra* notes 196-97, 208-09. However, *Ariganello v. Scott Paper Co.*, 588 F. Supp. 484 (E.D. Mich. 1982) applied *Toussaint* to an alleged promise of severance pay.

76. For the implied contract cases, see *infra* notes 196-97; for the public policy cases, see *infra* notes 208-09. The two cases using both theories are: *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981).

It is interesting to note that while Michigan is considered to be in the forefront of litigation on wrongful discharge, it has not adopted the covenant of good faith and fair dealing exception to employment-at-will. Indeed, Michigan courts have defined public policy exceptions quite narrowly. Even the implied contract exception, for which Michigan has become so widely recognized, has not yielded very favorable results for plaintiffs.

A. Status of At-Will Policy Statements

A number of employers in Michigan have chosen to adopt written employment-at-will contracts. Since *Toussaint*, courts in at least ten cases decided in favor of defendants on the basis of at-will provisions in employee handbooks, manuals, or other company statements.⁷⁷ The supreme court in *Toussaint* held that employers could protect against wrongful discharge suits based on implied contract theories by having a clearly stated policy that employees may be terminated at the will of the employer without regard to cause. A classic example of such a contract is that of Sears, Roebuck, and Co., which had a terminable-at-will policy before *Toussaint*. The Sears employment application — which all prospective employees are asked to sign — states in part:

In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.⁷⁸

Under *Toussaint*, such a provision allows an employer to safely terminate an employee without regard to cause. This led the federal district court in *Novosel v. Sears, Roebuck & Co.* to state: "Based on this agreement there is no way that the plaintiff could reasonably have had a legitimate expectation of a right to a just cause determination prior to

77. See *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Ringwelski v. Sears, Roebuck & Co.*, 636 F. Supp. 519 (E.D. Mich. 1985); *Summers v. Sears, Roebuck & Co.*, 599 F. Supp. 1157 (E.D. Mich. 1982); *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Riethmiller v. Blue Cross & Blue Shield*, 151 Mich. App. 188, 390 N.W.2d 227 (1986); *Ford v. Blue Cross & Blue Shield*, 150 Mich. App. 462, 390 N.W.2d 227 (1986); *Eliel v. Sears, Roebuck & Co.*, 150 Mich. App. 137, 387 N.W.2d 842 (1985); *Longley v. Blue Cross & Blue Shield*, 136 Mich. App. 336, 356 N.W.2d 20 (1984); *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 429 (1984).

78. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980) (emphasis omitted).

termination.”⁷⁹ Five of the implied contract cases reported in Michigan were brought by Sears employees.⁸⁰ The plaintiffs lost each of these cases.

In *Summers v. Sears, Roebuck & Co.*,⁸¹ the court found that the Sears contractual provision, though it refers to termination, also precluded a legitimate expectation of a right to a just cause determination prior to demotion.⁸² By extending the Sears at-will contract to an issue other than termination, the court expanded considerably the scope of such provisions.

A possible chink in the Sears-type provision was opened in *Reid v. Sears, Roebuck & Co.*,⁸³ where the court said:

While such language may well bar a *Toussaint* claim in some cases, it seems to me that an automatic barring application thereof is a negation of what this writer perceives to be the essential meaning of *Toussaint* — that there may be terms of the contract of employment implied in fact from the actions of the employer and its agents. The signing of an employment application as here, 17 years before the incident complained of and the automatic ignoring of any and all facts occurring thereafter as bearing on an employee's employer-induced expectation of some type of longevity in employment, seems a particularly unjust and unjustified interpretation of *Toussaint* which ought not to be automatically applied in this court without the Michigan court's authoritative ruling to that effect.⁸⁴

The court then evaluated the plaintiff's arguments and concluded that all she had was a “subjective belief that she could be terminated only for just cause, but that belief alone created no enforceable contract rights.”⁸⁵

In the five other at-will provision cases, including three against Blue Cross & Blue Shield,⁸⁶ the courts ruled against plaintiffs on the ground that employees had signed terminable-at-will statements in job applications or while employed by defendant employers, or that there was a handbook containing an at-will provision. It is interesting to note that the three cases in which Blue Cross & Blue Shield was the defendant involved discharges which occurred after the consolidation

79. *Id.*

80. See *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Ringwelski v. Sears, Roebuck & Co.*, 636 F. Supp. 519 (E.D. Mich. 1985); *Summers v. Sears, Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Eliel v. Sears, Roebuck & Co.*, 150 Mich. App. 137, 387 N.W.2d 842 (1985).

81. 549 F. Supp. 1157 (E.D. Mich. 1982).

82. *Id.* at 1161.

83. 588 F. Supp. 558 (E.D. Mich. 1984), *aff'd* 790 F.2d 453 (6th Cir. 1986).

84. *Id.* at 561.

85. *Id.*

86. See *Riethmiller v. Blue Cross & Blue Shield*, 151 Mich. App. 188, 390 N.W.2d 227 (1986); *Ford v. Blue Cross & Blue Shield*, 150 Mich. App. 462, 389 N.W.2d 114 (1986); *Longley v. Blue Cross & Blue Shield*, 136 Mich. App. 336, 356 N.W.2d 20 (1984).

of the two companies in 1975. The joined organization's handbook contained the following provision: "Just as any employee may resign at any time and for any reason, the company, because of legal considerations, reserves the right to release an employee at any time for any reason."⁸⁷ Based on the above-quoted handbook provision, Blue Cross & Blue Shield has prevailed in wrongful discharge suits decided after *Toussaint*.

In affirming a summary judgment in *Longley v. Blue Cross & Blue Shield*,⁸⁸ the court of appeals held that the plaintiff — who was discharged in 1976 — knew she could be dismissed with or without cause, and was therefore precluded from claiming she had any expectation that she could only be terminated for cause.⁸⁹ The Blue Cross & Blue Shield handbook provision was also sustained in two 1986 cases, *Ford v. Blue Cross & Blue Shield*⁹⁰ and *Riethmiller v. Blue Cross & Blue Shield*.⁹¹ In *Ford*, the jury awarded three plaintiffs discharged for falsifying payroll records amounts of \$10,000, \$6,625 and \$5,930 (apparently because the three had not been given exit interviews as called for in the employee handbook).⁹² The appellate court reversed and remanded for entry of a directed verdict for the defendant and stated: "The fact that the employer chooses to codify it [the exit interview] cannot in and of itself, transform the 'at will' contract into a contract with a 'just cause' termination provision."⁹³ In *Riethmiller*, the court of appeals affirmed the trial court's finding that Blue Cross & Blue Shield had not breached an implied employment contract when it terminated a physician (again based on an employee handbook at-will provision).⁹⁴ Dr. Riethmiller did, however, have his judgment of \$103,624 (plus interest, taxable costs and attorneys' fees) upheld on the basis of unlawful age discrimination.⁹⁵

As of this writing, awaiting a Michigan Supreme Court ruling is the very important question of whether an employer's terminable-at-will policy is applicable to employees hired before the policy was established. In *Ledl v. Quik Pik Food Stores, Inc.*,⁹⁶ an appeals court panel affirmed the trial court grant of summary judgment for the defendant in a case involving a fifty-seven-year old managerial employee who

87. *Longley v. Blue Cross & Blue Shield*, 136 Mich. App. 336, 338, 356 N.W.2d 20, 21 (1984) (quoting Blue Cross & Blue Shield's employee handbook).

88. 136 Mich. App. 336, 356 N.W.2d 20 (1984).

89. *Id.* at 340-42, 356 N.W.2d at 22-23.

90. 150 Mich. App. 462, 389 N.W.2d 114 (1986).

91. 151 Mich. App. 188, 390 N.W.2d 227 (1986).

92. *Ford v. Blue Cross & Blue Shield*, 150 Mich. App. 462, 464, 389 N.W.2d 114, 115 (1986).

93. *Id.* at 467, 389 N.W.2d at 116.

94. *Riethmiller v. Blue Cross & Blue Shield*, 151 Mich. App. 188, 198, 390 N.W.2d 227, 232 (1986).

95. *Id.* at 203, 390 N.W.2d at 234.

96. 133 Mich. App. 583, 349 N.W.2d 529 (1984).

had worked eight years for Quik Pik. Six months before her discharge, the plaintiff had signed an agreement that stated she could be terminated with or without notice or cause, despite having been told when hired that she would be continued as long as her service was satisfactory.⁹⁷ The court, quoting from *Toussaint*, stated:

An employer who establishes no personnel policies instills no reasonable expectation of performance. Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force. Employees could, however, expect that policies in force at any given time will be uniformly applied to all.⁹⁸

Paying little heed to the plaintiff's allegation that she had signed an adhesion contract, the court read *Toussaint* as indicating that the defendant could properly change its employment policies and make them applicable to employees hired prior to the change.⁹⁹

The *Ledl* decision has since been called into question by three other appellate decisions. In *Bullock v. Automobile Club*,¹⁰⁰ the plaintiff claimed the defendant had breached its employment contract by demoting him for failing to meet a unilaterally imposed production standard which allegedly violated his preexisting contract. The Michigan Court of Appeals agreed with the trial court (though not with the lower court's reasoning) that "[w]hether there was a legitimate and reasonable expectation in the employee that an employer's policy or practice is a term of the employment contract which bears directly upon the question of whether the employer is free to unilaterally change the policy or practice is for the trier of fact."¹⁰¹ In *Farrell v. Automobile Club*,¹⁰² another appeals court panel cited *Bullock* as having correctly interpreted *Toussaint* as holding "that notice or knowledge of unilateral changes can be construed from the circumstances surrounding employment"¹⁰³ and that "whether such notice or knowledge was ever given to an employee was a question for the trier of fact."¹⁰⁴ The court in *Farrell* then affirmed a jury verdict of \$150,000 in favor of the plaintiff — who had been terminated for failure to meet minimum production requirements — and it remanded for reduction

97. *Id.* at 586-87, 349 N.W.2d at 531.

98. *Id.* at 587-88, 349 N.W.2d at 531 (quoting *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 619, 292 N.W.2d 880, 894-95 (1980)).

99. *Id.* at 587, 349 N.W.2d at 531. For a different view on employer disclaimers, see Steiner & Dabrow, *The Questionable Value of the Inclusion of Language Confirming Employment-at-Will Status in Company Personnel Documents*, 37 LAB. L.J. 639 (1986).

100. 146 Mich. App. 711, 381 N.W.2d 793 (1985).

101. *Id.* at 721, 381 N.W.2d at 797.

102. 155 Mich. App. 378, 399 N.W.2d 531 (1986).

103. *Id.* at 386, 399 N.W.2d at 536.

104. *Id.* at 387, 399 N.W.2d at 536.

of future damages to their present value.¹⁰⁵ It is interesting to note that neither *Bullock* nor *Farrell* made any reference to *Ledl*.

Bullock was also cited as authority in a third case, *Scholz v. Montgomery Ward & Co.*,¹⁰⁶ in which the Michigan Court of Appeals affirmed a jury verdict of \$16,503 for wrongful discharge and \$8,250 for religious discrimination, plus interest, costs, and attorneys' fees. When Scholz was hired in 1970 as a salesperson, she was told that she would not have to work Sundays.¹⁰⁷ At that time, the store was not open on Sundays; subsequently, however, Montgomery Ward decided to remain open on Sundays.¹⁰⁸ In 1982, Scholz, along with all of her coworkers, signed an agreement stating that she understood she could be terminated at any time "with or without cause, and without any previous notice."¹⁰⁹ The agreement also said Scholz understood that rules governing her employment could be changed without notice at any time.¹¹⁰ In 1983, she was discharged for refusing to work Sundays.¹¹¹

Montgomery Ward filed an application for leave to appeal to the Michigan Supreme Court in April 1987.¹¹² (In an *amicus curiae* brief, the Michigan Manufacturers Association argued that the court of appeals erred in holding that the plaintiff's at-will contract did not supersede and defeat her alleged prior oral agreement in accordance with the supreme court's decision in *Toussaint*.¹¹³) Assuming leave to appeal is granted, the supreme court's decision in *Scholz* should resolve the thorny and highly important issue as to whether an employer's adoption of an at-will policy is binding on employees hired before the policy was established.

In *Damrow v. Thumb Cooperative Terminal, Inc.*,¹¹⁴ the court of appeals held that a "just cause" provision, adopted by an employer eight months after an employee was hired, was nonetheless binding upon the employer when the employee was dismissed after the manual provision was instituted. This holding is consistent with the decision in *Ledl*, though it favors the employee rather than the employer. Should the supreme court reverse *Scholz v. Montgomery Ward & Co.*, it would raise a serious question regarding the *Damrow*-type case.

105. *Id.* at 391, 399 N.W.2d at 538.

106. No. 86118 (Mich. Ct. App. 1986).

107. Amicus Curiae Brief in Support of Leave to Appeal of Michigan Manufacturers Association at 1, *Scholz v. Montgomery Ward & Co.*, No. 80709 (Mich. July 20, 1987).

108. *Id.*

109. *Id.* at 2 (quoting employment-at-will agreement signed by plaintiff).

110. *Id.*

111. *Id.* at 3.

112. *Scholz v. Montgomery Ward & Co.*, No. 80709 (Mich. July 20, 1987).

113. *Id.* at 6.

114. 126 Mich. App. 354, 337 N.W.2d 338 (1983).

(*Damrow* was remanded for trial. However, we have learned that the defendant employer went out of business before the trial and the plaintiff therefore failed to recover any damages.)

B. Mental Distress Damages for Breach of Implied Contract

In affirming an appellate decision in *Valentine v. General American Credit, Inc.*,¹¹⁵ the supreme court stated that "a person discharged in breach of an employment contract may not recover mental distress damages."¹¹⁶ In explaining its ruling, the court stated:

An employment contract will indeed have a personal element. Employment is an important aspect of most persons' lives, and the breach of an employment contract may result in emotional distress. The primary purpose in forming such contracts, however, is economic and not to secure the protection of personal interests. The psychic satisfaction of the employment is secondary.

Mental distress damages have not been awarded where there is a market standard by which damages can be adequately determined. Valentine's monetary loss can be estimated with reasonable certainty according to the terms of the contract and the market for, or the market value of, her service. Mental distress damages are not awarded an employee found to have been wrongfully discharged in violation of a collective bargaining agreement.¹¹⁷

In *Chamberlain v. Bissell, Inc.*,¹¹⁸ the federal district court ruled that although the defendant had good cause to discharge the plaintiff (a manager of Manufacturing Engineering with 22 years of service) it was still liable for negligent job evaluation for failing to notify him during his evaluation of the impending discharge.¹¹⁹ The court further stated that "while a complete failure to perform a contractual obligation may be actionable only as a breach of contract, the negligent performance of the obligation is actionable as a tort."¹²⁰ The court also noted that a "cause of action for negligent job evaluation has already been recognized in the Michigan courts in the wake of the *Toussaint* opinion."¹²¹ Assessing damages of \$360,906 (\$210,906 in compensatory and \$150,000 in mental distress damages), the court ruled that the plaintiff was entitled to recover only 17 percent of actual damages (\$61,354) plus interest because of his own "high degree of contributory negligence."¹²²

115. 420 Mich. 256, 362 N.W.2d 628 (1984).

116. *Id.* at 263, 362 N.W.2d at 631.

117. *Id.* Although *Valentine* was remanded for trial, it was settled prior to being heard. Damages for mental distress, in a breach of contract action, were also denied by the Michigan Court of Appeals in *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 378 N.W.2d 558 (1985).

118. 547 F. Supp. 1067 (W.D. Mich. 1982).

119. *Id.* at 1081-82.

120. *Id.* at 1081 (emphasis in the original).

121. *Id.* (citing *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981)).

122. *Id.* at 1084 (W.D. Mich. 1982). With respect to negligent evaluation being a tort per *Chamberlain* and *Schipani*, the court in *Gach v. National Educ. Corp.*, No. 84-1792, (E.D. Mich. Sept. 17, 1985) (Westlaw DCT database) asserted:

C. Standards for Voluntary Arbitration

In *Vander Toorn v. City of Grand Rapids*,¹²³ the court of appeals reversed the trial court's ruling that the plaintiff's discharge claim was not entitled to be heard by a jury. The lower court had based its ruling upon the notion that the decision to terminate was made by an administrative agency acting in a quasi-judicial capacity and therefore the courts' scope of review under the Michigan Constitution was limited to determining whether the agency's decision was "supported by competent, material and substantial evidence on the whole record."¹²⁴ Applying this limited standard of review, the trial court affirmed the agency's decision.¹²⁵ The appeals court, however, held that the lower court's dismissal of Vander Toorn's complaint on the ground that it was subject only to limited judicial review was error because the Commission was not functioning as a judicial or quasi-judicial administrative agency under the city charter or an ordinance when it decided to terminate the plaintiff.¹²⁶ Noting that *Toussaint* allowed an employer to avoid a jury trial by providing for binding arbitration, the court of appeals went on to quote the supreme court's statement that the "promise to terminate employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge."¹²⁷ The appeals court then held that the arbiter referred to in *Toussaint* must be "impartial."¹²⁸ Since the Commission, under the Museum's handbook procedure, had participated in the initial decision to discharge the plaintiff, it could not be considered impartial.¹²⁹ The court, therefore, reversed and remanded for a jury trial.¹³⁰

In *Khalifa v. Henry Ford Hospital*,¹³¹ the court of appeals held that an Employee Grievance Council — consisting of nine non-supervisory hospital employees (elected by their co-workers) whose decisions were

The law in Michigan, as reflected in *Hart v. Ludwig*, 347 Mich. 559 (1956), is that a tort action will lie for conduct constituting a breach of contract only if a legal duty existed apart from the contract. . . . This court recognizes that its ruling as to plaintiff's claim for negligent evaluation of performance is directly contrary to the decisions of *Schipani v. Ford Motor Co.* and *Chamberlain v. Bissell*. This court does not follow these decisions.

Id. at 5 (citations omitted).

123. 132 Mich. App. 590, 348 N.W.2d 697 (1984).

124. *Id.* at 594, 348 N.W.2d at 699-700 (quoting MICH. CONST. art. 6, § 28 (1963)).

125. *Id.* at 594, 348 N.W.2d at 700.

126. *Id.* at 597, 348 N.W.2d at 701.

127. *Id.* at 598, 348 N.W.2d at 701.

128. *Id.*

129. *Id.* at 598-99, 348 N.W.2d at 701.

130. *Id.* at 601-02, 348 N.W.2d at 703. We have learned that the case was settled without a trial for \$200,000-\$240,000.

131. 156 Mich. App. 485, 401 N.W.2d 884 (1986).

final and binding — met the *Toussaint* standard of an alternative method of dispute resolution by an impartial arbiter.¹³² The plaintiff argued that the hearing on his discharge was unfair and lacked due process since: 1) he was not allowed to be present at the hearing except to testify as a witness; 2) he had no opportunity to rebut evidence and argument or to cross-examine witnesses; 3) no record was made of the hearing; 4) representation of counsel was not permitted; and 5) the personnel office representative — a professional on grievance procedure who was involved in the decision to terminate — was permitted to testify.¹³³ Nonetheless, the court noted that, while some of the plaintiff's claims would be valid in the context of a judicial proceeding, the hearing still met the standard of fairness which is applied in grievance arbitration.¹³⁴ The court distinguished its ruling from that in *Vander Toorn*, in which the grievance committee only had the power to recommend action to the Museum Director and the Art and Museum Commission, while the Employee Grievance Council's decision was final and binding on the parties.¹³⁵

In *Renny v. Port Huron Hospital*,¹³⁶ the Michigan Supreme Court explicitly set forth the elements necessary to meet the *Toussaint* standard for an alternative method of dispute resolution. Renny, a registered nurse, was discharged for allegedly verbally intimidating a subordinate.¹³⁷ A jury awarded her \$100,000 in damages for wrongful discharge.¹³⁸ The court of appeals affirmed,¹³⁹ as did the supreme court in a 4-3 decision.¹⁴⁰ Rejecting the defendant's internal grievance procedure, the supreme court majority stated that the requirements for a fair and legally acceptable adjudication in administrative and arbitration proceedings are:

- 1) Adequate notice to persons who are to be bound by the adjudication;
- 2) The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument [sic] [party];
- 3) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
- 4) A rule specifying the point in the proceeding when a final decision is rendered; and,
- 5) Other procedural elements as may be necessary to ensure a means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter must be re-

132. *Id.* at 491, 494-98, 401 N.W.2d at 887, 888-90.

133. *Id.* at 497, 401 N.W.2d at 890.

134. *Id.* at 498, 401 N.W.2d at 890.

135. *Id.* at 499, 401 N.W.2d at 890.

136. 427 Mich. 415, 398 N.W.2d 327 (1986).

137. *Id.* at 421, 398 N.W.2d at 331.

138. *Id.* at 417, 398 N.W.2d at 329.

139. *Id.* at 425, 398 N.W.2d at 333.

140. *Id.* at 439, 398 N.W.2d at 339.

solved and the opportunity of the parties to obtain evidence and formulate legal contentions.¹⁴¹

D. Extension of *Toussaint* to Non-Discharge Cases

In 1982 a federal district court held that *Toussaint* was not limited to discharge cases. In *Ariganello v. Scott Paper Co.*,¹⁴² the court ruled that thirty-eight former salaried employees stated a claim under *Toussaint* in their suit for severance pay when their plant was sold and they were employed by the purchasing company.¹⁴³ The court found there was an issue of fact as to whether the company had actually distributed to the plaintiffs a statement allowing the company not to grant severance pay in the event of sale and reemployment of the employees by a successor company.¹⁴⁴ However, in 1984, the Sixth Circuit affirmed that same district court's refusal to extend *Toussaint* to layoffs without further guidance from the state courts.¹⁴⁵ In *Grubb v. W.A. Foote Memorial Hospital*, a hospital laundry supervisor claimed breach of an implied employment contract when his position was eliminated.¹⁴⁶ The Sixth Circuit agreed with the district court's refusal to extend *Toussaint* to layoff policies because the Michigan courts had not as yet applied *Toussaint* in situations that did not involve a wrongful discharge from a continuing position.¹⁴⁷

V. PUBLIC POLICY CASES

The public policy exception to the general rule of employment-at-will has played a much less important role in wrongful discharge actions in Michigan than has the implied contract exception. Indeed, the Michigan courts have been less venturesome in considering suits challenging discharge as a violation of public policy than some other state courts.

*Sventko v. Kroger Co.*¹⁴⁸ was the first case in which a Michigan court recognized the public policy exception to the employment-at-will doctrine. Sventko suffered a disabling injury while working for defendant Kroger Co. in May 1973.¹⁴⁹ Sventko did not file for workmen's compensation until July and was still being treated for her in-

141. *Id.* at 437, 398 N.W.2d at 338 (citing the RESTATEMENT (SECOND) OF JUDGMENTS §§ 83(2), 84(3)(b) (1982)).

142. 588 F. Supp. 484 (E.D. Mich. 1982).

143. *Id.* at 488-89.

144. *Id.* at 487. We have since discovered that settlements were reached in varying amounts with the individual plaintiffs.

145. *Grubb v. W.A. Foote Memorial Hosp.*, 741 F.2d 1486, 1488 (6th Cir. 1984).

146. *Id.* at 1488.

147. *Id.* at 1500.

148. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

149. *Id.* at 646, 245 N.W.2d at 152.

jury when she was fired in November 1973.¹⁵⁰ Alleging she had been wrongfully discharged in retaliation for filing the workmen's compensation claim, Sventko brought an action against Kroger Co. in December 1974.¹⁵¹ The trial court granted summary judgment in favor of the defendant on the grounds that the plaintiff was an at-will employee and there was no provision in the Michigan workmen's compensation statute prohibiting retaliatory discharges.¹⁵² In a split decision reversing the trial court, a panel of the Michigan Court of Appeals stated:

[W]hile it is generally true that either party may terminate an employment at will for any reason or for no reason, that rule is not absolute. . . . [T]he better view is that an employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state. That the workmen's compensation statute does not directly prohibit a retaliatory discharge by employers does not hinder this opinion.¹⁵³

The court also noted that the workmen's compensation act was to "provide financial and medical benefits to the victims of work-connected injuries in an efficient, dignified and certain form."¹⁵⁴ Consequently, the court asserted, "discouraging the fulfillment of this legislative policy by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy of our state."¹⁵⁵

Conspicuously absent from the opinion were any citations to cases from other states which were on point. Rather, the court relied on its notions of legislative intent and cases involving workmen's compensation issues and discrimination. In contrast, the concurring opinion did cite a number of well-known non-Michigan cases, such as *Petermann v. International Brotherhood of Teamsters*,¹⁵⁶ *Monge v. Beebe Rubber Co.*,¹⁵⁷ and *Frampton v. Central Indiana Gas Co.*¹⁵⁸

Less than two years later, the Michigan courts recognized the public policy exception for the first time in a non-workmen's compensation case. In *Trombetta v. Detroit, Toledo & Ironton R.R.*,¹⁵⁹ a railroad employee sued for wrongful discharge, alleging he was fired for refusing to alter pollution control reports. The trial court granted the de-

150. *Id.*

151. *Id.*

152. *Id.* See also MICH. COMP. LAWS ANN. § 418 (West 1984).

153. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 646, 245 N.W.2d 151, 152 (1976).

154. *Id.* at 646-47, 245 N.W.2d at 153 (quoting *Whetro v. Awkerman*, 388 Mich. 235, 242, 174 N.W.2d 783, 785 (1970) (Kavanagh, J., dissenting)).

155. *Id.* at 648, 245 N.W.2d at 153.

156. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

157. 114 N.H. 130, 316 A.2d 549 (1974).

158. 260 Ind. 249, 297 N.E.2d 425 (1979). *Frampton* was particularly relevant since the Indiana Supreme Court allowed a worker fired for filing a workmen's compensation claim to sue her employer for retaliatory discharge. *Id.* at 256, 297 N.E.2d at 428-29.

159. 81 Mich. App. 489, 265 N.W.2d 385 (1978).

pendant railroad summary judgment because the public policy exception did not apply to modify the plaintiff's at-will status.¹⁶⁰ The lower court based its judgment on the ground that discharges for reporting alleged violations of Michigan's pollution control standards¹⁶¹ had not yet been classified by the appellate courts as a violation of the public policy of the state.¹⁶²

The court of appeals subsequently obliged the trial court in no uncertain terms, by declaring:

It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws.

. . . Such action would clearly violate the law of this state.

Hence, we find that plaintiff has stated a claim upon which relief can be granted, and therefore the trial court erroneously granted defendant's motion for summary judgment on the basis of this ground.¹⁶³

However, the appellate court affirmed the trial court's summary judgment, since no material issue of fact had been presented. Plaintiff's failure to submit any proof which would qualify as admissible evidence at trial to contradict the sworn statements made by defendants' agents contributed to the trial court's findings.¹⁶⁴

It should be noted that, although the court of appeals may well have been "right" in its expansion of the public policy exception, it still was acting on its own authority as an appellate court. One wonders why the court did not cite various cases beginning with *Petermann* to support and lend credence to its opinion. Indeed, even though the court's interpretation of the law was reasonable, it would have brought more momentum to the public policy exception in Michigan had the court used some of the growing body of precedents from around the country.

Following recognition of the public policy exception in *Sventko* and *Trombetta*, the courts have held that an employer may not discharge an employee for failing to disclose on his employment application that he had previously filed for workers' compensation at another company,¹⁶⁵ that an employee may not be terminated because he had been subpoenaed by a grand jury,¹⁶⁶ and that the termination of a secretary to a federal court judge is not immune from challenge as a wrongful discharge.¹⁶⁷ The courts have also found that dismissals for whistleblowing are in violation of public policy as expressed in the

160. *Id.* at 495, 265 N.W.2d at 388.

161. MICH. COMP. LAWS ANN. § 323.1 (West 1984).

162. *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 495, 265 N.W.2d 385, 388 (1978).

163. *Id.* at 495-96, 265 N.W.2d at 388 (citations omitted).

164. *Id.* at 498, 265 N.W.2d at 389.

165. *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983).

166. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983).

167. *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987).

Michigan Whistleblowers' Protection Act.¹⁶⁸ The Michigan Supreme Court, however, has refused to find public policy exceptions to the general rule of employment-at-will when an employee was discharged for absence from work due to a workers' compensation injury.¹⁶⁹ The court has also held that the Michigan Whistleblowers' Protection Act did not apply to an internal corporate complaint and that the code of ethics of a private professional association does not establish a public policy.¹⁷⁰ Federal courts in Michigan have held that discharge actions for union activity were preempted from consideration under state law by the National Labor Relations Act.¹⁷¹

In *Goins v. Ford Motor Co.*,¹⁷² a labor relations employee sued for wrongful discharge after being fired by Ford in November 1977 for not revealing on his medical history form, when hired, that he had received workers' compensation benefits while employed at General Motors.¹⁷³ A jury awarded him \$450,000, which was reduced by the trial court to a present value of \$270,439.50.¹⁷⁴ The appeals court affirmed, stating:

We find no reason, as defendant suggests, to limit this rule only to employers who fire employees who file claims against them rather than previous employers. The public policy extends to situations such as this where the employee argues an unlawful or retaliatory discharge because he or she filed a worker's compensation claim against any employer, including a previous employer.¹⁷⁵

Contrary to the relatively expansive interpretation of public policy in *Goins* was the supreme court ruling in *Clifford v. Cactus Drilling Corp.*¹⁷⁶ Clifford was injured in December 1977 and received workers' compensation payments for a period of five weeks.¹⁷⁷ Shortly after returning to work, a recurrence of the pain caused by the injury forced him to call in sick.¹⁷⁸ After being terminated the next day, Clifford sued for wrongful discharge.¹⁷⁹ The trial court granted summary judgment for the defendant,¹⁸⁰ but a divided court of appeals panel reversed.¹⁸¹ The supreme court then reversed the appeals court, and

168. *Melchi v. Burns Int'l Sec. Serv.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985).

169. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 353 N.W.2d 469 (1984).

170. *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).

171. *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982).

172. 131 Mich. App. 185, 347 N.W.2d 184 (1983).

173. *Id.* at 190, 347 N.W.2d at 187.

174. *Id.* at 189, 347 N.W.2d at 187.

175. *Id.* at 194, 347 N.W.2d at 189.

176. 419 Mich. 356, 353 N.W.2d 469 (1984).

177. *Id.* at 359, 353 N.W.2d at 470.

178. *Id.*

179. *Id.*

180. *Id.* at 359-60, 353 N.W.2d at 470.

181. *Clifford v. Cactus Drilling Corp.*, 109 Mich. App. 776, 312 N.W.2d 380 (1981).

proclaimed: "We cannot agree . . . that an employee's protection from discharge in retaliation for filing a workers' compensation claim necessarily includes protection from discharge because of an absence from work because of a work-related injury."¹⁸²

In a lone dissent, Chief Justice Williams reviewed the case history regarding the public policy exception in Michigan and other states and concluded that "it would be myopic of this Court to narrowly define 'retaliation for filing a workers' compensation claim' to exclude retaliation for absence because of a work-related injury."¹⁸³ Additionally, he argued:

If an employee may be discharged for an absence because of a work-related disability for which the employee may receive compensation, the employee will be reluctant to jeopardize his job security by filing a workers' compensation claim in conjunction with taking time off to attend a disability. Such a practice effectively hampers an employee's right to workers' compensation and thus contravenes public policy.¹⁸⁴

In 1981, Michigan became the first state in the country to enact a law to protect "whistleblowers." The Michigan Whistleblowers' Protection Act provides that:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee reports or is about to report, verbally, or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.¹⁸⁵

In *Melchi v. Burns International Security Service, Inc.*,¹⁸⁶ the plaintiff, a security guard, alleged he had been discharged for revealing to public officials and agencies the destruction and falsification of security records and reports at a nuclear power facility.¹⁸⁷ Suing under the Michigan Whistleblowers' Protection Act, Melchi was awarded \$33,128 by a federal court.¹⁸⁸ The court, however, did not reinstate him — although it was a possible remedy under the Act — because there was some evidence he may have acted in part for an improper motive stemming from apprehension over his perceived diminishing job security.¹⁸⁹

182. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 360, 353 N.W.2d 469, 471 (1984).

183. *Id.* at 369, 353 N.W.2d at 475 (Williams, C.J., dissenting).

184. *Id.* at 371, 353 N.W.2d at 475 (Williams, C.J., dissenting). *Goins* was not cited by either the majority or the dissent in *Clifford*.

185. MICH. COMP. LAWS ANN. § 15.362 (West 1984).

186. 597 F. Supp. 575 (E.D. Mich. 1984).

187. *Id.* at 576-78.

188. *Id.* at 586.

189. *Id.*

In *Watassek v. Michigan Department of Mental Health*,¹⁹⁰ the plaintiff, an attendant nurse in the Department of Mental Health who was still a probationary employee, alleged that he had been terminated for reporting incidents of patient abuse to his superior.¹⁹¹ The appeals court affirmed the trial court's denial of summary judgment to the defendant. In so doing, it cited the Whistleblowers' Protection Act as well as *Sventko* and *Trombetta* — even though the plaintiff's termination occurred in 1976, five years before the Act was passed.¹⁹² The case was remanded and awaiting trial at the time this article was written.

In *Suchodolski v. Michigan Consolidated Gas Co.*,¹⁹³ the supreme court rejected the plaintiff's public policy exception claim on four main grounds. First, the court held that alleged retaliation for attempts to bring improper accounting and other practices to the attention of the plaintiff's superiors was "a corporate management dispute" and not "the kind of violation of a clearly mandated public policy that would support an action for retaliatory discharge."¹⁹⁴ Furthermore, according to the court:

The code of ethics of a private association [the Institute of Internal Auditors] does not establish public policy. Nor is the regulation of public utilities sufficient to sustain the plaintiff's action. The regulation of the accounting systems of utilities is not, as in the workers' compensation statute, directed at conferring rights on the employees. Finally, we note that the plaintiff does not claim that his discharge arose from his refusal to falsify reports or documents required by the Public Service Commission.¹⁹⁵

Unlike in *Watassek* — where the appeals court held that the 1981 Whistleblowers' Protection Act was applicable to the plaintiff's wrongful discharge claim arising during 1976 — the supreme court did not refer to the Act in *Suchodolski*, although the termination also occurred in 1976.

VI. STATISTICAL SUMMARY OF CASES

Since the *Toussaint* decision in 1980, we have found thirty-seven reported cases based on an implied contract exception to the general employment-at-will rule. At the trial court level, the issues in twenty-five of these cases (67.6%) were decided for defendants,¹⁹⁶ generally

190. 143 Mich. App. 556, 372 N.W.2d 617 (1985).

191. *Id.* at 558, 372 N.W.2d at 618.

192. *Id.* at 564, 372 N.W.2d at 621.

193. 412 Mich. 692, 316 N.W.2d 710 (1982).

194. *Id.* at 696, 316 N.W.2d at 712.

195. *Id.*

196. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Kay v. United Technologies Corp.*, 757 F.2d 400 (6th Cir. 1985); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Grubb v. W.A. Foote Memorial Hosp.*, 741 F.2d 1486 (6th Cir. 1984); *Ringwelski v. Sears, Roebuck & Co.*, 636 F. Supp. 519 (E.D. Mich. 1985); *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Taylor v. General*

on pretrial motions for summary judgment. Twelve (32.4%) were decided for plaintiffs,¹⁹⁷ either on denial of defendants' motions for summary judgment or on verdicts awarding damages to plaintiffs (although settlements may have been reached later).

All reported state court decisions were appealed (state trial court judgments are not reported), while only four of the fourteen cases decided by federal district courts were appealed to the Sixth Circuit.¹⁹⁸ Two cases were decided by the Michigan Supreme Court.¹⁹⁹ Appellate courts affirmed eleven trial court results for defendants²⁰⁰ and five for

Motors Corp., 588 F. Supp. 562 (E.D. Mich. 1984); *Summers v. Sears, Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982); *Rhoden v. Allstate Ins. Co.*, 115 L.R.R.M. (BNA) 4808 (E.D. Mich. 1982); *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984); *Dzierwa v. Michigan Oil Co.*, 152 Mich. App. 281, 393 N.W.2d 610 (1986); *Riethmiller v. Blue Cross & Blue Shield*, 151 Mich. App. 188, 390 N.W.2d 227 (1986); *Eliel v. Sears, Roebuck & Co.*, 150 Mich. App. 137, 387 N.W.2d 842 (1985); *Cowdrey v. A.T. Transport*, 141 Mich. App. 617, 367 N.W.2d 433 (1985); *Rasch v. City of East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985); *Luce v. Goetze Corp. of Am.*, 117 L.R.R.M. (BNA) 3036 (Mich. Ct. App. 1984); *Kipke v. Lenawee County Bd.*, 138 Mich. App. 791, 360 N.W.2d 300 (1984); *Longley v. Blue Cross & Blue Shield*, 136 Mich. App. 336, 356 N.W.2d 20 (1984); *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 429 (1984); *Vander Toorn v. City of Grand Rapids*, 132 Mich. App. 590, 348 N.W.2d 697 (1984); *Damrow v. Thumb Coop. Terminal*, 126 Mich. App. 354, 337 N.W.2d 338 (1983); *Schwartz v. Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981); *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, 298 N.W.2d 915 (1980).

197. *Fletcher v. Advo Sys., Inc.*, 616 F. Supp. 1511 (E.D. Mich. 1985) (case set for trial; confidential settlement reached later); *Halsam v. Pepsi-Cola Co.*, 117 L.R.R.M. (BNA) 2950 (E.D. Mich. 1984) (court allowed exemplary damage claim to stand; settled later for \$50,000-\$100,000); *Ariganello v. Scott Paper Co.*, 588 F. Supp. 484 (E.D. Mich. 1982); *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982); *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1986); *Khalifa v. Henry Ford Hosp.*, 156 Mich. App. 485, 401 N.W.2d 884 (1986); *Farrell v. Automobile Club*, 155 Mich. App. 378, 399 N.W.2d 531 (1986); *Ford v. Blue Cross & Blue Shield*, 150 Mich. App. 188, 390 N.W.2d 227 (1986); *Bullock v. Automobile Club*, 146 Mich. App. 711, 381 N.W.2d 793 (1985); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 145 Mich. App. 641, 378 N.W.2d 558 (1985); *Obey v. McFadden Corp.*, 138 Mich. App. 767, 360 N.W.2d 292 (1984); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981).
198. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Kay v. United Technologies Corp.*, 757 F.2d 400 (6th Cir. 1985); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Grubb v. W.A. Foote Memorial Hosp.*, 741 F.2d 1486 (1984).
199. *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1986); *Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984).
200. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Kay v. United Technologies Corp.*, 757 F.2d 400 (6th Cir. 1985); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984); *Dzierwa v. Michigan Oil Co.*, 152 Mich. App. 281, 393 N.W.2d 610 (1986); *Riethmiller v. Blue Cross & Blue Shield*, 151 Mich. App. 188, 390 N.W.2d 227 (1986); *Eliel v. Sears, Roebuck & Co.*, 150 Mich. App. 137, 387 N.W.2d 842 (1985); *Kipke v. Lenawee County Bd.*, 138 Mich. App. 791, 360 N.W.2d 300 (1984); *Longley v. Blue Cross & Blue Shield*, 136 Mich. App. 336, 356 N.W.2d 20 (1984);

plaintiffs.²⁰¹ They reversed six lower court results for defendants²⁰² and three for plaintiffs.²⁰³ All four federal district court judgments that were appealed were affirmed.²⁰⁴ The Michigan Supreme Court affirmed one decision for a plaintiff²⁰⁵ and one for a defendant.²⁰⁶ The final outcome in the thirty-seven implied contract cases was 60 percent in favor of defendants and 40 percent for plaintiffs.²⁰⁷

Of the nine public policy exception claims to employment-at-will since 1980, the issues in five were decided for defendants,²⁰⁸ while four cases²⁰⁹ went the plaintiffs' way at the trial court level. Four of these

Ledl v. Quik Pik Food Stores, Inc., 133 Mich. App. 583, 349 N.W.2d 429 (1984); Schwartz v. Michigan Sugar Co., 106 Mich. App. 471, 308 N.W.2d 459 (1981); Hollowell v. Career Decisions, Inc., 100 Mich. App. 561, 298 N.W.2d 915 (1980).

201. Renny v. Port Huron Hosp., 427 Mich. 415, 398 N.W.2d 327 (1986); Farrell v. Automobile Club, 155 Mich. App. 378, 399 N.W.2d 531 (1986); Bullock v. Automobile Club, 146 Mich. App. 711, 381 N.W.2d 793 (1985); Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 552 (1985); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981).
202. Cowdrey v. A.T. Transport, 141 Mich. App. 617, 367 N.W.2d 433 (1985); Rasch v. City of East Jordan, 141 Mich. App. 336, 367 N.W.2d 856 (1985); Luce v. Goetze Corp. of Am., 117 L.R.R.M. (BNA) 3036 (Mich. Ct. App. 1984); Vander Toorn v. City of Grand Rapids, 132 Mich. App. 590, 348 N.W.2d 697 (1984); Damrow v. Thumb Coop. Terminal, 126 Mich. App. 354, 337 N.W.2d 338 (1983); Hrab v. Hayes-Albion Corp., 103 Mich. App. 90, 302 N.W.2d 606 (1981).
203. Khalifa v. Henry Ford Hosp., 156 Mich. App. 485, 401 N.W.2d 884 (1986); Ford v. Blue Cross & Blue Shield, 150 Mich. App. 462, 389 N.W.2d 114 (1986); Obey v. McFadden Corp., 138 Mich. App. 767, 360 N.W.2d 292 (1984).
204. Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); Kay v. United Technologies Corp., 757 F.2d 100 (6th Cir. 1985); Grubb v. W.A. Foote Memorial Hosp., 741 F.2d 1486 (6th Cir. 1984); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).
205. Renny v. Port Huron Hosp., 427 Mich. 415, 398 N.W.2d 327 (1986).
206. Valentine v. General Am. Credit, Inc., 420 Mich. 265, 362 N.W.2d 628 (1984).
207. See *supra* notes 196-97. Six cases in note 196 were reversed in favor of the plaintiffs: Cowdrey v. A.T. Transport, 141 Mich. App. 617, 367 N.W.2d 433 (1985); Rasch v. City of East Jordan, 141 Mich. App. 336, 367 N.W.2d 856 (1985); Luce v. Goetze Corp. of Am., 117 L.R.R.M. (BNA) 3036 (Mich. Ct. App. 1984); Vander Toorn v. City of Grand Rapids, 132 Mich. App. 590, 348 N.W.2d 697 (1984); Damrow v. Thumb Coop. Terminal, 126 Mich. App. 354, 337 N.W.2d 338 (1983); Hrab v. Hayes-Albion Corp., 103 Mich. App. 90, 302 N.W.2d 606 (1981). Three cases in note 197 were reversed in favor of defendants: Khalifa v. Henry Ford Hosp., 156 Mich. App. 485, 401 N.W.2d 884 (1986); Ford v. Blue Cross & Blue Shield, 150 Mich. App. 462, 389 N.W.2d 114 (1986); Obey v. McFadden Corp., 138 Mich. App. 767, 360 N.W.2d 292 (1984).
208. Sitek v. Forest City Enters., 587 F. Supp. 1381 (E.D. Mich. 1984); Morris v. Chem-Lawn Corp., 541 F. Supp. 479 (E.D. Mich. 1982); Clifford v. Cactus Drilling Corp., 419 Mich. 356, 353 N.W.2d 469 (1984); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982); Hrab v. Hayes-Albion Corp., 103 Mich. App. 90, 302 N.W.2d 606 (1981).
209. Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983); Melchi v. Burns Int'l Sec. Serv., 597 F. Supp. 575 (E.D. Mich. 1984); Watassek v. Michigan Dept. of Mental Health, 143 Mich. App. 556, 372 N.W.2d 617 (1985); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983).

nine cases were heard by federal district courts.²¹⁰ Six were appealed,²¹¹ but only one²¹² went to the Michigan Supreme Court. One case was appealed to the Sixth Circuit.²¹³ On appeal, the lower court result was affirmed in five cases²¹⁴ and reversed in one.²¹⁵ The final outcome in public policy cases favored defendants in four cases²¹⁶ and plaintiffs in five cases.²¹⁷

The foregoing results are fairly similar to those reported for the United States for 1984 and 1985 by the American Bar Association Committee on the "Development of the Law of Individual Rights and Responsibilities in the Workplace."²¹⁸ Yet, the amounts awarded to plaintiffs in Michigan cases were much lower than might be expected for a state which has been ranked second only to California in the extent to which the employment-at-will doctrine has allegedly been eroded. Fifteen plaintiffs received court awards or agreed to monetary damages through settlements.²¹⁹ All of the awards and known settle-

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210. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Melchi v. Burns Int'l Sec. Serv.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982).
 211. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 353 N.W.2d 469 (1984); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981).
 212. *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).
 213. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983).
 214. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 353 N.W.2d 469 (1984); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983).
 215. *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981).
 216. *Sitek v. Forest City Enters.*, 587 F. Supp. 1381 (E.D. Mich. 1984); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982); *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 353 N.W.2d 469 (1984); *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982).
 217. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Melchi v. Burns Int'l Sec. Serv.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985); *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981).
 218. Cited in Note, *Individual Rights and Responsibilities in the Work Place*, 1 LAB. LAW. 89 (1985), and Report, *Individual Rights and Responsibilities in the Work Place*, 2 LAB. LAW. 351 (1986).
 219. *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Fletcher v. Advo Sys., Inc.*, 616 F. Supp. 1511 (E.D. Mich. 1985); *Haslam v. Pepsi-Cola Co.*, 117 L.R.R.M. (BNA) 2950 (E.D. Mich. 1984); *Melchi v. Burns Int'l Sec. Serv.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982); *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1986); *Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984); *Far-*

ments were well below \$1,000,000. The largest award was \$740,000²²⁰ with the strong likelihood that the final settlement was for a lesser amount, since it was reached while on appeal by the defendant to the Michigan Supreme Court. Four awards and settlements were in the \$100,000-\$500,000 range,²²¹ three were between \$50,000 and \$99,000,²²² five were for less than \$50,000,²²³ and two were confidential.²²⁴

We realize that reported court decisions represent only a very small proportion of all wrongful discharge suits. Not all state appeals court or federal court cases are reported, and most trial court judgments are not appealed. Even more numerous are the cases that are settled at the pretrial level or at some stage of the litigation process. Some attorneys specializing in employment rights litigation estimate that over 90 percent of the cases they handle are settled at the pretrial stage. However, it is unlikely that pretrial settlements and unreported trial court awards which were not appealed were for amounts substantially exceeding those in reported cases.

California is the only state for which we have found trial court decisions summarized over a time-frame comparable to the period covered in this study of Michigan. Using data from *Jury Verdicts Weekly*, a non-official reporting service that relies on voluntary participation by attorneys and court officials, a California law firm compiled a "Summary of Wrongful Discharge and Related Cases Which Concluded With a Jury Verdict" for the period October 1979 to September 1986.²²⁵ This summary reported 112 jury verdicts during the

rell v. Automobile Club, 155 Mich. App. 378, 399 N.W.2d 531 (1986); Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 558 (1985); Rasch v. City of East Jordan, 141 Mich. App. 336, 367 N.W.2d 856 (1985); Cowdry v. A.T. Transport, 141 Mich. App. 617, 367 N.W.2d 433 (1985); Vander Toorn v. City of Grand Rapids, 132 Mich. App. 590, 348 N.W.2d 697 (1984); Luce v. Goetze Corp. of Am., 117 L.R.R.M. (BNA) 3036 (Mich. Ct. App. 1984); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983); Hrab v. Hayes-Albion Corp., 103 Mich. App. 90, 301 N.W.2d 606 (1981).

220. Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 558 (1985).

221. Renny v. Port Huron Hosp., 427 Mich. 415, 398 N.W.2d 327 (1986); Farrell v. Automobile Club, 155 Mich. App. 378, 399 N.W.2d 531 (1986); Vander Toorn v. City of Grand Rapids, 132 Mich. App. 590, 348 N.W.2d 697 (1984); Goins v. Ford Motor Co., 131 Mich. App. 185, 347 N.W.2d 184 (1983).

222. Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983); Haslam v. Pepsi-Cola Co., 117 L.R.R.M. (BNA) 2950 (E.D. Mich. 1984); Chamberlain v. Bis-sell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982).

223. Melchi v. Burns Int'l Sec. Serv., 597 F. Supp. 575 (E.D. Mich. 1984); Valentine v. General Am. Credit, Inc., 420 Mich. 256, 362 N.W.2d 628 (1984); Rasch v. City of East Jordan, 141 Mich. App. 336, 367 N.W.2d 856 (1985); Luce v. Goetze Corp. of Am., 117 L.R.R.M. (BNA) 3036 (Mich. Ct. App. 1984); Hrab v. Hayes-Albion Corp., 103 Mich. App. 90, 302 N.W.2d 606 (1981).

224. Fletcher v. Advo Sys., Inc., 616 F. Supp. 1511 (E.D. Mich. 1985); Cowdrey v. A.T. Transport, 141 Mich. App. 617, 367 N.W.2d 433 (1985).

225. Orrick, Herrington & Sutcliffe, Summary of Wrongful Discharge and Related

seven year period, of which seventy-three (65.2%) were for plaintiffs and thirty-nine (34.8%) favored defendants.²²⁶ Ten of the verdicts were for amounts of over \$1,000,000 and many others were in the six figure range.²²⁷ Forty-two verdicts awarded emotional distress and/or punitive damages.²²⁸ Undoubtedly, many of these awards were or will be reduced in settlements or even set aside on appeal.

Another California report found fifty-one jury verdicts in wrongful discharge cases during the 1986 calendar year.²²⁹ Seventy-eight percent of these verdicts favored plaintiffs and averaged \$424,527, including two for over \$1,000,000.²³⁰ Punitive damages averaging \$494,000 were awarded in forty percent of the cases won by plaintiffs.²³¹ This report also estimated that of 314 state and federal appellate court cases in 1985, jury verdicts usually favored plaintiffs and averaged \$200,000 to \$400,000.²³²

Allowing for reduction or even elimination of some of the above-cited awards, Michigan's experience with wrongful discharge actions would hardly qualify it as a fertile state for such suits as compared with California or even the nation as a whole.

VII. AVOIDING AND DEFENDING AGAINST WRONGFUL DISCHARGE SUITS

The proliferation of wrongful discharge suits in the courts and the reporting of sizable jury awards in business, professional, and trade journals as well as in the popular media has alerted employers to the potential risks involved in terminating employees in violation of public policy or in contravention of written and oral company policies. Management attorneys and consultants frequently participate in conferences and symposiums advising employers on how to avoid wrongful discharge actions and how to defend against them if and when they do occur. Any employer which has not examined its personnel policies and/or sought professional advice on their adequacy to protect against wrongful discharge suits is probably not sufficiently astute to survive in today's business climate, quite apart from the organization's personnel policies.

Cases Which Concluded With a Jury Verdict (Oct. 1979 to Sept. 1986) (unpublished report).

226. *Id.*

227. *Id.*

228. *Id.*

229. Schachter, Kristoff, Ross, Sprague & Curiale, Summary Analysis of Reported California Jury Verdicts in Wrongful Discharge Cases (1986) (unpublished report).

230. *Id.*

231. *Id.*

232. *Key Wrongful Discharge Ruling Expected Shortly from California Supreme Court*, 197 Daily Lab. Rep. (BNA) A-4 (Oct. 10, 1986).

In Michigan, the advice given to employers has been strongly influenced by the supreme court's decision in *Toussaint*. Employers are advised to decide whether they wish to follow an "at-will" or a "just cause" policy (sometimes referred to as the "hard" and the "soft" approach) in employee dismissals.

Employers who choose "at-will" are urged to state clearly and explicitly in employment application forms and/or handbooks that employment is at-will and may be terminated by either party with or without reason or notice. A model for at-will employers is the Sears, Roebuck-type contract referred to earlier in several cases. Based on court decisions in actions against companies with at-will employment policies, these provisions have proved an excellent defense against wrongful discharge claims. Companies using this approach must still guard against commitments, promises, or intimations to employees by recruiters, supervisors, or other organization representatives that their employment is "permanent" or otherwise assured excepting good cause for termination. As the federal district court stated in *Reid v. Sears, Roebuck & Co.*,²³³ even as definitive an at-will statement as that of Sears, Roebuck cannot serve as an "automatic" bar to a wrongful discharge claim.²³⁴ The facts and circumstances must be examined and evaluated to see if there was an "employer-induced expectation" of continuing employment.²³⁵ Nonetheless, such a written policy statement requires strong evidence to overcome the at-will presumption.

The major drawback to this so called "hard" at-will approach is that it presents a bad organizational image to the prospective employee and may dissuade some highly qualified individuals from accepting employment in the organization. Employers who are concerned about their image and ability to recruit superior employees will probably choose to follow the "soft" or "just cause" policy in dismissing employees.

Briefly stated, a just cause policy would include procedures for unorganized employees which are very similar to those provided to unionized workers in most collective bargaining agreements, excluding only final and binding adjudication by an impartial arbitrator. Such a procedure might include a fair hearing before one or more responsible management officials not involved in the incident giving rise to the termination, or before a committee of elected coworkers. Reasons for dismissal should be supported by personnel records, including performance evaluations, evidence of previous warnings or disciplinary actions, an opportunity for the discharged employee to present evidence and witnesses and to cross-examine opposing witnesses, and

233. 588 F. Supp. 558 (E.D. Mich. 1984).

234. See *id.* at 561.

235. See *id.*

other requirements of a fair hearing as set forth in *Renny*²³⁶ and *Watassek*.²³⁷

Some management attorneys advise clients to seriously consider final and binding arbitration by a neutral person for their unorganized employees. The Michigan Supreme Court specifically recognized the arbitration alternative in *Toussaint*, stating: "The employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could, for example, provide for binding arbitration on the issues of cause and damages."²³⁸

One management attorney has listed, in an unpublished article,²³⁹ the following employer advantages of the arbitration option:

Procedural

1) Time limits can be determined by contract or in a handbook, e.g., 30 days as opposed to six years for commencing a breach of contract suit.

2) There is no pretrial discovery, depositions, and interrogations. This avoids scrutiny by the discharged employee or his attorney of employer records.

3) Arbitrators are professionals and more impartial than juries.

4) The award is relatively swift as compared with litigation.

5) Costs are much lower than for litigation. (Another management attorney estimated that it costs her employer \$15,000 to \$40,000 in attorney's fees to win a wrongful discharge suit at the summary judgment stage.²⁴⁰ The employer's share of arbitration fees averages \$1,000 to \$2,000 without an attorney, and less than \$5,000 if an attorney is used.

Substantive

1. The remedy can be defined by contract, e.g., reinstatement, back pay, and benefits less earnings while awaiting arbitration.

2. Arbitrators' awards are likely to be more predictable than jury verdicts.

236. *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1986).

237. *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985).

238. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 624, 292 N.W.2d 880, 897 (1980). See also *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1986); *Khalifa v. Henry Ford Hosp.*, 156 Mich. App. 485, 401 N.W.2d 884 (1986); *Vander Toorn v. City of Grand Rapids*, 132 Mich. App. 590, 348 N.W.2d 697 (1984).

239. Rosenfeld, Outline for the American Arbitration Association (AAA), Detroit Region, Seminar (June 6, 1986) (unpublished).

240. *Alternative Dispute Resolution Explored in Employment Context*, 53 Daily Lab. Rep. (BNA) A-7 (Mar. 20, 1987) (citing Mary O'Callaghan, Canteen Corp.).

3. Under *Toussaint*, an employer may establish its own performance standards and dismiss an employee for failing to meet them. Such standards may not be subject to challenge on grounds of "reasonableness" — as long as the employer is consistent in their application.

Possible disadvantages of arbitration for some employers might include the unacceptability of reinstatement as a remedy, being unable to wear down the resolve of the discharged employee through litigation procedures, and the very limited availability of appealing the arbitrator's award.

Since *Toussaint*, the at-will approach appears to be much more popular with Michigan employers than either the just cause or the voluntary arbitration approach. A survey conducted in New York State found that fifty percent of responding companies had recently changed the language in their handbooks to clarify their employment-at-will policy.²⁴¹ As noted above, Michigan courts have almost always sustained dismissals by employers with such provisions.

VIII. LIMITATIONS OF LITIGATION

The major beneficiaries of developments of the last two decades leading to some erosion of the employment-at-will doctrine have been middle- and upper-level managerial employees. Hourly workers and lower-level salaried workers are rarely listed as plaintiffs in reported wrongful discharge actions. Only seven of thirty-six Michigan decisions in which the plaintiff's occupation was reported involved relatively low-paid employees.²⁴² Among the more typical titles of plaintiffs were: vice-president, safety director, office manager, salesperson, terminal manager, and senior auditor. A similar occupational distribution was found in another reported study of ninety-two wrongful discharge cases, of which only eight involved "secondary market" employees.²⁴³

Since hourly and lower-level salaried employees obviously far outnumber managerial employees among the total of all discharged workers, their relative scarcity in reported decisions requires some explanation. There are several reasons for this phenomenon. Lower-paid workers are not likely to be aware of recent changes in the at-will

241. *Attorney says Companies are Moving to Forestall Wrongful Firing Suits*, 242 Daily Lab. Rep. (BNA) A-21 (Dec. 17, 1984) (citing Joseph Barbash).

242. *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987); *Ringwelkski v. Sears, Roebuck & Co.*, 636 F. Supp. 519 (E.D. Mich. 1985); *Melchi v. Burns Int'l. Sec. Serv.*, 597 F. Supp. 575 (E.D. Mich. 1984); *Reid v. Sears, Roebuck & Co.*, 588 F. Supp. 558 (E.D. Mich. 1984); *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1984); *Clifford v. Cactus Drilling Co.*, 419 Mich. 356, 353 N.W.2d 469 (1984); *Watassek v. Michigan Dept. of Mental Health*, 143 Mich. App. 556, 372 N.W.2d 617 (1985).

243. Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1941 (1983).

doctrine and therefore do not consult attorneys to ascertain whether they have any legal recourse when they are fired. When they do seek legal advice, they may be discouraged from pursuing a court suit because of the monetary and psychic expense involved, even should an attorney be prepared to accept their case on a contingency fee basis. And lawyers may be less interested in representing low-income workers since their own share of the award or settlement is likely to be quite low relative to the amount of time involved in handling such cases.

A second explanation for underrepresentation of low income employees in reported cases is the inherent bias in the implied contract exception to at-will employment. Lower-level workers are generally not in a position to inquire about or to be assured of job security when they seek employment. This is especially true when they are unemployed. Nor are they likely to read carefully an employee handbook which might serve as the basis for an implied contract exception.

The major public policy exception applicable to hourly workers involves dismissal for filing a workers' compensation claim. Such suits, which were quite common during the early years of the developing law on wrongful discharge, occur less frequently today. This may be because in those states where such discharges are unlawful, employers are less likely to dismiss for filing claims, or if they do so it will be done on some facially viable pretext.

The relative infrequency with which lower-paid workers are involved in reported wrongful discharge cases may also be due to the greater likelihood that such cases will be settled without a trial. Given the expense of litigation to both plaintiffs and defendants as well as the need of lower income workers for immediate sustenance, the likelihood of settlement out of court seems greater than in actions involving higher-paid employees, who are able to hold out longer and for whom the amount of potential monetary damages is likely to be much more lucrative should the case go to trial.

IX. PROPOSED LEGISLATION

Various courses of action have been proposed to deal with wrongful discharge. Many believe that increased unionization is the answer. But this is an illusory solution. With unions losing more than half of all NLRB representation elections, many workers who join or want union representation remain unprotected against unjust discharge.²⁴⁴ In addition, there are millions of managerial and supervisory employees who are not covered by the National Labor Relations Act. Finally,

244. U.S. BUREAU OF LABOR STATISTICS NEWS (Sept. 3, 1979); BUREAU OF LABOR STATISTICS, EARNINGS AND OTHER CHARACTERISTICS OF ORGANIZED WORKERS, MAY 1980 (1981).

and most important, the tide of unionization in the United States has been receding rather than advancing, leaving little likelihood that organizing is a practical solution to the wrongful discharge problem.

A second approach is voluntary employer action to provide due process in the workplace. A small number of progressive employers have established grievance procedures which include impartial arbitration for discharged employees. But this approach cannot begin to address the magnitude of the unjust discharge problem.²⁴⁵

There are those who believe that the judiciary holds the best promise for doing away with the anachronistic employment-at-will doctrine. Such persons point out that the courts — through the creation of exceptions to the doctrine — have been moving in the right direction, and they therefore expect that eventually this movement will provide protection for all employees against unjust discharge. But there is absolutely no evidence that the courts are in fact moving toward adoption of full-scale protection against unfair termination.²⁴⁶ Indeed, some courts have begun to withdraw from earlier decisions in wrongful discharge cases in favor of the view that it is up to the legislatures, not the courts, to explicitly address the employment-at-will issue.²⁴⁷

The shortcomings of unjust discharge protection through unionization, voluntary employer action, and reliance on the courts lead to consideration of legislative action to provide some viable form of due process. Legislation has been proposed at both the state and federal levels.

A bill was proposed in 1980 to amend Section 7 of the National Labor Relations Act to add the following language: "Employees shall have the further right to be secure in their employment from discharge or other discrimination except for just cause."²⁴⁸ Section 8(a) was to be amended by adding a new unfair labor practice: "To discharge or otherwise discriminate against an employee except for just cause."²⁴⁹ The bill never came to a vote in Congress.

A federal statute would have an advantage over state legislation in that it would make irrelevant the argument that a state providing statutory protection against wrongful discharge would make it less attractive for industry. We think such an argument is baseless because it

245. The Conference Board, *Nonunion Complaint Systems: A Corporate Appraisal* (1980); BNA *Policies for Unorganized Employees*, PPF Survey No. 125, (April 1979).

246. *The Employment-At-Will Issue*, 225 Daily Lab. Rep. (BNA) 23 (Nov. 19, 1982) (BNA Special Report).

247. See, e.g., *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

248. M. Green, *Conceptual Draft of Corporate Democracy Act*, (1980) (Public Citizens' Congress Watch 89) (unpublished).

249. *Id.*

magnifies a single factor far beyond its significance in plant location decisions. Nonetheless, it has been used effectively to discourage support for state legislation against wrongful termination.

In July 1987, Montana became the first state to enact a comprehensive law protecting at-will employees from wrongful discharge. The law prohibits employers from discharging employees without "good cause" as defined in the statute, if the action was in retaliation for the employee's refusal to violate public policy or if the employer violated the express provisions of its own written personnel policy. Wrongfully discharged employees may be awarded compensatory and punitive damages.²⁵⁰

The Montana law encourages arbitration of wrongful discharge claims by providing that a party who makes a valid offer to arbitrate, that is not accepted by the other party, and who prevails in the courts is entitled to recover reasonable attorney's fees. If a discharged employee's offer to arbitrate is accepted by the employer and the employee prevails, the employer must pay the arbitrator's fee and other costs of arbitration. Once arbitration is agreed to by the parties, it becomes the exclusive remedy for the wrongful discharge dispute and bars the pursuit of a claim through the courts.²⁵¹

In Michigan, a bill was introduced during 1983, with hearings being held in 1984.²⁵² The proposal provided for notifying an employee of the reasons for discharge, mediation by the Michigan Employment Relations Commission (MERC), and, if mediation is unsuccessful, the right of appeal by the employee to final and binding arbitration.²⁵³ The arbitrator was to be selected jointly by the employer and the employee from a list provided by MERC, and his or her fee and expenses would be shared equally by the parties.²⁵⁴ The arbitrator's fee for study and decision writing was limited to twice the number of hearing days.²⁵⁵ The arbitrator could sustain the discharge, reinstate the employee with full, partial or no back pay, or order a severance payment to be made to the employee.²⁵⁶ The award was to be reviewable by the circuit court only for the reason that the arbitrator exceeded or did not have jurisdiction, the award was not supported by competent, material, and substantial evidence, or was secured by fraud, collusion, or other unlawful means.²⁵⁷

The proposed Michigan Act would exempt from coverage an em-

250. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (Supp. 1987)

251. Wrongful Discharge From Employment Act, 1987 Mont. Laws ch. 641 (now codified at MONT. CODE ANN. § 39-2-914 (1987)).

252. H.B. 5155, 80th Mich. Leg. (1983).

253. *Id.* at 2-4 (sections 4-6).

254. *Id.* at 4 (sections 7-8(1)).

255. *Id.* at 5 (section 8(1)).

256. *Id.* at 7-8 (section 11).

257. *Id.* at 8 (section 13).

ployer with a grievance procedure providing for impartial, final and binding arbitration.²⁵⁸ A discharged employee who filed a lawsuit against his or her former employer would be barred from seeking relief under the Act.²⁵⁹ It would also apply to employers of 10 or more employees.²⁶⁰ To be eligible to seek relief under the Act, an employee must have worked for an employer for at least 15 hours per week for six months, and not be protected against unjust discharge by a collective bargaining agreement, civil service, or tenure.²⁶¹ Managerial employees and others with a written employment contract of not less than two years would not be covered.²⁶²

Employers have generally opposed statutory protection against unjust discharge. Despite some extremely generous awards by juries to dismissed employees, employers prefer to adopt personnel procedures and policies to avoid or reduce their liability in wrongful discharge cases rather than extend protection against unjust discharge to employees generally — even though the remedies available under arbitration would be much more limited than those awarded through the judicial process.

The conventional wisdom has been that unions would oppose or take no position on legislation to protect nonunionized workers against discharge. This view was based on the assumption that such legislation would undercut a major union argument in trying to persuade workers to vote for unionization. However, in February 1987, the AFL-CIO Executive Council adopted a resolution supporting both federal and state measures "that safeguard workers against discharges without cause."²⁶³ According to the Council, the following elements must be included in any viable piece of legislation: a prohibition on discharges without cause; financing to assure that discharged employees will be able to enforce their statutory rights; prompt review of discharge decisions by an independent tribunal; mandatory reinstatement for wrongfully discharged employees; and full compensation for losses sustained as a result of wrongful discharge.²⁶⁴ Prior to the AFL-CIO action, unions in Michigan, California, and Connecticut had come out in favor of unjust discharge legislation. The AFL-CIO resolution should make it easier for unions in other states to favor such legislation.

Support for legislation has also come from the American Civil Liberties Union. In 1987, the ACLU National Board adopted a policy res-

258. *Id.* at 8 (section 15).

259. *Id.* at 9 (section 16).

260. *Id.* at 2 (section 3(2)).

261. *Id.* at 2 (section 3(1)).

262. *Id.*

263. *Statements adopted by AFL-CIO Executive Council*, 34 Daily Lab. Rep. (BNA) E-8 (Feb. 23, 1987) (regarding the employment-at-will doctrine).

264. *Id.*

olution favoring state and federal legislation to protect all private sector employees against unjust discipline or discharge.²⁶⁵

Trial lawyers who represent plaintiffs and defendants in wrongful discharge suits have generally opposed legislation that would remove wrongful discharge claims from the courts. Such legislation would deprive attorneys of generous fees — whether they represent plaintiffs on a contingency fee basis or defend employers against compensatory and punitive damage claims often running into six or seven figures. Obviously, fees to be derived by representing relatively high salaried employees, who have been discharged, far exceed possible income from actions involving hourly and lower-paid workers.

In order to have a chance for passage, any bill must represent a compromise among the various interest groups. Such a compromise might well take the following form:

1. The employment-at-will doctrine would be abolished in favor of the general rule that employees may be discharged only for just cause.

2. Discharged workers who are interested primarily in being reinstated to their former jobs with compensation for economic loss that they have suffered would be given an opportunity to have a government conciliator try to resolve differences with their employers and, if conciliation fails, to appeal to an impartial arbitrator. Arbitrators would be empowered to award monetary damages in cases of unjust dismissal where reinstatement is not considered to be practicable.

3. Discharged employees who seek exemplary as well as compensatory damages for economic loss and who are not interested in reinstatement would be permitted to sue their former employers in the courts. Employers would be protected against exorbitant jury verdicts by establishment of a cap on such awards. This is the approach that has been adopted by several states for medical malpractice suits in an attempt to curtail sharply rising insurance premiums for physicians. Certainly, the mental and emotional distress suffered by discharged workers is not greater than the pain and suffering of victims of incompetent doctors.

4. Recovery of attorneys' fees and costs would be permitted to prevailing plaintiffs or to defendants when charges against them are found to be totally without merit and made primarily for purposes of harassment.

These guidelines would provide much greater protection against unjust discharge than existing exceptions to at-will employment, while leaving considerable scope for negotiation in legislatures with respect to such issues as employee eligibility, employer coverage, arbi-

265. Policy No. 55, "Due Process Rights of Private Employees," ACLU Policy Guide, (Jan. 24-25, 1987).

trator selection, allocation of cost, remedies, and other compromises which are inherent in the legislative process.